Nuisance and Privacy

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In this case note, I consider the Court of Appeal decision in *Fearn v Board of Trustees of Tate Gallery* [2020] EWCA Civ 104, [2020] Ch 621, which concerned whether a claimant could sue in private nuisance for a privacy violation. After reviewing previous authorities on this question, I argue that the ruling that interference with privacy is not actionable in private nuisance is to be welcomed. I also explore the relevance of the 'abnormal sensitivity' principle and of possible self-help measures in assessing whether an interference with the use and enjoyment of land is unreasonable for the purposes of a private nuisance claim.

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[1] One of the most appealing characteristics of the common law is the way in which the fact patterns that generate litigation put existing legal rules and principles to the test. And with fact so often being stranger than fiction, the events on which the courts must adjudicate are frequently more testing, and more engaging, than the products of even the most fertile legal imagination conjuring up examples for the purposes of illustration or examination. The power of example in the common law is demonstrated by the facts of *Fearn v Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104; [2020] Ch. 621. The Tate Modern art gallery opened an external viewing platform on the tenth floor of its new Blavatnik Building which offered panoramic views in all directions, and from which it was possible to see directly into the living areas of the claimants' flats in a luxury residential development situated some 35 metres away. Despite notices asking visitors to the platform to respect the privacy of the Tate's neighbours, a significant number of them found staring into the flats, photographing and filming their interiors, and waving (or in some instances even gesturing obscenely) at the occupants more entertaining than the London skyline. The claimants sought an injunction requiring the Tate to prevent members of the public observing their apartments from designated sections of the platform, including the whole of the southern walkway. There was little doubt that the opening of the viewing gallery had caused what the trial judge described as a "material intrusion" into the claimants' privacy, not least because many of the photographs and videos taken by visitors to the platform (who numbered up to 300 at any given time, and hundreds of thousands annually) had subsequently been posted on social media. But was there any redress for this at common law, and in particular was the intrusion actionable in the tort of private nuisance?

At first instance ([2018] EWHC 246 (Ch); [2019] Ch. 369), Mann J. held that while the tort of private nuisance was capable of protecting privacy interests, on the facts the interference was not unreasonable. There were various reasons why **[2]** he arrived at the latter conclusion, including the nature of the locality—an inner city urban environment with a significant amount of tourist activity—and the fact that the flats were "particularly sensitive" to this form of interference, because of their floor-to-ceiling windows, and because their "winter gardens" (a form of indoor balcony) had been incorporated into the general living accommodation. Mann J.'s decision was upheld on appeal, but for different reasons. According to the Court of Appeal, it had been a mistake for the trial judge to open the door to privacy claims in nuisance at all. As a matter of authority and principle an invasion of privacy by overlooking was

simply not capable of being actionable in private nuisance, and any development of the law in this area should be left to Parliament. It should also be noted that Mann J. had held that the Tate Gallery was not a "public authority" for the purposes of the Human Rights Act 1998, so that no direct claim could be brought against it under s.6 of that Act for violation of the right to respect for private and family life and the home in art.8 of the European Convention on Human Rights. That aspect of his decision was not contested at the appeal hearing.

In ruling that interference with privacy is not actionable in private nuisance, the Court of Appeal confirmed the general understanding of the position prior to the first instance decision. However, there had previously been no single, determinative, resolution of the question. A series of mostly nineteenth-century authorities were traditionally cited for the proposition that the law of nuisance did not recognise a "right not to be overlooked", either as an automatic incident of land ownership or as an easement that could be acquired by grant or prescription. The example usually given was that it was not a nuisance to open (in the sense of create) a new window commanding a view of neighbouring properties. Though many of the statements to this effect were merely dicta—most of the relevant cases were primarily concerned with rights to light—the rule seems to have been well-established, and in the fourth edition of Kenny's *Cases on Tort* (1926) the author cited (at p.367) an unreported case from 1904 in which a dentist in Balham was denied redress against neighbours who used an array of mirrors to observe events in his surgery. Further afield, a majority of the High Court of Australia added to this line of authority in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 C.L.R. 479, by holding that no legal right of the plaintiff had been infringed when the defendants broadcast a live radio commentary from a platform overlooking its racecourse. However, the point was not uncontroversial: Evatt J., dissenting in *Victoria Park Racing*, argued that there were limits to the right to spy on or overlook another's property, and in *Bernstein v Skyviews & General Ltd* [1978] Q.B. 479, a case on trespass to land, Griffiths J. suggested that continuous aerial surveillance of a person's property, accompanied by the photographing of his every activity, might be actionable in nuisance, albeit without having had the benefit of citation of the relevant authorities. Furthermore, the extension of the law of confidence to protect private information in *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 A.C. 457 suggested that the courts might in future take a more protective stance on the privacy interests of occupiers of land.

