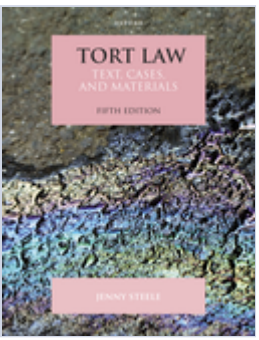

Tort Law: Text, Cases, and Materials (5th edn)
Jenny Steele

p. 645

11. Nuisance

Jenny Steele, Professor of Law, University of York

https://doi.org/10.1093/he/9780198853916.003.0011
Published in print: 29 September 2022
Published online: September 2022

Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter is concerned with two forms of action in nuisance: public nuisance and private nuisance. It begins by considering the basis of liability in private nuisance and the difficulties presented by cases of overlap between negligence and nuisance. It also discusses the relationship between private and public interests and the relevance of the Human Rights Act 1998. The chapter concludes by assessing the role of community or public interest in nuisance actions, particularly in relation to remedies, and recent attempts to use public nuisance in particular to restrain collective activities on the basis of public order. Relevant court cases are cited where appropriate.

Keywords: nuisance, public nuisance, private nuisance, liability, negligence, public interests, Human Rights Act 1998, public order, injunctions, remedies

Central Issues

i) There are two forms of action in nuisance, namely **public** and **private** nuisance. A private nuisance may be defined as an unreasonable interference with use and enjoyment of land or with some right over, or in connection with it. Public nuisance by contrast is a crime and is actionable by the Attorney-General in the public interest. It extends to a far wider range of interests than private nuisance, including especially public health.

ii) The basis of liability in private nuisance is not straightforward. But, despite some confusing dicta in cases where nuisance and negligence overlap, the tort is clearly very different from negligence. The main concern is not the quality of the defendant's conduct unless this is relevant for some particular reason (for example, in the defence of statutory authority). The main concern is the reasonableness and lawfulness of interference with the claimant's interests in land. A nuisance is an unlawful interference with such interests.

iii) Cases of overlap between negligence and nuisance have caused particular difficulty. One category of overlap arises where actual damage is caused by a nuisance which has not been created by the defendant, but which has arisen on land occupied by the defendant. Beyond this, higher court decisions have minimized the overlap between negligence and nuisance, by removing cases of personal injury from the whole area of private nuisance, and by ensuring that only those with an interest in land may bring an action.

iv) The relationship between private and public interests has always been a key concern surrounding nuisance, and it is now even more pertinent. The influence of the Human Rights Act 1998 has of course added a new element to such issues, although this influence has changed over time. In addition, the Supreme Court has considered the role of community or public interest in nuisance actions, particularly in relation to remedies.

p. 646

1 Private Nuisance

1.1 Making Sense of Private Nuisance

Private nuisance has a longer history than negligence, and this gives rise to certain challenges in interpreting and applying the law. It could be said that through recent higher court activity, the ambit of nuisance is becoming clearer, but narrower. Nuisance as we describe it here is separate from the tort of negligence, and to a large extent conceptually independent of it.

1.2 The Basis of Liability: Placing Private Nuisance on the 'Map' of Tort Law

A Basic Statement of Actionability in Nuisance

'Private nuisance may be described as unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it.'

The above statement was adopted by Scott LJ in *Read v Lyons* [1945] KB 216, at 236 and approved in a number of other cases. However, it is declared to be a *description* (rather than a definition). With nuisance it is often necessary to turn to previous decisions, rather than to abstract definitions, to settle the detailed question of whether any particular interference is actionable.

Placing Private Nuisance on the Tort Map

Protected Interests and Relevant Conduct

Remembering the way that we 'mapped' tort law in Chapter 1, we see that the description above shows that nuisance is different from negligence in more than one way. It is different from negligence because the definition of **protected interests** in nuisance is both narrower (relating only to interests in or rights over land) and within that field in some senses broader (including losses that would be regarded as intangible and probably some that would be regarded as purely economic in negligence terms).

In terms of **relevant conduct**, there is no requirement that the conduct of the defendant should be careless, although it is often said that reasonableness of conduct plays a part and we will explore whether and when this is so. In some instances, nuisances can arise from perfectly careful, deliberate behaviour. As Lord Goff clearly put it in a key modern case:

Cambridge Water v Eastern Counties Leather plc
[1994] 2 AC 264, at 299

> ... if the user is reasonable, the defendant will not be liable for subsequent harm to his neighbour's enjoyment of land; but if the user is not reasonable, the defendant will be liable, even though he may have used reasonable care and skill to avoid it.

p. 647 ↵ Although 'conduct' need not be unreasonable in the sense of lack of due care or falling short of a standard, it is clear that there must be some element of 'unreasonableness' before the interference can fulfil the definition of a nuisance. In the above statement, Lord Goff describes the applicable idea of reasonableness through the terminology of 'reasonable user' of the land. Unfortunately, the precise *meaning* of 'reasonable user' has remained rather unclear, as has its range of applicability. This can be traced to some large ambiguities in the important case of *St Helen's v Tipping*, which is extracted later in the present chapter.

Lord Goff also suggested that 'liability for nuisance has generally been regarded as strict' (*Cambridge Water*, above, at 299). In fact, most writers avoid describing it in quite that way. Fleming, for example, categorizes nuisance with 'Miscellaneous' torts, rather than under the category of 'Strict Liability': John G. Fleming, *The Law of Torts* (9th edn, Law Book Company, 1998). Nevertheless, with the support of Lord Goff's statement above, we can say that conduct need not be faulty in all cases of nuisance. In fact, we can go further and suggest that lack of care is only relevant to nuisance actions of particular kinds, and then for particular reasons. Nuisance is, typically, 'stricter than' negligence.

'Continuing' Nuisances

It is also important to notice that nuisances may be, and often are, *continuing*. The core concern is with deliberate activities causing interference, rather than with momentary carelessness causing loss. Dealing with a continuing nuisance requires looking to the future, while negligence cases by contrast invite a retrospective outlook. The key question in cases of continuing nuisance is whether there should be an injunction to stop the unreasonable interference; it is normally thought that only in rare instances would damages be awarded 'in

lieu' of the injunction in such a case, although damages may also be sought to compensate for past interference. The overlap between nuisance and negligence is largely confined to cases where the interference amounts to damage of a relevant sort and *has already occurred*. In cases of continuing nuisance where the claimant seeks an *injunction* to prevent the nuisance, there is no question of foreseeability, which is so central to negligence.

> **Lord Goff, *Cambridge Water*, at 300**
>
> … we must be on our guard, when considering liability for damages in nuisance, not to draw inapposite conclusions from cases concerned only with a claim for an injunction. This is because, when an injunction is claimed, its purpose is to restrain further action by the defendant which may interfere with the plaintiff's enjoyment of his land, and ex hypothesi the defendant must be aware, if and when an injunction is granted, that such interference may be caused by the act which he is restrained from committing. It follows that these cases provide no guidance on the question whether foreseeability of harm of the relevant type is a prerequisite of the recovery of damages for causing such harm to the plaintiff.

In the case of continuing nuisances, it is especially clear that a state of affairs may amount to a nuisance even if all due care is taken in the course of the activity which gives rise to it. In *Rushmer v Polsue and Alfieri*, Cozens-Hardy LJ imagined a noise nuisance from the operation of a steam-hammer: 'it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked' ([1906] 1 Ch 234, at 251). This comment ↵ was expressly approved by Lord Loreburn LC on appeal ([1907] AC 121, at 123). Many of the modern cases analysed in this chapter reaffirm the point.

p. 648

A further point about nuisances which 'continue' over a period of time relates to when the nuisance should be considered to have ceased. The reason why this may be important is that once the nuisance has ceased, the 'limitation period' (the time within which an action must be brought) will begin to run, with a limit of six years. Here, a distinction has been drawn between continuing nuisances, and one-off nuisances which have continuing effects. In *Jalla v Shell International Trading and Shipping Co* [2021] EWCA Civ 63, the defendants were responsible for an oil spill in Nigeria which caused extensive damage to a number of claimants. The defendants argued that the limitation period[1] had expired six years from the spill; the claimants countered that there was a 'continuing nuisance' until the consequences of the spill were eradicated: the damage was still continuing. The Court of Appeal dismissed the claim and distinguished this case from one where the *source* of the nuisance continues—as in the case of encroaching tree roots, for example. The spill was a 'one off' nuisance, despite its longer term impact, and there was not a fresh nuisance each day until the spill was cleaned up. The defendants were held to have done what they were obliged to do by removing the source of the spill within five to six hours, even though it would appear they did not take steps to remove the consequences of the spill. This clearly limits the effectiveness of private nuisance in addressing pollution, by attaching responsibility to polluters in relation to the source of the nuisance but offering less protection in relation to clean up over extended periods of time (see further Section 4).

In summary, nuisance requires that the interference must be judged to be 'unreasonable', and this incorporates assessment of all the circumstances. However, there is no general requirement that *conduct* should be unreasonable. In particular, lack of due care will not be essential.

1.3 Elements of Actionability

Interference

Our basic description of nuisance above referred to unreasonable interference with the use and enjoyment of land, or with some right over, or in connection with the use and enjoyment of, land. In itself, this does not describe the types of interference which may be involved. In *Hunter v Canary Wharf*, Lord Lloyd said that:

> Private nuisances are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land.

p. 649 ↵ In *Williams v Network Rail Infrastructure* [2018] EWCA Civ 1514, the Court of Appeal emphasized that these categories should not be read as mutually exclusive.

> 40. First, a private nuisance is a violation of real property rights. That means that it involves either an interference with the legal rights of an owner of land, including a legal interest in land such as an easement and a profit a prendre, or interference with the amenity of the land, that is to say the right to use and enjoy it, which is an inherent facet of a right of exclusive possession: Hunter v Canary Wharf Ltd [1997] AC 655, 687G—688E (Lord Goff citing FH Newark, The Boundaries of Nuisance_65 LQR 480), 696B (Lord Lloyd of Berwick), pp 706B, p 707C (Lord Hoffmann) and p 723D—E (Lord Hope of Craighead). It has been described as a property tort: Dolan Nolan, A Tort Against Land: Private Nuisance as a Property Tort, in Rights and Private Law, Dolan Nolan & Andrew Robertson (eds) (2011).
>
> 41. Secondly, although nuisance is sometimes broken down into different categories, these are merely examples of a violation of property rights as I have described them. In Hunter's case at p 695C, for example, Lord Lloyd said that nuisances are of three kinds ... [The Master of the Rolls quoted from the passage in Lord Lloyd's judgment extracted above, and continued] The difficulty with any rigid categorisation is that it may not easily accommodate possible examples of nuisance in new social conditions or may undermine a proper analysis of factual situations which have aspects of more than one category but do not fall squarely within any one category, having regard to existing case law.

Williams itself was a case of encroachment of roots (or more properly rhizomes) from Japanese knotweed, an invasive species of plant, on the defendant's property, affecting the claimants' neighbouring land. The Court of Appeal determined that a nuisance by encroachment may not be dependent on physical damage, and could be completed where the encroachment leads to an interference with use and enjoyment of land—permitting an amalgamation of categories 1 and 3.

There is a category of case not mentioned by Lord Lloyd, but referred to in *Williams*, namely interferences with specific rights over land, such as easements. These too are actionable as nuisances: see, for example, *Colls v Home and Colonial Stores Ltd* [1904] AC 179, concerning interference with light.[2] In *Midtown v City of London Real Property Co Ltd* [2005] EWHC 33, the claimants established that they had acquired a right to light by prescription pursuant to section 3 of the Prescription Act 1832: a right to light to a building is absolute and indefeasible if it 'shall be naturally enjoyed therewith for a period of twenty years without obstruction' (*Midtown* at [6]). In this particular case, the interference amounted to a nuisance.[3]

In the absence of a positive right (such as the right to light acquired by prescription), the mere presence of a building on the defendants' land would not generally amount to a nuisance. Ordinarily, there will need to be some sort of 'emanation' from the defendant's land, as explained in the following extract:

p. 650 **Hunter v Canary Wharf**
[1997] AC 655

> **Lord Goff, at 684–6**
>
> … in the absence of an easement, more is required than the mere presence of a neighbouring building to give rise to an actionable private nuisance. Indeed, for an action in private nuisance to lie in respect of interference with the plaintiff's enjoyment of his land, it will generally arise from something emanating from the defendant's land. Such an emanation may take many forms—noise, dirt, fumes, a noxious smell, vibrations, and suchlike. Occasionally activities on the defendant's land are in themselves so offensive to neighbours as to constitute an actionable nuisance, as in *Thompson-Schwab v. Costaki* [1956] 1 W.L.R. 335, where the sight of prostitutes and their clients entering and leaving neighbouring premises were held to fall into that category. Such cases must, however, be relatively rare. In one New Zealand case, *Bank of New Zealand v. Greenwood* [1984] 1 N.Z.L.R. 525, the glass roof of a verandah which deflected the sun's rays so that a dazzling glare was thrown on to neighbouring buildings was held, prima facie, to create a nuisance; but it seems that the effect was not merely to reflect the sunlight but to deflect it at such an angle and in such a manner as to cause the dazzling glare, too bright for the human eye to bear, to shine straight into the neighbouring building … such a case can be distinguished from one concerned with the mere presence of a building on neighbouring land. At all events the mere fact that a building on the defendant's land gets in the way and so prevents something from reaching the plaintiff's land is generally speaking not enough for this purpose.

Lord Goff (and Lord Hoffmann) offered inconclusive remarks on the question of whether interference with television reception—which was the subject of the comments above—could ever amount to a nuisance in English law.[4] If it is so capable, it will be on the basis that there is a substantial interference with 'an important incidence of ordinary user of property'.

Steel has argued in response to the judgment in *Williams Network Rail Infrastructure* that the tort of private nuisance can best be stated as follows:

S Steel, 'The Gist of Private Nuisance' (2019) 135 LQR 192–195, 195

> ...The decision ... points towards a unified understanding of the interference necessary for private nuisance: the tort always requires physical damage or interference with the ability to use and enjoy the land or rights over land. More ambitiously, physical damage could be considered a subspecies of interference with amenity—if so, the gist of private nuisance is simply interference with the amenity value of land or rights over land.

Overlooking

Even where there is an interference with amenity, the approach in *Hunter* underlines that it must also be determined whether the particular type of interference is capable of amounting to a nuisance. In *Fearn v Board and Trustees of the Tate Gallery* [2020] EWCA Civ 104, the ↵ Court of Appeal decided that 'overlooking' of one property by another was not capable of being a nuisance, though it could be argued to fit within the third of Lord Lloyd's categories of nuisance. Therefore, separate questions about reasonableness or sensitivity (which are explored below) did not arise.

p. 651

Here, the claimants were occupiers of glass-fronted flats in a block adjacent to the Tate Gallery. On construction of a new viewing platform on the Gallery, the claimants' flats apparently became the object of great interest from many of the Gallery's visitors, including photographing and sometimes filming of the occupants inside their flats. This prompted a claim in nuisance, seeking an injunction compelling parts of the walkway to be closed. The Court of Appeal started with the position that the law of nuisance had never been applied to cases of overlooking, and argued that there were sound reasons not to extend it to do so. In particular, there would be no objective bright lines between cases of overlooking such as the one raised in *Fearn* itself—where many visitors on the Tate Gallery's viewing platform were able to look inside the claimants' flats on a daily basis—and other cases where there are far fewer people able to look at a property, but Hit may be found equally annoying. Equally, there were other means of protection of owners of land from this sort of overlooking, including planning laws and control. Nuisance would be unable to balance the appropriate private and public interests that are in play. In the end, the Court of Appeal concluded that this case was essentially about protection of privacy, rather than property rights, and nuisance exists to protect the latter. There was no basis to extend nuisance here on the basis of a right to privacy. While this may appear to prioritize property rights in the hierarchy of protection, the end result shows that this position is not so simple. Protection of property rights through nuisance continues to be subject to restrictions, as courts recognize the limitations of private law reasoning in resolving conflicts between private and public interests. These conflicts have taken different guises over time, and the relationship between nuisance and planning referred to below is just one of these. Essentially, the Court of Appeal seeks to draw a bright line around 'overlooking' as a potential nuisance.

Fearn v Trustees of the Tate Gallery [2020] Ch 621

The Court referred to comments of Lord Hoffmann in *Hunter v Canary Wharf* [1997] AC 655 relating to the ability of planning processes to balance different interests and offer certainty to developers, and continued:

> 83. Those comments are equally applicable in a case like the present one where there are complex issues about reconciling the different interests—public and private—in a unique part of London, with unique attractions, which draw millions of visitors every year. It is well established that planning permission is not a defence to an action for nuisance: see, for example, *Lawrence* [2014] AC 822. That, however, is a different issue to the question whether, as a matter of policy, planning laws and regulations would be a better medium for controlling inappropriate overlooking than the uncertainty and lack of sophistication of an extension of the common law cause of action for nuisance.
>
> 84. Finally, it may be said that what is really the issue in cases of overlooking in general, and the present case in particular, is invasion of privacy rather than (as is the case with the tort of nuisance) damage to interests in property. There are already other laws which bear on privacy, including the law relating to confidentiality, misuse of private information, data protection (Data Protection Act 2018), harassment and stalking (Protection Against
>
> p. 652
>
> Harassment Act 1997). This is an area in which the legislature has intervened and is better suited than the courts to weigh up competing interests: cf *Wainwright v Home Office [2004] 2 AC 406*, esp at para 33, in which the House of Lords held that there is no common law tort of invasion of privacy and that it is an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle.
>
> 85. For all those reasons, we consider that it would be preferable to leave it to Parliament to formulate any further laws that are perceived to be necessary to deal with overlooking rather than to extend the law of private nuisance.

This case is concerned specifically with overlooking, but gives an indication of some of the challenges facing the tort and particularly the need to balance both public and private nuisances. The Court of Appeal departed from the approach of the judge below, who had approached the question of whether there was a nuisance through the question of whether there was a reasonable 'expectation of privacy' from overlooking in the circumstances of the case: he concluded that there was not. The Court of Appeal on the other hand divided the nuisance and privacy questions, adopting a notably restrictive approach to protection of privacy through nuisance, which is revisited in Section 2 of this Chapter, where we investigate the influence of Article 8 ECHR on the law of nuisance. At the time of writing, an appeal to the Supreme Court is outstanding.

Unreasonableness of Interference

In order to be actionable as a nuisance, the relevant interference must also be judged to be 'unreasonable'. 'Unreasonableness' is one of the key concepts in nuisance law. Unfortunately, it is also one of the key puzzles. Some cases discuss the issues in terms of whether the defendant's use of land constitutes a 'reasonable user'. The meaning of '*reasonable user*' is introduced here through two influential nineteenth-century cases.

p. 653

‘Give and Take’: *Bamford v Turnley* (Court of Exchequer Chamber, 1862: 3 B & S 66; 31 LJQB 286; 6 LT 721; 9 Jur NS 377; 10 WR 803; 122 ER 27)

The plaintiff complained of interference from smoke and smell arising from the burning of bricks by the defendant. On the basis of *Hole v Barlow* (1858, 6 WR 619; 140 ER 1113), Lord Cockburn CJ directed ‘that if the jury thought that the spot was convenient and proper, and the burning of bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict’. It will be seen that this statement incorporated both reasonable user, and the appropriateness of the locality in which the offending activity was carried out. The jury found for the defendant, and the plaintiff appealed to the Court of Exchequer Chamber. By a majority, the Court of Exchequer Chamber allowed the plaintiff’s appeal. The main majority judgment dealt narrowly with the correctness of *Hole v Barlow*, which was disapproved as unsupported by prior authority. But it is the separate concurring judgment of Bramwell B that is most often referred to and that continues to inspire most comment. It proposes a potential compromise which has continued to return to the agenda.

Bramwell B, *Bamford v Turnley* (1862)

… those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. This principle would comprehend all the cases I have mentioned, but would not comprehend the present, where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner—not unnatural or unusual, but not the common and ordinary use of land.

Then can this principle be extended to, or is there any other principle that will comprehend, the present case? I know of none. It is for the defendant to show it. There is an obvious necessity for such a principle as I have mentioned. It is as much for the benefit of one owner as of another, for the very nuisance the one has complained of as the result of his neighbour's ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live. But none of the above reasoning is applicable to such a case of nuisance as the present …

But it is said that, temporary or permanent, it is lawful, because it is for the public benefit. In the first place, that law, to my mind, is a bad one which, for the public benefit, inflicts loss on an individual without compensation. But, further, with great respect, I think this consideration misapplied in this and in many other cases. The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all; so that if all the loss or all the gain were borne and received by one individual, he or the whole would be a gainer. But wherever this is the case, wherever a thing is for the public benefit, properly understood, the loss of all the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site, and accordingly no one thinks it would be right to take an individual's land, without compensation, to make a railway … So in like way in this case: a money value indeed cannot easily be put on the plaintiff's loss, but it is equal to some number of pounds or pence—£10, £50, or what not. Unless the defendant's profits are enough to compensate this, I deny it is for the public benefit he should do what he has done. If they are, he ought to compensate.

The only objection I can see to this reasoning is, that by injunction or abatement of a nuisance a man who would not accept a pecuniary compensation might put a stop to works of great value, and much more than enough to compensate him. This objection, however, is of small practical importance. It may be that the law ought to be amended, and some means provided to legalise such cases, as I believe is the case in some foreign countries giving compensation; but I am clearly of opinion, that though the present law may be defective, it would be made worse, and be unjust and inexpedient, if it permitted such power of inflicting loss and damage on individuals without compensation, as is claimed by the argument for the defendants …

Bramwell B divided the cases of amenity nuisance into two. First were those where the inconvenience arose from the 'common and ordinary' use of land. Here, the law of nuisance applies a principle of 'give and take' in a situation understood as one of general reciprocity. As one facet of this, the locality is important. It is appropriate to ask whether the offending use of land is conducted in a suitable location. Second, there are other cases which would fall outside this principle of 'give and take'. In these cases, the defendant's activities
p. 654 go beyond ↵ the 'common and ordinary' use of land, even though they are not in any sense 'unnatural or unusual'. Here, it would be no answer to the claim that the activity in question was for the public benefit. On the contrary, the argument that something was for the public benefit would be *believed* only if the activity was still considered worthwhile after the payment of compensation to those whose interests in land were thereby compromised. Only if it remained worthwhile to the defendant in these circumstances could it be said that the activity was of benefit overall.

