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Private Nuisance: The UK Supreme Court Take a View

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Abstract: *Fearn v Board of Trustees of the Tate Gallery*, required the UK Supreme Court to resolve claims that by operating an open-air terrace, from which visitors could enjoy a high-level view of London, the defendants were committing the tort of private nuisance against the owners of nearby luxury flats. The Court decided that the intrusive staring into the flats by visitors to the terrace could be a form of private nuisance, but split as to whether the tort was being committed; a minority thought that it would be necessary to take account of the claimants' flats being glass-walled, and consequently unusually vulnerable to ocular intrusion, and the possibility of the claimants mitigating their discomfort by using blinds, whilst the majority insisted that it was straightforward to hold the defendants liable. This article concentrates on the majority's re-statement of the basic test for liability in private nuisance, in particular their shift from an approach that assesses the "reasonableness" (or otherwise) of the defendant's activity to one that relies heavily on a distinction between "common and ordinary" and "special and unusual" uses of land. It concludes that several key elements in the re-statement will require further elucidation, and that the key distinction does not reflect the values that its proponents hoped that it would.

Keywords: tort liability; private nuisance; viewing gallery; intrusive viewing; test for liability; UK Supreme Court

Fearn v Board of Trustees of the Tate Gallery,¹ involved claims that by operating an open-air terrace, providing a vantage point from which visitors could enjoy a 360° view of London at a height of 65 m above the ground, the defendants were

¹ *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4, [2023] 2 WLR 339. [*Fearn* (UKSC)] in subsequent footnotes]. The viewing terrace is in an extension to the Tate Modern art gallery. This extension was designed by the Herzog & de Meuron architectural practice, and details of the project, including photographs showing the terrace and adjacent flats, can be found at: <https://www.herzogdemeuron.com/projects/263-the-tate-modern-project/> (last visited, 20 October 2023). The Tate Modern gallery was created from the former Bankside 'B' power station in London. That power station's coal-fired predecessor, Bankside 'A', was famously subjected to an injunction because of the

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committing the tort of private nuisance against the owners of nearby luxury flats; several hundred thousand people visited the terrace each year, and from one side they could look into the flats, particularly those on the eighteenth and nineteenth floors, which are glass-walled and about 34 m away; many visitors simply peered into the flats, but others waved at the occupants, or took photographs, sometimes posting these on social media. Lord Leggatt JSC, who delivered the judgment that gained the support of a majority in the UK Supreme Court,² wrote: “It is not difficult to imagine how oppressive living in such circumstances would feel for any ordinary person – much like being on display in a zoo.”³

When the case reached the UK Supreme Court, the claims having been initially dismissed by Mann J,⁴ with that conclusion upheld in the Court of Appeal,⁵ though for a different reason, the parties agreed that the appeal raised five issues:

(1) did the common law cause of action for private nuisance provide a remedy in respect of the ways in which the viewing gallery was said to interfere with the use and enjoyment of the claimants’ flats; (2) did public viewing from the viewing gallery constitute an unjustified interference with the claimants’ rights under article 8 of the Human Rights Convention to respect for their private lives and their homes; (3) to give effect to rights conferred by article 8, should nuisance, in an appropriate case, be extended to such things as watching/observation/viewing/photographing/overlooking (and, more generally, other types of privacy invasion); (4) was the Court of Appeal right to say that Mann J’s approach, in finding that the ‘remedial steps’ which the claimants could have taken was relevant to the actionability of an interference with privacy, was contrary to principle; and (5) did any common law sensitivity principle applicable in cases of amenity nuisance apply where the ‘undue sensitivity’ arose not from the claimants as individuals or from the activity undertaken in the property, but from the property itself, and, if so, was Mann J correct to hold that the claimants’ claim should be dismissed on the ground that they occupied sensitive properties in sensitive ways.⁶

This article will focus on two questions: (1) can “intrusive viewing” into neighbouring premises amount to the tort of private nuisance? (2) in applying the tort of private nuisance, how, if at all, is it relevant that the design of a claimant’s premises has made the interference possible, or amplified it, or that the claimant could have used some physical means (such as blinds) to reduce the interference? But behind these

private nuisance it caused to a neighbouring public house: *Shelfer v City of London Electric Lighting* [1895] 1 Ch 287. (Though see: [1895] 2 Ch 388, CA.)

² Lord Reed PSC and Lord Lloyd-Jones JSC agreed with Lord Leggatt JSC’s judgment.

³ *Fearn* (UKSC) at [48].

⁴ [2019] EWHC 246 (Ch), [2019] Ch 369.

⁵ [2020] EWCA Civ 104, [2020] Ch 621.

⁶ Summary of counsels’ argument: [2023] 2 WLR 339 at pp 342–3. Readers from outside England and Wales will note that those known as “plaintiffs” in North America, and in many other jurisdictions, have become “claimants” in England and Wales; a change that occurred in 1998.

questions, the principal significance of the case stems from the Supreme Court having treated it as supplying an opportunity to re-state the fundamental condition for liability in private nuisance: the dividing line between an “unreasonable”, or “unlawful”, interference and one that is not wrongful. Significantly, this judicial power to re-state was exercised without anything like the deliberative drafting process used to generate the private nuisance paragraphs in the American Law Institute’s *Restatement (Third) of Torts*. Moreover, the re-statement project was pursued despite – or, perhaps, because of – deep division in the Court: there were two views as to the fundamental condition for liability, and two views as to the significance of the design of the claimant’s premises, and two views as to appropriate outcome. On this last point: by a majority of three to two the claimants’ appeal was allowed, so liability was imposed.⁷

Can “Intrusive Viewing” into Neighbouring Premises Amount to a Private Nuisance?

