

MODERN NUISANCE LAW FROM A HISTORICAL PERSPECTIVE

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## **ABSTRACT**

This thesis discusses issues affecting contemporary nuisance law from an historical standpoint. It is recognised that there is a considerable volume of literature relating to the nineteenth century antecedents of the law today. Yet nuisance is a most ancient tort, dating back almost a thousand years, and likewise the environmental problems it addresses date back to antiquity. Thus there is scope for a deeper historical analysis of this area of the common law which looks beyond industrialisation and the revolutionary nuisances of that period to the developments in the law applicable to environmental nuisances of feudal and post-feudal agrarian times. That is the aim of this thesis. It examines the lessons scholars and practitioners can learn by revisiting the origins of the law, and by critically reflecting on key evolutionary milestones which have shaped the law up to the present day.

Four specific areas of current debate regarding nuisance doctrine are the focus of attention. Standing is one, concerning who has the right to sue in private nuisance. What types of injury are remediable with private nuisance is another, with particular reference to the question of the actionability of personal injury. The relationship between private nuisance and negligence is another, with reference to the issue of 'reasonableness' within private nuisance. The remedy of an injunction is the fourth area. Throughout the discussion of each of these issues the discussion follows a common pattern, beginning with identification of a leading late twentieth or early twenty-first century case which is the subject of debate and exploring the law at issue from an historical perspective, including the 'original position' in medieval case law.

Nuisance law is currently encountering difficulties which not only prevent it from having a stable doctrinal identity in relation to other torts (and in relation to 'its own' history), but which also cast doubt on its scope for it continuing to provide worthwhile environmental

protection in a modern age characterised by the emergence and proliferation of environmental regulatory bodies. It is *not* argued that the solution to nuisance law's problems lies in returning to an original position and re-applying it to changing political realities. Nonetheless, it *is* argued that there is a 'simple form' of the law to discover from within a millennia of case law, and it is in many – but not all – respects different from the law as it now stands (or is thought to stand). Many judges and scholars have misunderstood and even to some extent misused history and this has contributed to the difficulties the law is faced with today.

This research advocates that when the tort is considered from a historical perspective – where we can find its simplest form - there is scope for its traditional 'green credentials' to again be realised.

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# Modern Common Law Nuisance from a Historical Perspective

## Introduction

### 1. Thesis Hypothesis

This research examines modern private nuisance law in England and Wales from a historical perspective with the main broad research objective to contribute to a deeper understanding of *common law* private nuisance and its potential to protect the natural environment. The concern throughout is with how the letter of the law has evolved, and how the evolutionary steps the law has taken over the epochs have impacted on the scope for understanding private nuisance's so called 'green' credentials in a modern setting. Nuisance law has evolved from its origins in medieval times, as indeed have environmental challenges arising from societal developments; some of which have transcended the ages. During common law nuisance's evolution it has consistently remedied environmental harms and, as such, is a precursor to the emergence of what is termed today as 'environmental law'.<sup>1</sup> Whilst it is logical that nuisance continues to play a part in protecting individual environmental rights (and public health), as it is fixed in its ancestry, private nuisance has become decidedly underutilised, in part, because modern developments in the law have challenged its very existence.<sup>2</sup> The purpose of the thesis is to explore the relationship between changes in law and engagement of the law with the task of providing individuals with a remedy for environment-type harm.

Specifically, the hypothesis that is explored is that modern developments in nuisance law have broadly weakened the capacity of the law to adequately remedy pollution of the natural environment, as it affects individuals in occupation of land. This hypothesis addresses the

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<sup>1</sup> J Steele, *Tort Law: Text, Cases and Materials* (OUP 2007), 670.

<sup>2</sup> C Gearty, 'The Place of Private Nuisance in a Modern Law of Torts' [1989] 48(2) CLJ 214, 216.



strands of modern nuisance law scholarship (as identified throughout the thesis), which are critical of recent developments in the common law in this field on the basis that they weaken the tort's contribution to environmental protection. Modern commentary in this field rarely engages in a holistic historical overview despite the ancient origins of the law. What is distinctive about the hypothesis of this thesis is that it takes a deeper historical perspective by looking beyond the nineteenth century period where much of the historical attention has been centred. Whilst historical investigations of nuisance law are by no means a novel idea, for historical claims pervade adjudication and scholarly commentary in this field, they rarely venture beyond the nineteenth century, and thus many jurists have based their observations without the benefit of its ancestry. Accordingly formative junctures across the epochs are overlooked arguably generating confusion about its purpose and scope in a modern setting. We go back to the medieval origins of the law, as well as the subsequent milestones in the law's development leading up to, including, and going beyond the Industrial Revolution. By situating the concerns of some modern commentators regarding recent development of the law into a wider historical context I offer a fresh – albeit historical - perspective on such matters.