This idea is often referred to as the principle of 'internalization of costs': those who undertake costly activities should be forced to take into account their *true* costs. Bramwell's overtly economic approach continues to inspire interest. Although it appears to be based in welfare economics rather than in fairness or equity, its outcomes have resonances with more recent approaches to compensation for losses imposed upon individuals by activities that are justified in the public interest (see Section 1.7, Remedies). Bramwell also even suggests, in effect, that a change in the law to allow greater availability of damages in lieu of an injunction would encourage productive activities and enhance economic efficiency. Here, he proposes a constructive compromise which he says would enhance the public interest. It is essentially the same solution proposed by a number of judges and commentators in more recent years (see Section 1.7; and S. Tromans, 'Nuisance—Prevention or Payment?' [1982] CLJ 87), and now authoritatively accepted by the Supreme Court in *Coventry v Lawrence* [2014] UKSC 13. For a study which places Bramwell's approach in the context of its time, see A. W. B. Simpson, *Leading Cases in the Common Law* (Oxford University Press, 1995), chapter 7, 'Victorian Judges and the Problem of Social Cost', p 175.

The 'Character of the Neighbourhood': *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642, HL(E)

In a case which symbolizes the historic conflict between landed and industrial interests, and which appeared likely to bring to a head the question of public interest or at least local prosperity as against established property rights, the plaintiff brought an action in respect of the damage allegedly being caused to his property by copper smelting works on neighbouring land. He had purchased what is described in the judgment of Lord Westbury LC as an 'estate of great value' in June 1860; the particular smelting works in question had commenced later in the same year. However, he had purchased the estate in an area in which the industrial smelting of copper was a well-established activity, and he almost certainly had full knowledge of the defendant's plans at the time of the purchase: it has been suggested that the negotiated price was affected by the construction of the smelting works (Simpson, *Leading Cases in the Common Law*, p 184).

Having succeeded in this action, Tipping later applied successfully for an injunction to restrain the smelting works: *Tipping v St Helen's Smelting Co* (1865) [LR] 1 Ch App 66. The equitable remedy was granted,[5] notwithstanding that Tipping's predecessor in title had sold the neighbouring land to the defendants with full knowledge of their plan to construct copper smelting works.

The extract that follows is one of the most cited passages in nuisance law, so that its ambiguities are highly significant.

p. 655

Lord Westbury LC, at 650–2

... my Lords, in matters of this description it seems to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom ..., whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large ...

But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property ...

[... the only ground on which Your Lordships are asked to set aside the verdict is that] ... the whole neighbourhood where these copper smelting works were carried on, is a neighbourhood more or less devoted to manufacturing processes of a similar kind, and therefore it is said, that inasmuch as the this copper smelting is carried on in what the Appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction, or the very considerable diminution, of the value of the plaintiff's property. ... The word 'suitable' unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighbouring property ...

The House of Lords was asked to set aside the judgment of the courts below on the important, but narrow ground that the neighbourhood was one devoted to manufacturing processes. This has become known as an issue concerning the **'locality'** or **'character of the neighbourhood'**. The *St Helen's* case seems to lay down that the 'character of the neighbourhood' is relevant only to certain cases of nuisance, namely those which relate to 'amenity' nuisance, or (mere) interference with 'comfort and convenience'. The difficulty is that Lord Westbury was not consistent in identifying the features of this case which made the locality principle inapplicable. The interference is variously described in the extract above as causing 'material injury to the property'; 'sensible injury to the value of the property', and 'considerable diminution of the value of the property'. The first of these seems to suggest physical damage; the others do not.

Even so, the case is usually understood as dividing cases of material *physical* damage to property (which was present in this case in the form of damage to trees), from cases falling short of that.[6] Even if this was the distinction intended by Lord Westbury (and as we have seen his language was by no means clear), then no
p. 656 particular reason was given for dividing ↵ material physical damage from other interferences in this way. Many amenity nuisances are capable of persisting in the long term, and permanent and severe interference with personal comfort, or even with quiet enjoyment, is easily capable of affecting the market value of property. Perhaps this is a point more readily appreciated in the context of the modern domestic housing market, than in the context of competing productive economic uses of land. The status of Tipping's estate was itself ambiguous: it was a working farm; but it also provided a gentleman's residence.

Whatever the true interpretation of the *St Helen's* case, it represents a compromise solution. It places the dividing line in a different position from that proposed by Bramwell B in *Bamford v Turnley*, and unfortunately (since it is the leading authority in this field) it lacks reasoned justifications for doing so.

In the earlier case, Bramwell B wanted the principle of 'give and take' (which would encompass the locality rule) to be confined to cases where land was used in a 'common and ordinary' way. Beyond this, the convenience of the location and the reasonableness of the activity could not, in his view, justify an interference which would otherwise amount to a nuisance. *Bamford v Turnley* itself was a case of nuisance through interference with comfort and enjoyment, but the locality rule did not apply. So some amenity nuisances, on his approach, were *outside* the rule of 'give and take'.

In the *St Helen's* case, it was suggested that in cases of 'material injury to property', there was no place for the locality rule to operate, since no location could be regarded as 'convenient' for an activity having such effects. This much is narrowly compatible with the decision in *Bamford v Turnley*. But in placing the line here, Lord Westbury appears to have meant that *all* cases falling short of 'material injury to property', *are* subject to the locality rule, notwithstanding the fact that the nature of the activity was quite beyond what was common and ordinary. This means that the ambiguous meaning of 'material injury to property' is exceedingly important.

Although Lord Westbury's comments are particularly directed at the locality principle, it is typically assumed that the 'reasonable user' test as a whole is applicable only to amenity nuisances; and then to all such nuisances. An example of this understanding is the following statement of Lord Hoffmann in *Wildtree Hotels v Harrow LBC* [2001] 2 AC 1, concerning claims for damage caused by noise, dust, or vibration:

> Being things 'productive of material physical discomfort' within the meaning of Lord Westbury's dichotomy in *St Helen's Smelting v Tipping* ..., the claim is subject to the principle that a reasonable use of land, with due regard to the interests of the neighbours, is not actionable (at 12).

In the context of building works, Lord Hoffmann went on to explain that '[a]ctionability at common law therefore depends upon showing that the works were conducted without reasonable consideration for the neighbours' (at 13). Building works—in their nature typically both necessary and temporary—are thus subject to questions of 'reasonable consideration'.

Summary: Unreasonableness and Reasonable User

Our general statement of private nuisance referred to 'unreasonable interference'. The idea of 'reasonable user' introduces slightly different terminology, focusing on the defendant's use of the land, rather than the effect on
p. 657 the claimant. Because of the accepted interpretation ↵ of *St Helen's v Tipping*, 'reasonable user' applies to those nuisances falling short of 'material physical damage'.

Reasonable user is not the same as reasonable conduct, since some activities in some places are destined to be judged unreasonable no matter how carefully they are carried out. On the other hand, the idea of 'give and take' means that some activities are protected unless they are carried on without due regard for one's neighbours. We noted the example of reasonable building works. In such cases, there will be attention to methods employed, times of operation, precautions taken, and so on. These are similar to negligence questions surrounding breach of duty, but they are aspects of a different enquiry.

This illustrates a general point about the nature of 'reasonableness' in nuisance. We noted at the start of this section that the crucial question is whether the interference is to be judged unreasonable, *not* whether the defendant's activity is carried out with due care. Nevertheless, there have been cases where the nature of the defendant's activities has been influential, and occasionally decisive, in the balancing exercise. And there are other cases where the nature of the claimant's interests has been a crucial element. The next section considers some 'special' issues in the broader reasonableness enquiry.

Unreasonableness: Special Considerations

Sensitivity

In the case of 'amenity' type nuisances, in which there is interference with personal comfort or convenience, private nuisance will not protect unduly sensitive claimants. Private nuisance protects only *ordinary* use and enjoyment of land. This principle was expressed by Knight-Bruce V-C in *Walter v Selfe* (1851) 4 De G & Sm 315, at 322 as cited, for example, in *Vanderpant v Mayfair Hotel Co Ltd* [1930] 1 Ch 138:

> **Luxmoore J, at 165**
>
> [I]t is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among English people: see *Walter v. Selfe* and the remarks of Knight Bruce V.-C.

But what of cases of actual physical damage? In *Robinson v Kilvert* (1889) 41 Ch D 88, the idea that nuisance would not protect those making particularly sensitive use of property applied in a case of actual physical damage. Hot, dry air in a cellar caused damage to paper stored by the plaintiff, the defendant's tenant, on the floor above. Ordinary paper would not have been damaged. The action in nuisance failed. The defendant could not, by choosing a particularly sensitive use of the premises, prevent the defendant from making use of the cellar in a reasonable way, nor convert that use into a nuisance. Cotton LJ put it in the following way (at 94):

> If a person does what in itself is noxious, or which interferes with the ordinary use and enjoyment of a neighbour's property, it is a nuisance. But no case has been cited where the doing something not in itself noxious has been held a nuisance, unless it interferes with the ordinary enjoyment of life, or the
> p. 658 ordinary use of property for the purposes of residence ↵ or business. It would, in my opinion, be wrong to say that the doing something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life. Here it is shewn that ordinary paper would not be damaged by what the Defendants are doing, but only a particular kind of paper, and it is not shewn that there is heat such as to incommode the workpeople on the Plaintiff's premises. I am of opinion, therefore, that the Plaintiff is not entitled to relief on the ground that what the Defendants are doing is a nuisance.

Even so, in cases of physical damage, the remoteness rules applicable in nuisance are similar to those in negligence. In particular, if the claimant's sensitivity affects only the *extent* of damage suffered, then the defendant must compensate to the full extent of the loss. The Canadian case of *McKinnon Industries v Walker* [1951] 3 DLR 577 illustrates this well. Emissions from the defendant's factory foreseeably damaged the plaintiff's plants. These happened to be valuable orchids, thus increasing the sum payable in damages. The plaintiff's sensitivity had not caused the defendant's activities to constitute a nuisance, but had merely increased the size of the losses suffered.

In *Network Rail Infrastructure v Morris* [2004] EWCA Civ 172, the claimant sought damages in nuisance in respect of electromagnetic interference caused by Railtrack's signalling system, to electric guitar music played in his recording studio. The Court of Appeal observed that application of the approach in *Robinson v Kilvert* in such a case would be difficult, since use of sensitive equipment is now widespread. Lord Phillips thought that the balance to be struck would be a matter of reasonableness (which, as we have already said, is the traditional underlying test, of which *Robinson v Kilvert* is only an example). He also noted (at [19]) that foreseeability is now recognized to be a vital ingredient in the tort of nuisance. Foreseeability was not established on the facts of the case.

Although Lord Phillips noted that the tort of private nuisance has 'moved on' since cases such as *Robinson v Kilvert*, Buxton LJ went further, arguing that:

> 35 … it is difficult to see any further life in some particular rules of the law of nuisance, such as for instance the idea of 'abnormal sensitiveness' drawn from *Robinson v Kilvert*. … That rule was developed at a time when liability in nuisance … was thought to be strict.

He went on to argue that the 'general view of the law of nuisance' had been changed by the judgment of Lord Cooke in *Delaware Mansions v Westminster City Council* [2002] 1 AC 321 (a case of encroaching tree roots), and that questions of reasonableness would now be considered in terms of 'foreseeability'.

It is suggested, however, that key recent decisions such as *Cambridge Water* and *Hunter v Canary Wharf* do not mitigate the strictness of nuisance liability. Quite the contrary: they underline its strictness, while also restricting its scope. *Delaware Mansions* concerned the duty of an occupier (there the Highway Authority) to compensate a neighbour for reasonable repair costs when a nuisance (in the form of *physical damage*) was

created by trees on the defendant's land. In this sort of case, in accordance with cases such as *Goldman v Hargrave* and *Leakey v National Trust* (below), it has long been recognized that foreseeability, and the definition
p. 659 of *reasonable steps to abate a nuisance*, are relevant. This does not mean that more ↵ typical forms of nuisance are to be approached in terms closer to negligence. There is little justification for treating *Delaware Mansions* as marking a major reorientation in the law of nuisance, akin to *Donoghue v Stevenson* in the tort of negligence (proposed by Buxton LJ at [35]).

Malice

Turning from claimant's use to defendant's use, bad motive on the part of the defendant will sometimes tip the balance decisively in the claimant's favour. In *Christie v Davey* [1893] 1 Ch 316, the defendant deliberately created a noise nuisance, solely in retaliation against his neighbours, the plaintiffs. The plaintiffs provided music lessons from the semi-detached house which shared a party wall with the defendant's house. Since there was no legitimate reason for the noise interference from the defendants, in contrast with the innocent (if perhaps raucous) activities of the plaintiffs, the defendant would be restrained from continuing.

North J, *Christie v Davey*, at 326–7

> If what has taken place had occurred between two sets of persons both perfectly innocent, I should have taken an entirely different view of the case. But I am persuaded that what was done by the Defendant was done only for the purpose of annoyance, and in my opinion it was not a legitimate use of the Defendant's house to use it for the purpose of vexing and annoying his neighbours … This being so, I am bound to give the Plaintiffs the relief which they ask.

Christie v Davey was followed in *Hollywood Silver Fox Farm v Emmett* [1936] 2 KB 468. Here the plaintiff kept silver foxes. The defendant arranged for guns to be fired near to his boundary with the plaintiff's land, and as near to the vixens' pens as possible, solely in order to prevent successful breeding of the animals. Macnaghten J awarded damages, and an injunction to prevent such behaviour during the foxes' breeding season. In doing so, he had to contend with the next case, which has inspired much comment and more confusion over the years.

Bradford Corporation v Pickles [1895] AC 587

Between the two authorities of *Christie v Davey* (1893) and *Hollywood Silver Fox Farm* (1936), an opposite result was obtained in the very different case of *Bradford Corporation v Pickles*. The plaintiffs in this case supplied water to the city of Bradford. Some of it derived from a spring known as Many Wells, situated on land owned by the Corporation. Pickles owned land above Many Wells. His land acted as a sort of natural reservoir for subterranean water which flowed in undefined channels. The water flowed naturally from Pickles' land, to Many Wells. It was common ground that neither party had any legal interest over the water itself. In 1892, Pickles began work on his land which would divert water from its natural route, and would eventually diminish the supply of water to Many Wells. The Corporation claimed that these works were done 'maliciously', to deprive them of water, and sought an injunction.

In refusing the injunction, the House of Lords regarded the matter was resolved by the decision in *Chasemore v Richards* ((1859) 7 HLC 349): there is no ownership in underground water percolating in undefined channels.[7]

p. 660 Rather, a property owner such as Pickles has the ↵ right to divert or appropriate such water from beneath his own land. A neighbouring owner has no right to prevent this. In trying to avoid the impact of *Chasemore v Richards*, the Corporation relied on two matters. The first was a point of statutory interpretation which will not affect us. But second, they claimed that Pickles' motive was 'malicious', and that he had therefore acted in excess of his rights. The members of the House were not persuaded by Pickles' own explanation of his acts (that he was seeking to work minerals under his land), and they seem to have concluded that he was seeking to extract an inflated price for his land. As it happens, they were not persuaded that this motive could be described as 'malicious'. But more importantly, they did not consider that motive, malicious or not, was in any sense relevant to the case.

> **Lord Halsbury LC, at 594–5**
>
> The only remaining point is the question of fact alleged by the plaintiffs, that the acts done by the defendant are done, not with any view which deals with the use of his own land or the percolating water through it, but is done, in the language of the pleader, 'maliciously.' I am not certain that I can understand or give any intelligible construction to the word so used. Upon the supposition on which I am now arguing, it comes to an allegation that the defendant did maliciously something that he had a right to do. If this question were to have been tried in old times as an injury to the right in an action on the case, the plaintiffs would have had to allege, and to prove, if traversed, that they were entitled to the flow of the water, which, as I have already said, was an allegation they would have failed to establish.
>
> This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me to be absolutely irrelevant … So, here, if the owner of the adjoining land is in a situation in which an act of his, lawfully done on his own land, may divert the water which would otherwise go into the possession of this trading company, I see no reason why he should not insist on their purchasing his interest from which this trading company desires to make profit.

> **Lord Macnaghten, at 601**
>
> He [Pickles] prefers his own interests to the public good. He may be churlish, selfish, and grasping. His conduct may seem shocking to a moral philosopher. But where is the malice? Mr Pickles has no spite against the people of Bradford. He bears no ill-will to the corporation. They are welcome to the water, and to his land too, if they will pay the price for it. So much perhaps might be said in defence or in palliation of Mr Pickles' conduct. But the real answer to the claim of the corporation is that in such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element.

'Nuisance' was mentioned only once in the judgment of the House of Lords, and then as providing an analogy (Lord Watson, at 508). Macnaghten J further pointed out (at 476) that in *Allen v Flood* [1898] AC 1, 101, decided soon after *Bradford v Pickles*, Lord Watson had explained that 'No proprietor has an absolute right to create
p. 661 noises upon his land, because any right which the law gives him is qualified by the condition that it must ↵ not be exercised to the nuisance of his neighbours or of the public.' One interpretation then is that some of the rights enjoyed by property owners are qualified by the need not to create a nuisance, whereas others are not. One must be careful how much noise one makes, but need not be careful about how much percolating underground water one extracts.

However, a more satisfactory way of dividing noise nuisances from the activities of a landowner such as Pickles is to suggest that to deprive one's neighbours of water flowing in undefined channels, rather than (for example) to subject them to insufferable amounts of noise, is not capable of amounting to a nuisance at all.

This time we do not focus exclusively on the defendant, but pay attention also to the claimant. There is no right (absolute or qualified) to receive percolating groundwater, whereas there is a right of quiet enjoyment of one's property. The latter right is, of course, only a relative one, dependent on showing that any interference is unreasonable in the relevant sense. In the same way, there is a right to receive one's groundwater in an uncontaminated form, but this right is qualified by the need to show that any interference with it is a nuisance, or within the rule in *Rylands v Fletcher* (*Ballard v Tomlinson* (1885) 29 Ch D 115, as interpreted by the House of Lords, and not the Court of Appeal, in *Cambridge Water v Eastern Counties Leather plc* [1994] 2 AC 264). On this interpretation, it is because of the absence of any right to receive groundwater that there is no space for the tort of nuisance to operate, if the only damage suffered is the absence of the resource itself.

It is true that the House of Lords focused on the motive of Pickles in particular, rather than on the nature of the damage suffered by the plaintiff, perhaps because this was the only ground on which the plaintiffs could seek to distinguish *Chasemore v Richards* (1859) 7 HL Cas 349. But the remarks quoted above are consistent with the present interpretation. See, for example, Lord Halsbury's statement about what would have been needed to be proved in an action upon the case: 'If this question were to have been tried in old times as an injury to the right in an action on the case, the plaintiffs would have had to allege, and to prove … that they were entitled to the flow of water, which, as I have already said, they would have failed to establish'. The interpretation is further supported by his comments at 592:

> [I]t is necessary for the plaintiffs to establish that they have a right to the flow of water, and that the defendant has no right to do what he is doing.

As Lord Macnaghten put it in the extract earlier, Pickles' acts gave rise to 'damage without legal injury', and this remains true whatever the motive. If so, Macnaghten J was correct to distinguish *Bradford v Pickles* in the *Hollywood Silver Fox Farm* case, for it has no application to cases of noise nuisance.

Planning Permission and the Character of the Neighbourhood

Inevitably, the law of nuisance raises questions about the boundaries between private law, and the planning process through which certain uses of land must be authorized. It is clear that the grant of planning permission does not operate in the same way as 'statutory authority', which is a recognized defence to nuisance (and is considered with other defences in Section 1.6).

p. 662

Coventry v Lawrence [2014] UKSC 13; [2014] 2 WLR 233

In 2006, the claimants bought a house situated close to a sports stadium used for various motor sports, and a further track used for motocross. These uses were the subject of planning permission. The claimants complained about the noise generated by the use of the defendants' land for motorsports, and the local planning authority served 'abatement notices' requiring noise reduction works to be carried out. Those works having been completed, the planning authority took no further action. The claimants commenced proceedings in nuisance. The Court of Appeal[8] considered that this was a case where, as in *Gillingham v Medway (Chatham) Dock Co Ltd* [1993] QB 343, the noise was such an established part of the 'character of the locality' that it should be taken into account when assessing whether the interference constituted a nuisance.

The Supreme Court disagreed, deciding that the approach in *Gillingham* was incorrect. This was by no means the only important aspect of the tort of private nuisance determined by the Supreme Court in a complex decision: see particularly the discussion in Section 1.6 (Defences), and Section 1.7 (Remedies). In certain other aspects of its decision, and particularly its approach to remedies, the Supreme Court accorded considerably more weight to 'public interest' factors than have previously been admitted in cases of private nuisance.

Lord Neuberger, *Coventry v Lawrence*
[2014] UKSC 13

> 94 … I consider that the mere fact that the activity which is said to give rise to the nuisance has the benefit of a planning permission is normally of no assistance to the defendant in a claim brought by a neighbour who contends that the activity causes a nuisance to her land in the form of noise or other loss of amenity.
>
> 95 A planning authority has to consider the effect of a proposed development on occupiers of neighbouring land, but that is merely one of the factors which has to be taken into account. The planning authority can be expected to balance various competing interests, which will often be multifarious in nature, as best it can in the overall public interest, bearing in mind relevant planning guidelines. Some of those factors, such as many political and economic considerations which properly may play a part in the thinking of the members of a planning authority, would play no part in the assessment of whether a particular activity constitutes a nuisance—unless the law of nuisance is to be changed fairly radically. Quite apart from this, when granting planning permission for a change of use, a planning authority would be entitled to assume that a neighbour whose private rights might be infringed by that use could enforce those rights in a nuisance action; it could not be expected to take on itself the role of deciding a neighbour's common law rights.
>
> 96 However, there will be occasions when the terms of a planning permission could be of some relevance in a nuisance case. Thus, the fact that the planning authority takes the view that noisy activity is acceptable after 8.30 am, or if it is limited to a certain decibel level, in a particular locality, may be of real value, at least as a starting point as Lord Carnwath JSC says
p. 663 in para 218 below, in a case where the claimant is contending that the activity gives rise to a nuisance if it starts before 9.30 am, or is at or below the permitted decibel level. While the decision whether the activity causes a nuisance to the claimant is not for the planning authority but for the court, the existence and terms of the permission are not irrelevant as a matter of law, but in many cases they will be of little, or even no, evidential value, and in other cases rather more.

The conclusion that planning permission cannot be taken to authorize a nuisance, even by changing the character of the neighbourhood, is consistent with another significant conclusion, namely that when assessing the character of the neighbourhood, the court must *ignore* the defendant's activities, *to the extent that they are a nuisance* ([65]). An element of circularity in this approach was admitted ([72]) (how is one first

to judge whether the activities amount to a nuisance?); but Lord Neuberger thought the alternative was that the defendants could 'invoke their own wrong' against the claimants. On this approach, the grant of planning permission should make no difference.