The Supreme Court’s unanimous answer to this question can be summarized briefly: “Yes”. Lord Leggatt JSC went so far as to assert: “there is no conceptual or *a priori* limit to what can constitute a nuisance.” A proposition that he explained more fully two sentences later: “Anything short of direct trespass on the claimant’s land which materially interferes with the claimant’s enjoyment of rights in land is capable of being a nuisance.”⁸ He cited support for this in his explanation as to *why* emanations of tangibles and intangibles are potentially actionable (“In all such cases ... the basis of the claim is not the physical invasion itself but the resulting interference with the utility or amenity value of the claimant’s land”) and a miscellany of cases which did not involve any form of invasion (withdrawal of support; obstructing access; obstructing an acquired right to light or airflow; preventing connection to a public sewer; and “offensive sights”).⁹

⁷ The Supreme Court did not decide what remedy would be appropriate.

⁸ *Fearn* (UKSC) at [12]. See also Lord Sales JSC (with whom Lord Kitchin JSC agreed) at [170] and [179].

⁹ *Fearn* (UKSC) at [13]. The cases catalogued in the miscellany are: *Guppys (Bridport) Ltd v Brookling* (1983) 14 HLR 1; *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836; *Jolly v Kine* [1907] AC 1; *Bass v Gregory* (1890) 25 QBD 481; *Barratt Homes Ltd v Dŵr Cymru Cyfyngedig* [2013] 1 WLR 3486; and *Thompson-Schwab v Costaki* [1956] 1 WLR 335. Lord Sales (at [172]–[173] and [177]) attached more significance to the case of *J Lyons & Sons v Wilkins* [1899] 1 Ch 255 CA, where an injunction was granted against defendants who were picketing the premises of a leather bag manufacturer: but although this case used the language of “watching and besetting” the premises, it seems the primary concern was that the method was intended to persuade the claimant’s employees to stop working for the claimant: it is not clear that it was significant that the pickets were within sight of the premises.

Whilst Lord Leggatt went on to re-state the “core principles of private nuisance”, he went no further in glossing the key concept of “material interference” “with the utility or amenity value of the claimant’s land”. Arguably, this concept will require further refinement. Presumably, for example, sinking the ferry (owned by a third party) that the claimant needs to use to obtain convenient access to her insular summer house is *not* a private nuisance no matter how significantly it impedes the claimant from making use of her land. But, if so, the most obvious explanation may be that to constitute a private nuisance an interference with “enjoyment of rights in land” has to operate *on* the claimant when she is *on* the premises concerned and attempting to make use of them (or operate on someone else *on* the premises attempting to make use of them with the claimant’s consent),¹⁰ and if C was resident in her summer house *before* the sinking then absence of the ferry service would not reduce the range of things *she* could do whilst *on* the premises. This explanation, however, would suggest that some of the entries in Lord Leggatt’s miscellany (e.g. obstructing access) are not straightforward examples of “interference” at all: they do not operate *on* claimants when they are *on* their premises.¹¹ Clearly, however, this level of refinement was not *necessary* in order to reach a decision in *Fearn*: “being stared at” by thousands of visitors operated *on* the claimants’ premises, and did not involve any “physical invasion”.

Lord Leggatt did not allege that the Court of Appeal, which had rejected the claim, had fallen prey to any “physicalist heresy”, such as that liability in private nuisance requires a defendant who can be held responsible for a crossing of the boundary onto the claimant’s land by objects (e.g. tree roots), substances (e.g. water), particles (e.g. smoke; odours, bright light) or energy (e.g. sound; vibrations; bright light), or, in circumstances where the claimant can establish the appropriate right to non-obstructed passage, an obstruction of people, objects, particles or energy.¹²

¹⁰ Otherwise, wrongfully imprisoning the claimant in a distant dungeon might amount to a private nuisance.

¹¹ Lord Leggatt’s explanation made no allowance for the existence of a group of cases where it seems that claimants cannot succeed without demonstrating *more* than substantial interference with “the utility or amenity value of the claimant’s land”: they must also establish a property right over neighbouring land – be it a natural right or an easement. In some cases, even this may be insufficient: consider, C has an easement allowing him to run a cable car across D’s land in order to reach C’s mountain top café; D has contracted to operate the cable car from 9 a.m. until 9 p.m. seven days per week; D, in breach of contract, fails to operate the cable car: arguably, not a private nuisance despite substantial interference *and* an easement, perhaps since an unreasonable interference with an easement has to operate *on* the easement.

¹² *Fearn* (UKSC) at [94]. (The author should confess that he adheres to beliefs about the tort of private nuisance that share more in common with “the physicalist heresy” than with Lord Leggatt’s “there is no conceptual or *a priori* limit to what can constitute a nuisance.”; for example, the author believes that most of the catalogued private nuisance situations that involve “no physical invasion”, such as

Rather he took the court below to have decided that “overlooking” was “one of a small number of specific types of interference with the use and enjoyment of land which are excluded from the scope of the law of private nuisance as a matter of legal precedent and policy.”¹³

Lord Leggatt’s rejection of this part of the Court of Appeal’s decision involved him drawing a distinction between “overlooking” and operating a public viewing gallery. With respect to “overlooking”, a term which he took normally to refer to constructing a building so as to create “a spatial relationship between two places such that one affords a view, from a greater height, of the other”, he agreed that *this* could not amount to a private nuisance: but he believed this was because the law of England and Wales contains a general liberty (as a matter of private law) to build any structure you please on your own land.¹⁴ Lord Leggatt also believed, however, that an ordinary act of “merely looking at what is happening on neighbouring land” could not be actionable: here, though, the explanation was that neighbours have to put up with such *minor* annoyances “under the rule of give and take, live and let live”.¹⁵ But operating a public viewing platform from which hundreds of thousands of people peer into the claimants’ flats was, for Lord Leggatt, clearly distinguishable from mere “overlooking” and occasional looking: the gulf was similar to that between “household noise” and “inviting a brass band to practice all day every day in my back garden”.¹⁶