The idea of deeply examining nuisance law in the vast setting of environmental problems is an ambitious one. That is why the focus is on a selection of the current controversies surrounding today's doctrine in an environmental setting. The selected topics comprise: standing to sue in nuisance (Chapter 2); which injuries are remediable in nuisance (Chapter 3); the nature of liability in nuisance (chapter 4); and injunctive relief (Chapter 5). The justification for this focus is that it is self-evident that who can sue, in respect of what injuries, on what basis in terms of liability, and with what remedy, provide the core architecture of private nuisance.

It will be immediately apparent that these are not the only areas of controversy in relation to nuisance law's 'environmental credentials', but it is necessary to be selective in order to gain a meaningful appreciation of the evolution of the law in these important doctrinal spheres in the limited space available. Thus, little attention is given to, amongst others, the relationship between administrative controls and private nuisance (for reasons explained later in this section of the chapter) and the potential for the European Convention on Human Rights, through Article 8 and other provisions, to better orient the law around environmental protection. There are, of course, a number of other aspects of private nuisance that a fully exhaustive study would need to cover, for instance the role of malice has deep historical implications for the tort but are outside of the remit of both the thesis hypothesis and thesis objectives.

Furthermore, in focusing on private nuisance, it should not be taken as being suggested that other torts play no part in the remedying of harm relating to the environment as it affects private individuals. Public nuisance is of importance in an environmental setting, as illustrated for example by the *Corby Group Litigation* and, most recently, *Bodo v Shell Nigeria*.<sup>3</sup> Negligence clearly has a part to play, as do breaches of statutory duty sounding in tort. Trespass is also a facet of the common law of relevance to the environment, and even specialist torts such as occupier's liability cannot be dismissed as entirely marginal to a comprehensive understanding of modern tort in an environmental setting. But nevertheless the focus in this thesis is on private nuisance, as a reflection of the many scholars who see this as an important – and perhaps even the most important – tort in the context of protecting the natural environment.

## **2. Research Objectives**

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<sup>3</sup> *Corby Litigation Claimants v Corby Borough Council* [2008] EWCA Civ 463; *Bodo Community v Shell Petroleum Development Co of Nigeria Ltd* [2014] EWHC 1973 (TCC); [2014] EWHC 2170 (TCC).

It follows from the above statement of the hypothesis that the primary research objective is to evaluate the contention in some of the leading literature that nuisance law has developed along regressive lines in recent decades; in other words, the contention is that despite attempts to develop the law in modern decisions, that nuisance has missed opportunities to continue on a prior path of broadly adequate protection of interests in land affected by environmental harm. If this is the case, recent attempts to move the law forward have in reality taken a step back in relation to the level of environmental control nuisance has bestowed for centuries. When the four areas of nuisance law are examined individually from a historical perspective, is it true that early law is demonstrated to be at least as robust as that of the present on these points? Are there differences between the areas under scrutiny such that generalisation is difficult?

A key secondary research objective is to reflect on how history can be better used to assess present day law. This has many elements. One is to elucidate and defend the idea of elucidating, a formative nuisance doctrine – what I term the ‘simple form’ of nuisance - with which to compare, and against which to evaluate, today’s doctrine in the selected core areas. In identifying the simple form the aim is to provide a standard against which to identify shifts in the law over history and, crucially, to be able to evaluate them. In searching for this simple form, whilst attention will (of course) be given to the history of the law, it will not be assumed that it is at the very beginning of the law’s evolution that the ‘simple form’ is to be found. It may well be the case that the simple form - as I understand it - was present from the outset (as indeed I argue it to be), but the thesis is open minded about when this simple form emerged. Certainly, simple does not equate to ‘original’.