It is suggested that Lord Neuberger's approach, though it is now authoritative, may actually go too far in discounting the effects of planning permission. He dismissed the potential distinction between 'strategic' and 'non-strategic' planning permission as a 'recipe for uncertainty' ([91]). Notably Lord Carnwath—whose judgment in the Court of Appeal in *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312; [2013] QB 455 was approved by Lord Neuberger—took a different view, considering that some grants of planning permission were of such scope that they could not be ignored in assessing the character of the neighbourhood. And while Lord Neuberger's judgment generally gained the agreement of his colleagues, Lord Carnwath's remarks (below) were also supported by Lord Clarke: 'as Lord Carnwath has shown, the facts of such cases are so varied that it is difficult to lay down hard and fast rules' ([169]).

Lord Carnwath, *Coventry v Lawrence*

> 222 In agreement with Peter Gibson LJ in *Wheeler* [1996] Ch 19, 35, I think there should be a strong presumption against allowing private rights to be overridden by administrative decisions without compensation. The public interest comes into play in the limited sense accepted by Lord Westbury in *St Helen's Smelting Co v Tipping* 11 HL Cas 642, 650, as discussed above, that is in evaluating the pattern of uses 'necessary … for the benefit of the inhabitants of the town and of the public at large', against which the acceptability of the defendant's activity is to be judged. Otherwise its relevance generally in my view should be in the context of remedies rather than liability.
>
> 223 I would accept, however, that in exceptional cases a planning permission may be the result of a considered policy decision by the competent authority leading to a fundamental change in the pattern of uses, which cannot sensibly be ignored in assessing the character of the area against which the acceptability of the defendant's activity is to be judged. I read Staughton LJ's use of the word 'strategic' as equivalent to Peter Gibson LJ's reference to 'a major development altering the character of a neighbourhood with wide consequential effects such as required a balancing of competing public and private interests before permission was granted'. For this reason, in my view (differing respectfully from Lord
> p. 664 Neuberger PSC on this point) the reasoning of the judge in *Gillingham* can be supported. Similarly, the Canary Wharf development was understandably regarded by Lord Cooke as strategic in the same sense. But those projects were exceptional both in scale and the nature of the planning judgments which led to their approval. By contrast, in neither *Wheeler v JJ Saunders Ltd* nor *Watson v Croft Promosport Ltd* did the relevant permissions result in a significant change in the pattern of uses in the area, let alone one which could be regarded as strategic; and for the reasons noted above neither decision could be regarded as reflecting a considered assessment by the authorities concerned of the appropriate balance between public and private interests.

In both of these paragraphs, Lord Carnwath refers to the question of *compensation*. These references are important to the question of remedies for nuisance, and particularly the question of when damages are available in place of an injunction, which was one of the most important aspects of the decision in *Lawrence*. It is considered in Section 1.7. But it is worth noting at this stage that the Supreme Court recommended a much greater flexibility in remedy than has hitherto been recognized in the law of nuisance. Plainly, one question raised if courts are to disregard planning permission is whether activities will be permitted by the planning process only to be stopped by the common law? This was the very move attempted by the planning authority itself in *Gillingham*, and the answer was 'no'. The answer since given however is, 'sometimes, yes', and *Watson v Croft Promo-Sport* [2009] EWCA Civ 15 was one such case. Since *Coventry* will mean that planning permission will not protect against liability in nuisance even where it is 'strategic' in nature, it is significant that the approach in *Watson* was disapproved and that damages will now more often be awarded 'in lieu'.

1.4 Connection with the Nuisance: Who May Be Sued?

What is the necessary relationship between the defendant and the nuisance? The simplest cases are those where the occupier of land on which a nuisance originates is also the creator of the nuisance. Equally, the case law has treated as without difficulty those cases where the nuisance is created by the servant or agent of the occupier. Tenants and licensees raise different issues, and are considered separately below. But what of other cases where the occupier does not create the nuisance? Some such cases bring into question the nature of the overlap between nuisance and the tort of negligence.

Occupiers Who do not Create the Nuisance (Nonfeasance)

Some occupiers clearly benefit from states of affairs which were created by someone else (typically a previous occupier). In the terms used in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 (extracted below), such nuisances may be 'adopted' by the occupier. As defined by that case, all that is required for 'adoption' is that the occupier should make some use of whatever constitutes the nuisance. This will be sufficient even if the nuisance was initially created through the act of a trespasser, as in *Sedleigh-Denfield* itself. But falling short of this, there are many other states of affairs which arise on land and where the occupier, though he may not positively adopt the nuisance, is the party in a position to do something to prevent the nuisance from arising or continuing.
p. 665 Although these may arise through the actions of ↵ third parties, they may equally arise through natural processes affecting the land. Should there be an action against such an occupier?

If there is such an action, then there will be a *positive duty to act* in order to prevent damage to another. Successive decisions have determined that there is scope for positive duties as regards nuisances arising on land, even where the occupier is not the originator. The content of these duties requires that the occupier should take 'reasonable steps' to abate the nuisance. This sounds very much like negligence, and the language of negligence has been applied (see *Goldman v Hargrave*, Section 1.4). But what should we make of this? It is true that in a case of nuisance, we do not usually ask whether there is a 'duty', nor concentrate on the nature of the steps taken or not taken by the defendant, as is done in the cases extracted below. On the other hand, these cases are not typical of negligence analysis either. They recognize *positive* duties to take action, which

are rare in negligence; and the standard applied is *subjective*, whereas the typical negligence standard is of course *objective*. Despite the terms used in *Goldman v Hargrave*, the more recent cases are clearly treated as cases of nuisance.

Sedleigh-Denfield v O'Callaghan [1940] AC 880

Sedleigh-Denfield v O'Callaghan holds the key to understanding many of the more recent cases on the positive duties of an occupier. In this case, a pipe was laid on the defendants' land without their knowledge or consent, by a trespasser.[9] The occupiers subsequently became aware of the existence of the pipe, which had the function of draining their fields. A grating was placed on the pipe, but because of its position it did not adequately prevent the pipe from becoming blocked. During a heavy rainstorm, the pipe became blocked and the water overflowed on to the plaintiff's neighbouring land. The House of Lords held that the defendants had sufficient connection with the nuisance to be treated as both adopting it, and continuing it. These terms are explained in the extract from the judgment of Viscount Maugham below. Either ground was sufficient for the defendants to be held liable in nuisance.

> **Viscount Maugham, at 894–5**
>
> The statement that an occupier of land is liable for the continuance of a nuisance created by others, e.g., by trespassers, if he continues or adopts it—which seems to be agreed—throws little light on the matter, unless the words 'continues or adopts' are defined. In my opinion an occupier of land 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. He 'adopts' it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance. In these sentences I am not attempting exclusive definitions …
>
> My Lords, in the present case I am of opinion that the respondents both continued and adopted the nuisance. After the lapse of nearly three years they must be taken to have suffered the nuisance to continue; for they neglected to take the very simple step of placing a grid in the proper place which would have removed the danger to their neighbour's land. They adopted the nuisance for they continued during all that time to use the artificial contrivance of the conduit for the purpose of getting rid of water from their property without taking the proper means for rendering it safe.

p. 666

> **Lord Atkin, at 896–7**
>
> … For the purpose of ascertaining whether as here the plaintiff can establish a private nuisance I think that nuisance is sufficiently defined as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by oneself. The occupier or owner is not an insurer; there must be something more than the mere harm done to the neighbour's property to make the party responsible. Deliberate act or negligence is not an essential ingredient but some degree of personal responsibility is required, which is connoted in my definition by the word 'use.' This conception is implicit in all the decisions which impose liability only where the defendant has 'caused or continued' the nuisance. We may eliminate in this case 'caused.' What is the meaning of 'continued'? In the context in which it is used 'continued' must indicate mere passive continuance. If a man uses on premises something which he found there, and which itself causes a nuisance by noise, vibration, smell or fumes, he is himself in continuing to bring into existence the noise, vibration, etc., causing a nuisance. Continuing in this sense and causing are the same thing. It seems to me clear that if a man permits an offensive thing on his premises to continue to offend, that is, if he knows that it is operating offensively, is able to prevent it, and omits to prevent it, he is permitting the nuisance to continue; in other words he is continuing it.

A useful definition of adopting and continuing is spelt out in Viscount Maugham's judgment. However, given our interest in the similarities and differences between nuisance and negligence, it is also instructive to note the observations of Lord Atkin. In particular, Lord Atkin specifies here that the action in nuisance does not require any degree of negligence, but that it does require some degree of 'personal responsibility'. In other words, in addition to the question of whether the interference amounts to a 'nuisance' (is it an unreasonable interference?), there is the further and separate question of whether there is a sufficient link between the occupier of land, and the nuisance, to justify liability on the part of the occupier. As Lord Atkin says, if the

occupier *creates* the nuisance then there is of course an adequate link. In the particular case of *Sedleigh-Denfield*, knowledge of the nuisance (or, as Viscount Maugham put it, 'presumed knowledge') together with the opportunity to take steps to abate the nuisance amounted to sufficient connection.

Since a 'very simple step' would have sufficed to abate the nuisance in *Sedleigh-Denfield* itself, the case did not test the question of what the *content* of the positive duty might be. Questions about the content of the duty were considered in the case of *Goldman v Hargrave*.

Goldman v Hargrave [1967] 1 AC 645

The decision of the Privy Council in *Goldman v Hargrave* does not use the kind of language that is typical of nuisance cases. Indeed in specifying that there must be breach of a 'duty of care' Lord Wilberforce appears to imply that this is a case of negligence properly so called. However, it is suggested that the references to 'negligence' in this case should be read as referring above all to the quality of the actions of the defendant. We should be careful how we read Lord Wilberforce's remark that this is a case 'where liability, if it exists, rests upon negligence and nothing else'. Lord Wilberforce expressly pointed out (at 656) that the Privy Council would decide the case without answering the 'disputable question' of categorization. His comments should not be taken to mean that this was a case in the *tort* of negligence.

Goldman v Hargrave was a decision on appeal from the High Court of Australia. A giant redgum tree on the
p. 667 defendant's property was struck by lightning and caught fire. The blaze ↵ was impossible to deal with while the tree was standing, so it was cut down, and the defendant cleared a space around the tree. From the following day, the defendant did nothing to extinguish the fire, preferring to let it burn itself out. It was found that the defendant could have extinguished the fire by spraying it with water either immediately after the tree was felled, or on the following day. A change in the weather caused the fire to flare up and spread to the plaintiff's land, after which it could not be stopped. The Court of Western Australia found that there was no action available either in nuisance, or in *Rylands v Fletcher*. On appeal, the High Court of Australia held that the appellant was under a duty to use reasonable care once the tree was felled in order to stop the fire from causing damage to his neighbours. The appeal raised the question of whether the principle in *Sedleigh-Denfield* would apply to nuisances arising naturally. But it also raised questions about the *content* of the positive duty.

> **Lord Wilberforce, at 656–7 (giving the judgment of the Board)**
>
> … the case is not one where a person has brought a source of danger onto his land, nor one where an occupier has so used his property as to cause a danger to his neighbour. It is one where an occupier, faced with a hazard accidentally arising on his land, fails to act with reasonable prudence so as to remove the hazard. The issue is therefore whether in such a case the occupier is guilty of legal negligence, which involves the issue whether he is under a duty of care, and, if so, what is the scope of that duty. Their Lordships propose to deal with these issues as stated, without attempting to answer the disputable question whether if responsibility is established it should be brought under the heading of nuisance or placed in a separate category. As this Board has recently explained in *Overseas Tankship (U.K.) Ltd v. Miller Steamship Co. Pty. Ltd (The Wagon Mound No. 2)* ([1966] 3 WLR 498), the tort of nuisance, uncertain in its boundary, may comprise a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive. The present case is one where liability, if it exists, rests upon negligence and nothing else; whether it falls within or overlaps the boundaries of nuisance is a question of classification which need not here be resolved.
>
> What then is the scope of an occupier's duty, with regard to his neighbours, as to hazards arising on his land? With the possible exception of hazard of fire, to which their Lordships will shortly revert, it is only in comparatively recent times that the law has recognised an occupier's duty as one of a more positive character than merely to abstain from creating, or adding to, a source of danger or annoyance. It was for long satisfied with the conception of separate or autonomous proprietors, each of which was entitled to exploit his territory in a 'natural' manner and none of whom was obliged to restrain or direct the operations of nature in the interest of avoiding harm to his neighbours…

Lord Wilberforce reviewed the older case law including *Giles v Walker* (1890) 24 QBD 656, and rejected a suggested distinction between the present case (natural hazard) and the case of *Sedleigh-Denfield v O'Callaghan* (nuisance created by a third party). He concluded (at 661) that:

> On principle …, their Lordships find in the opinions of the House of Lords in *Sedleigh-Denfield v O'Callaghan* … support for the existence of a general duty upon occupiers in relation to hazards occurring on their land, whether natural or man-made.

p. 668 ↵ Later, he considered the *content* of the occupier's duty to neighbours (at 663):

> So far it has been possible to consider the existence of a duty, in general terms. But the matter cannot be left there without some definition of the scope of his duty. How far does it go? What is the standard of the effort required? What is the position as regards expenditure? It is not enough to say merely that these must be "reasonable," since what is reasonable to one man may be very unreasonable, and indeed ruinous, to another: the law must take account of the fact that the occupier on whom the duty is cast has, ex hypothesi, had this hazard thrust upon him through no seeking or fault of his own. His interest, and his resources, whether physical or material, may be of a very modest character either in relation to the magnitude of the hazard, or as compared with those of his threatened neighbour. A rule which required of him in such unsought circumstances in his neighbour's interest a physical effort of which he is not capable, or an excessive expenditure of money, would be unenforceable or unjust. One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it. And in many cases, as, for example, in Scrutton L.J.'s hypothetical case of stamping out a fire, or the present case, where the hazard could have been removed with little effort and no expenditure, no problem arises. But other cases may not be so simple. In such situations the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able-bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should, have done more. … Their Lordships therefore reach the conclusion that the respondents' claim for damages, on the basis of negligence, was fully made out.

Leakey & Others v National Trust [1980] QB 485

The plaintiffs' two houses had been built at the foot of a large mound of earth, 'The Burrow Mump', which was owned and occupied by the defendants. Due to natural weathering and the particular steepness of the relevant banks of the Mump, soil and debris had fallen on the houses over a number of years. After a hot summer and a wet autumn in 1976, the plaintiffs drew the defendants' attention to a large crack in the soil above their houses. Some time later, there was a fall of soil and tree roots on to the plaintiffs' property, and the plaintiffs brought an action in nuisance seeking orders for the abatement of the nuisance and damages.

The Court of Appeal reaffirmed the proposition in *Goldman v Hargrave* that the occupier of land owes positive duties to a neighbour in respect of a nuisance arising on his land through the operation of natural forces, and confirmed that this proposition formed part of English law. It also reaffirmed that the duty as outlined in *Goldman v Hargrave* was subjective, so that the steps which ought reasonably to be taken would vary depending on the resources of the defendant. Such questions, according to Megaw LJ, could be addressed in a broad and general way, and would not require long enquiry into the exact resources available to the parties.

Writing in 1989, Conor Gearty suggested that cases such as *Sedleigh-Denfield*, which concerned indirectly
p. 669 caused physical damage to property, were historically more appropriately ↵ categorized as aspects of the newly emerging tort of negligence, rather than of nuisance (Gearty, Further Reading). In key cases such as *Cambridge Water* and *Hunter v Canary Wharf*, the House of Lords has re-emphasized the independence of nuisance from negligence. Arguably, there is now more confidence in the general irrelevance of the defendant's conduct to the majority of nuisance actions, and nuisance exists more securely as an independent action. This being so, there may be less 'strategic' need to evacuate the cases of overlap studied here from the tort of nuisance, and it is suggested that the continuation of the *Sedleigh-Denfield* line of cases is now too well established as an aspect of nuisance to make such a move desirable.

Holbeck Hall Hotel Ltd v Scarborough BC [2000] QB 836

The developments in *Leakey* were tested again before the Court of Appeal in this coastal erosion case.

In determining whether the 'measured duty of care' arose, Stuart-Smith LJ drew a distinction between *patent* dangers and defects (which can easily be observed), and *latent* dangers and defects. In respect of latent defects, no duty arose to conduct investigations. The emphasis was on 'knowledge' and (through the idea of 'presumed knowledge') on what 'should have been seen'.

> **Stuart-Smith LJ, *Holbeck Hall Hotel v Scarborough BC***
>
> 42. The duty arises when the defect is known and the hazard or danger to the claimants' land is reasonably foreseeable, that is to say it is a danger which a reasonable man with knowledge of the defect should have foreseen as likely to eventuate in the reasonably near future. It is the existence of the defect coupled with the danger that constitutes the nuisance; it is knowledge or presumed knowledge of the nuisance that involves liability for continuing it when it could reasonably be abated. … if the defect is latent, the landowner or occupier is not to be held liable simply because, if he had made further investigation, he would have discovered it …

On these particular facts,

> 43 … it is in my view clear that Scarborough did not foresee a danger of anything like the magnitude that eventuated. It was common ground that the G.E.N. report gave no clue of such an eventuality; and it seems clear that they could not have appreciated the risk without further investigation by experts.

Nonfeasance and Statute

***Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42, reversing Court of Appeal ([2002] EWCA Civ 64;**

[2002] 2 WLR 932)

Here the Court of Appeal made surprising use of the *Leakey* line of cases in order to hold a sewerage undertaker liable in nuisance for external flooding by foul water suffered by the plaintiff's property. (The court would also have awarded a remedy under the Human Rights Act 1998 (HRA), had the remedy in nuisance not been sufficient.) The decision was ↵ surprising because it was contrary to previous case law p. 670 determining the liability of sewerage undertakers; and because of the way in which the court interpreted the burden of proving 'fairness' for the purposes of the measured duty of care. The court proposed that the burden of proving that the duty was discharged (which in this instance would be the case if their system of priorities was 'fair') lay on the defendants. Ordinarily, it is of course for the claimant to show that a duty has been breached. Indeed, the Court of Appeal suggested that the taking of 'reasonable steps' to alleviate a nuisance was a *defence* to an action in nuisance. It is clear from the cases reviewed earlier that the subjective content of the measured duty of care is relevant to whether duties arise and are breached, rather than to whether defences are made out in order to rebut some form of presumed liability.

Still more surprising was the content of the 'measured duty' in this case. The flooding of Mr Marcic's property could be alleviated only by acquiring land and building more sewers. In holding that the positive duty under *Leakey* could compel a defendant to take such steps, the Court of Appeal discovered a far more onerous positive duty than has previously been associated with the 'measured duty of care'. The estimated cost of £1,000 million to alleviate the flooding problems of all those in the same position as the plaintiff ([2002] EWCA Civ 64, at [3]) is a significant investment even for a trading company of the size of the defendants.[10]

The House of Lords reversed the Court of Appeal's decision. The *Leakey* line of cases did nothing to alter the position in respect of sewerage undertakers stated by Denning LJ in *Pride of Derby and Derbyshire Angling Association v British Celanese Ltd* [1953] Ch 149, which was itself based on consideration of the *Sedleigh-Denfield* case:

> **Denning LJ, at 190, quoted by Lord Hoffmann, *Marcic v Thames Water Utilities*, at [55]**
>
> … they [the plaintiffs] have a perfectly good cause of action for nuisance, if they can show that the defendants created or continued the cause of the trouble; and it must be remembered that a person may 'continue' a nuisance by adopting it, or in some circumstances by omitting to remedy it: see *Sedleigh-Denfield v. O'Callaghan*.
>
> This liability for nuisance has been applied in the past to sewage and drainage cases in this way: when a local authority take over or construct a sewage and drainage system which is adequate at the time to dispose of the sewage and surface water for their district, but which subsequently becomes inadequate owing to increased building which they cannot control, and for which they have no responsibility, they are not guilty of the ensuing nuisance. They obviously do not create it, nor do they continue it merely by doing nothing to enlarge or improve the system. The only remedy of the injured party is to complain to the Minister.

The House of Lords added that there were good reasons for the common law not to interfere further than this with the activities of sewerage undertakers through the law of nuisance, in particular that the issues had been allocated by statute to an independent regulator with elaborate powers of enforcement.[11] The existence of the statutory scheme was said to exclude the operation of the tort of nuisance, although we may assume from the
p. 671 approval of Denning LJ's ↵ statement in the *Pride of Derby* case that the common law is only excluded so far as it relates to cases where the sewerage undertaker has taken over sewers built by another, and where the sewers have become inadequate due to increased demand. This was the situation in *Marcic* itself.

Lord Nicholls, *Marcic v Thames Water Utilities*

34 In my view the cause of action in nuisance asserted by Mr Marcic is inconsistent with the statutory scheme. Mr Marcic's claim is expressed in various ways but in practical terms it always comes down to this: Thames Water ought to build more sewers. This is the only way Thames Water can prevent sewer flooding of Mr Marcic's property. This is the only way because it is not suggested that Thames Water failed to operate its existing sewage system properly by not cleaning or maintaining it. Nor can Thames Water control the volume of water entering the sewers under Old Church Lane. Every new house built has an absolute right to connect. Thames Water is obliged to accept these connections: section 106 of the 1991 Act. A sewerage undertaker is unable to prevent connections being made to the existing system, and the ingress of water through these connections, even if this risks overloading the existing sewers. But, so Mr Marcic's claim runs, although Thames Water was operating its existing system properly, and although Thames Water had no control over the volume of water entering the system, it was within Thames Water's power to build more sewers, as the company now has done, to cope with the increased volume of water entering the system. Mr Marcic, it is said, has a cause of action at law in respect of Thames Water's failure to construct more sewers before it eventually did in June 2003.

35 The difficulty I have with this line of argument is that it ignores the statutory limitations on the enforcement of sewerage undertakers' drainage obligations. Since sewerage undertakers have no control over the volume of water entering their sewerage systems it would be surprising if Parliament intended that whenever sewer flooding occurs, every householder whose property has been affected can sue the appointed sewerage undertaker for an order that the company build more sewers or pay damages. On the contrary, it is abundantly clear that one important purpose of the enforcement scheme in the 1991 Act is that individual householders should not be able to launch proceedings in respect of failure to build sufficient sewers. When flooding occurs the first enforcement step under the statute is that the director, as the regulator of the industry, will consider whether to make an enforcement order. He will look at the position of an individual householder but in the context of the wider considerations spelled out in the statute. Individual householders may bring proceedings in respect of inadequate drainage only when the undertaker has failed to comply with an enforcement order made by the Secretary of State or the director. The existence of a parallel common law right, whereby individual householders who suffer sewer flooding may themselves bring court proceedings when no enforcement order has been made, would set at nought the statutory scheme. It would effectively supplant the regulatory role the director was intended to discharge when questions of sewer flooding arise.

36 For this reason I consider there is no room in this case for a common law cause of action in nuisance as submitted by Mr Marcic and held by the Court of Appeal.