From the perspective of “legal precedent”, Lord Leggatt thought there was no judicial authority to support the proposition that visual intrusion cannot amount to a nuisance “no matter how constant and oppressive”.¹⁷ the primary authorities from English courts went no further than opining that “the construction or alteration of premises so as to provide the means to overlook neighbouring land ... is not actionable in nuisance”, a proposition with which Lord Leggatt agreed,¹⁸ the

cases involving “mental disturbance” caused by knowing the prostitution is occurring nearby, nonetheless have a physical dimension (i.e. the objectionable activity being “nearby” makes a difference). For what it is worth, being stared at appears to have such a physical dimension: the experience varies in accordance with the physical proximity of the observer (or the use of technology to ‘overcome the distance’).

¹³ *Fearn* (UKSC) at [94].

¹⁴ *Fearn* (UKSC) at [90]. (At the risk of nit-picking, it is not clear that there is any liberty vis-à-vis a neighbour to build a structure that could – at any moment – collapse over the boundary onto the neighbour’s land: *Birmingham Development Co Ltd v Tyler* [2008] EWCA Civ 859. Indeed, elsewhere in his judgment Lord Leggatt accepted that the liberty might not be absolute: *Fearn* (UKSC) at [76].)

¹⁵ *Fearn* (UKSC) at [91].

¹⁶ *Fearn* (UKSC) at [92].

¹⁷ *Fearn* (UKSC) at [95].

¹⁸ *Fearn* (UKSC) at [98], citing the Court of Appeal’s summary of the authority in [2020] Ch 621 at [61].

famous Australian case of *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*,¹⁹ where liability was not imposed, was treated as one where the defendants were interfering with the claimant's *business* by broadcasting commentary to the races taking place on the claimant's racecourse, rather than one where the defendants were having an effect on the amenity of the land through the commentator's looking at what was happening there; and cases from New South Wales and British Columbia had imposed liability on defendants who had directed surveillance cameras at neighbouring property.

With respect to "policy", the arguments assessed (and then rejected) by the Supreme Court were: (i) it would be unusually difficult to draw the line between actionable and non-actionable visual intrusion; (ii) disturbance by visual intrusion would be better regulated by administrative decisions applying planning law, rather than by the private law tort of private nuisance; and, (iii) the essential wrong was one of invasion of privacy, so the necessary balances might be better set by the legislature. Lord Leggatt (and the minority judges who did not accept Lord Leggatt's general re-statement) rejected all three of these arguments as reasons for creating a special exception for ocular intrusion:²⁰ (i) The difficulty of allocating hard cases in relation to a borderline was a "deeply unpersuasive" reason for refusing to impose liability in *clear* cases, and there was no obvious basis for thinking that identifying unacceptable degrees of staring or surveillance would be more difficult than identifying unacceptable levels of noise or smells;²¹ (ii) The purpose of planning law is to "control the development of land in the public interest", and it is consequently *not* an appropriate mechanism for establishing or protecting private rights;²² (iii) "Invasion of privacy" is a broad description for a catalogue of "legally distinct wrongs", and the fact that surveillance and publication on social media of photographs of people's homes may fall under the broad description is not a reason to deny that: "An important aspect of the amenity value of real property is the freedom to conduct your life in your own home without being constantly watched and photographed."²³

¹⁹ (1937) 58 CLR 479.

²⁰ The Court of Appeal had considered the arguments as reasons for not *extending* private nuisance to cover "overlooking"; The Supreme Court's starting position was that mass staring was *already* actionable (though, for Lord Leggatt, erecting a building from which other premises *could* be seen was not), and this led Lord Leggatt to address whether the arguments were reasons for *restricting* private nuisance: *Fearn* (UKSC) at [105]. See also Lord Sales' rejection of the same policy arguments at [200]–[204].

²¹ *Fearn* (UKSC) at [107]–[108].

²² *Fearn* (UKSC) at [109]–[110].

²³ *Fearn* (UKSC) at [112].

Re-stating the Fundamental Condition for Liability in Private Nuisance

Having rejected the physicalist heresy,²⁴ precedent, and public policy, as reasons for excluding “mass staring” from the scope of private nuisance, why did the Supreme Court need to re-state the fundamental condition for liability in the tort? The answer is that the judge at first instance, Mann J, had accepted that “mass staring” could be a private nuisance, but had nonetheless rejected the claims; the majority in the Supreme Court had to re-state the fundamental condition to explain where they believed Mann J had fallen into error.

Lord Leggatt’s diagnosis was that Mann J had misunderstood the fundamental condition of liability. He had mistakenly “thought that an overall assessment was required of what - in an undefined sense - is ‘reasonable’ in all the circumstances”.²⁵ In more detail:

the judge applied the wrong legal test by framing the question he had to decide as ‘whether the Tate Modern, in operating the viewing gallery as it does, is making an unreasonable use of its land’. The judge thought that this required an overall assessment bearing in mind the nature of the Tate’s use of its land, the character of the locality and ‘bearing in mind that the victim is expected to have to put up with some give and take appropriate to modern society and the locale’.²⁶

For Lord Leggatt the fundamental condition of liability was not the “reasonableness” of the defendant’s use of land, which he thought was likely to collapse into an assessment of “whether the defendant’s land use is of public benefit”,²⁷ but depended on “principles, settled since the 19th century, which run through the cases ... [and] provide clear standards rooted in values of reciprocity and equal justice.”²⁸ Within these principles, the crucial conceptual pivot was a divide between “common and ordinary” uses of land and “special and unusual” uses:

This principle of reciprocity explains the priority given by the law of nuisance to the common and ordinary use of land over special and unusual uses. A person who puts his land to a special use cannot justify substantial interference which this causes with the ordinary use of neighbouring land by saying that he is asking no more consideration or forbearance from his neighbour than they (or an average person in their position) can expect from him. Nor can such

²⁴ The phrase “physicalist heresy” is explained above: see text to fn. 12.