A further aspect of this objective is the idea that nuisance law has a transparent essence; that it is essentially one thing (and not the other) which can be identified as its ‘true essence’. The simple form argument is part of this essence, but the essential aspect is the inherently

evolutionary character of the law. The law has ‘witnessed’ major societal changes, broadly explained below, to which the law has to some extent responded, whilst maintaining its simple form. In other words, in positing the analytical and normative ‘device’ of a simple form, the thesis permits – indeed recognises – that the law evolves according to societal needs. In identifying the simple form and its essence a perception of intrinsic simplicity comes to the fore in the realm of nuisance law, despite modern perceptions of a tort ‘immersed in undefined uncertainty’.<sup>4</sup> This thesis takes the proposition that that simplicity has been visibly lost within our period of living memory owing to misuses of nuisance’s rich history that first structured the law. In consideration that it has been asserted that the common law – particularly nuisance - is at its best when it is simple it is pertinent to elucidate whether simplicity is possible drawing on the abundance of historical materials.<sup>5</sup>

Putting these ideas of simple form and evolutionary essence (true essence) together, the objective is further to identify a specific historical juncture – a point zero as it were - where the simple form can be said to have matured in a coherent early modern form of law. There is a number of irreconcilable differences between the medieval ‘forms of actions’ and the actions of the early modern period, not least because they were constrained by aspects of the feudal legal framework. The medieval writs became obsolete when they were fully supplanted by actions on the case following the decision in *Cantrell v Church* in 1601.<sup>6</sup> This is the juncture in history that is posited to represent the ‘point zero’ for modern nuisance law. In essence, the usurpation of the older forms of action by actions on the case embodies the culmination of judicial activity – that commenced in the fourteenth-century – which reacted to changing societal mores as feudalism declined.

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<sup>4</sup> As per Erle CJ’s judgment in *Brand v Hammersmith Railway* (1867) LR 2 QB 223, 247. Quoted by Professor FH Newark in ‘The Boundaries of Nuisance’ (1949) 65 LQR 480, 480.

<sup>5</sup> *Barr and others v Biffa Waste Services Ltd* [2009] EWHC 1033 [799] (Carnwath LJ).

<sup>6</sup> (1601) B & M 588; Cro Eliz 845; 74 ER 1007.

In identifying that the simple form and true essence of nuisance were preserved by judges (after *Cantrell*) - when all others have faded into obscurity - the final research objective becomes apparent: to demonstrate that a proper use of historical sources can be positively helpful in developing the law of nuisance in the future. By identifying the elements that are constant throughout we have a point of reference from which to determine the nature of nuisance law and – perhaps – to address the current maligned form of the tort in future judgments. Implicit in the notion of the better use of history in informing modern law is the risk that history will nevertheless be misused. Part of the objective in justifying my historical analysis is to delineate acceptable and unacceptable uses of history. It is with some reluctance and respect for scholarship that the possibility that certain uses of nuisance law history in recent times involve a misuse of history is entertained, but it is not possible to ‘pull punches’. An inescapable part of my concern with identifying an appropriately specific way of using historical analysis is that there are occasions when history has not been used appropriately, with damaging implications that I examine.

### **3. Context of this research**

The main context of this research is the current uncertainty about the place of common law solutions to environmental problems in a modern age when Parliament has enacted a body of regulatory law for the purpose of environmental protection. It can be suggested that there is an inclination within the judiciary to develop the tort of private nuisance with reference to the need to avoid the risk of ‘undesirable’ inconsistencies with legislative measures to ‘effect environmental protection’.<sup>7</sup> But on the other hand, present-day legal mechanisms are quite widely perceived to have not only consistently failed to solve enduring environmental

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<sup>7</sup> *Cambridge Water v Eastern Counties Leather* [1994] 2 AC 264(Lord Goff) [305].