It is worth considering whether the House of Lords was too sceptical about the ability of a court to consider the fairness of the situation as it affected the claimant. For all that the Court of Appeal required a very significant investment by the defendants, that investment had somehow become possible by the time of the

action in the House of Lords, and the remedial action had been carried out. Furthermore, the Director had
p. 672 stated in the process ↵ of consultation that the *Marcic* case had concentrated *his* mind on the need for 'robust and rational prioritisation schemes' (Lord Nicholls, at [28]), so that it contributed to the formulation of a new and perhaps more defensible approach. Lord Nicholls further admitted in his judgment that '[i] n Mr Marcic's case, matters plainly went awry' (at [43]). Without recourse to the courts, whether through the nuisance claim or the HRA claim, would 'fairness' have received such an emphasis in the new priorities adopted? A critique of the treatment of the statutory scheme in *Marcic* can be found in M. Lee, 'Occupying the Field: Tort and the Pre-Emptive Statute', in T. T. Arvind and J. Steele (eds), *Tort Law and the Legislature* (Hart Publishing, 2013). At the most general level, the comments may also be contrasted with recent cases emphasizing the independence of nuisance, and regulatory schemes, in relation to planning permission in particular (Section 1.3).

In *Dobson v Thames Water* [2007] EWHC 2021, Ramsey J distinguished *Marcic*, and held that an action in nuisance is potentially available if a claimant can show *negligence* in the day-to-day operation of a sewerage system, provided that action does not 'conflict with' the statutory scheme. Lack of care may therefore take the interference outside the protection of *Marcic* and of *Leakey*, particularly if the alleged negligence attaches to 'operational' issues such as the maintenance of a sewage plant, rather than 'policy'-based decisions such as the setting of priorities for spending. Conflict with the statutory scheme is much less likely in these circumstances. In this case, the claimants complained of smells and mosquitoes emanating from a water treatment plant which, they argued, was not carefully run. Such a claim was arguable since it would not fall foul of the considerations that were decisive against the *Marcic* claim.

Common law remedies may be available then, even if the duty which is thereby enforced appears to be the same as a statutory duty. This is consistent with the position in relation to negligence in the sphere of statutory duties, discussed in Chapter 5.3.[12] The important issue is conflict with the statutory scheme. Overlap without conflict is acceptable. Significant issues surrounding the remedies that might arise if such a nuisance was established were subject to appeal, and are considered in Section 2.2 of this chapter.

Nuisance Created by Tenants and Licensees

Baxter v Camden LBC (No 2) [2001] 1 AC 1

The council had divided a house into three dwellings, and the plaintiffs were tenants of the middle floor. The tenant complained to the council that she suffered serious interference in her enjoyment of the flat as a result of the normal day-to-day noise generated by her neighbours. Although this noise was not unusual, its effect was made worse by the poor sound insulation installed during conversion of the premises. She brought proceedings both on the basis of breach of the covenant of quiet enjoyment in her tenancy, and for nuisance. Her claim for breach of covenant was dismissed because the problem that arose was a result of the state of the premises at the time they were let. The claim in nuisance was also dismissed:

> **Lord Hoffmann, *Baxter v Camden LBC (No 2)*, at 15–16**
>
> I turn next to the law of private nuisance. I can deal with this quite shortly because it seems to me that the appellants face an insuperable difficulty. Nuisance involves doing something on adjoining or
> p. 673 nearby land which constitutes an unreasonable interference with the utility of ↵ the plaintiff's land. The primary defendant is the person who causes the nuisance by doing the acts in question. As Sir John Pennycuick V-C said in *Smith v Scott* [1973] Ch 314, 321:
>
> > "It is established beyond question that the person to be sued in nuisance is the occupier of the property from which the nuisance emanates. In general, a landlord is not liable for nuisance committed by his tenant, but to this rule there is, so far as now in point, one recognised exception, namely, that the landlord is liable if he has authorised his tenant to commit the nuisance."
>
> What is the nuisance of which the appellants complain? The sounds emanating from their neighbours' flats. But they do not allege the making of these sounds to be a nuisance committed by the other tenants…
>
> … If the neighbours are not committing a nuisance, the councils cannot be liable for authorising them to commit one. And there is no other basis for holding the landlords liable. They are not themselves doing anything which interferes with the appellants' use of their flats. Once again, it all comes down to a complaint about the inherent defects in the construction of the building. The appellants say that the ordinary use of the flats by their neighbours would not have caused them inconvenience if they had been differently built. But that, as I have said more than once, is a matter of which a tenant cannot complain.

As explained here, the lessor is liable for nuisances created by a tenant only if he or she has authorized that nuisance. If the tenant does not create a nuisance, then the landlord does not authorize a nuisance, and so cannot be liable. As Lord Millett put it, at 22:

> The logic of the proposition is obvious. A landlord cannot be liable to an action for authorising his tenant to do something that would not be actionable if he did it himself.

Authorizing a nuisance, rather than creating it by bad design of the premises let, therefore appears to be the only basis on which a landlord will be liable for noise nuisance resulting from the activities of tenants. In fact, the result does not seem to be entirely compelled by logic, as Lord Millett suggests. The House of Lords adopts quite a narrow formulation, particularly when compared with the decision of the Court of Appeal in *Lippiatt*, concerning the congregation of people likely to commit a nuisance upon one's land (below).

In the slightly earlier case of *Hussain v Lancaster City Council* [2000] QB 1, the Court of Appeal also emphasized that the landlord's liability for nuisances caused by the tenant are limited. In this case, the acts of the tenants certainly constituted a nuisance. They carried out a series of acts including racial harassment of neighbours and acts of vandalism against their properties. The council, as landlords, were subject to actions in negligence and nuisance for failing to control the acts of the tenants. Both claims failed. In respect of the action in

nuisance, Hirst LJ concluded that the acts of the tenants 'did not involve the tenants' use of the tenants' land and therefore fell outside the scope of the tort' (at 23). This seems to be a reference to the fact that they left their own homes in order to carry out their actions, although this reasoning will be hard to reconcile with the law on licensees (below). Giving what appeared to be a separate sufficient reason for the decision, Hirst LJ added that according to *Smith v Scott* [1973] Ch 314, a similar case involving nuisances created (on that occasion foreseeably) by council tenants, the only grounds for holding a landlord liable for the nuisances of his or her tenant is that the landlord authorized the nuisance. The liability ↵ of landlords for nuisances created by tenants was also considered in *Lawrence v Fen Tigers (No 2)* [2015] AC 106, Lord Neuberger suggesting that for a landlord to be liable, they 'must either participate directly in the commission of the nuisance, or they must be taken to have authorized it by letting the property' (at para [11]). In *Cocking v Eacott* [2016] EWCA Civ 140; [2016] 3 WLR 125, Voss LJ summarized the position, namely that for liability (at para [17]):

p. 674

> there had to be actual, active or direct participation by the landlord or his agents, and the fact that a landlord does nothing to stop or discourage a nuisance cannot amount to participating in it.

Licensees

In *Lippiatt v S. Gloucestershire CC* [2000] QB 51, travellers had congregated on the defendant council's land, on one edge of a road. The plaintiffs were tenant farmers of land situated on either side of the road. They complained that the travellers frequently trespassed on their land and carried out various acts amounting to a nuisance, including obstruction, fouling with rubbish and excrement, theft, and actual damage. The first instance judge, Judge Weeks QC, had struck out the statement of claim on the basis that it could not succeed following the newly decided *Hussain* case: the nuisance, he concluded, had not arisen from the licensees' use of the council's land. The Court of Appeal ruled, however, that the action should not be struck out. The Court therefore had to suggest that this case was at least arguably distinguishable from the *Hussain* case.

Evans LJ seemed to suggest that the nuisance was not that of the tenants or licensees in carrying out the acts, but that of the council in allowing the licensees to congregate. The question of whether the council authorized or adopted the nuisance therefore need not arise. But if this is what justifies the potential liability in *Lippiatt*, why could the same argument not be used against the council in *Hussain*—that they ought to have taken steps to have evicted the tenants? Perhaps the answer is that the eviction of tenants with a right to occupation, by a housing authority with obligations to provide housing, is a more complex operation which involves many different agencies. Some reasons of this sort were discussed in *Hussain* as militating against the success of an action in negligence, but they were not discussed in respect of the action in nuisance. The same distinction also seems implicit in Sir Christopher Staughton's short judgment in *Lippiatt*: he proposed that the offenders were either licensees or trespassers, and 'could be moved on'.

In *Cocking v Eacott* [2016] EWCA Civ 140; [2016] 3 WLR 125, the distinction between a tenancy and a licence was crucial to liability. The distinction was explained on the basis that a landlord, unlike a licensor, has ceased to be in occupation of the land: it is the tenant who is the occupier.

Lady Justice Arden, *Cocking v Eacott*
[2016] EWCA Civ 140

> 34. A landlord who has granted a tenancy is not in general liable in nuisance if his tenant commits that tort. Mrs Waring let her daughter into her property and allowed her and her dog to live there without executing a tenancy. The dog's persistent barking caused a nuisance to the neighbours. Mrs Waring now accepts that the barking amounted to a nuisance: she seeks only to argue that she should not be liable for the tort of her daughter and that she should be in the same position as if she had granted a tenancy.
>
> p. 675 35. In my judgment, in agreement with Vos and McFarlane LJJ, that argument is wrong in law and the appeal should be dismissed. I agree with the judge that Mrs Waring was liable in law for the nuisance caused by her daughter's dog because as licensor she is to be treated as in occupation of the property. She is not in the same position as a landlord who has parted with possession of the property.

1.5 Who May Sue?

The question of who may sue in private nuisance goes to the very heart of the tort, for it is related to the question of which interests it protects. In the case of *Hunter v Canary Wharf*, the House of Lords has affirmed that nuisance is to be regarded as a tort against property, and not a tort against the person.

Hunter v Canary Wharf [1997] AC 655

The plaintiffs lived in London's Docklands area, which was designated by the Secretary of State as an urban development area and enterprise zone. The consequence of this was that the normal planning process was suspended. It amounted in effect to a general grant of planning permission. Some of the plaintiffs were property owners or leaseholders; others were mere occupiers. The latter group included children. In the first of two actions, the plaintiffs claimed for damages in negligence and nuisance in respect of interference with television reception following the construction of the 'Canary Wharf' tower (250 metres high and over 50 metres square). In the second action, the plaintiffs claimed damages for negligence and nuisance in respect of deposits of dust on their properties and homes caused by the construction of a link road. At first instance, the judge ruled that interference with television reception could amount to a nuisance, but that to claim in private nuisance it was necessary to have a right to exclusive possession of property. The Court of Appeal unanimously reversed these two rulings. The appeal to the House of Lords concerned two points relating to private nuisance. First, could interference with television signals amount to a private nuisance? On this aspect of the case, see the extract in Section 1.3 of this chapter. Second, were all of the plaintiffs entitled to sue in nuisance? We will concentrate here on this crucial second point.

Lord Goff, at 687

> ### Right to sue in private nuisance
>
> ... In the two cases now under appeal before your Lordships' House, one of which relates to interference with television signals and the other to the generation of dust from the construction of a road, the plaintiffs consist in each case of a substantial group of local people. Moreover they are not restricted to householders who have the exclusive right to possess the places where they live, whether as freeholders or tenants, or even as licensees. They include people with whom householders share their homes, for example, as wives or husbands or partners, or as children or other relatives. All of these people are claiming damages in private nuisance, by reason of interference with their television viewing or by reason of excessive dust.
>
> ...

p. 676

Lord Hoffmann, at 704–8

... the concept of nuisance as a tort against land has recently been questioned by the decision of the Court of Appeal in *Khorasandjian v. Bush* [1993] Q.B. 727. ... Dillon L.J. brushed *Malone v. Laskey* [1907] 2 K.B. 141 aside. He said, at p. 734:

> "To my mind, it is ridiculous if in this present age the law is that the making of deliberately harassing and pestering telephone calls to a person is only actionable in the civil courts if the recipient of the calls happens to have the freehold or a leasehold proprietary interest in the premises in which he or she has received the calls."

This reasoning, which is echoed in some academic writing and the Canadian case of *Motherwell v. Motherwell*, 73 D.L.R. (3d) 62 which the Court of Appeal followed, is based upon a fundamental mistake about the remedy which the tort of nuisance provides. It arises, I think, out of a misapplication of an important distinction drawn by Lord Westbury L.C. in *St. Helen's Smelting Co. v. Tipping* (1865).

Lord Hoffmann quoted from Lord Westbury's judgment in *St Helen's Tipping* and continued:

> *St. Helen's Smelting Co. v. Tipping* was a landmark case. It drew the line beyond which rural and landed England did not have to accept external costs imposed upon it by industrial pollution. But there has been, I think, some inclination to treat it as having divided nuisance into two torts, one of causing 'material injury to the property,' such as flooding or depositing poisonous substances on crops, and the other of causing 'sensible personal discomfort' such as excessive noise or smells. In cases in the first category, there has never been any doubt that the remedy, whether by way of injunction or damages, is for causing damage to the land. It is plain that in such a case only a person with an interest in the land can sue. But there has been a tendency to regard cases in the second category as actions in respect of the discomfort or even personal injury which the plaintiff has suffered or is likely to suffer. On this view, the plaintiff's interest in the land becomes no more than a qualifying condition or springboard which entitles him to sue for injury to himself.
>
> If this were the case, the need for the plaintiff to have an interest in land would indeed be hard to justify. The passage I have quoted from Dillon L.J. (*Khorasandjian v. Bush* [1993] Q.B. 727, 734) is an eloquent statement of the reasons. But the premise is quite mistaken. In the case of nuisances 'productive of sensible personal discomfort,' the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered 'sensible' injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to compensation.
>
> I cannot therefore agree with Stephenson L.J. in *Bone v. Seale* [1975] 1 W.L.R. 797, 803–804 when he said that damages in an action for nuisance caused by smells from a pig farm should be fixed by analogy with damages for loss of amenity in an action for personal injury. In that case it was said that 'efforts to prove diminution in the value of the property as a result of this persistent smell over the years failed.' I take this to mean that it had not been shown that the property would sell for less. But diminution in capital value is not the only measure of loss. It seems to me that the value of the right to occupy a house which smells of pigs must be less than the value of the occupation of an
> p. 677 equivalent house which does not. In the ↵ case of a transitory nuisance, the capital value of the property will seldom be reduced. But the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted. To some extent this involves placing a value upon intangibles. But estates agents do this all the time. The law of damages is sufficiently flexible to be able to do justice in such a case: compare *Ruxley Electronics and Construction Ltd v. Forsyth* [1996] A.C. 344.
>
> There may of course be cases in which, in addition to damages for injury to his land, the owner or occupier is able to recover damages for consequential loss. He will, for example, be entitled to loss of profits which are the result of inability to use the land for the purposes of his business. Or if the land is flooded, he may also be able to recover damages for chattels or livestock lost as a result. But inconvenience, annoyance or even illness suffered by persons on land as a result of smells or dust are not damage consequential upon the injury to the land. It is rather the other way about: the injury to the amenity of the land consists in the fact that the persons upon it are liable to suffer inconvenience, annoyance or illness.

It follows that damages for nuisance recoverable by the possessor or occupier may be affected by the size, commodiousness and value of his property but cannot be increased merely because more people are in occupation and therefore suffer greater collective discomfort. If more than one person has an interest in the property, the damages will have to be divided among them. If there are joint owners, they will be jointly entitled to the damages. If there is a reversioner and the nuisance has caused damage of a permanent character which affects the reversion, he will be entitled to damages according to his interest. But the damages cannot be increased by the fact that the interests in the land are divided; still less according to the number of persons residing on the premises.

...

Once it is understood that nuisances 'productive of sensible personal discomfort' (*St. Helen's Smelting Co. v. Tipping*, 11 H.L. Cas. 642, 650) do not constitute a separate tort of causing discomfort to people but are merely part of a single tort of causing injury to land, the rule that the plaintiff must have an interest in the land falls into place as logical and, indeed, inevitable.

Is there any reason of policy why the rule should be abandoned? Once nuisance has escaped the bounds of being a tort against land, there seems no logic in compromise limitations, such as that proposed by the Court of Appeal in this case, requiring the plaintiff to have been residing on land as his or her home. This was recognised by the Court of Appeal in *Khorasandjian v. Bush* [1993] Q.B. 727 where the injunction applied whether the plaintiff was at home or not. There is a good deal in this case and other writings about the need for the law to adapt to modern social conditions. But the development of the common law should be rational and coherent. It should not distort its principles and create anomalies merely as an expedient to fill a gap.

The perceived gap in *Khorasandjian v. Bush* was the absence of a tort of intentional harassment causing distress without actual bodily or psychiatric illness. This limitation is thought to arise out of cases like *Wilkinson v. Downton* [1897] 2 Q.B. 57 and *Janvier v. Sweeney* [1919] 2 K.B. 316. The law of harassment has now been put on a statutory basis (see the Protection from Harassment Act 1997) and it is unnecessary to consider how the common law might have developed. But as at present advised, I see no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence: see *Hicks v. Chief Constable of the South Yorkshire Police* [1992] 2 All E.R. 65. The policy considerations are
p. 678 quite different. I do not therefore say ↵ that *Khorasandjian v. Bush* was wrongly decided. But it must be seen as a case on intentional harassment, not nuisance.

So far as the claim is for personal injury, it seems to me that the only appropriate cause of action is negligence. It would be anomalous if the rules for recovery of damages under this head were different according as to whether, for example, the plaintiff was at home or at work. It is true, as I have said, that the law of negligence gives no remedy for discomfort or distress which does not result in bodily or psychiatric illness. But this is a matter of general policy and I can see no logic in making an exception for cases in which the discomfort or distress was suffered at home rather than somewhere else.

Lord Cooke of Thornden (dissenting on the issue of who can sue in nuisance), at 711–12

... Naturally I am diffident about disagreeing in any respect with the majority of your Lordships, but such assistance as I may be able to give in your deliberations could not consist in mere conformity and deference; and, if the common law of England is to be directed into the restricted path which in this instance the majority prefer, there may be some advantage in bringing out that the choice is in the end a policy one between competing principles ...

At 713–14

Malone v. Laskey, a case of personal injury from a falling bracket rather than an interference with amenities, is not directly in point, but it is to be noted that the wife of the subtenant's manager, who had been permitted by the subtenant to live in the premises with her husband, was dismissed by Sir Gorell Barnes P., at p. 151, as a person who had 'no right of occupation in the proper sense of the term' and by Fletcher Moulton L.J. as being 'merely present.' My Lords, whatever the acceptability of those descriptions 90 years ago, I can only agree with the Appellate Division of the Alberta Supreme Court in *Motherwell v. Motherwell*, at p. 77, that they are 'rather light treatment of a wife, at least in today's society where she is no longer considered subservient to her husband.' Current statutes give effect to current perceptions by according spouses a special status in respect of the matrimonial home, as by enabling the court to make orders regarding occupation (see in England the Family Law Act 1996, sections 30 and 31).

The status of children living at home is different and perhaps more problematical but, on consideration, I am persuaded by the majority of the Court of Appeal in *Khorasandjian v. Bush* [1993] Q.B. 727 and the weight of North American jurisprudence to the view that they, too, should be entitled to relief for substantial and unlawful interference with the amenities of their home. Internationally the distinct interests of children are increasingly recognised. The United Nations Convention on the Rights of the Child, ratified by the United Kingdom in 1991 and the most widely ratified human rights treaty in history, acknowledges children as fully-fledged beneficiaries of human rights. Article 16 declares, inter alia, that no child shall be subjected to unlawful interference with his or her home and that the child has the right to the protection of law against such interference. International standards such as this may be taken into account in shaping the common law.

The point just mentioned can be taken further. Article 16 of the Convention on the Rights of the Child adopts some of the language of article 12 of the Universal Declaration of Human Rights and article 8 of the European Convention for the Protection of Human Rights and ↵ Fundamental Freedoms (1953) (Cmd. 8969). These provisions are aimed, in part, at protecting the home and are construed to give protection against nuisances. ... The protection is regarded as going beyond possession or property rights: see *Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights* (1995), p. 319. Again I think that this is a legitimate consideration in support of treating residence as an acceptable basis of standing at common law in the present class of case.

p. 679

At 717–18

The preponderance of academic opinion seems also to be against confining the right to sue in nuisance for interference with amenities to plaintiffs with proprietary interests in land. Professor John G. Fleming's condemnation of a 'senseless discrimination'—see now his 8th ed., p. 426—has already been mentioned. His view is that the wife and family residing with a tenant should be protected by the law of nuisance against forms of discomfort and also personal injuries, 'by recognising that they have a "right of occupation" just like the official tenant.' *Clerk & Lindsell on Torts*, 17th ed., pp. 910–911, para. 18–39, is to the same effect, as is *Linden, Canadian Tort Law*, 5th ed. (1993), pp. 521–522; while *Winfield & Jolowicz on Tort*, 14th ed. (1994), pp. 419–420 and *Markesinis & Deakin, Tort Law*, 3rd ed. (1994), pp. 434–435 would extend the right to long-term lodgers. *Salmond & Heuston on the Law of Torts*, 21st ed. (1996), p. 63, n. 96 and the New Zealand work *Todd, The Law of Torts in New Zealand*, 2nd ed. (1997), p. 537 suggest that the status of spouses under modern legislation should at least be enough; and the preface to the same edition of *Salmond & Heuston* goes further, by welcoming the decision in *Khorasandjian v. Bush* [1993] Q.B. 727 as relieving plaintiffs in private nuisance cases of the need to show that they enjoyed a legal interest in the land affected.

My Lords, there is a maxim communis error facit jus. I have collected the foregoing references not to invoke it, however, but to suggest respectfully that on this hitherto unsettled issue the general trend of leading scholarly opinion need not be condemned as erroneous. Although hitherto the law of England on the point has not been settled by your Lordships' House, it is agreed on all hands that some link with the land is necessary for standing to sue in private nuisance. The precise nature of that link remains to be defined, partly because of the ambiguity of 'occupy' and its derivatives. In ordinary usage the verb can certainly include 'reside in,' which is indeed the first meaning given in the *Concise Oxford Dictionary*.

In logic more than one answer can be given. Logically it is possible to say that the right to sue for interference with the amenities of a home should be confined to those with proprietary interests and licensees with exclusive possession. No less logically the right can be accorded to all who live in the home. Which test should be adopted, that is to say which should be the governing principle, is a question of the policy of the law. It is a question not capable of being answered by analysis alone. All that analysis can do is expose the alternatives. Decisions such as *Malone v. Laskey* [1907] 2 K.B. 141 do not attempt that kind of analysis, and in refraining from recognising that value judgments are involved they compare less than favourably with the approach of the present-day Court of Appeal in *Khorasandjian* and this case. The reason why I prefer the alternative advocated with unwonted vigour of expression by the doyen of living tort writers is that it gives better effect to widespread conceptions concerning the home and family.