²⁵ *Fearn* (UKSC) at [54]. The auditoria of England’s law schools are already echoing with jokes about Lord Leggatt’s condemnation of the unduly “reasonable” Mann J.

²⁶ *Fearn* (UKSC) at [54], quoting Mann J, [2019] Ch 369 at [180].

²⁷ *Fearn* (UKSC) at [116].

²⁸ *Fearn* (UKSC) at [20].

a person complain on that basis about substantial interference with his special use of his land caused by the ordinary use of neighbouring land. By contrast, a person who is using her land in a common and ordinary way is not seeking any unequal treatment or asking of her neighbours more than they ask of her.²⁹

He presented four subsidiary elements to elaborate on this central device: (i) There is no liability unless interference exceeds “a minimum level of seriousness to justify the law’s intervention”; this level is set by drawing on “the standards of an ordinary or average person in the claimant’s position”; what would such a person find sufficiently “real”, “substantial”, “material”, or “significant”?³⁰ (ii) “[W]hat is a ‘common and ordinary use of land’ is to be judged having regard to the character of the locality.”³¹ Perhaps: “is the use of land one which is in accordance ‘the established pattern of uses’ in the locality”?³² (iii) There is a “general rule at common law that anyone may build whatever they like on their land, unless this violates an agreement not to do so or an acquired right to light or to a flow of air through a defined aperture”.³³ Indeed, Lord Leggatt pushed the proposition that “the physical attributes of a building cannot themselves give rise to a claim ... in nuisance” to a surprising point: “Although the question does not arise for decision in this case, I would not wish to rule out the possibility that there could be extreme cases where the design or construction of a building is so unusual and far from anything that could actually be expected that it might do so.”³⁴ One suspects that cases about leaky gutters, and other features of buildings that channel rainwater towards a neighbour’s land, were not drawn to the Court’s attention.³⁵ (iv) The principles are applied without regard to any

²⁹ *Fearn* (UKSC) at [35].

³⁰ *Fearn* (UKSC) at [22]–[23].

³¹ *Fearn* (UKSC) at [38].

³² The phrase “established pattern of uses” comes from Lord Carnwath’s judgment in the UK Supreme Court’s previous restatement of the tort of private nuisance for the 21st century: *Lawrence v Fen Tigers Ltd* (No. 1) [2014] UKSC 13; [2014] AC 822. Significantly, Lord Carnwath’s explanation for use of the “character of the locality” as a baseline (at [183]) does not cohere with Lord Leggatt’s “equal justice” rationale: “After more than 60 years of modern planning and environmental controls, it is not unreasonable to start from the presumption that the established pattern of uses generally represents society’s view of the appropriate balance of uses in a particular area, taking account both of the social needs of the area and of the maintenance of an acceptable environment for its occupants.”

³³ *Fearn* (UKSC) at [36], citing *Hunter v Canary Wharf Ltd* [1997] AC 655 at 685D–F (Lord Goff), 699C–H (Lord Lloyd), 709A–H (Lord Hoffmann) and p 726B–H (Lord Hope). Clearly *agreements* and *acquired* rights are an incomplete catalogue of exceptions: there is, for example, no right at common law to build a wall across an easement for vehicle access.

³⁴ *Fearn* (UKSC) at [76].

³⁵ The possibility that Lord Leggatt had in mind may have been related to one of the cases discussed in *Fearn*, *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525, where the positioning of glass on a defendant’s building reflected the sun in such a way as to cause problems for the claimants. In 2013, a commercial building in London known as the “Walkie Talkie” was reported to reflect sunlight in such

self-protective measures that a claimant could have taken, such as shutting a window to exclude noise.³⁶

Lord Sales, whose judgment did not gain the support of a majority, maintained that the fundamental condition of liability is “reasonableness”, an “objective principle” reflecting “reciprocity”, “compromise”, and a balance between the competing interests of neighbouring users of land.³⁷ He identified three concerns with respect to Lord Leggatt’s over-reliance on a divide between “common and ordinary” uses of land and “special and unusual” uses: (i) authority suggests a defendant will avoid liability for the consequences of “common and ordinary” uses of land only when these are “conveniently done”, implying that a defendant may sometimes have to modify even how she uses her land in a “common and ordinary way”;³⁸ (ii) the “common and ordinary”/“special and unusual” divide provides no guidance as to how a court should deal with disputes between a defendant whose “special” use of land is affecting a claimant’s “special” use of land,³⁹ and may tilt the balance of the tort too far against those who choose to use their land in innovative ways;⁴⁰ (iii) attaching undue significance to characterization of a defendant’s use of land as “special and unusual” may lead to an inappropriate answer to the second fundamental question in the case, since it may lead to marginalization of the question whether the design of the claimant’s building has contributed to the problems, and whether the claimant could have reasonably been expected to take steps to mitigate the problems. These concerns, however, were insufficient to convince a majority: Lord Leggatt’s position has become the law in England and Wales.⁴¹

Common and Ordinary/Special and Unusual

Under this sub-heading I want to investigate three questions relating to the “common and ordinary/special and unusual” pivot relied on by the majority: (i) must a claimant

a way as to be capable of “melting cars”; a sunshade was later fitted; the City of London has also introduced design rules to address the issue of skyscrapers generating downdraughts that can knock over pedestrians and cyclists.