At first instance, Mann J. took the view that the authorities were inconclusive, in that they did not altogether rule out the possibility of nuisance protecting privacy. Furthermore, he considered that cases on the opening of new windows were of **[3]** limited assistance when it came to a structure, such as the Tate's viewing gallery, "whose whole purpose is to overlook" ([2019] Ch. 369 at [159]). He was therefore minded to conclude that private nuisance was capable of protecting privacy, at least in a home, with any doubts on that score being allayed by the need to develop the law so as to give due effect to art.8 of the European Convention. Sir Terence Etherton M.R., giving the only substantive judgment in the Court of Appeal, took a very different view of the authorities. There was, he pointed out, "no reported case in this country in which a claimant has been successful in a nuisance claim for overlooking by a neighbour" ([2020] 2 W.L.R. 1081 at [53]), and he concluded (at [74]) that "the overwhelming weight of judicial authority" was against a right not to be overlooked actionable in nuisance. And while he acknowledged that there was a substantial

difference of degree between overlooking from new windows and overlooking from the Tate's viewing platform, in his opinion the underlying issue of principle was the same.

The Court of Appeal's conclusion on the authorities was bolstered by several practical considerations that told against recognition of a right not to be overlooked. First, the refusal of the common law courts to recognise general rights to light, air flow and prospect had been justified on the ground that such rights would unduly constrain building in towns and cities, and the same concern probably underlay the resistance to claims for overlooking, which was "commonplace and indeed inevitable when the great cities were being constructed" (at [78]). Second, it would be difficult to draw a line between cases of acceptable and unacceptable overlooking for the purpose of determining whether there was a material interference with the amenity of the affected property. Third, other legal mechanisms, most obviously planning regulations, were more suited to the task of controlling inappropriate overlooking than the common law of nuisance. And fourth, arguably what was really at issue in overlooking cases was invasion of privacy rather than damage to property interests (though could it not be both?), and the protection of privacy was now largely the domain of the legislature, which was better placed than the courts to weigh up the competing interests involved.

The Master of the Rolls then proceeded robustly to dismiss the trial judge's reliance on art.8 of the Convention to justify recognition of a right not to be overlooked, thereby providing yet further evidence that the much vaunted "horizontal effect" of the Human Rights Act 1998 on the law of tort has (with one or two notable exceptions) proved to be something of a damp squib. For such an argument to work, it would need to be shown both that art.8 was engaged on the facts, and that it was appropriate to extend the common law to provide a remedy. In the Court of Appeal's view, neither requirement was met. There was no Convention authority holding that mere overlooking breached art.8, and in any case "overlaying the common law tort of private nuisance with Article 8 would significantly distort the tort in some important respects" (at [91]). In particular, (1) licensees have no standing in nuisance and yet no such limit applied to art.8; (2) in assessing whether someone had a reasonable expectation of privacy for art.8 purposes, the courts would take into account factors usually irrelevant to a nuisance claim, such as a peculiar sensitivity of the claimant; (3) questions of relevance to a justification enquiry under art.8(2) might have no place in the tort of nuisance; **[4]** and (4) any gap in the protection afforded to the art.8 right might be best left to the legislature to fill.

The Court of Appeal's forthright decision that "the construction or alteration of premises so as to provide the means to overlook neighbouring land … is not actionable in nuisance" (at [61]) is to be welcomed. Some commentators have sought valiantly to explain the exclusion of certain kinds of interference with the use and enjoyment of land from the ambit of private nuisance in terms of some broader principle, usually in an attempt to reconcile the law with some pet economic or philosophical theory. An example is the suggestion that nuisance is limited to physical invasions of the claimant's land, or—which amounts to much the same thing—to emanations from the defendant's (an idea dismissed by Mann J. at first instance). However, as the Court of Appeal recognised, the justification for rules such as this is essentially pragmatic. Put simply, there was little to be gained by extending the law of nuisance to encompass interference with privacy, and potentially a great deal to be