Of course in this field as in most others there will be borderline cases and anomalies wherever the
p. 680 lines are drawn. Thus there are, for instance, the lodger and, as some of your Lordships ↵ note, the au pair girl (although she may not figure among the present plaintiffs). It would seem weak, though, to refrain from laying down a just rule for spouses and children on the ground that it is not easy to know where to draw the lines regarding other persons. ... Occupation of the property as a

> home is, to me, an acceptable criterion, consistent with the traditional concern for the sanctity of family life and the Englishman's home—which need not in this context include his workplace. As already mentioned, it is consistent also with international standards.

Commentary

The key judgments in *Hunter v Canary Wharf* have been extracted at some length because of their central importance to the development of the tort of private nuisance, and because of the importance of the variations between them. The majority of the House of Lords resoundingly affirmed that private nuisance was a tort against land and not against the person. The argument that nuisance might be 'modernized' by developing it to protect certain personal interests was rejected. The House of Lords preferred such personal rights to be protected by other means which may be more appropriately designed for the task.

The interpretation of nuisance as exclusively a tort against land resolved the question of who could sue in nuisance; but it also had far-reaching implications for the way that damages are assessed in cases of amenity nuisance (see Lord Hoffmann, earlier), and indeed for the range of injuries for which damages are recoverable in a nuisance action. In particular, it is clear that nuisance will not provide damages for personal injury per se. Although the majority judgments extracted above are generally notable for their logic and coherence, they are not altogether above criticism. In particular, as regards Lord Goff's refusal to treat the home as a special case, it may be objected that there are substantial grounds for doing exactly this: see Article 8 of the European Convention on Human Rights (ECHR), increasingly important in domestic law since enactment of the Human Rights Act 1998 (HRA). Seen in this light, their Lordships' concerns over how one should interpret the interests of the 'au pair girl' for these purposes would simply come down to a question about what counts as a home. This may not be an easy question to answer, but it surely does not require rejection of the whole concept of the home as having special status. Lord Cooke made a broader point about the status both of the home and of children in international human rights instruments in the course of his dissenting judgment.

It is suggested that Lord Cooke is right to say that it is policy, rather than logic, that compels the majority view in *Hunter*. The question is not only the historical one of what nuisance has in the past been able to protect, but the more forward-thinking question of whether nuisance is really adequate to the task of protecting an expanded range of interests. We may accept or reject the policy behind the decision even if we do not accept that the logic is inescapable. In rejecting the idea of a 'substantial link' with the land as giving sufficient standing to sue, Lord Goff suggested that such a change (as he saw it) in the tort of nuisance 'would transform it from a tort to land to a tort to the person, in which damages could be recovered in respect of something less serious than personal injury and the criteria for liability were founded not upon negligence but upon striking a balance between the interests of neighbours in land'. The question remains: is there justification for giving these interests extra protection in tort law, because of their status as events in the home?

Lord Hoffmann's judgment goes furthest in its drive to divorce nuisance from the sorts of personal interest typically protected through the tort of negligence. He explains that cases of nuisance causing personal
p. 681 discomfort do not constitute a 'separate tort' of causing ↵ discomfort to people but are still concerned only with the protection of interests in land. From here, he concludes that damages will not be increased 'merely' because more people are on the land, and therefore more people suffer personal discomfort. On the other hand, the 'size, commodiousness, and value' of the property will have an impact on the damages awarded,

because the damage to the amenity of the land is valued at a greater sum. This thinking was applied in the case of *Dennis v Ministry of Defence*, which could be seen as a sort of latter-day *St Helen's v Tipping*. We consider *Dennis* later. Lord Hoffmann's approach suggests that it is quite right to award much more substantial damages for noise nuisance to a family or even a single person occupying an exceptionally valuable estate (as in *Dennis*), than to a similar or larger family living in an ordinary dwelling. The 'loss of amenity in the property' will be valued at a much higher sum.

The effect of this reasoning is illustrated by *Raymond v Young* [2015] EWCA Civ 456; [2015] HLR 41. Here there had been a very lengthy history of nuisances committed by a neighbour against the occupiers and former occupiers of a farm, stretching back forty years. The occupiers of the farm were granted an injunction, but this was personal and given the history, it was not likely that a purchaser of the farm would be confident that the nuisances would stop. Thus, there was a diminution in the value of the farm and damages could be awarded *in addition to* the injunction. However, the first instance judge had gone wrong in that he had *also* awarded damages for loss of amenity and distress, in nuisance and under the Protection from Harassment Act 1997. As the Court of Appeal explained, nuisance damages treat loss of amenity in terms of loss of amenity *value*, and this was therefore double counting:

Patten LJ, *Raymond v Young*

After quoting from the judgment of Lord Hoffmann in *Hunter v Canary Wharf* extracted above, Patten LJ continued:

> 27 The issue in *Hunter* was whether a claim in private nuisance could be maintained by occupiers of flats whose television reception had been interfered with by the construction of the Canary Wharf Tower but who did not have a lease or other right to exclusive possession of their own properties. But I read the passage I have quoted as an endorsement of the principle that damages for what is commonly described as loss of amenity are damages for the diminution in the value of the right to occupy the affected property and not merely damages for the personal distress or inconvenience suffered by the individuals concerned. They are intended to and do compensate the claimant landowners for the distress and loss of amenity which they experience as a result of the nuisance but only in terms of the consequent loss in the use value of their property. For this reason, as Lord Hoffmann explains, the damages are not increased simply because the property is occupied by more than one person.
>
> 28 It must, I think, also follow from this that it is not appropriate to make separate awards of damages for distress in cases of nuisance. The consequences in terms of personal distress or discomfort which the claimant may experience as a result of the nuisance are, as I have said, simply part of the assessment of the claimant occupier's loss of amenity …

In the extreme case of *Manson-Smith v Arthurworrey* [2021] EWHC 2137 (QB), the defendant freeholder had continued a campaign of harassment against the claimant tenants despite a period of imprisonment for the criminal offence of harassment. An injunction was awarded but bearing in mind that this was unlikely to
p. 682 bring the harassment to an end, there ↵ was also an award of damages for nuisance representing the loss

in market value of the flat. In order to avoid double compensation for amenity nuisance, applying *Raymond v Young*, there was no additional sum of compensation for past amenity nuisance and distress, as this was represented by the loss of market value.

A potentially knotty problem is how to distinguish this consistent approach to amenity damage in terms of the loss of value of property from the following statement of the Master of the Rolls in *Williams v Network Rail Infrastructure* [2018] EWCA Civ 1514, which we briefly extracted in Section 1.2.

Sir Terence Etherton MR, *Williams v Network Rail Infrastructure*

> 48 The purpose of the tort of nuisance is not to protect the value of property as an investment or a financial asset. Its purpose is to protect the owner of the land (or a person entitled to exclusive possession) in their use and enjoyment of the land as such a facet of the right of ownership or right to exclusive possession. The decision of the recorder in the present case extends the tort of nuisance to a claim for pure economic loss. Counsel for the claimants did not identify any decision in which a similar decision was reached or, more generally, where the amenity of a property has been held, for the purposes of actionable private nuisance, to include the right to realise or otherwise deploy the value of property in the financial interests of the owner. …

The key point of distinction is that in this instance, the property was 'threatened by' an invasion of Japanese knotweed from adjoining property. Other than potential problems with lender caution and marketability, it did not yet damage the property nor interfere with the use and enjoyment of land. The comments extracted, therefore, are aimed at the actionability of nuisance, and not at the way in which damages are to be assessed, where there is an interference with use and enjoyment. For this reason, the author of the next extract suggests that the paragraph in question may mislead:

David Howarth, 'Clearing the Ground – Nuisance, Damage and Japanese Knotweed' CLJ 2019, 78(1), 21–24

> … In *Williams,* the claimants undoubtedly had more than a contractual interest in their properties. None of their loss was 'purely economic' in the negligence sense. The issue was instead what kinds of property damage nuisance protects against. Mr Recorder Grubb went too far only in implying that nuisance might apply to reductions in property values unrelated to impairments to the usefulness of a property. He was not wrong that nuisance protects the value of property rights.

So far as **personal injury** is concerned, we should be careful how we state the conclusion to be drawn from *Hunter v Canary Wharf*. It is clear that no damages will be awarded in respect of personal injury as such. Private nuisance will not operate as an alternative to negligence in this respect. However, it should be clear enough that an activity whose effects cause personal injury on the property—perhaps from noxious fumes, for example—is capable of amounting to a nuisance because the amenity value of premises is inevitably
p. 683 affected ↵ by such a state of affairs. Although injured persons will not have an action in their own right as a consequence of being injured, there will presumably be grounds for an action in nuisance either for an injunction, or for damages in respect of the loss of amenity value, just as there would be for other interference

with comfort and enjoyment. Indeed, invasions which threaten actual personal injury should logically be subject to increased damages as there is serious loss of amenity. (See further L. Crabb, 'The Property Torts' (2003) 11 Tort L Rev 104–18; and our discussion of *Dobson v Thames Water*, later in this chapter.)

1.6 Defences

Prescription

In principle, the right to commit a nuisance may be obtained by prescription. However, it is necessary that the interference should amount to a nuisance throughout the whole prescriptive period of 20 years. In *Sturges v Bridgman* (1879) 11 Ch D 852, the plaintiff began a conflicting use of the land some time during the period that was claimed to give rise to the right by prescription. As there was no nuisance prior to this, then the time period began to run only when the plaintiff initiated his use of the land.

Coming to the Nuisance?

It is well established that the defendant cannot argue, by way of defence, that the claimant 'came to the nuisance'. Being there first is not a sufficient reason to allow a defendant to create an interference with the claimant's enjoyment of land. Allowing such a defence would entitle a defendant to 'tie up' the potential uses of neighbouring land. *Sturges v Bridgman* (above) is itself a leading authority for this proposition, which has been reaffirmed by the Supreme Court in *Coventry v Lawrence* [2014] UKSC 13. However, the latter decision appears to have introduced qualifications to this simple statement, in circumstances where the defendant's pre-existing use would not otherwise be a nuisance. This is the other side of certain points noted earlier about the decision in *Lawrence*, particularly that a *nuisance* must be ignored in considering the 'character of the neighbourhood'. This is another area where the Supreme Court could be said to have at least 'suggested' a change in the law, by qualifying the status of 'coming to the nuisance', though only where the claimant's actions have changed the use of his or her land. This aspect of the decision is hedged with many qualifications.

Lord Neuberger, *Coventry v Lawrence*

> 56 … where a claimant builds on, or changes the use of, her land, I would suggest that it may well be wrong to hold that a defendant's pre-existing activity gives rise to a nuisance provided that (i) it can only be said to be a nuisance because it affects the senses of those on the claimant's land, (ii) it was not a nuisance before the building or change of use of the claimant's land, (iii) it is and has been, a reasonable and otherwise lawful use of the defendant's land, (iv) it is carried out in a reasonable way, and (v) it causes no greater nuisance than when the claimant first carried out the building or changed the use. (This is not intended to imply that in any case where one or more of these requirements is not satisfied, a claim in nuisance would be bound to succeed.)
>
> …
>
> p. 684 58 Accordingly, it appears clear to me that it is no defence for a defendant who is sued in nuisance to contend that the claimant came to the nuisance, although it may well be a defence, at least in some circumstances, for a defendant to contend that, as it is only because the claimant has changed the use of, or built on, her land that the defendant's pre-existing activity is claimed to have become a nuisance, the claim should fail.

In *Jones v Ministry of Defence* [2021] EWHC 2276 (QB), the criteria in paragraph 56 of Lord Neuberger's judgment, above, were applied in rejecting a claim for noise nuisance caused by RAF jet activities. The claimants had bought property with the intention of developing it into a holiday and leisure park, while aircraft noise from the nearby Royal Air Force airfield had been part of the locality for 70 years, and the Ministry of Defence had taken all reasonable steps to ensure that the noise was kept to a reasonable minimum. The decision illustrates that the general principle, that coming to the nuisance is no defence, has been significantly qualified by the decision in *Coventry v Lawrence*.

Contributory Negligence and *Volenti non fit Injuria*[13]

The wording of the Law Reform (Contributory Negligence) Act 1945 is certainly sufficiently broad to apply to nuisance. However, in the light of the principle that 'coming to the nuisance' is no defence, the applicability of this defence is likely to be limited. Similarly, the defence of *volenti non fit injuria* is theoretically applicable to nuisance but there would perhaps be a need for some active steps on the part of the claimant, encouraging the creation of the nuisance. It is especially hard to imagine a case of *continuing* nuisance in which the defence of *volenti* is made out. Even in *Gillingham v Medway (Chatham) Dock Co Ltd* ([1993] QB 343, extracted earlier in Section 1.3), where a local authority had granted planning permission, the authority was not prevented from changing its mind about the desirability of the defendant's activity. The case was decided on other grounds. This was, however, a case of public nuisance brought for the protection of the rights of local residents, and not ostensibly to protect the plaintiff's own interests.

Statutory Authority

Direct authorization by statute is an important defence to an action in private nuisance. A starting point in determining the limits to this defence is the statement of Lord Blackburn in *Geddis v Proprietors of the Bann Reservoir* (1878) 3 App Cas 430, at 455–6: 'no action will lie for doing that which the legislature has authorized, if it be done without negligence'. Certainly, negligence in the conduct of an authorized activity is likely to take it out of the scope of the defence.

An alternative formulation is the statement of Viscount Dunedin in *Manchester Corporation v Farnworth* [1930] AC 171, at 183: where the 'making or doing' of any thing has been expressly or impliedly authorized by statute, there can be no action in nuisance 'if the nuisance is the inevitable result of the making or doing so authorised'. This suggests that the defence of statutory authority protects only those nuisances which are an 'inevitable' result of the activity authorized. In the leading case of *Allen v Gulf Oil* [1981] AC 1013, the statement of Viscount Dunedin was quoted with approval.

p. 685 **Lord Wilberforce, *Allen v Gulf Oil***
[1981] AC 1013

> … The respondent alleges a nuisance, by smell, noise, vibration, etc. The facts regarding these matters are for her to prove. It is then for the appellants to show, if they can, that it was impossible to construct and operate a refinery upon the site, conforming with Parliament's intention, without creating the nuisance alleged, or at least a nuisance. Involved in this issue would be the point discussed by Cumming-Bruce L.J. in the Court of Appeal, that the establishment of an oil refinery, etc. was bound to involve some alteration of the environment and so of the standard of amenity and comfort which neighbouring occupiers might expect. To the extent that the environment has been changed from that of a peaceful unpolluted countryside to an industrial complex (as to which different standards apply—*Sturges v. Bridgman* (1879) 11 Ch.D. 852) Parliament must be taken to have authorised it. So far, I venture to think, the matter is not open to doubt. But in my opinion the statutory authority extends beyond merely authorising a change in the environment and an alteration of standard. It confers immunity against proceedings for any nuisance which can be shown (the burden of so showing being upon the appellants) to be the inevitable result of erecting a refinery upon the site—not, I repeat, the existing refinery, but any refinery—however carefully and with however great a regard for the interest of adjoining occupiers it is sited, constructed and operated. To the extent and only to the extent that the actual nuisance (if any) caused by the actual refinery and its operation exceeds that for which immunity is conferred, the plaintiff has a remedy.

From this statement, we can see that the defendant will not succeed with this defence if the claimant can show *either* that the works in question could have been differently sited within the terms of the statute, and thus the nuisance could have been avoided (as in *Metropolitan Asylum District v Hill*, 6 App Cas 193); *or* that the works were not 'carefully' constructed and operated, and that due care could have avoided the nuisance. In *Allen v Gulf Oil* itself, the statute was specific about the siting of the refinery; *and* no lack of due care was apparent in its construction and operation. Thus the nuisance was an inevitable consequence of the authorized activities, and the defence succeeded.

Allen v Gulf Oil also raised the question of 'implied' authorization. It was held that the defendants could rely on the defence of statutory authorization even though the statute in question, the Gulf Oil Refining Act 1965, expressly authorized only the acquisition of the specific land and the construction of a refinery upon it. It did not expressly authorize the *operation* of the refinery. As Lord Diplock put it (at 1014):

> Parliament can hardly be supposed to have intended the refinery to be nothing more than a visual adornment to the landscape in an area of natural beauty. Clearly the intention of Parliament was that the refinery was to be operated as such; and it is perhaps relevant to observe that in *Metropolitan Asylum District v. Hill*, 6 App. Cas. 193, all three members of this House who took part in the decision would apparently have reached the conclusion that the nuisance caused by the small-pox hospital could not have been the subject of an action, if the hospital had been built upon a site which the board had been granted power by Act of Parliament to acquire compulsorily for that specific purpose.

p. 686

Relationship between Statutory Authorization and Planning Permission

In an earlier section of this chapter (1.3), we saw that planning permission is not a defence in the same way as statutory authority. Local planning authorities do not have authority to override private rights. However, planning permission may nevertheless determine the outcome of the case, if it is interpreted as changing the 'character of the neighbourhood'.

Public Interest?

Public interest in the activities of the defendant is not generally considered to be a defence to an action in nuisance. In *Dennis v MOD* (further discussed below in respect of remedies), Buckley J reviewed the authorities in the following terms:

> ***Dennis v Ministry of Defence* [2003] EWHC 793 (QB)**
>
> [30] This case raises an important and problematic point of principle in the law of nuisance. Namely, whether and in what circumstances a sufficient public interest can amount to a defence to a claim in nuisance. In several cases the point has arisen in a less dramatic form than here. For example, the local cricket club case: *Miller v Jackson* [1977] QB 966, [1977] 3 All ER 338 and *Kennaway v Thompson* [1981] QB 88, [1980] 3 All ER 329 in which the Court of Appeal affirmed the principle in *Shelfer v City of London Electric Lighting Company* [1894] 1 Ch 287, namely, the fact that the wrong doer is in some sense a public benefactor has never been considered a sufficient reason to refuse an injunction. (See Lindley LJ. At 315/6). Clerk and Lindsell concludes that public interest is 'not in itself a defence, but a factor in assessing reasonableness of user'. 18th Edition para 19.72. Fleming The Law of Torts 9th Edition at 471 points out that some weight is accorded to the utility of the defendant's conduct, but suggests that the argument 'must not be pushed too far.' He cites Bohlen Studies 429:
>
> "If the public be interested let the public as such bear the costs."
>
> He points out this can be achieved by holding the defendant liable and leaving him to include the cost in charges to the public, or by statutory authority with provision for compensation. The former suggestion, of course, would only apply to a service provider capable of raising charges.

Buckley J clearly considered the meagre case law not to determine the answer to his simple question of whether the public interest could amount to a defence. Indeed, the case of *Miller v Jackson* [1977] QB 966 appears to be unique in stating clearly that the public interest—in preserving the playing of cricket on village greens—outweighed the private interests of neighbours such that they could have no action in nuisance. Buckley J considered whether he should give effect to the public interest by holding that it afforded a defence in itself, or by varying the remedy that could be awarded. He preferred to take the latter course. There was a nuisance; but damages should be awarded in lieu of an injunction. This was a controversial course to take, but in view of the absence of authority concerning the status of public interest, there was no 'uncontroversial' path available to resolve this case. Effectively the same solution has now been adopted by the Supreme Court in *Coventry v Lawrence*. Because of the solution adopted, it is further explored in respect of 'Remedies', below.

1.7 Remedies

Broadly speaking, there are three remedies for nuisance. These are abatement, injunction, and damages.

p. 687

Abatement

Abatement is a form of self-help. It justifies the claimant in entering on to land from which a nuisance emanates, in order to prevent its continuation. The following statement from the case of *Burton v Winters* [1993] 1 WLR 1077 gives an indication of the types of case in which abatement will be appropriate:

> **Lloyd LJ, at 1081**
>
> [T]he courts have confined the remedy by way of self-redress to simple cases such as an overhanging branch, or an encroaching root, which would not justify the expense of legal proceedings, and urgent cases which require an immediate remedy.

Abatement is regarded by the courts with some caution. This is not surprising, given the possible adverse consequences of self-help, especially in the context of neighbour disputes. Indeed in *Burton v Winters* itself, the plaintiff had been committed to prison for two years for breaching the terms of an injunction which prevented her from damaging the defendants' garage. She had earlier been denied a mandatory injunction requiring the demolition of the garage, even though the court had granted a declaration that it encroached upon her land. The Court of Appeal denied her claim that abatement was an appropriate remedy in such a case.

Injunctions[14]

In cases of continuing nuisance, the majority of claimants will seek an injunction. As already indicated, the continuing nature of many nuisances, and therefore the appropriateness of seeking injunctive relief, is one of the factors marking a distinction between negligence and nuisance. An injunction is an equitable remedy and as such is not available as of right. Rather, it is within the discretion of the court whether to award an injunction, and on what terms. This gives considerable flexibility. Rather than prohibiting the defendant's activities, the court may, for example, set limits to the times during which the activity may continue, or even order that certain technical alterations are made to ameliorate the nuisance. Mandatory injunctions (which require the defendant to take positive steps) are less often used, and their terms must be very clearly expressed: a recent example is *Regan v Paul Properties* [2006] EWCA Civ 1391. The degree to which courts are ready to award injunctions to protect rights from being violated, rather than leaving those rights unprotected or allowing them to be 'converted into money' through an award of damages instead, raises very important questions. It is also worth noting, however, that injunctions are personal and that, in the case of a continuing nuisance, a court may take the view that damages are required *in addition to* an injunction, not only because of past interference and injury (below), but also to reflect a continued risk that the value of the property will be affected. Purchasers may not be confident that the nuisance has come to an end or may fear the need to seek their own injunction, affecting the purchase price of the property: see the judgment of the Court of Appeal in *Raymond v Young* [2015] EWCA Civ 456; [2015] HLR 41.

p. 688

Damages for Past Injury and Interference

Some cases of nuisance do not have any continuing element, but are actions in respect of damage or interference that has already been suffered. Furthermore, even in cases of continuing nuisance there will typically be some element of past interference. In these cases, claimants may be awarded damages to compensate for injury in the usual way. However, it should be noted that the comments of Lord Hoffmann in *Hunter v Canary Wharf* (extracted in Section 5.1) regarding the nature of the interests protected by the tort of nuisance may have invalidated some of the existing case law on the assessment of damages. In particular, he disapproved of the approach of Stephenson LJ in *Bone v Seale* [1975] 1 WLR 797, which suggested that the court

should draw analogies with personal injury awards in negligence when compensating for a nuisance by smell. The sums awarded in cases of amenity nuisance must, according to Lord Hoffmann's approach, reflect instead the diminution of amenity value (though this may be temporary) in the property affected.

Damages in Lieu of Injunction

The Chancery Amendment Act of 1858 ('Lord Cairns' Act') gave courts the power to award damages for future interference in lieu of an injunction. However, the power to do this has typically been restrictively interpreted by the courts themselves. Until the decision of the Supreme Court in *Coventry v Lawrence,* courts have mostly regarded themselves as bound by the criteria set out by A. L. Smith LJ in the case of *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, at 322–3:

> In my opinion, it may be stated as a good working rule that—
>
> (1) If the injury is small,
>
> (2) And is one which is capable of being estimated in money,
>
> (3) And is one which can adequately be compensated by a small money payment,
>
> (4) And the case is one in which it would be oppressive to the defendant to grant an injunction:—
>
> then damages in substitution for an injunction may be given.