³⁶ *Fearn* (UKSC) at [81]–[88].

³⁷ *Fearn* (UKSC) at [158]–[167].

³⁸ *Fearn* (UKSC) at [167]. The phrase “conveniently done” appears in Bramwell B’s influential statement of the principle in *Bamford v Turnley* (1862) 3 B & S 66 at 83; cited and adopted by Lord Goff in *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 at 299.

³⁹ *Fearn* (UKSC) at [229].

⁴⁰ *Fearn* (UKSC) at [227] – [230].

⁴¹ Lord Sales lists, at [245], some of the textbook writers who will have to rewrite their chapters, including NJ McBride and R Bagshaw.

actually be using her land in a “common and ordinary way” in order to claim? (and, the matching question for a defendant seeking to claim a defence based on her use being “common and ordinary”); (ii) can the question of what uses fall on either side of this divide be answered without attention to the advancement of any public interests? (iii) can “common and ordinary” uses be privileged without jeopardizing a commitment to “equality”?

Must a Claimant Actually Be Using Her Land in a “Common and Ordinary Way” in Order to Claim?

One possibility is that a claimant must be using her land in a “common and ordinary way” at the time of the interference in order to claim; an alternative possibility is that to claim a claimant must show that her *actual* use of land has been significantly affected *and* there would have been a sufficient interference *if* she had been using it in a “common and ordinary way”. Is “ordinary use” a condition, or simply the means by which the law sets the *level* at which interference can become actionable? The difference can be illustrated with a picturesque hypothetical case: suppose the claimant and her spouse live in a house in a locality where many couples of their age are bringing up infants, but they decide not to adopt a child, but instead to use the ‘nursery’ in their house for supporting orphaned hedgehogs; the defendant makes noises loud enough to have woken an adopted child in the nursery each night, and equally effective at waking the orphaned hedgehogs; the claimant and her spouse have to go to the nursery each night to sooth the woken creatures, just as they would have had to sooth a disturbed child. Can the claimant claim?

The text of Lord Leggatt’s judgment does not provide a definitive answer: it contains the sentence: “One aspect of this core principle is that an occupier cannot complain if the use interfered with is not an ordinary use.”⁴² But whilst this might suggest a condition, his judgment also includes sentences from authority which are consistent with the *standard-setting* reading: “Cotton LJ ... rejected the notion that something can be 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.’ As Lord Robertson said ... ‘A man cannot *increase* the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure.’”⁴³ Lord Sales

⁴² *Fearn* (UKSC) at [25].

⁴³ Emphasis added. The quotation from Cotton LJ is from *Robinson v Kilvert* (1889) 41 ChD 88 (CA) at 94; Lord Robertson’s is from *Eastern and South African Telegraph Co v Cape Town Tramways Corp Ltd* [1902] AC 381 (PC) at 393.

highlights the paragraph in which Lord Leggatt *may* have limited the right to sue to those who make ordinary use of their land, and explains his opposition to this proposal,⁴⁴ but Lord Leggatt's text contains no remedial clarification.

The question of the precise role of the "ordinary use" element cannot be separated from the question of how a court should determine *whether* a particular use is "ordinary". Clearly, if using premises in an "ordinary way" is now to be a *condition* for bringing a claim then claimants (a heterogeneous class) will have an incentive to establish that a *broad range* of uses of land are "ordinary". Indeed, it is unclear how the notion of "ordinary trade" could be defined in anything other than a broad way given that in many "mixed" localities there will be only a few examples of *each* trade: one or two garages, one or two cafes, one or two butchers, one or two schools, etc. But clearly parties may be subject to a dilemma: a *broad* approach to "ordinary" will assist a claimant in being able to claim, but this *breadth* may simultaneously assist a defendant in demonstrating that the consequences of *their* use are non-actionable (because the broad approach make *their* use "ordinary" too).

Most authorities before *Fearn* seem to assume that "ordinary use" is *not* a condition of liability: for instance, where noise and dust from demolition works interfered with a hotel on Wigmore Street, London, the question whether it was "ordinary" to use two houses on Wigmore Street as a hotel was not asked.⁴⁵ Similarly, in the extraordinary case of the defendants who arranged mirrors in their garden so that they could see what was happening in the operating room of a neighbouring dentist, Professor Winfield does not appear to have thought liability would turn on the "ordinariness" of performing dental operations in the relevant part of Balham.⁴⁶

Assuming, then, that "ordinary use" sets the level of interference at which a claimant can complain, so a Hedgehog Orphanage may still invoke private nuisance to secure some protection from noise, does the concept play the same role in establishing a level of interference that a defendant can inflict on her neighbours before it becomes actionable, or must the defendant actually be creating that interference through an ordinary use? Here the parallel picturesque hypothetical might become something like: the claimant complains about the noise made by neighbour 1's and neighbour 2's children shouting and bumping during their play, and confesses that the children of each neighbour make the same amount of noise and are equally irritating; he subsequently discovers that neighbour 2 doesn't have a child, and the child-like noises are actually being made by neighbour 2's pet Komodo dragon: can the claimant hold neighbour 2 liable in private nuisance because there is no locality in England where it can be said that keeping a Komodo dragon (boisterous or otherwise) is "ordinary"?

⁴⁴ *Fearn* (UKSC) at [229] and [242].

⁴⁵ *Andreae v Selfridge & Co Ltd* [1938] Ch 1, CA.

⁴⁶ Percy H Winfield, "Privacy" (1931) 47 LQR 23 at 27. Quoted in *Fearn* (UKSC) at [103].