problems, they have been deemed, by contrast, to escalate matters.<sup>8</sup> In the meantime people have become more informed and are progressively mindful of the effects of unwelcome environmentally harmful activities. After recognising the failings of legislation many instinctively turn to the courts for a remedy to protect themselves, their property and their environment. When viewed from that perspective private nuisance is the natural choice of affected citizens, but scholarly and judicial opinion here is quite polarised. Whereas Lord Goff believes a ‘well-informed and carefully structured legislation’ achieves adequate environmental protection (thus the development of common law principles is neither desirable nor needed), at the other end of the spectrum, Jenny Steele, Donald McGillivray and John Wightman, and Maria Lee, amongst others, see a role for private nuisance as ‘unofficial’ environmental law capable and indeed necessary for members of the public who cannot get justice through regulatory law; the type Lord Goff expressly reveres for one reason or another.<sup>9</sup>

This thesis is concerned primarily with issues relating to the environment that the common law - through nuisance - has protected over the course of nearly a thousand years. A pragmatic philosophical approach is taken which regards nuisance law chiefly as an instrument or tool for environmental protection. Whilst this means there is an instrumentalist approach to the research that argues private nuisance is, in essence, an environmental tort, it does not work critically within the framework of the traditional economic efficiency model adopted by some to analyse the practical purpose of the tort, rather it examines the

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<sup>8</sup> P Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of our Planet* (Shepherd-Walwyn 2010) 131.

<sup>9</sup> *Cambridge* (7) [305]. See generally J Steele, ‘Private law and the environment: nuisance in context’ (1995) 15(2) *Legal Studies* 236, M Lee, ‘What is Private Nuisance?’ (2003) *LQR* 298; and D McGillivray and J Wightman, ‘Private Rights, Public Interests and the Environment’ in T Hayward and J O’Neill ed. *Justice, Property and the Environment: Social and Legal Perspectives* (Ashgate 1997).

evolutionary path of nuisance law to reflect on its proven and potential environmental efficacy.

Pigou, McLaren, Brenner, Calabresi and Melamed, and Ogus and Richardson all argue to a degree that government regulation often restricts economic growth. When it does they argue that state regulation acts as the antithesis to the growth economy. Accordingly private nuisance can represent an attractive alternative to state regulation, which perhaps explains why the tort has ‘enjoyed’ a significant amount of attention from the economist. Despite economists sometimes preferring common law regulation over government control, this research has a clear ambit to move away from such analysis and looks beyond its role as a market-oriented alternative to regulation. The simple form is not an economic form; it is more about ethical or moral values concerning good neighbourly relations, or in other words, a compromise between neighbours famously encapsulated by Baron Bramwell in *Bamford v Turnley*.<sup>10</sup>

That ethical character is given the fullest articulation in relation to private nuisance in the work of James Penner. According to Penner, the morality of the law here is to do with what it means to be a ‘good neighbour’.<sup>11</sup> A good neighbour recognizes reciprocity among proprietors of a neighbourhood. The law is about remedying a situation in which one proprietor demands too much of another (giving too little in return). A ‘demanding

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<sup>10</sup> (1862) 3 B & S 66. See generally AC Pigou, *The Economics of Welfare* (Macmillan 1932); R Coase, ‘The Problem of Social Cost’, 3 (1960) JLE 1-44; RA Posner *Economic Analysis of Law* (Little, Brown 1986); JF Brenner, ‘Nuisance Law and the Industrial Revolution’, (1974) 3 LS 403; G Calabresi and AD Melamed, ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ (1972) 85(6) Harv Law Rev 1089; and AI Ogus and GM Richardson, ‘Economics and the Environment: A Study in Private Nuisance’ (1977) 36 CLJ 284, 297.

<sup>11</sup> J Penner, ‘Nuisance, Neighbourliness and Environmental Protection’, in Lowry and Edmunds (ed), *Environmental Protection and the Common Law* (2000). For the clearest judicial endorsement of this, see Lord Millett: ‘The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him’ (in *Southwark LBC v Mills* [2001] AC 1, 20).

neighbour' may argue that they have the public interest on their side, for they were involved in useful enterprises which they operated with reasonable care and which can be argued as important ingredients of the economy. But the courts base (pace Penner) their decision on the morality of relations between the neighbours independent of the wider public interest, whilst what was held to matter most as regards reasonableness was the extent of the injury complained of (not the conduct underpinning it).<sup>12</sup>