These conditions focus on the interests of the claimant, rather than on extraneous grounds such as the social utility of the defendant's activities. A. L. Smith LJ also suggested that particular conduct on the part of the defendant (amounting to 'reckless disregard for the plaintiff's rights') might militate against the award of damages in lieu, even if all four of the conditions above were satisfied.

There are well-known older cases in which the presumption in favour of an injunction as opposed to damages, and indifference to issues of public interest, appears to have had striking effects. In *Manchester Corporation v Farnworth* [1930] AC 171, the House of Lords said it would disregard the effect of an injunction on Manchester's electricity supply. On the other hand, the demanding nature of the *Shelfer* criteria (bearing in mind that *all* of them should be satisfied) could incline a court against the award of any relief at all, given that the injunction, as an equitable remedy, is not available 'as of right'.

p. 689 ↵ That point was made by Millett LJ in the following extract. The case was concerned not with nuisance but with the award of damages in lieu of an injunction where there had been breach of a restrictive covenant.

Millett LJ, *Jaggard v Sawyer*
[1995] 1 WLR 269

At 286

It has always been recognised that the practical consequence of withholding injunctive relief is to authorise the continuance of an unlawful state of affairs. If, for example, the defendant threatens to build in such a way that the plaintiff's light will be obstructed and he is not restrained, then the plaintiff will inevitably be deprived of his legal right. This was the very basis upon which before 1858 the Court of Chancery had made the remedy of injunction available in such cases. After the passing of Lord Cairns's Act many of the judges warned that the jurisdiction to award damages instead of an injunction should not be exercised as a matter of course so as to legalise the commission of a tort by any defendant who was willing and able to pay compensation.

...

At 287–8

Nevertheless references to the 'expropriation' of the plaintiff's property are somewhat overdone, not because that is not the practical effect of withholding an injunction, but because the grant of an injunction, like all equitable remedies, is discretionary. Many proprietary rights cannot be protected at all by the common law. The owner must submit to unlawful interference with his rights and be content with damages. If he wants to be protected he must seek equitable relief, and he has no absolute right to that. In many cases, it is true, an injunction will be granted almost as of course; but this is not always the case, and it will never be granted if this would cause injustice to the defendant. Citation of passages in the cases warning of the danger of 'expropriating' the plaintiff needs to be balanced by reference to statements like that of Lord Westbury L.C. in *Isenberg v. East India House Estate Co. Ltd*(1863) 3 De G. J. & S. 263, 273 where he held that it was the duty of the court not:

> "by granting a mandatory injunction, to deliver over the defendants to the plaintiff bound hand and foot, in order to be made subject to any extortionate demand that he may by possibility make, but to substitute for such mandatory injunction an inquiry before itself, in order to ascertain the measure of damage that has been actually sustained."

If the effect of granting an injunction *as between the parties* would be oppressive, then an injunction may be declined. The *Shelfer* criteria, Millett LJ explained, were not to be strictly construed, but were illustrative of the general approach to be taken. On the other hand, Bingham LJ cautioned that the test of 'oppressiveness' is a demanding one. It was not equivalent to the 'balance of convenience', which compares the impact on claimant and defendant of the different forms of relief.

p. 690

Coventry v Lawrence [2014] UKSC 13

We visited *Coventry v Lawrence* in relation to planning permission and the character of the neighbourhood, earlier in this chapter. Arguably, the more significant aspect of the decision is its conclusions on remedies. To one degree or another, all members of the Supreme Court agreed that courts should approach the choice of injunction or damages in a far more flexible and open way than implied by the *Shelfer* criteria, which are not to be slavishly followed. The Supreme Court also took a further significant step and declared that both the public interest, and the interests of third parties where relevant, may also be directly relevant when considering whether to award an injunction or damages in lieu: the issues are not confined to those concerning the wrong of one party to another. Illustrating the significance of these moves, the Court disapproved the approach to remedies taken by the Court of Appeal in the recent decision in *Watson v Croft Promo-Sport* [2009] EWCA Civ 15, both because it had emphasized the 'exceptional' nature of an award of damages in lieu of an injunction; and because it had rejected as irrelevant an argument that public interest favoured the continuation of racing at the defendants' site, suggesting that only in a 'marginal case where the damage to the claimant is minimal' could the public interest be let in.

No Strict Adherence to Shelfer

Whilst Lord Neuberger was markedly less scathing about strict adherence to the *Shelfer* criteria than was Lord Sumption, it was nonetheless clear that in the opinion of all five justices, the *Shelfer* criteria should no longer be strictly applied. Lord Neuberger said that (i) an almost mechanical application of the *Shelfer* criteria, and (ii) an approach in which damages should be applied only in 'exceptional' circumstances, 'are each simply wrong in principle, and give a serious risk of going wrong in practice' ([119]). Lord Sumption's remarks underlined the significance of the issue for nuisance as a whole: the court's discretion as to remedies 'could save the law from anomaly and incoherence' ([157]), which would otherwise be the effect of issuing injunctions to prevent authorized activities. The overall question so far as Lord Sumption was concerned was 'how is one to reconcile public and private law in the domain of land use where they occupy much the same space?' Adherence to the *Shelfer* criteria, in his view, is produced by 'an unduly moralistic approach to disputes', in which the possibility of one party effectively purchasing another's rights is given too much emphasis ([160]). The following observations go further than the other judges were prepared to go, although all agreed that, as Lord Carnwath put it, 'the opportunity should be taken to signal a move away from the strict criteria derived from *Shelfer*' ([239]).

Lord Sumption, *Coventry v Lawrence*

> 161 In my view, the decision in *Shelfer* [1895] 1 Ch 287 is out of date, and it is unfortunate that it has been followed so recently and so slavishly. It was devised for a time in which England was much less crowded, when comparatively few people owned property, when conservation was only beginning to be a public issue, and when there was no general system of statutory development control. The whole jurisprudence in this area will need one day to be reviewed in this court. There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it
p. 691 is likely that conflicting interests are engaged other than the parties' interests. In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission. However, at this stage, in the absence of argument on these points, I can do no more than identify them as calling for consideration in a case in which they arise.

So far as the role of public interest is concerned, the change in approach is equally marked.

Lord Neuberger, *Coventry v Lawrence*

> 124 As for the second problem, that of public interest, I find it hard to see how there could be any circumstances in which it arose and could not, as a matter of law, be a relevant factor. Of course, it is very easy to think of circumstances in which it might arise but did not begin to justify the court refusing, or, as the case may be, deciding, to award an injunction if it was otherwise minded to do so. But that is not the point. The fact that a defendant's business may have to shut down if an injunction is granted should, it seems to me, obviously be a relevant fact, and it is hard to see why relevance should not extend to the fact that a number of the defendant's employees would lose their livelihood, although in many cases that may well not be sufficient to justify the refusal of an injunction. Equally, I do not see why the court should not be entitled to have regard to the fact that many other neighbours in addition to the claimant are badly affected by the nuisance as a factor in favour of granting an injunction.

Together, these various observations constitute a far-reaching shift, from a focus on the two parties and primarily upon the interests of the claimant; to a balanced exercise in which damages are not 'exceptional' and the interests of other parties, and indeed the public, are also relevant to the choice of remedy. Only Lord Sumption expressed the view that damages should *ordinarily* be sufficient in a case of nuisance.

Though certainly striking, these changes did not emerge without preceding discussion, judicial and academic. Lord Carnwath in a brief discussion neatly brought some key issues together.

Lord Carnwath, *Coventry v Lawrence*

> 240 As has been seen, Peter Gibson LJ in *Wheeler* [1996] Ch 19 saw more flexible remedial principles as a possible answer to the public interest aspect of cases such as *Gillingham* [1993] QB 343, rather than creating an exception to the law of nuisance. Commenting on the restrictive view taken by the Court of Appeal in *Watson*, Maria Lee has said:
>
> "The fact that something should go ahead in the public interest does not tell us where the costs should lie; we need not assume that injured parties should bear the burden associated with broader social benefits … The continued strength of private nuisance in a regulatory state probably depends on a more flexible approach to remedies." ("Tort Law and Regulation: Planning and Nuisance" (2011) 8 JPL 986, 989–990.)
>
> I agree.

p. 692 ↵ Before *Coventry v Lawrence*, the clearest instance of an English court recognizing public interest issues as affecting the choice of remedy was the first instance decision of Buckley J in *Dennis v Ministry of Defence* [2003] EWHC 793 (QB). That case involved the public interest in defence of a realm, and raised the matter of public interest in a very direct manner. Given that the *Shelfer* criteria were not fulfilled, and given that there was a substantial noise nuisance, was the court bound to award an injunction? Buckley J relied on human rights arguments, by reference to the Court of Appeal's decision in *Marcic v Thames Water*[15] in concluding that although the flying of Harrier jets at RAF Wittering had constituted a nuisance, it should be permitted to continue but that damages should be paid. It is interesting that the Supreme Court has now felt able to resolve the underlying issue—of the general relevance of public interest in the law of nuisance—by adapting remedies, without reference to the HRA or to Convention rights. This may be an illustration of the general point, that domestic courts are now less inclined to 'use' Convention arguments to produce desired results.

Assessment of Damages

An issue left relatively open by the Supreme Court in *Coventry v Lawrence* was the approach to assessing damages in lieu of an injunction, though it was clear that such damages will more readily be awarded. Clearly this is therefore now a pressing issue, both in the *Coventry* case itself, and generally. There was some inconclusive discussion of recent authorities, most particularly concerning the question of whether *more than compensatory damages* should be awarded; and whether these should be 'gain-based'. As Lord Carnwath said, 'the issues are complex on any view' ([248]).

Such questions were considered by Gabriel Moss QC at first instance in the case of *Tamares (Vincent Square) v Fairpoint Properties* [2007] EWHC 212 (Ch); (2007) 1 WLR 2176. Here, it was agreed by the parties that the amount payable in damages could in principle be greater than the value of the lost amenity of the claimant, because the damages ought to compensate for the lost opportunity of an injunction. This was a right to light case between two commercial parties. In these circumstances, the guiding principle was that the court should find what would be a 'fair' result of a hypothetical negotiation between the parties. This hypothetical negotiation would be imagined as being conducted by 'hypothetical reasonable commercial people' and, in

accordance with the Court of Appeal's approach in *Lunn Poly Ltd v Liverpool and Lancashire Properties* [2006] EWCA Civ 430, it ought in most cases to be approached as though taking place at the time of the breach. Another guiding principle, given that an injunction had been refused, was that the amount should not be so large that the development, or relevant part of it, would be deterred had such a sum been payable. It is by no means clear that such an assumption could be made in future where the Supreme Court's 'open' approach in *Coventry* is followed: the award of damages will no longer depend on showing there were strong reasons against awarding an injunction.

On the other hand, the approach in *Tamares* suggests that it should be accepted that the owner of the right had a good bargaining position in the hypothetical deal, and so the owner of the right would ordinarily expect to receive some part of the *profit* from the relevant part of the development. This is not, therefore, simple
p. 693 compensation for lost amenity, but ↵ compensation for loss of an injunction and an element of damages calculated on the basis of the defendant's likely gain. On the other hand, this was expressed in terms of 'compensation' (for the lost right to stop the interference). It is not a 'disgorgement' remedy of the sort that is intended to strip a defendant of its profits. A remedy of the latter type may appear illogical in a case where the injunctive remedy has been refused on application of the *Shelfer* criteria; for different reasons, it may also appear illogical on the new, more flexible approach, if it is thought that the balance of interests comes down in favour of damages rather than injunction. In *Forsyth-Grant v Allen* [2008] EWCA Civ 505, discussed in Chapter 9, no account of profits was awarded in respect of a nuisance involving interference with the claimant's right to light. These issues remain to be resolved.

2 Nuisance and the Human Rights Act 1998

2.1 The Convention Rights and Their Status

Private nuisance was one of the first torts to test the impact of the HRA. The impact of that Act was discussed in a general sense in Chapter 1, where the statute was extracted. Here, we remind ourselves of the key provisions.

By section 6 of the HRA, it is unlawful for a public authority—which is defined to include a court—to act incompatibly with a Convention right. It has been generally concluded that this will not mean that new causes of action will arise at common law, but it may mean that existing actions (like private nuisance) may be interpreted differently in light of the Convention rights (see Chapter 1, and further discussion in Chapter 14).

By sections 7 and 8 of the HRA, actions may be brought against a public authority, seeking damages for unlawful acts (in violation of a Convention right). This is not an action in tort, but the existence of remedies under section 8 may influence the development of tort actions (see particularly Chapter 5, Section 3). Of course, such actions are available only against defendants who fit the definition of 'public authorities'.

The following two Articles of the Convention are the most relevant to actions in private nuisance.

Human Rights Act 1998 (c. 42)

> ### Schedule 1 The Articles
>
> Part I The Convention: Rights and Freedoms, Article Right to respect for private and family life
>
> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. ...
>
> p. 694 ### Part II The First Protocol
>
> **Article 1: Protection of property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.
>
> ...

2.2 Applications

In Section 1.5 of this chapter, we extracted the House of Lords' decision in *Hunter v Canary Wharf*. That case reaffirmed that nuisance is a tort against land and not against the person, and declined to support any 'modernization' of the tort so as to protect those occupying property as a home. Their Lordships considered that such a move would lead to incoherence in the law, and would also be unnecessary. We noted the dissent of Lord Cooke, which was supported in part by the existence of international human rights documents affirming rights specific to the home. With the enactment of the HRA, would the restrictions to the tort of nuisance stated by *Hunter v Canary Wharf* begin to create difficulties?

In *McKenna & Others v British Aluminium* [2002] Env LR 30, Neuberger J declined to strike out actions in nuisance and in *Rylands v Fletcher* which were brought on behalf of children with no proprietary interests in their home. The general nature of their complaints concerned pollution and annoyance from neighbouring

industrial activities. (There were additional actions on behalf of adults with proprietary interests, and there were also actions in negligence brought on behalf of all of the claimants, and the striking out action did not apply to these.)

Neuberger J concluded that, in the absence of the HRA, the actions both in nuisance and (by analogy) in *Rylands v Fletcher*, would clearly have failed and would have been struck out. This would have been the effect of the decision in *Hunter v Canary Wharf*, extended to *Rylands v Fletcher* on the authority of *Cambridge Water v Eastern Counties Leather plc*. The relationship between nuisance, and the action in *Rylands v Fletcher*, is considered in the Chapter 12. For now, we are interested in the way that Neuberger J addressed the impact of the HRA on what was a clear, recent, and binding authority of the House of Lords.

Neuberger J clearly considered that the common law as stated in *Hunter* might be inconsistent with the rights stated in Article 8.1 of the Convention.

> **Neuberger J, at 17–18**
>
> There is obviously a powerful case for saying that effect has not been properly given to Article 8.1 if a person with no interest in the home, but who has lived in the home for some time and had his enjoyment of the home interfered with, is at the mercy of the person who owns the home, as the only person who can bring proceedings. I think it also questionable that it would be Article 8 compliant if,
> p. 695 in such a case, damages are limited, as Lord Lloyd of ↵ Berwick indicated [in *Hunter v Canary Wharf*, 698H–699A]. If the law is as he stated, then in practice an infant or other person with no interest in the home, has no claim in his own right to those damages. In any event those damages would be calculated so as, in many people's eyes, not to satisfactorily reflect the damage he has suffered in his home.

Subsequently, the issue raised by *McKenna* was considered in slightly different circumstances by the Court of Appeal in *Dobson v Thames Water* [2009] EWCA Civ 28. Here, the defendant was a 'public authority' within the terms of the HRA, and the issue was now expressed, not in terms of whether tort should adapt, but in terms of the availability of a separate remedy under section 8 of the HRA for violation of the occupier's Article 8 right. There was no appeal from the judge's finding, extracted in Section 1.4 of this chapter, to the effect that there could be liability for 'negligent' nuisances which fell outside *Marcic*. But there was an appeal in respect of the available remedies. The judge had been asked to rule on a number of questions of principle, and two were particularly relevant to the present discussion.

First, some of the claimants in *Dobson* were children. If their parents had legal interests in the home and could therefore obtain damages in nuisance, could there still be a separate award to an occupying child, under Article 8 ECHR? The judge answered this question by reference to the claim by one of the children, Thomas Bannister. His conclusion was:

> **Ramsey J, *Dobson v Thames Water* [2007] EWHC 2021**
>
> 209 … when the court awards damages for nuisance to those with a legal interest that will usually afford just satisfaction to partners and children but … there may be circumstances where they will not. In the case of Thomas Bannister, he lives in the same household as his parents who will receive damages for the loss of amenity of their property. There is nothing in the claim to show that such damages received by the household would not afford just satisfaction as they did for Mrs Dennis or would have done for Mr Marcic. I conclude that these damages would afford Thomas Bannister just satisfaction.

The point made here is that although Thomas Bannister as a mere occupier does not have the right to sue in private nuisance, it is likely that the sum payable to other members of the household in a successful nuisance action would suffice to afford 'just satisfaction', which is the goal of damages under both the ECHR and the HRA.[16] The Court of Appeal had sympathy with this view, but thought the state of the law too uncertain to say quite so much. Rather, they emphasized that even under the approach in *Hunter v Canary Wharf*, the impact of the nuisance upon those occupying the land, 'although not formally the measure of common law damages for loss of amenity, will in practice be relevant to the assessment of damages in such cases' (at [35]). Section 8(3) of the HRA requires a court to take into account any remedy granted 'in relation to the act in question'. This is not confined to remedies awarded to the person alleging infringement of his or her rights.

p. 696

> **Waller LJ, *Dobson v Thames Water* [2009] EWCA Civ 28**
>
> 45 … The vital question will be whether it is *necessary* to award *damages* to another member of the household or whether the remedy of a declaration that Article 8 rights have been infringed suffices, alongside the award to the landowner, especially when no pecuniary loss has been suffered. If, for the reasons explained above, … the effects of the odour and mosquitoes upon Thomas Bannister personally were in practice taken into account in determining the diminution in the amenity value of the property, and therefore in determining the amount of damages awarded to his parents in nuisance, we would regard that as a highly significant consideration when determining whether an award of damages was necessary to afford Thomas just satisfaction under Article 8. In any event the fact of an award to his parents, if made, and its amount, must be a circumstance relevant to whether an award is necessary.
>
> 46 … For the reasons given, it may very well be that a declaration is sufficient in his case, but it will depend on the judge's findings in relation to his parents and to any particular consideration affecting Thomas. Even if it is thought that necessity be shown, the fact of any award to his parents, and its amount will be relevant as to quantum. It should be noted that in any event damages if awarded on such issues are not substantial.

It is noted here that monetary remedies under the HRA are in these circumstances unlikely to be 'substantial'. This is underlined by the Court of Appeal's approach to the second question of principle. That is, could those claimants who had a legal interest in their homes, and who therefore qualified for damages in nuisance, also

claim additional damages for violation of their own Article 8 rights? As the Court of Appeal pointed out, this question was drafted on the basis that there might be a 'top-up' award of damages, over and above the compensatory damages awarded by the tort of nuisance. This, they pointed out, was 'highly improbable, if not inconceivable', given the comments above (at [50]). 'Just satisfaction' was unlikely ever to require a top-up award to someone who had already received an award of damages in nuisance in respect of 'injury to the amenity value of the home'.

The difference in outlook between *McKenna* and *Dobson* lies in the realization that damages awarded under the HRA, being modelled on Strasbourg awards, are considerably less generous than are damages in tort. There is no requirement to remodel tort law to provide tort's generous remedies in a case of violation of Convention rights. There is a chance that a claimant may succeed in establishing a violation of his or her rights, which is not 'satisfied by' an award in nuisance. But if so, the remedy is likely to be a declaration of violation, and perhaps, though rarely, a modest award of damages.

The decision of the European Commission of Human Rights in *Khatun v UK* (1998) 26 EHRR CD12 also appears to limit the role of the Convention where nuisances are concerned. The Commission rejected as inadmissible the claims of 181 applicants, arising from the same interferences as *Hunter v Canary Wharf*. In particular, the Commission said that it could not rule that a fair balance had not been struck between the competing interests of the individuals, and of the community as a whole. This was partly because the regeneration of Docklands was carried out in pursuit of a legitimate and important aim. Not every case in which regeneration is claimed to give rise to interference with Article 8 rights will necessarily be safe from a claim based on interference with Convention rights. The Commission noted that neither personal injury nor depreciation in the value of property was complained of in these particular cases; that the period of interference was limited to three and a half years; and that there was no attempt on the applicants' part to prevent the alleged nuisance whilst it was happening.

p. 697 ↵ With hindsight, the difference in approach between *McKenna* and *Dobson* may reflect different periods in the developing relationship between tort law, and Convention Rights after the HRA. For a period of time, it was assumed that the law of tort would need to adapt to bring its protection into line with the expectations of the Convention, given the role of the courts as public authorities. Most notably, this gave rise to protection from publication of certain private information under the influence of the status of art 8, developments which are considered in Chapter 15. But as time has passed, courts have been more confident in separating common law from Convention rights in a number of respects, touched on in Chapter 1. A particularly clear example of this separation can be seen in the decision of the Court of Appeal in ***Fearn v Trustees of the Tate Gallery*** **[2020] EWCA Civ 104** (which was briefly extracted in Section 1.2). The Court rejected the approach of the judge below, which was to develop the common law under the influence of statute (namely, the HRA). If overlooking of domestic property was an infringement of art. 8 rights, then nuisance should extend to provide a remedy. Instead:

***Fearn v Trustees of the Tate Gallery* [2020] EWCA Civ 104**

> 88. In principle, the analysis should have been to ask whether, if the tort of nuisance does not otherwise extend at common law to overlooking: (1) there was nevertheless an infringement of article 8; and (2) if so, whether it is appropriate to extend the common law in order to provide a remedy for the claimants and so avoid a breach of section 6 of the HRA 1998 on the part of the courts as a public authority.
>
> Among the reasons why the Court of Appeal thought the answers to these questions were negative were the following:
>
> 90. In any event, in determining whether or not article 8 is engaged, it would be necessary to bear in mind that there has never been a Strasbourg case in which it has been held that mere overlooking by a neighbour or a neighbour's invitees is a breach of article 8. The 'mirror principle' articulated by Lord Bingham of Cornhill in *R (Ullah) v Special Adjudicator [2004] 2 AC 323* (that our courts should keep pace with, but not go beyond, Strasbourg), as clarified by Lord Brown of Eaton-under-Heywood in *Rabone v Pennine Care NHS Trust (INQUEST intervening) [2012] 2 AC 72*, dictates caution about any conclusion as to the engagement of article 8, let alone its infringement, in the case of mere overlooking.
>
> 91. Moreover, overlaying the common law tort of private nuisance with article 8 would significantly distort the tort in some important respects. In the first place, as we have stated above, and all the authorities emphasise, the tort is a property tort and so mere licensees have no cause of action. Article 8 is not limited in that way and so will in principle confer a right on anyone who has a reasonable expectation of privacy: *In re JR38 [2016] AC 1131*; *Harrow London Borough Council v Qazi [2004] 1 AC 983*, paras 50, 82 and 89. As Lord Lloyd said in *Hunter [1997] AC 655*, 698B–C, to allow the wife or daughter of those who suffered from harassment on the telephone, whether at home or elsewhere, a remedy in private nuisance 'would not just be to get rid of an unnecessary technicality. It would be to change the whole basis of the cause of action'.