One difficulty here is that the difference between actionable and non-actionable interferences can depend on matters such as frequency, duration and time of day; factors that are less relevant to characterisation of a *claimant's* use of land (e.g. as a home, as a hotel, as an office, as a school). Furthermore, many of the defendant-sided categories of “common and ordinary” use of land, such as “temporary construction work (where reasonable precautions have been taken to minimise disturbance)”, incorporate the *reason* why interference is caused, and do not simply set a *level* of disturbance that must be tolerated *regardless of explanation*:

For instance, a man who pulls down his house for the purpose of building a new one no doubt causes considerable inconvenience to his next door neighbours during the process of demolition; but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by the works of demolition. Nor is he liable to an action, even though the noise and dust and the consequent annoyance be such as would constitute a nuisance if the same, instead of being created for the purpose of the demolition of the house, had been created in sheer wantonness, or in the execution of works for a purpose involving a permanent continuance of the noise and dust.⁴⁷

Consequently, it cannot be taken for granted that the noise created by Komodo dragons is entitled to the same degree of protection as the noise made by toddlers, even if its frequency, duration and volume is identical. In this, the law may follow psychology: the disturbing effect of various noises is not independent of the listener's assessment of their cause.⁴⁸ Indeed, in the “affront cases”,⁴⁹ which are frequently invoked to show that private nuisance can be committed without any physical emanation onto the claimant's land, the effect on the claimant's enjoyment of land is likely to be significantly dependent on evaluative judgements about the reasons behind the defendant's activities.⁵⁰

⁴⁷ *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409, at 414.

⁴⁸ Thus I am likely to find my left-side neighbour's habit of playing tape-recordings of the noises of small children at a volume so that I can hear them through the party wall more disturbing than identical noises made by my right-side neighbour's small children.

⁴⁹ A label for cases where claimants allege they are unable to enjoy their land because of their distress at the proximity of a defendant's “objectionable” activities, such as prostitution, selling pornography, or embalming dead bodies: see, e.g. *Laws v Florinplace Ltd* [1981] 1 All ER, ChD, a successful claim for an interlocutory injunction against defendants responsible for the “Victoria Sex Centre and Cinema Club”. (For those who like historical details: some of the evidence against the defendants in this case was provided by Lord Leggatt's father, who had bought a house nearby for his son and daughter, and who, like the lead claimant, John Laws, subsequently became an eminent judge in the Court of Appeal.)

⁵⁰ It seems plausible that a claimant may feel affront at a neighbouring property being used as a meeting place for racists planning their campaigns and no affront at another neighbour hosting similar meetings of tort professors planning their conferences; judgements about the *reasons* for the meetings change their effects on neighbours.

Can the Question of What Uses Fall on Either Side of the Ordinary/Special Divide Be Answered Without Attention to the Advancement of Any Public Interests?

Lord Leggatt insisted that the benefit that the public might derive from a use of land was *irrelevant* to the question of liability: “The point of the law of private nuisance is to protect equality of rights between neighbouring occupiers to the use and enjoyment of their own land when those rights conflict. In deciding whether one party’s use has infringed the other’s rights, the public utility of the conflicting uses is not relevant.” He accepted, however, the Supreme Court’s previous decision, in *Lawrence v Fen Tigers (No. 1)*,⁵¹ that the public interest in a use of land continuing can properly influence the exercise of discretion involved in selection of an appropriate remedy:⁵² it may be in the public interest for a specific use of land to continue, but a payment of damages “in lieu of injunction” to compensate the claimant.⁵³

There are two problems, however, with the notion that “ordinariness” is *independent* of public benefit: first, notions of what is “common and ordinary” vary with the “character of the locality” and it is far from clear that the processes that have determined the character of each locality are independent of widespread support for the achievement of particular local or general goals;⁵⁴ and, secondly, notions of what is “common and ordinary” frequently reflect conventions and co-ordination rules, and a major reason for privileging those who comply with such rules is the public benefit in such channeling of activities. Both problems can be discussed further alongside the next question.

Can “Common and Ordinary” Uses Be Privileged Without Jeopardizing Commitment to “Equality”?

Suppose that a monastic order wishes to pursue a form of worship involving a celebration at sunrise each morning, preceded by a ringing of bells; consequently,

⁵¹ [2014] UKSC 13; [2014] AC 822.

⁵² *Fearn* (UKSC) at [7].

⁵³ Before the *Lawrence* case it was thought that it would only generally be appropriate for a judge to order the payment of such an amount in a case where the interference with the claimant’s rights could be addressed by a small sum (see, *Shelfer v City of London Electric Lighting* [1895] 1 Ch 287). The prospect of injunctions being refused, and payments ordered, in cases involving more substantial forms of interference raises the difficult question of what rights a defendant who has made such a payment (of damages in lieu) will thereby acquire, and how these rights will affect a subsequent purchaser of the claimant’s land for value *without notice*.

⁵⁴ For more detailed discussion, see: Sandy Steel, “The locality principle in private nuisance” (2017) 76 Cambridge LJ 145.

the monks like to go to sleep relatively early each evening. Unfortunately, their premises are located in East Oxford, England, a locality where many university students have their lodgings (though they are not a majority), and where many of these students “party” noisily until the early hours then sleep until noon.⁵⁵ The hypothetical is, transparently, set up to suggest that any privileging of the students’ nocturnal noise on the basis that it has become an established feature of the locality is likely to reflect widespread resignation influenced by the economic benefits that educational institutions bring to the city, in particular to the landlords and small businesses of East Oxford. In other words, what is tolerated, and becomes “ordinary”, is not independent of a community’s judgements about what advances the public interest. (Although East Oxford may enjoy the world’s highest concentration of Kantian professors per square mile, the community does not appear to have set its standards by attempting to ensure that all property owners have an equal opportunity to use their property to pursue their goals.) Further, should any student-tenants choose to make a claim against the pre-dawn bells that summons the monks to prayer, it seems likely that a court will privilege a convention relating to “ordinary waking hours”.⁵⁶ It is hard to see, however, how privileging “ordinary waking hours” reflects “equality” in a conflict between different models of life: if “ordinary waking hours” wins over “early rising for dawn worship”, then this would seem to be through weight of numbers (rather than “equality”⁵⁷).