A further context of this research is the now extensive literature on the common law process and the creative role played by the judiciary.<sup>13</sup> Whilst it is not possible to make the common law process a focus of this study in the space available, it is an important part of the context of this research that judges are increasingly seen as occupying an active and creative part in the law making process, rather than passive functionaries in a more mechanistic process of applying precedent in the past. Some legal realists have in the past advanced the premise that judges have simply 'found' the necessary law to decide a particular case.<sup>14</sup> Other legal realists have gone as far as to propose that the process of judicial reasoning can be influenced by what the judge had for breakfast.<sup>15</sup> Whilst such notions may have gone too far, Justice Kirby recognised that judges are required to:

Face up to the fact that they make choices and therefore must be alert to the need for differentiation between the considerations which may permissibly affect the choice and those which are irrelevant, prejudiced and otherwise inadmissible.<sup>16</sup>

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<sup>12</sup> *ibid* 40 ('no one should suffer unreasonable interference in his use and possession of land, however meritorious or in keeping with the goals of public policy the defendant's activities might otherwise be.')

<sup>13</sup> M Kirby, 'Judging: Reflections on the Moment of Decision' (Charles Stuart University 1998), 10.

<sup>14</sup> W Rehnquist, 'Remarks on the Process of Judging' (1992) 49 Wash. & Lee L. Rev. 263, 263-4

<sup>15</sup> W Rehnquist, *ibid*. For discussions on mood and its influence on decision-making see JP Forgas, 'Sad and Guilty? Affecting Influences on the Explanation of Conflict in Close Relationships' (1994) 66 *Journal of Personality and Social Psychology* 56-68, 56; JP Forgas, 'On Being Happy and Mistaken: Mood Effects on the Fundamental Attribution Error' (1998) 75(2) *Journal of Personality and Social Psychology* 318-331.

<sup>16</sup> M Kirby (13) 11.



Some of the judicial ‘choices’ involve references to history. In a general setting, Learned Hand comments judges must uphold their authority by shrouding themselves ‘in the majesty of an overshadowing past’<sup>17</sup> but at the same time they must take heed of dominant trends of the time. The thesis engages with the risk that the past will be distorted by the need to make decisions that fit well with the present, for example by changing the past so that it is able to confer authority on the rules thought desirable today.

What stands out in twentieth-century cases (as elaborated on in relevant chapters of the thesis) is that judges have had to contend with the rise of negligence – a judicial construct in the same way that nuisance law is, except that negligence has less of a deep rooted history. Judges appear to be concerned with ensuring that nuisance law and negligence retain a sense of their ‘original’ autonomy, yet work coherently together. Whilst this is by no means an impossible undertaking, the risk in deciding the autonomous areas relative to each other is that the ideas underpinning one ‘infect’ the other, and that the conceptual independence of both torts is compromised. This is central to my concern with a simple form of nuisance, which can be ‘defended’ (I hope to show) against abrogation as a result of the hegemony of the newer tort of negligence.

During the process of judicial reasoning and decision-making judges need to consider relevant policy factors, what sources may be used to derive those factors and whether they should be acknowledged in the judgment. Often – as is the case in the decisions discussed within this thesis (it is argued) – the fact that ‘policy’ has influenced the reasoning and decision-making process is, in the main, extant from official judgments. We can only infer

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<sup>17</sup> J Hand, ‘Mr Justice Cardozo’ in *The Spirit of Liberty* (Vintage Books 1959) 98 (at 99).

that the decision was one of policy and we are thus none the wiser regarding what sources have influenced that decision.

It is suggested that the decisions taken by the judges in the twentieth-century were a response to dealing with uncertainty and taking steps towards modernising nuisance law in line with modern developments in the law of torts and societal changes. This important role that judges undertake can nonetheless be unreliable if a requisite knowledge of the past is lacking. This research considers the most prolific example of this is the adoption of negligence principles. In adopting negligence judges were creating the law by taking the choice to advance the law in respect of what they believed the law is.<sup>18</sup> But comparatively fledgling negligence principles are conceptually independent from nuisance doctrines which have developed over more than eight centuries. A pertinent line of investigation ensues whether borrowing conceptually independent principles is a matter of developing the law or in actuality changing the law. For example, traditionally, nuisance law has dealt with the outcomes of activities rather than conduct; thus adopting doctrines concerning conduct (of the reasonable man) is a cross-infection of principles that has notably proven problematic, and has received justifiable (I argue) criticism.