The Court proceeded to give additional reasons why nuisance was a poor fit with protection of privacy under Art 8, including the need to assess issues which are irrelevant to the tort of nuisance when determining a
p. 698 claim in privacy; the existence of 'justification' under ↵ Art.8(2); and the existence of a 'margin of appreciation' on the part of states. As has been pointed out, whether an overlay of human rights law would amount to a 'distortion' rather than a liberalisation is very much a matter of perspective; and the perspective of the Court of Appeal in this particular case is particularly protective of the existing restrictions on the tort of nuisance: see Leo Boonzaier, 'Privacy Overlooked?' (2021) 37 PN 95-101. This, however, reflects the fact that these restrictions are considered to be justified.

Changes in the Relationship between Private Right and Public Interest?

As we noted above, the compromise between public and private interests arrived at in the first instance decision of *Dennis v MOD* was based in part on *obiter dicta* of the Court of Appeal in *Marcic*, and appealed to the new status of Convention rights. We also noted, however, that in *Coventry v Lawrence*, the Supreme Court reached a similar accommodation without reference to the Convention. The House of Lords in *Marcic* itself in any event showed little inclination to support the route taken by the Court of Appeal in relation to Convention rights.

Marcic v Thames Water Utilities Ltd [2003] UKHL 66; [2004] 2 AC 42: Human Rights Act Elements

Extracts from the judgment in Section 1.4 of this chapter dealt with the claim in nuisance. In addition, since the defendant could be treated as a 'public authority' for the purposes of section 6 of the Act, there was scope for a separate claim for damages under section 8. This claim had succeeded before the first instance judge, Sir Richard Havery QC. The Court of Appeal did not disagree with his analysis, although the damages they awarded for nuisance afforded just satisfaction for the infringement and they therefore commented only briefly on this aspect of the case. The House of Lords rejected the claim for damages under the Act for infringement of Convention rights, just as they had rejected the claim in nuisance. As with the claim in nuisance, the statutory context was treated as decisive to the claim under the HRA.

Lord Nicholls

The claim under the Human Rights Act 1998

37 I turn to Mr Marcic's claim under the Human Rights Act 1998. His claim is that as a public authority within the meaning of section 6 of the Human Rights Act 1998 Thames Water has acted unlawfully. Thames Water has conducted itself in a way which is incompatible with Mr Marcic's Convention rights under article 8 of the Convention and article 1 of the First Protocol to the Convention. His submission was to the following effect. The flooding of Mr Marcic's property falls within the first paragraph of article 8 and also within article 1 of the First Protocol. That was common ground between the parties. Direct and serious interference of this nature with a person's home is prima facie a violation of a person's right to respect for his private and family life (article 8) and of his entitlement to the peaceful enjoyment of his possessions (article 1 of the First Protocol). The burden of justifying this interference rests on Thames Water. At the trial of the preliminary issues Thames Water failed to discharge this
p. 699 burden. The trial judge found that the system of priorities used by Thames Water in deciding whether to carry out flood alleviation works might be entirely fair. The judge also said that on the limited evidence before him it was not possible to decide this issue, or to decide whether for all its apparent faults the system fell within the wide margin of discretion open to Thames Water and the director: [2002] QB 929, 964, para 102.

38 To my mind the fatal weakness in this submission is the same as that afflicting Mr Marcic's claim in nuisance: it does not take sufficient account of the statutory scheme under which Thames Water is operating the offending sewers. The need to adopt some system of priorities for building more sewers is self-evident. So is the need for the system to be fair. A fair system of priorities necessarily involves balancing many intangible factors. Whether the system adopted by a sewerage undertaker is fair is a matter inherently more suited for decision by the industry regulator than by a court. And the statutory scheme so provides. Moreover, the statutory scheme provides a remedy where a system of priorities is not fair. An unfair system of priorities means that a sewerage undertaker is not properly discharging its statutory drainage obligation so far as those who are being treated unfairly are concerned. The statute provides what should happen in these circumstances. The director is charged with deciding whether to make an enforcement order in respect of a sewerage undertaker's failure to drain property properly. Parliament entrusted this decision to the director, not the courts.

39 What happens in practice accords with this statutory scheme. When people affected by sewer flooding complain to the director he considers whether he should require the sewerage undertaker to take remedial action. Before doing so he considers, among other matters, the severity and history of the problem in the context of that undertaker's sewer flooding relief programme, as allowed for in its current price limits. In many cases the company agrees to take action, but sometimes he accepts that a solution is not possible in the short term.

40 So the claim based on the Human Rights Act 1998 raises a broader issue: is the statutory scheme as a whole, of which this enforcement procedure is part, Convention-compliant? Stated more specifically and at the risk of over-simplification, is the statutory scheme unreasonable in its impact on Mr Marcic and other householders whose properties are periodically subjected to sewer flooding?

41 The recent decision of the European Court of Human Rights, sitting as a Grand Chamber, in *Hatton v United Kingdom* (Application No 36022/97) The Times, 10 July 2003 confirms how courts should approach questions such as these. In *Hatton's* case the applicants lived near Heathrow airport. They claimed that the Government's policy on night flights at Heathrow violated their rights under article 8. The court emphasised 'the fundamentally subsidiary nature' of the Convention. National authorities have 'direct democratic legitimation' and are in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, 'the role of the domestic policy maker should be given special weight': see paragraph 97. A fair balance must be struck between the interests of the individual and of the community as a whole.

42 In the present case the interests Parliament had to balance included, on the one hand, the interests of customers of a company whose properties are prone to sewer flooding and, on the other hand, all the other customers of the company whose properties are drained through the company's sewers. The interests of the first group conflict with the interests of the company's customers as a whole in that only a minority of customers suffer sewer flooding
p. 700 but the company's customers as a whole meet the cost of building more sewers. As already noted, the balance struck by the statutory scheme is to impose a general drainage obligation on a sewerage undertaker but to entrust enforcement of this obligation to an independent regulator who has regard to all the different interests involved. Decisions of the director are of course subject to an appropriately penetrating degree of judicial review by the courts.

43 In principle this scheme seems to me to strike a reasonable balance. Parliament acted well within its bounds as policy maker. In Mr Marcic's case matters plainly went awry. It cannot be acceptable that in 2001, several years after Thames Water knew of Mr Marcic's serious problems, there was still no prospect of the necessary work being carried out for the foreseeable future. At times Thames Water handled Mr Marcic's complaint in a tardy and insensitive fashion. But the malfunctioning of the statutory scheme on this occasion does not cast doubt on its overall fairness as a scheme. A complaint by an individual about his particular case can, and should, be pursued with the director pursuant to the statutory scheme, with the long stop availability of judicial review. That remedial avenue was not taken in this case.

...

46 For these reasons I consider the claim under the Human Rights Act 1998 is ill-founded. The scheme set up by the 1991 Act is Convention-compliant. The scheme provides a remedy for persons in Mr Marcic's unhappy position, but Mr Marcic chose not to avail himself of this

> remedy.

Commentary

When considering compatibility with Convention rights, the House of Lords declined to consider the acts of the defendants as sewerage undertakers, but focused instead on the sufficiency of the statutory scheme as a whole. Although it was considered by Lord Nicholls that in this case 'matters plainly went awry', the existence of a statutory scheme for complaints and enforcement under the Water Industry Act 1991 in effect shielded the water company itself from action under the HRA. Furthermore, the statutory scheme was considered to be Convention-compliant despite concerns, again expressed by Lord Nicholls (at [44]), surrounding the availability of compensation to those suffering external flooding. It was also emphasized that the appropriate route for challenging the operation of the scheme was by judicial review as against the director, *not* in common law (or under the HRA) directly against the sewerage undertaker.

The members of the House of Lords placed considerable emphasis upon the then very recent decision of the Grand Chamber of the Court of Human Rights in *Hatton v UK* ((2003) 37 EHRR 28). This, they argued, showed that in arriving at a fair balance between the interests of people whose homes and property are affected by an activity, and the interests of other people (and the public) in the activity in question, national institutions have a broad discretion in choosing the appropriate machinery and the appropriate solution to achieve this balance.

The precise use made of *Hatton* is not beyond dispute. It is true that the Grand Chamber decided that the national authority should be left a choice in the means by which it achieved a balance between different interests. Nevertheless, the Grand Chamber did still address the *substantive* question of whether or not the solutions in question had achieved a fair balance. It did not confine itself to the procedural question of whether appropriate machinery exists for determining what the appropriate balance might be.

p. 701

> 123 … While the State is required to give due consideration to the particular interests the respect for which it is obliged to secure by virtue of Art.8, it must in principle be left a choice between different ways and means of meeting this obligation. The Court's supervisory function being of a subsidiary nature, it is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance.

Furthermore, the *Hatton* case was not a situation in which priorities needed to be set for the use of resources, so that some needs would go entirely unmet. Rather, it was a case of serious disagreement over what *level* of protection against noise from night flying was acceptable. It was thus the *substance* of the regime adopted, in terms of how it measured noise disturbance and what criteria were set for its control, that was challenged:

***Hatton v UK* (2003)**
37 EHRR 28

> 125 … [The Court] notes the dispute between the parties as to whether aircraft movements or quota counts should be employed as the appropriate yardstick for measuring night noise. However, it finds no indication that the authorities' decision to introduce a regime based on the quota count system was as such incompatible with Art.8.

In considering whether an appropriate balance had been struck, the court also stated that it was relevant to consider the impact upon the applicants' interests. For example:

> 127 … The Court also notes that the applicants do not contest the substance of the Government's claim that house prices in the areas in which they live have not been adversely affected by the increase in night noise. The Court considers it reasonable, in determining the impact of a general policy on individuals in a particular area, to take into account the individuals' ability to leave the area.

It was relevant that the applicants' interests were not entirely disregarded, and it was also relevant that they may not be so adversely affected as first appeared, if they were able to move out of the area. None of this is quite the same as saying that a fair mechanism for deciding priorities will suffice, or that it is sufficient to entrust the decision to a regulator. The truth is that the House of Lords preferred that the issues concerning Article 8 be considered in a public law context, if necessary through judicial review, and not through an action in the tort of nuisance.

There is also a question over the proper role of the 'margin of appreciation' in a *national* (as opposed to an international) court. Hart and Wheeler, for example, suggest in their analysis of *Hatton v UK* that a national court should be less deferential when asked to rule on similar issues: 'Night Flights and Environmental Human Rights' (2004) 16 JEL 132–9, at 138.

3 Public Nuisance

3.1 General Statement: Varieties of Public Nuisance

Public nuisance is a crime at common law. Although it no doubt provides a very useful tool for the prosecutor, it has been doubted whether it is an appropriate element in modern criminal law. Historically, it has been broad, impressionistic, and even more indistinct in its boundaries than the tort of private nuisance.

Prior to *Rimmington and Goldstein* (below), the most authoritative definition of the **crime** of public nuisance was as follows:

***Archbold's Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, 2022), para 31.40**

> Public nuisance is an offence at common law. 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 or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.

So broad is the potential scope of this definition, J. R. Spencer in his much-cited study of public nuisance ('Public Nuisance—A Critical Examination' [1989] CLJ 55) wondered whether there was really much need for any other criminal law at all. He concluded, however, that a trimmed-down version of public nuisance would have a valuable gap-filling role for use against behaviour which seriously threatens public health or the environment, but which fails to fit with the definition of more specific crimes.

In *R v Rimmington and Goldstein* [2005] UKHL 63; [2006] 1 AC 459, two appellants challenged their convictions of offences of public nuisance, arguing (amongst other things) that the offence was so loosely defined that it violated Article 7 ECHR:

> **Article 7 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 House of Lords determined that the crime of public nuisance was tolerably clear, provided the reference to 'public morals' was removed from the standard definition. Thus the ambit of the offence has been reduced.
p. 703 Equally, the House proposed that a common law ↵ offence should only very rarely be used where statutory offences were applicable to the same conduct.[17]

Lord Bingham of Cornhill, *R v Rimmington and Goldstein*
[2006] 1 AC 459

> 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. ... 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 J R 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), 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.

The end result of *Rimmington and Goldstein* is that the crime of public nuisance is more closely defined, and less flexible. Nevertheless, public nuisance may sometimes be the appropriate charge: *R v Stockli* [2017] EWCA Crim 1410.

For tort lawyers, the issues that arise from public nuisance have been narrower and somewhat more controllable, even if they are the product of historical accident and therefore do not conform to tidy categorization (F. Newark, 'The Boundaries of Nuisance' (1949) 65 LQR 480). Nonetheless, the breadth of the public nuisance category has recently enabled attempts to use private law remedies to restrain group activities. From the tort lawyer's point of view, it is convenient to divide public nuisances into three types, which are important to tort law for different reasons:

1. 'amalgamated' private nuisances, affecting large numbers of people (3.2);
2. nuisances that affect a sufficient class of people, and are actionable by an individual suffering 'special damage' (3.3);
3. cases relating to the highway (3.4).

p. 704 ↵ We will also consider the issues raised by uses of injunctive remedies against group activities and particularly groups with fluctuating membership (3.5).

3.2 Amalgamated Private Nuisances

The first category consists of those public nuisances which could be said to be made up of a series of private nuisances. Where a sufficiently substantial number of people suffer relevant interferences, then the interferences will amount to a 'public' nuisance. This type of 'public' nuisance, which is public because of the numbers of people involved, was summed up in *AG v PYA Quarries* [1957] 2 QB 169, at 187:

> **Romer LJ**
>
> 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.

In such a case, the action is brought by the Attorney General, but the case is one of 'amalgamated' private nuisances. Some cases brought in public nuisance therefore provide important authority concerning the principles of private nuisance. An example is *Gillingham v Medway Chatham Dock Co* ([1993] QB 343, extracted in Section 1.3), which also exemplifies that local authorities may bring such actions pursuant to section 222 of the Local Government Act 1972.

AG v PYA Quarries is also a leading authority on the question of what constitutes a sufficient 'class' of people for the purposes of an action in public nuisance, a question of importance to both this and the next category of public nuisance.

> **Romer LJ, at 184**
>
> It is clear … 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, at 191**
>
> So here I decline to answer the question how many people are necessary to make up her Majesty's subjects generally. I prefer to look to the reason of the thing and 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.

p. 705

3.3 Individuals Suffering 'Special Damage'

Cases of 'amalgamated private nuisance', and therefore of overlap between private and public nuisance, are, however, the exception and not the rule. The second (and more typical) sort of public nuisance concerns interference with the 'comfort and convenience' of a class of Her Majesty's subjects. Public nuisance is thus broader in its coverage than private nuisance, for it encompasses damage to a far wider range of interests. Again, public nuisances of this type are actionable by the Attorney General in civil proceedings (in addition to criminal proceedings), where injunctions may be awarded. A public nuisance which affects the comfort or convenience of a sufficient class may also be actionable by an individual seeking damages. In order to recover compensation in an action for public nuisance, the individual will need to show that he or she has suffered 'special damage'.

In *Colour Quest Ltd v Total Downstream UK plc* [2009] EWHC 540 (Comm), the defendants Total raised among many other arguments the proposition that the second form of nuisance (affecting a class of Her Majesty's subjects) was not actionable by a claimant whose right to the enjoyment of his land (a private nuisance notion) had been affected. David Steel J rejected this argument, emphasizing as he did so that claims in private and public nuisance though entirely different were not mutually exclusive (at [432]–[433]):

> **David Steel J, *Colour Quest v Total Downstream UK plc* [2009] EWHC 540 (Comm)**
>
> 432 It follows that a collection of private nuisances can constitute a public nuisance: but it does not follow either that in consequence the claim in private nuisance is subsumed or that a public nuisance involving interference with health or comfort cannot be freestanding...
>
> 434 It is accordingly difficult to discern any difficulty in categorizing the incident at Buncefield as a public nuisance. ... The explosion was caused by negligence. A very large number of people were affected. Those who had an interest in land suffered private nuisance. The explosion endangered the health and comfort of the public at large. Subject to establishing a loss which was particular, substantial and direct ... there is a claim in public nuisance.

Special Damage

Special damage must be 'particular, direct, and substantial' (*Benjamin v Storr* (1873–74) LR 9 CP 400, Brett J). A very broad range of damage is actionable, including purely financial losses. In *Tate and Lyle v GLC* [1983] 2 AC 509, the defendants caused siltation of the River Thames and an obstruction to the public right of navigation. There was no damage to any property owned by the defendants, but they were put to particular expense in dredging the river around their jetties in order to continue their business. While such a claim would surely fail in negligence, the costs incurred were sufficient to represent a special damage for the purposes of public nuisance.

It has long been assumed that damages for personal injury, as well as for pure economic loss, were recoverable in public nuisance. This assumption was challenged in the *Corby Group Litigation* before the Court of Appeal [2008] EWCA Civ 463. The claimants in this significant litigation were born between 1986 and 1999 with deformities of the upper limbs, which they blamed on the manner in which Corby Borough Council had set about the reclamation of a large area of contaminated land which had been acquired from the British Steel
p. 706 Corporation. The defendant council argued that the House of Lords in the two key cases of ↵ *Hunter v Canary Wharf* (concerning private nuisance) and *Transco v Stockport* (concerning liability in *Rylands v Fletcher*) had accepted the arguments of Professor Newark, 'The Boundaries of Nuisance' (1949) 65 LQR 480, to the effect that personal injury damages were not recoverable in any part of the law of nuisance. This depended on acceptance of Professor Newark's argument that public nuisance was not in its origins separate from private nuisance, but was properly seen as a part of the same branch of law, protecting interests in property, not in the person.[18] The Court of Appeal concluded that in neither of the two cases referred to was there an implied reversal of the 'long-established principle that damages for personal injury can be recovered in public nuisance'. In fact, the House of Lords had not even criticized that principle in either of the two cases (*Corby Group Litigation*, at [22]). That was enough to dispose of the council's argument, since earlier cases in which damages for personal injury were awarded for public nuisance were therefore binding upon the Court of Appeal. However, Dyson LJ (with whom Ward LJ and Smith LJ agreed) went on to explain that as a matter of principle, he was not in any event convinced that the argument was correct. He went on to deploy a range of evidence to counteract the defendants' reliance on a single, albeit very influential, piece of academic opinion.

Dyson LJ, *Corby Group Litigation* [2008] EWCA Civ 463

27. It seems to me that it is at least arguable that Professor Newark was wrong to describe a public nuisance as a 'tort to the enjoyment of rights in land'. The definition of the crime of public nuisance says nothing about enjoyment of land and some public nuisances undoubtedly have nothing to do with the interference with enjoyment of land. As Lord Bingham said, the ingredients of the crime and the tort are the same. A public nuisance is simply an unlawful act or omission which endangers the life, safety, health, property or comfort of the public. As was said in *Salmond and Heuston on the Law of Torts* (21st edition 1986): 'Public and private nuisances are not in reality two species of the same genus at all. There is no generic conception which includes the crime of making a bomb-hoax and the tort of allowing one's trees to overhang the land of a neighbour'.

28. Professor Newark's response seems to be that, because we are mortals and earth-bound, the personal injuries we suffer as a result of a public nuisance must necessarily occur while we are exercising rights in land (p 489). In a sense this is true, if the phrase 'exercising rights in land' is given the generous interpretation for which Professor Newark contends, i.e. the liberty to exercise rights over land 'in the amplest manner'. It can be said that a person who suffers personal injury must be in some physical place when the injury is caused and, unless he is a trespasser, he is exercising a right over land when he is in that place, even if only as a licensee.

29. But even if that is true, it does not follow that the right which is interfered with in a public nuisance case is properly to be regarded as a right to enjoy property. The essence of the right that is protected by the tort of private nuisance is the right to enjoy one's property. It does not extend to a licensee: see *Hunter*. The essence of the right that is protected by the crime and tort of public nuisance is the right not to be adversely affected by an unlawful act or omission whose effect is to endanger the life, safety, health etc of the public. This view is reflected in the *American Law Institute, Restatement of the Law, Second, Torts 2d* (1979) chapter 40 para 821B (h) which states: 'Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land'.

p. 707

30. In these circumstances, it is difficult to see why a person whose life, safety or health has been endangered and adversely affected by an unlawful act or omission and who suffers personal injuries as a result should not be able to recover damages. The purpose of the law which makes it a crime and a tort to do an unlawful act which endangers the life, safety or health of the public is surely to protect the public against the consequences of acts or omissions which do endanger their lives, safety or health. One obvious consequence of such an act or omission is personal injury. The purpose of this law is not to protect the property interests of the public. It is true that the same conduct can amount to a private nuisance and a public nuisance. But the two torts are distinct and the rights protected by them are different.

31. On the other hand, I acknowledge that Professor Newark's article presents a powerful argument in support of the proposition that personal injury damages should only be recoverable in negligence and that it is an argument which the House of Lords may accept.

> **Conclusion**
>
> 32. For the reasons that I have given, I do not consider that it is open to this court to decide that damages for personal injury are not recoverable in public nuisance. The fact that the law may be developed by the House of Lords deciding to accept Professor Newark's thesis is not a reason for this court not to apply the law as it now stands.

Despite the similarity in name, the Court of Appeal therefore regards this variety of public nuisance as an entirely different tort from private nuisance, with different origins and protecting against a different range of interferences.

Subsequently, at trial of a number of issues of principle relating to the litigation, Akenhead J determined that —subject to proof of causation—the council would be liable in public nuisance ([2009] EWHC 1944 (TCC)). The case subsequently settled. Importantly though, he also held that there were breaches of the duty of care in negligence, and of statutory duty in the form of section 33 of the Environmental Protection Act 1990.