The obvious observation is that basing private nuisance on a model of “ordinary use” that incorporates conventions – such as that people generally sleep at night, and make productive noises during the day – and also responds to a majority’s willingness to tolerate socially-beneficial disturbances – like those caused by the profitable students – cannot claim to be based on “equal respect” for the different life choices made by property owners. A court that genuinely wanted to attach equal importance

⁵⁵ The author lives in East Oxford, next to a house tenanted by university students.

⁵⁶ In *Rushmer v Polsue & Alferi Ltd* [1906] 1 Ch 234, the Court of Appeal granted an injunction to a dairyman to prohibit the firm next door from running a new printing machine *at night* despite the fact that he lived in “a district specially devoted to the printing and allied trades”. Similarly, in *Vanderpant v Mayfair Hotel Co* [1930] 1 Ch 138, Ch D, the noise being caused by “the departure and the arrival of the staff and the delivery of goods” at the defendant’s hotel was restrained by injunction “between the hour of 10 P.M. in the evening and the hour of 8 A.M. in the morning” (at 167). By contrast, in *Metropolitan Properties Ltd v Jones* [1939] 2 All ER 202, at 204, Goddard LJ held that a motor that started to run at 8 a.m. was a nuisance, since “after [that] hour an elderly gentleman is quite entitled to stay in bed, if he wants to, and have a restful time”.

⁵⁷ The suggestion that “weight of numbers wins” ensures “equality” because each owner’s preference carries equal weight relies on a *trivial* form of equality: one that would allow a minority group to be subjected to devastating restrictions on their ability to use their land to pursue their goals whenever the majority do not want to make the tiny sacrifices in using their land necessary to accommodate them.

to every owner's opportunity to use their land to pursue their life choices could not simply import conventions and majority preferences without checking whether they reflect *different* values (such as the many dominating the few, and the economically strong dominating the economically weak).⁵⁸

How, If at All, Should Article 8 of the European Convention on Human Rights Influence Development of the Tort of Private Nuisance?

Lord Leggatt's answer to the questions about the scope of the tort of private nuisance made it unnecessary for him to express an opinion: "There is no need or justification for invoking human rights law when the common law has already developed tried and tested principles which determine when liability arises for the type of legal wrong of which the claimants complain."⁵⁹ Given this, I will mention only one related point, stimulated by Lord Leggatt's uncompromising conceptualization of the relationship between private property and the public interest. The *claimants* in *Fearn* invoked their Convention Rights to support a perceived need to *extend* the tort of private nuisance, but, ironically, their success, and the prioritization of the "common and ordinary" within the tort, may mean that defendants are more likely to need to invoke Convention Rights in future. If, for example, the combination of "special use" and the social convention against dawn noise is sufficient to prohibit the monastic order's early bells, the order may have to turn to their "right to religious freedom" as an antidote. Ernest Weinrib has pointed out the significant function that "fundamental rights" might play in orienting a state's "private law towards the actualization of constitutional values": "under the dignity function, constitutional rights give rise to a set of principles about human dignity to which private law should give a maximally concordant effect."⁶⁰ To put the point more practically, rules offering no protection for uses of land that are not "common and ordinary", or imposing liability whenever the source of interference is a use of land that is "special and unusual", might offer insufficient respect for the human dignity of *some* people. For those who prefer concrete examples, perhaps, in a modern, heterogeneous society, the monks' bells should remain unmuffled, even if this requires the majority in East Oxford to

⁵⁸ I do not want to suggest that the notion of equality *conditional* on compliance with conventions is unusual as a model for organizing a community's affairs: clearly public rights, such as an equal right to drive on the highway, are conditioned by compliance with conventions (e.g. as to the side of the road that should be used when not passing others).

⁵⁹ *Fearn* (UKSC) at [113]. See also Lord Sales at [206]–[208].

⁶⁰ Weinrib, *Reciprocal Freedom* (2022), p 132.

wake up earlier than the conventional norm, and, similarly, the law of tort should class as a private nuisance the performing of “religiously offensive” acts in proximity to a place of worship, even if that form of worship is far from being “common and ordinary”.

In Applying the Tort of Private Nuisance, How, If at All, Is It Relevant That the Design of the Claimant’s Premises Has Made the Interference Possible, or Amplified It, or That the Claimant Could Have Used Some Physical Means (Such as Blinds) to Reduce the Interference?

This question divided the Court. Lord Sales, whose opinion did not secure majority support, suggested that in setting the “objective reasonableness” standard a judge should take into account that the way in which a claimant’s buildings were designed might have amplified any interference, and should also consider how far “good neighbourliness” might be advanced though a claimant taking steps to minimize interference (e.g. by using a blind) rather than through a defendant altering its activities. By contrast, Lord Leggatt insisted that: “It is not a defence that the defendant’s activity would not have caused a nuisance if the claimant’s building had been differently constructed or designed.”⁶¹ Thus Lord Leggatt rejected the relevance of the trial judge’s finding that the viewing gallery would not have interfered with the claimants’ enjoyment of land to an intolerable extent if the residential building had been designed with a more usual ratio of wall to window, and if the claimants had not chosen to convert areas intended as “glazed balconies” into general living space.⁶²

Similarly, Lord Sales stated: “In striking the appropriate balance between the competing property interests, I can see no good reason why one should leave out of

⁶¹ *Fearn* (UKSC) at [69]. He treated this as entailed by “the basic right of a person at common law ... to occupy and build on their land as they choose.”

