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VISUAL INTRUSION, PUBLIC INTERESTS AND PRIVATE NUISANCE: *FEARN V TATE*

QUESTIONS about the proper place of tort are not new, and technological, social and regulatory change frequently challenge private nuisance. In *Fearn v Board of Trustees of Tate Gallery* [2023] UKSC 4, the Supreme Court goes out of its way to emphasise the simplicity with which the ancient tort of private nuisance can be applied to what it describes as a "straightforward case of nuisance", in which "developments in technology" play a significant role (at [7], [103]). For all its purported simplicity, however, it took nearly 14 months to hand down a split judgment running to 283 paragraphs. The High Court ([2019] EWHC 246 (Ch)) and Court of Appeal ([2020] Ch 621) moreover, reached the opposite result from the Supreme Court, each for different reasons.

In 2016, the Tate Modern gallery opened a public viewing platform on the top floor of its newly developed Blavatnik building. As well as views of London, visitors could and did enjoy the view into the claimants' flats: "Some look, some peer, some photograph, some wave. Occasionally binoculars are used. Many photographs showing the interiors of the flats have been posted on social media" (at [7]). The High Court held that there was no nuisance: the defendant's use of their property (including time restrictions and other "not quite wholly useless" mitigating measures (at [221])) was reasonable in the locality, and the claimants' floor to ceiling glass walls and absence of counter-measures (such as net curtains) increased their sensitivity. The Court of Appeal held that overlooking could never constitute a private nuisance.

The majority (Lord Leggatt, with whom Lord Reed and Lord Lloyd-Jones agree) confirms that "visual intrusion" is indeed capable of constituting a private nuisance, and that this particular visual intrusion did so. In the absence of argument on the subject, remedies are remitted to the High Court (at [132]). The claimants had sought an injunction, and the viewing platform is "temporarily closed until further notice" (https://www.tate.org.uk/visit/tate-modern/viewing-level). The Supreme Court (citing *Lawrence v Fen Tigers* [2014] A.C. 822) is clear however that any public interest in the defendant's activities may be relevant in assessing remedies, raising the possibility an award of damages in lieu of an injunction. The minority (Lord Sales, with whom Lord Kitchin agrees) concurs that visual intrusion is capable of constituting a nuisance, and that in this case, it reached a sufficient level to do so. They conclude however, relying on a different interpretation of the first instance

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decision from the majority, that striking a reasonable balance between the parties requires the claimants to take "self-help measures" (at [273]).

The majority provides a substantial review of the tort of private nuisance, starting with Newark ("The Boundaries of Nuisance" (1949) 65 L.Q.R. 480) and *Hunter v Canary Wharf* [1997] A.C. 655: "the harm from which the law protects a claimant is diminution in the utility and amenity value of the claimant's land, and not personal discomfort to the persons who are occupying it" (at [11]). An emanation from the defendant's land is not, the court tells us, a necessary element of private nuisance. The court refers to a number of authorities, but more importantly perhaps, holds that "there is no conceptual or a priori limit to what can constitute a nuisance … the categories of nuisance are not closed" (at [12]). It is not intuitive to characterise loss of privacy as harm to land rather than people, but the existence of an invasion of privacy does not preclude the simultaneous existence of an interference with property rights. Whilst there may be broader issues around the prioritisation of certain aspects of a situation for the purposes of a tort claim – the private, the individual, property – this is similar to Newark's coughing and spluttering householders.

The Supreme Court tells us that reasonableness in private nuisance is not a test. In an approach reminiscent of Carnwath L.J.'s description in *Barr v Biffa* [2013] Q.B. 455 of reasonable user as "at most a different way of describing old principles, not an excuse for re-inventing them" (cited at [33]), reasonableness is shorthand for:

> principles, settled since the nineteenth century, which run through the cases and govern whether interference with the use and enjoyment of land is "unlawful" or "undue" or (if the term is to be used) "unreasonable". These principles are not formulae or mechanical rules. They involve judgment in their application. But they provide clear standards rooted in values of reciprocity and equal justice (at [20]).