3.4 Structures Adjoining or Overhanging the Highway

A number of authorities concern dangerous structures adjoining or overhanging the highway. These authorities appear to conflict concerning the relevant standard of liability. In *Tarry v Ashton* [1876] 1 QBD 314, the defendant was considered to be under a 'non-delegable duty of care' to repair a lamp overhanging the highway, and was therefore liable to the plaintiff for personal injuries suffered even though she had recently paid reputable contractors to repair the lamp. Perhaps the defendant could reasonably be expected to have been aware of the continuing hazard presented by the lamp. If so, then the later case of *Wringe v Cohen* [1940] 1 KB 229 went further, in that there was liability for artificial structures adjoining the highway whether the defendant could reasonably have known of their condition, or not. By contrast, in *Noble v Harrison* [1926] 2 KB
p. 708 332, a landowner was found to be not liable when ↵ a branch from one of his trees damaged the plaintiff's vehicle, on the basis that the defect in the tree was not reasonably discoverable. On the face of it, a different standard of liability will apply depending on whether the damage is caused by an artificial structure (*Wringe v Cohen*), or by a natural feature (*Noble v Harrison*). This scarcely seems defensible, and it has been proposed (Buckley, *The Law of Nuisance*, 2nd edn, p 84) that the interpretation in *Wringe v Cohen* does not represent the law. To accept this would also bring the law concerning structures overhanging the highway into line with the law of nuisance more generally concerning hazards which are not originated by the occupier. It was the view of A. L. Goodhart, writing in 1930, that the following broad and simple conclusion could be drawn in respect of both public and private nuisance:

A. L. Goodhart, 'Liability for Things Naturally on the Land' (1930) 4 CLJ 13, at 30

> The correct principle seems to be that an occupier of land is liable for a nuisance of which he knows, or ought to know, whether that nuisance is caused by himself, his predecessor in title, a third person or by nature. Whether a natural condition is or is not a nuisance is, of course, a question of fact. Is the injury caused by the natural condition more than a reasonable neighbour can be asked to bear under the rule of 'live and let live'? In other words, the ordinary rules of nuisance apply in the case of natural conditions. As we must all bear with our neighbour's piano-playing so we must also submit to his thistle down. This does not mean that we have no remedy if he introduces a large orchestra, or if he allows his tree, even of natural growth, to remain in a dangerous condition along the highway.

This statement was endorsed as correct so far as public nuisance is concerned by Kennedy LJ in the public nuisance case of *Wandsworth LBC v Railtrack plc* [2001] EWCA Civ 1236; [2002] 2 WLR 512, at [9]. It is also consistent with the approach of the Court of Appeal in *Mistry v Thakor* [2005] EWCA Civ 953. The claimant was seriously injured while walking along a public highway in Leicester, when two 50-kilogram pieces of concrete cladding fell from a building owned by the defendants. The difficult questions involved in this case—which was accepted to be a case of public nuisance—concerned the knowledge which it was reasonable to impute to the owners, given that they had contracted a surveyor to comment on the state of the building. In its discussion of these issues, the court accepted implicitly that constructive knowledge of the defect (knowledge that a reasonably careful owner would have had) was required for liability to be established. Here, the primary responsibility was that of the surveyor, but lack of care on the part of the owners meant that they too bore some of the responsibility. This was assessed at 20 per cent.

3.5 Public Order, Injunctions and Public Nuisance

In recent years, attempts have increasingly been made to use public nuisance, sometimes along with other torts such as trespass to land and private nuisance, as the basis for injunctive remedies aimed at preventing various activities involving groups of people. These activities have included both protests (including camps that occupy public land and obstructions to the highway), and other gatherings. This illustrates a different
p. 709 facet of public ↵ and occasionally private nuisance,[19] aiming at restraint of group activities on the basis of interference with public health, amenity or rights of way, rather than (as we have seen) seeking accountability of those inflicting public harm, through damages. The availability of the injunctive remedy to restrain group activity, rather than the detailed basis of the tort, is the common theme raised by these actions.

Some such actions have been brought by public authorities seeking to restrain broadly 'anti-social' activities. In the era of coronavirus restrictions these are continuous with cases of civil disobedience. Activities subject to such actions on the basis of public nuisance have included both illegal 'raves' and similar gatherings (*City of London Corporation v Persons Unknown* [2021] EWHC 1378 (QB), where the injunction was not granted since the risk of a public nuisance in Epping Forest was not thought imminent enough and there was no sufficient means of bringing an in injunction to the attention of those engaged in the activities; *Wandsworth LBC v Persons Unknown* [2020] EWHC 3797 (QB), where an injunction against an amplified music event was extended but other elements of the injunction were discontinued), and camps set up to protest at coronavirus restrictions (*Hackney LBC v Grant* [2021] EWHC 2548 (QB), where a final injunction was refused because the

protestors had already left the area). But other such actions have been brought by private organisations seeking to control the actions of protestors (for example, the case of *Boyd v Ineos* [2019] EWCA Civ 515 and *Cuadrilla Bowland v Persons Unknown* [2020] EWCA Civ 9, aimed at restraint of fracking protests; *UK Oil and Gas v Persons Unknown* [2021] 6 WLUK 455, where final injunctions were awarded against five protestors seeking to prevent drilling).

These cases have presented courts with a range of challenges when determining whether to grant the private law remedy of an injunction. One such challenge is that the injunctions are sometimes sought against 'persons unknown'. While the courts have decided that such an injunction is capable of being an appropriate remedy, limits have been set, both to the coverage of such injunctions and the maintenance of what are formally 'interim' remedies—secured without full determination of the factual basis of the claim—over a period of time. Equally, such cases clearly raise a question as to the weight to be given to rights of protest and expression, compared to the avoidance of nuisance. While not all of these cases depend on public nuisance alone, they represent an important direction in the current uses of the tort, and underline the significance of injunctive remedies.

The problems posed by these cases, and particularly the mismatch between private law litigation processes, and the issues which are raised by control of collective action through such processes, are well encapsulated in the following extract from *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303; [2020] 1 WLR 2802. This was a claim brought by a retailer against animal rights protests outside its store and was framed in terms of harassment, trespass, and nuisance.

***Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303; [2020] 1 WLR 2802 (judgment of the Court)**

> 93. As Nicklin J correctly identified, Canada Goose's problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protestors. It wishes to use remedies in
> p. 710 private litigation in effect to prevent what is sees as public disorder. Private law remedies are not well suited to such a task. As the present case shows, what are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Those affected are not confined to Canada Goose, its customers and suppliers and protestors. They include, most graphically in the case of an exclusion zone, the impact on neighbouring properties and businesses, local residents, workers and shoppers. It is notable that the powers conferred by Parliament on local authorities, for example, to make a public spaces protection order under the Anti-social Behaviour, Crime and Policing Act 2014, require the local authority to take into account various matters, including rights of freedom of assembly and expression, and to carry out extensive consultation: see, for example, *Dulgheriu v Ealing London Borough Council [2020] 1 WLR 609*. The civil justice process is a far blunter instrument intended to resolve disputes between parties to litigation, who have had a fair opportunity to participate in it.

Faced with an increase in cases seeking to use public nuisance—as well as other torts—as means to control activities of fluctuating groups of people, the courts have become increasingly aware of some of the dangers of awarding private law remedies in such proceedings. The last extract particularly emphasizes the atypical nature of these uses of private law, and points out some of the inconsistencies between private law processes, dependent as they are on fair opportunity to argue the point, and actions to restrain group activities of one sort or another.

4 The Environmental Tort(s)?

On a number of occasions, we have mentioned the potential 'environmental protection' function of both public and private nuisance; and we have also explored cases (such as *Marcic* and *Hatton*) which involve, even if tangentially, the question of environmental rights. On the other hand, the previous section (3.5) also drew attention to the capacity of the public nuisance action to be used in order to restrain protests, including some with environmental objectives, and the developments in that section are a counterpoint to any potential of nuisance to extend environmental protection.

Because of the subject matter of the nuisance actions—polluted water, noise, smells, acid smuts, damaged trees, and so on—actions in nuisance are generally recognized to have played some part in the battle against pollution, particularly before the emergence of that range of measures which can be loosely referred to as 'environmental law'. Even so, the actions in nuisance suffer from a number of limitations which have meant that the tort actions covered here and in the subsequent chapter will never be a central plank in environmental protection. Some of these are practical, concerning means of enforcement and the essentially reactive nature of an action in common law. Others are a question of more fundamental principle.

Private nuisance is concerned with protection of rights over land. Environmental law is usually thought to concern a more general public interest in protection of the environment. The question therefore is simple—how can the protection of certain selected private interests be an effective means of securing environmental protection? To the extent that the interests of property owners overlap with environmental interests, this could be described as coincidental. Nevertheless, such overlap undoubtedly exists in numerous cases of pollution, for example. Many aspects of this overlap are considered by contributors to Lowry and Edmunds,
p. 711 *Environmental Protection and the Common Law* (Hart Publishing, 2000). We will ↵ see later that some commentators would go further than this, and argue that property rights have much more than a coincidental relationship with environmental protection.

Public nuisance raises a rather different issue, since it is undoubtedly concerned with public health. Public health was a precursor of environmental law and in many respects overlaps with it, but it is still a relatively limited concern when compared with environmental protection in its broadest and most developed modern guise. For example, in the case of statutory nuisances under the Environmental Protection Act 1990 (sections 79–82), the historical link to public health is considered to give rise to certain limitations in the environmental protection function of the statutory nuisance provisions. Even so, the *Corby Group Litigation* seems to illustrate the continued scope for common law in this respect. However, as Akenhead J pointed out, the results of a trial of this sort do not equate to the findings of a free and open enquiry:

> **Akenhead J, *Corby Group Litigation* [2009] EWHC 1944 (TCC)**
>
> 2. It must be borne in mind that this trial has not as such been an open-ended inquiry in which the Court in an inquisitorial manner seeks to determine unilaterally what happened and what caused the birth defects. The Claimants have pleaded what their case is and it is that case which they have to establish broadly upon a balance of probabilities and which CBC has to meet. Thus, the Court is restricted to the evidence put before it. For instance, neither party has provided evidence to demonstrate whether there was statistically an increase in miscarriages or stillbirths during the period over which the Claimants were conceived and there has been no comparison with what had occurred over the previous years in Corby or since so far as the incidence of birth defects, miscarriages and stillbirths were concerned; that might have been of assistance to support either side's position. I suggested at an earlier procedural meeting that the parties might consider whether such evidence might be adduced. Further examples are Messrs Cropley and Palmer who were senior engineers and who were dismissed by CBC in early 1997; they were heavily involved in many of the projects about which criticism is made in these proceedings; neither party saw fit to call either of these people. Furthermore, although many thousands of pages of contemporary documents have been produced, many documents have not been; for instance, CBC has had a large number of documents destroyed accidentally; consequently, there are large gaps in the documentation. It would be wrong to speculate as to evidence which was not put before the Court. I must decide this case based on the evidence adduced by the parties.

As noted earlier, there continues to be lively disagreement about the degree to which the action in private nuisance, in particular, can play a part in environmental protection. Some commentators argue that the protection of property rights by affected individuals is an effective means of attaining environmental protection (see, for example, E. Brubaker, *Property Rights in the Defence of Nature* (Earthscan, 1995)). This challenges the prevailing orthodoxy, that environmental law must entail the deterrence of private pollution through public law means. Other commentators argue that nuisance is potentially an effective means of attaining an *efficient* level of environmental protection, which is argued to be the only appropriate measure. (The latter argument is derived in part from Ronald Coase's classic essay, 'The Problem of Social Cost' (1960) 3 JLE 1.) And there is also a contrary and subtle argument that philosophically speaking, environmental protection is misunderstood if it is cast primarily as a welfare-based public interest issue. Rather, environmental law should be understood precisely through a modified concept of property rights which
p. 712 recognizes ↵ the intrinsic rather than the purely instrumental value of natural resources (S. Coyle and K. Morrow, *Philosophical Foundations of Environmental Law* (Hart Publishing, 2004)).

The problem is that the law of nuisance as it stands does not entirely fit either of the last two conceptual arguments in favour of its use in environmental protection. As regards Coyle and Morrow's argument, we have seen that the primary focus of contemporary nuisance law is on 'use and enjoyment' of land, rather than on intrinsic value. And as regards the argument that nuisance may provide a distinct and independent property-based system for achieving optimum environmental protection, we have seen that the case law on nuisance is pervasively influenced by questions of public interest, by ideas of welfare quite independent of the satisfaction of individual preferences, and of course by deference to legislative intent. To borrow the words of David Campbell, 'Of Coase and Corn: A (Sort Of) Defence of Private Nuisance' (2000) 63 MLR 197–215, nuisance does not in its current form provide any sort of 'bright-line' method of attaining environmental protection,

independent of perceived judgments of public interest for resolving environmental issues. (Campbell suggests that nuisance ought to be reformed in order to do just this. In effect, he suggests that judgments as to public interest should be removed from the ambit of nuisance so that through the claims of those with property rights it may better perform its role of enhancing welfare, including environmental protection. Naturally this is a controversial proposition.)

There are also limitations which are more practical than principled. The expensive and unpredictable process of common law litigation, dependent on open-textured notions such as 'reasonableness' and on the resolve, resources, and qualifying property rights of affected parties, is not in itself the most effective way to achieve fundamental environmental improvements. Even in the apparent heyday of the nuisance actions, the nineteenth century, our focus on decided cases such as *St Helen's v Tipping* may be misleading, for that case has been described as an isolated instance of a sufficiently determined litigant: see further J. P. S. McLaren, 'Nuisance Law and the Industrial Revolution—Some Lessons from Social History' (1983) 3 OJLS 155; J. P. S. McLaren, 'The Common Law Nuisance Actions and the Environmental Battle—Well-Tempered Swords or Broken Reeds?' (1972) 10 Osgoode Hall LJ 505; A. W. B. Simpson, 'Victorian Judges and the Problem of Social Cost', in *Leading Cases in the Common Law* (1995). On the other hand, Ben Pontin has uncovered a different story, suggesting that genuine social progress may have been achieved through nineteenth-century tort litigation.[20] In more recent work, Pontin has argued that the injunctive remedies at the disposal of the courts led to far more positive results than has been acknowledged, with potential lessons for the development of modern law.[21] That being the case, what message might this give for today's courts, given the newly increased flexibility of remedy outlined in Section 1.7?

5 Conclusions

i. Despite its long historic roots, nuisance retains a useful role within the law of torts. Arguably, this is largely because of the work that has been done to distinguish its principles from those of the tort of
p. 713 negligence. Nuisance typically covers different situations from those with which negligence is concerned, principally those involving continuing states of affairs where there is a conflict between different uses of land. Here, the distinct nature of nuisance principles is at its clearest. This distinctness is reflected also in its remedies, where injunctions play a major role.

ii. Key issues of concern in the modern law of nuisance include the approach to calculation of damages, and the role of public interest in assessing both the existence of a nuisance, and the appropriate remedy. In relation to the first of these, calculation of damages, the character of nuisance as a tort against land is strongly represented by the way in which damages for loss of amenity are calculated with reference to the value of the land. This has led to the frustration of some attempts to use private nuisance as a means of protecting the rights of occupants against pollution and other harms, since damages are not sensitive to the number of people occupying the land and are available only to those with a formal interest in the land. This takes seriously the role of property in the tort of private nuisance. By way of partial contrast, there has been more recognition in recent years that public interest plays an important role in the tort of private nuisance. *Coventry v Lawrence* marks a sea change in the way that decisions about injunctive remedies are to be made, leaving greater scope for interests

beyond those of the parties to litigation to be considered and recognizing that those interests, and the conflicts between neighbours typically represented by private nuisance, are always set in the context of a much broader web.

iii. Although nuisance was one of the first areas to be affected by the new status of Convention rights after enactment of the HRA, there is some evidence that the influence of Article 8 is waning. At the same time, new uses of injunctive remedies framed typically in public nuisance (though also in other torts, such as trespass or private nuisance) have been sought in order to restrain the activities of groups involved in protest or disobedience. These latter cases illustrate the significance of remedies, in addition to the significance of substantive principle.

Further Reading

Ashworth, A., 'Public Nuisance: Elements of Offence' (2006) Crim LR 153.

Beever, A., *The Law of Private Nuisance* (Hart, 2013).

Buckley, R. A., *The Law of Negligence and Nuisance* (Butterworths, 2017).

Campbell, D., 'Of Coase and Corn: A (Sort of) Defence of Private Nuisance' (2000) 63 MLR 197.

Coase, R., 'The Problem of Social Cost' (1960) 3 JLE 1.

Crabb, L., 'The Property Torts' (2003) 11 Tort L Rev 104–18.

Gearty, C., 'The Place of Private Nuisance in a Modern Law of Tort' (1989) 48 CLJ 214–42.

Getzler, J., *A History of Water Rights at Common Law* (Oxford: Oxford University Press, 2004).

Goodhart, A. L., 'Liability for Things Naturally on the Land' (1930) 4 CLJ 13.

Hilson, C., 'Let's Get Physical' (2009) 29 JEL 33–57.

p. 714 ↵ Jolowicz, J. A., 'Damages in Equity—A Study of Lord Cairns' Act' [1975] 34 CLJ 224.

Lee, M., 'What is Private Nuisance?' (2003) 119 LQR 298–325.

Lee, M., 'Tort Law and Regulation: Planning and Nuisance' (2011) 8 JPL 986.

Lee, M., 'Occupying the Field: Tort and the Pre-emptive Statute', in T. T. Arvind and J. Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, 2013).

Lee. M., 'The Public Interest in Private Nuisance: Collectives and Communities in Tort' (2015) 74 CLJ 74.

Lees, E., '*Lawrence v Fen Tigers*: Where Now for Nuisance?' (2014) Conv 449.

Lees, E., '*Fearn v Board of Trustees of the Tate Gallery*: Privacy and the Law of Nuisance' (2021) 23 Env L Rev 49–55.

Lowry, J., and Edmunds, R., *Environmental Protection and the Common Law* (Oxford: Hart Publishing, 2000).

McLaren, J. P. S., ‘The Common Law Nuisance Actions and the Environmental Battle—Well-Tempered Swords or Broken Reeds?’ (1972) 10 Osgoode Hall LJ 505.

McLaren, J. P. S., ‘Nuisance Law and the Industrial Revolution—Some Lessons from Social History’ (1983) 3 OJLS 155.

Miller, C., ‘Environmental Rights in a Welfare State? A Comment on DeMerieux’ (2003) 23 OJLS 111–25.

Morrow, K., ‘The Rights Question: the Initial Impact of the HRA on Domestic Law Relating to the Environment’ (2005) JPEL 1010–21.

Murphy, J., *The Law of Nuisance* (Oxford University Press, 2010).

Newark, F. H., ‘The Boundaries of Nuisance’ (1949) 65 LQR 480.

Ogus, A. I., and Richardson, G. M., ‘Economics and the Environment—A Study of Private Nuisance’ [1977] CLJ 248.

Pontin, B., ‘Tort Law and Victorian Government Growth: The Historiographical Significance of Tort in the Shadow of Chemical Pollution and Factory Safety Regulation’ (1998) 18 OJLS 661–80.

Pontin, B., ‘Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence’ (2012) 75 MLR 1010.

Simpson, A. W. B., ‘Victorian Judges and the Problem of Social Cost’, in *Leading Cases in the Common Law* (Oxford: Oxford University Press, 1995).

Spencer, J., ‘Public Nuisance—A Critical Examination’ [1989] CLJ 55.

Steele, J., ‘Private Law and the Environment: Nuisance in Context’ (1995) 15 LS 236.

Taggart, M., *Private Property and the Abuse of Rights in Victorian England* (Oxford: Oxford University Press, 2002).

Wilde, M., ‘Nuisance Law and Damages in Lieu of an Injunction: Challenging the Orthodoxy of the *Shelfer* Criteria’, in S. Pitel, J. Neyers, and E. Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013).

Notes

[1] See Chapter 8.

[2] In this case, the interference fell short of a nuisance.

[3] See also *Regan v Paul Properties* [2006] EWCA Civ 1391; [2006] 3 WLR 1131 (below), another actionable interference with right to light which resulted in an injunction; and *Beaumont Business Centres v Florala Properties Ltd* [2020] EWHC 550 (where there was an award of damages on a ‘negotiating’ basis: Section 1.7, and Chapter 9).

[4] In the older case of *Bridlington Relay v Yorkshire Electricity Board* [1965] Ch 436, such interference was not recognized as capable of amounting to a nuisance. The House of Lords in *Hunter* accepted that circumstances may have changed since 1965, but did not decide the point since the existence of the building, as we have seen, was not actionable in the absence of an easement.

[5] The importance of the 'equitable' nature of the injunctive remedy is that it is available at the discretion of the court, and not as of right: see Section 1.7, Remedies.

[6] See, for example, *Halsey v Esso Petroleum* [1961] 1 WLR 683.

[7] *Chasemore v Richards* is discussed by Joshua Getzler, *A History of Water Rights at Common Law* (Oxford University Press, 2004), 302–25.

[8] *Lawrence v Fen Tigers Ltd* [2012] EWCA Civ 26; [2012] 1 WLR 2127.

[9] This was a rather unusual trespasser: Middlesex County Council laid the culvert for the benefit of another neighbouring occupier.

[10] Annual profits were estimated at £344 million. Having said that, it appears that by the time the case reached the House of Lords, there had been a change in priorities, and the required work had been carried out.

[11] Water Industry Act 1991.

[12] See particularly our discussion of *Stovin v Wise* [1996] AC 923.

[13] For details of these two defences, see Chapter 7.

[14] Additional comments about injunctions in relation to group activities are included in relation to public nuisance, in Section 3.5, and may on some occasions have relevance to private nuisance.

[15] [2002] EWCA Civ 64; [2002] 2 WLR 932 (Court of Appeal, reversed on appeal to House of Lords [2003] UKHL 66; [2003] 3 WLR 1603).

[16] For discussion of the controversies surrounding this interpretation of damages under the HRA, see J. Steele, 'Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?' (2008) 67 CLJ 606–34.

[17] The defendants also escaped conviction because there was not a sufficient 'public' dimension to their acts, or in other words no 'common injury'. One had sent offensive racist literature through the post to prominent people; the other had posted salt to a friend in New York as a practical joke, and this had caused an anthrax alert when it spilt out of the envelope at a sorting office.

[18] Indicating just how long the assumption has been in existence, Professor Newark traced the 'heresy' of recoverability of personal injury damages in public nuisance to what he called 'an incautious *obiter dictum* which let fall in the Common Pleas in 1535' (Newark, 'The Boundaries of Nuisance' (1949) 65 LQR 480, at 481).

[19] In relation to private nuisance see *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1012 (Ch).

[20] B. Pontin, 'The Secret Achievements of Nineteenth Century Nuisance Law' (2007) 19 Environmental Law and Management 271–4, 276–90, discussing the background to and after-effects of *AG v Birmingham Corporation* (1858) 4 K & J 528.

[21] B. Pontin, 'The Common Law Clean Up of the "Workshop of the World": More Realism About Nuisance Law's Historic Environmental Achievements' (2013) 40 Journal of Law and Society 173.

Related Books

View the Essential Cases in tort law

Related Links

Test yourself: Multiple choice questions with instant feedback *<https://learninglink.oup.com/access/content/brennan-concentrate6e-student-resources/brennan-concentrate6e-diagnostic-test>*

Find This Title

In the OUP print catalogue *<https://global.oup.com/academic/product/9780198853916>*