⁶² Lord Sales, at [223] quoted the trial judge’s reasoning: “The developers in building the flats, and the claimants as successors in title who chose to buy the flats, have created or submitted themselves to a sensitivity to privacy which is greater than would [be] the case of a less glassed design. It would be wrong to allow this self-induced incentive to gaze, and to infringe privacy, and self-induced exposure to the outside world, to create a liability in nuisance. Other architectural designs would have reduced the invasion of privacy to levels which should be tolerated; that is the appropriate measure in my view.”

account reasonable self-help measures which might be available to the person complaining about visual intrusion.”⁶³ Whilst, for Lord Leggatt, it was only acceptable to expect a claimant who was disturbed by an ordinary use of land, and who would consequently have no claim, to resort to self-help: “What is not acceptable is to place the burden on the claimant to mitigate the impact of a special use of the defendant’s property. To do so is inconsistent with the principle of reciprocity that underpins the law of nuisance.”⁶⁴

In both scenarios we can observe the logical consequences of the tension between Lord Leggatt’s general approach, reliably protecting “common and ordinary” uses against “special and unusual” ones, and Lord Sales’ general approach, of striving for a “reasonable compromise”. In a situation where a defendant’s unusual noise-making activity was disturbing the claimant’s “ordinary” domestic living, and where the cheapest route to allowing *both* property owners to continue to enjoy their land would involve the claimant installing sound-proofing and double-glazing, neither the approach of Lord Leggatt nor that of Lord Sales would preclude that position being reached: but in Lord Leggatt’s legal system the defendant would be liable to the claimant, and the position would only be reached through negotiation of a settlement (such as one where the defendant paid for the necessary work, and perhaps also a fee for the inconvenience) or the court being persuaded that an injunction should be refused and a sum of damages (perhaps equal to the cost of the work, and a fee for the inconvenience) awarded in lieu; whilst in Lord Sales’ legal system the defendant *might* avoid liability (or, at least, reduce it) by attributing responsibility to the poor design of the claimant’s building or the claimant’s failure to take self-help steps that might reduce the need for a more costly solution.

The word “burden” – in Lord Leggatt’s insistence that it “is not acceptable is to place the *burden* on the claimant to mitigate the impact of a special use of the defendant’s property” – may be worth attention. It was noted above that authority suggests a defendant will avoid liability for any substantial effects on her neighbour of “common and ordinary” uses of land only when these have been “conveniently done”,⁶⁵ and what this appears to mean is that a defendant should not require a claimant to put up with, for example, the intrusive effects of noise from a washing machine, if these could *easily* be ameliorated by, for example, moving the machine against a different, thicker, party wall. Clearly, this principle invites the question of what sort of “burden” a defendant should be required to put up with to benefit her neighbour, even when the disturbance is associated with a “common and ordinary” use; at what point she can object that the necessary change to the location of the

⁶³ *Fearn* (UKSC) at [214].

⁶⁴ *Fearn* (UKSC) at [84].

⁶⁵ See text, above, to fn. 38, and *Fearn* (UKSC) at [167].

washing machine involves more than a “convenient” adjustment? Once that point has been identified, it might seem attractive to promulgate a symmetrical principle: a claimant should forfeit the right to complain about an interference with her “common and ordinary” use if she could have avoided that interference through a “convenient” adjustment: if vibrations from the defendant’s washing machine are causing the needle on the claimant’s record-player to “jump”, and this could not be prevented by a “convenient” move of the washing machine, but could be avoided by a convenient move of the record player, it might seem odd to insist that only the defendant should ever be obliged to move their equipment. From here, the follow-on question is whether a defendant using their land in a “special and unusual” way should also be able to avoid liability for interferences that could be prevented by such “convenient” adjustments by the claimant? Arguably, a positive answer could be given here *without* challenging Lord Leggatt’s basic premise that “special and unusual” users should not be able to demand “special and unusual” sacrifices (just routine “convenient” ones) from their neighbours. This said, such a minor gloss on Lord Leggatt’s reasoning would not have been sufficient to lead to a different outcome in *Fearn*; reducing the size of the window apertures to the extent necessary to eliminate any objectionable effect from the mass staring would clearly have required far more by way of sacrifice than moving a record player or a washing machine.⁶⁶

An Addition to the Canon?

No doubt there are now – even in England and Wales, let alone the multiple jurisdictions of the United States – far too many cases which have decided significant points of law for any law teacher to present them all to their students. What factors, then, should influence judgements as to whether particular cases are “canonical” and should be designated “essential reading”. Four benchmarks, for a law teacher rather than a professional, might be: are the case’s facts memorable and easily summarized, how far will it be a foundation for further development in the law, does it reveal any conflict between the judges as to the best path for the law, and is the result (or, at least, the route to the result) likely to remain persistently contentious. Where a case gets a positive rating on each of these points then it is likely to be useful, to both teacher and their students, in developing knowledge about legal rules, how

⁶⁶ The flats in *Fearn* had windows that prevented people staring into the sleeping and bathing areas; if this had not been the case, and the claim had concerned the extent to which visitors to the gallery stared into, and took photographs of, these spaces, the question whether a claimant can claim without making “convenient” adjustments might have been raised more directly.

they can be generated and how they can be used. Using that scorecard, rather than one which assesses whether it provides an attractive re-statement of private nuisance law, I recommend *Fearn* for induction into the canon.