lost. Abandoning the traditional bar threatened to generate much litigation, but the decision at first instance in *Fearn* suggested that it would be very difficult to win an action of this kind. And if a nuisance claim for invasion of privacy could not succeed even on facts as extreme as these, then it is questionable whether opening the door to such claims would have been a sensible development of the law. It is true that Mann J. gave an example of a case where he thought that such a claim would succeed ([2019] Ch. 369 at [169]), involving members of the public being charged to make use of a tower erected to enable views into the gardens and houses of the owner's neighbours. But this scenario is extremely implausible, and, even if such a structure were to be permitted by the planning authorities, it is likely that other avenues of redress—such as proceedings in harassment—would be available to those affected. As with the duty of care mechanism in negligence law, there are a limited number of situations where it is preferable to exclude a category of interference with the use and enjoyment of land from the ambit of the law of nuisance altogether, rather than relying on a fact-sensitive enquiry into whether a particular instance of interference is substantial or unreasonable. The Court of Appeal recognised the wisdom of earlier generations of judges in holding that overlooking cases are one such "species of injury of which the law takes no cognizance" (*Tapling v Jones* (1865) 11 H.L.C. 290 at 317; 11 E.R. 1344 at 1355, per Lord Chelmsford), alongside interference with views from the claimant's property (*Aldred's Case* (1610) 9 Co. Rep. 57b; 77 E.R. 816; cf. Pontin (2018) 38 L.S. 627); appropriation or diversion of percolating water (*Bradford Corp v Pickles* [1895] A.C. 587; [1895-1899] All E.R. 984); and interference with television signals caused by a building (*Hunter v Canary Wharf Ltd* [1997] A.C. 655; [1997] 2 All E.R. 426).

Having said that, the vast majority of nuisance cases do of course turn on the question of substantial or unreasonable interference, and the facts of the *Fearn* case raised a couple of interesting issues in this regard, which were the subject of careful analysis at first instance. It having been determined that interference with privacy was never actionable in nuisance, these questions did not fall for consideration by the Court of Appeal, but some brief observations were nevertheless made. With respect, these were less convincing than the treatment of the privacy **[5]** issue, and rested on some rather dubious and inflexible propositions derived from a very limited number of authorities.

As Sir Terence Etherton M.R. emphasised in *Fearn*, it follows from the fact that private nuisance is a property tort concerned with the impact of the defendant's interference on the utility of the land that the gravity of that interference is assessed objectively, so that any particular sensitivity (or indeed insensitivity) of the claimant or his chosen use of the land is generally disregarded. In *Network Rail Infrastructure Ltd v Morris* [2004] EWCA Civ 172; [2004] Env. L.R. 41, the continued relevance of this "abnormal sensitivity" principle was questioned by Buxton L.J., but his scepticism was rooted in an approach to nuisance centred on an open-ended test of reasonableness as between neighbours, an approach emphatically rejected in *Fearn* (at [38]). As in the earlier Japanese knotweed case, *Network Rail Infrastructure Ltd v Williams* [2018] EWCA Civ 1514; [2019] Q.B. 601, the Court of Appeal in *Fearn* clearly endorsed the abnormal sensitivity principle, but they disagreed with Mann J.'s view that it was relevant on the facts, apparently on the basis that the principle did not extend beyond the claimant and the claimant's chosen use to encompass the physical state of the claimant's land. With respect, that seems mistaken, and the fact that the design, layout etc. of the claimant's property makes it unusually sensitive to a particular form of interference should be a relevant consideration when assessing whether a given instance of such

interference is actionable in nuisance. Suppose, for example, that in the "Three Little Pigs" fairy tale the threat to the houses of the little pigs had come from vibrations generated by a nearby factory, rather than the Big Bad Wolf. Would not their choice of construction materials (respectively, straw, sticks and bricks) have been highly pertinent in subsequent nuisance litigation? If so, then why not also the design of a luxury block of flats in which the price the occupiers pay for their magnificent views is a heightened level of exposure to the onlooker's gaze?

Similarly, the Court of Appeal was arguably too quick to dismiss Mann J.'s suggestion that in assessing whether the interference was unreasonable account should be taken of the possibility of remedial measures, such as the use of blinds, privacy film and net curtains (the mention of which gave rise to much commentary in the media coverage of the case). It might be thought that ascribing importance to the possibility of self-help means requiring the claimant to protect himself against the defendant's wrongful conduct, but that was not what Mann J. was saying: rather, his point was that, in assessing what it is reasonable to expect a claimant to put up with—and, therefore, what is wrongful in the first place—the court should take into account, as one factor amongst many, the measures which an occupier could reasonably be expected to take to minimise the effect of the interference on their use of their property (see also *Bank of New Zealand v Greenwood* [1984] 1 N.Z.L.R. 525 at 532). Whether it was in fact reasonable to expect the occupiers of the flats to take such measures is debatable, but in principle it was surely a relevant consideration. After all, it is precisely by means of self-help measures such as drawing curtains or lowering blinds, building walls or fences, and planting hedges or trees, that occupiers generally protect themselves from prying eyes.

Despite its memorable and apparently newsworthy facts, resolving the issues raised by the *Fearn* case called for the usual mix of precedent, principle and policy on which a common law court typically draws to resolve disputes between **[6]** neighbours. In this respect, the Court of Appeal's approach to the central question of the extension of private nuisance to privacy interests is hard to fault. But on some of the subsidiary issues explored in the thorough and thoughtful judgment of Mann J. at first instance, a more flexible and nuanced analysis was perhaps required.