The court takes us through many of these familiar principles, of which I will focus on two. First, the law's preference for an ordinary use of land over the unusual is allied with the importance of reciprocity (at [35]), "give and take, live and let live", *Bamford v Turnley* (1862) 122 E.R. 27 (at [27]). The right to build is said to be fundamental to the ordinary use of land (at [37]), and so (confirming *Hunter*) the simple presence of a building cannot be a nuisance (at [35]), meaning that, in agreement with the Court of Appeal, "mere" overlooking cannot give rise to liability in nuisance (at [90]). However, by contrast with the Court of Appeal, for the Supreme Court this is not a case of mere overlooking, but a case about the use of the defendant's top floor as a viewing platform. Further, the "freedom to build" apparently cuts both ways. Whilst confirming the "continued validity" of the principle of sensitive use (at [26]), the court holds that the design of a claimant's building (be that paper-thin walls as in *Southwark LBC v*

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Tanner [2001] A.C. 1, or glass walls) does not protect a defendant who is asking for more than reciprocal forbearance from its neighbour (at [72]); for the dissent by contrast, walls of glass take the claimants beyond a common and ordinary use of land.

Second, Lord Leggatt confirms the "general rule" that coming to a nuisance is not a defence. *Lawrence* had suggested a different approach if changed *use* (rather than ownership or occupation) of neighbouring property renders the defendant's previously benign activity problematic. In this case, the defendant's activity would be part of the locality against which nuisance is assessed, and hence at least somewhat protected. The extent of the change to the law in precisely the most interesting and consequential cases was not acknowledged in *Lawrence*. In *Fearn*, the Supreme Court emphasises that this discussion was obiter, and declines to go further (at [46]); the clear discussion of coming to the nuisance perhaps suggests a lack of sympathy. We might also note that whilst locality did a lot of work in assessing liability in *Lawrence*, it is discussed only briefly in *Fearn.*

Applying their description of the law to the facts as found at first instance ("constant observation from the Tate's viewing gallery for much of the day, every day of the week", spectators numbering "in the hundreds of thousands each year" and frequent photography and filming, sometimes posted on social media), the majority concludes that it is "beyond doubt" that the defendant's activities cause "a substantial interference with the ordinary use and enjoyment of the claimants" properties" (at [48]).

Lord Leggatt identifies a "common explanation" for the errors at first instance and on appeal: the influence of "what they perceived to be the public interest" in the defendant's use of land (at [114]), pitting "the private rights of a few wealthy property owners" against the accessibility to "the general public" of views of London, provided by the public-spirited figure of "a major national museum" (at [8]). The Supreme Court insists, following *Lawrence*, that the public interest is not relevant to liability, but only to remedy. The fact that the courts below did not clearly articulate their assessment of the public interest, however, might be a reminder of how hard it is to remove public interest considerations from private nuisance. Clearly articulating courts' assessments of the public interest would allow for scrutiny and disagreement, and this is enabled by the Supreme Court in respect of remedies at least. And as always, the public interest in *Fearn* is fragmented – for example, others might raise the contribution of the claimants' "striking" building (at [79] (Lord Leggatt)) to a public city-scape of "striking buildings of architectural distinction" (at [272] (Lord Sales)). The minority assert the importance of a common law approach that respects "innovation" in urban areas (presumably in the public interest) (at [231]), but do not

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consider the possibility that the claimant's property might also be considered innovative, in this and in other cases.

The discomfort with articulating public and private interests is not unusual, and is reflected in the division between the Supreme Court and the Court of Appeal on the role of the common law courts. The Court of Appeal saw the "extension" of protection from interference with property as being a matter for regulators, specifically planning authorities; and the "extension" of protection of rights of privacy as being for the legislature. The Supreme Court by contrast asserts the continued role of the common law, albeit holding that this case is not an extension to private nuisance, so leaving open the proposition from *Hunter*. Whilst automatic deference to the regulator (who in this case did not address visual intrusion) would be problematic, we may doubt that perfectly clean separations between public and private law are possible. Together with *Lawrence*, the Supreme Court's preference for parallel streams is however clear.

Finally, earlier cases on visual intrusion can sound quaint, with their constructions, mirrors and aeroplanes. The Supreme Court emphasises the role of new technologies, including observing that "the intensity of the interference in the present case is made possible by the fact that a large proportion of the population now carry a camera incorporated in their smartphone. And the sharing of images on social media adds a further dimension to the interference" (at [103]).

The other side of the nuisance equation, the claimants' glass towers, are also a feature of our cities and our case law only because of technological advances. For the common law to ignore the qualitative change in relationships wrought by technological transformation would indeed require the ground to be ceded to regulation. New situations are embraced in this case through a steadfastly conventional application of familiar, flexible, perhaps slippery, concepts.

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