Given the concern with elucidating a simple, autonomous tort of private nuisance, the decision to exclude consideration of the interface between nuisance and regulation requires defending. Surely it is part of the ‘dynamics of legal change’ that adjacent common law areas have the potential to be affected not only by ‘one another’ – to co-evolve - but by ‘external’ ones, notably regulatory laws. Maria Lee above others has argued that liability in private nuisance should take into account relevant decisions by government regulators, albeit not on

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<sup>18</sup> M Kirby (13) 2.

some generalised basis of regulatory pre-emption of private rights familiar in the US, but on a case by case basis.<sup>19</sup> By contrast, Ben Pontin has argued that regulatory decisions should be treated as entirely separate from nuisance liability, except where Parliament dictates otherwise.<sup>20</sup>

In terms of case law, the court in *Gillingham Borough Council v Medway (Chatham) Dock Ltd*<sup>21</sup> held that administrative consent – or at least planning consent – is capable of altering the ‘character of the neighbourhood’ within which interference with amenity is assessed. Throughout the writing of the thesis this decision had been referred to with approval by the appellate courts, and indeed it enjoyed some support within the academic commentary.

My original justification for excluding close attention to this topic was twofold. On the one hand, the conceptual justification that it would be difficult to learn much of relevance from nuisance law’s early history, as is the thrust of the thesis to do. That is because town planning and environmental protection legislation is a modern phenomenon; there is no medieval *Gillingham*. On the other hand, a pragmatic justification is based on this being too big an issue to be easily dealt with in the space of a chapter, within the limits of a doctoral thesis. The relationship with negligence is one thing, but it is a further, major step ‘outside’ common law to address regulatory law.

Since writing up, the Supreme Court in *Coventry v Lawrence*<sup>22</sup> has ruled that *Gillingham* was wrongly decided and that nuisance law and regulatory law are largely autonomous and one

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<sup>19</sup> 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 2013) 383.

<sup>20</sup> B Pontin, *Nuisance Law and Environmental Protection: A Study of Injunctions in Practice* (Lawtext Publications 2013).

<sup>21</sup> [1993] QB 343.

<sup>22</sup> *Coventry v Lawrence* [2014] UKSC 13.

does not affect the other. It is undeniable that it would have been interesting to have explored the development of the ruling and discussed the autonomy thesis not only in relation to negligence but ‘outside’ regulation, but at least *Coventry* has gone some way to vindicating the inside/outside dichotomy, and it is hoped that this justifies drawing the line where I have. I do however address the issue in connection with the chapter on remedies.

#### **4. Methodology**

This is predominantly a classic doctrinal project as it is principally library based relying upon primary and secondary sources and engaging in academic commentary. It has been necessary to examine and reflect upon case law from reported nuisance actions that both pre and post-date the modern law reporting system. The assistance of modern advances with technology including the advent of the internet and electronic resources has palpably changed the boundaries of what can be defined as a library based project. As all resources and materials are located in various law libraries (with some in the libraries of adjacent disciplines) only the method of obtaining some resources has changed from the classic doctrinal research approach. In addition some materials, owing to their age and often value, are only available in restricted forms from specific libraries (sometimes electronically). All resources have been utilised for the same purpose: to identify what the law is at any given time, and how this has changed.

Iconic historical literature by Maitland is considered but it is not defensible to rely on Maitland, writing in the 1900s, uncritically, without reference to the argument on the meaning of seisin of Jouon des Longrais, *La Conception Anglaise de la Saisine* (1924). Jouon des Longrais had a direct influence on esteemed legal historians such as Plucknett and Thorne

(and hence, indirectly, on Milsom). Woodbine's polemic in the notes to his edition of Glanvill is also important. However any analysis concerning novel disseisin and the assize of nuisance requires engagement with the current state of the enormous academic literature on this topic that started in the 1970s. Contributions by Sutherland, Loengard, Milsom, Palmer, Oldham and Baker provide proper reference to the literature of the debate. That historical analysis is applied to the case law and considered in terms of more recent commentary by leading nuisance scholars including Steele, Pontin, Lee, Gearty, and Murphy and also extends to leading scholars in cross-disciplinary fields.

It is important to be clear about the specific – and to some extent unusual or distinctive – uses of historical material in this thesis, and the limits of the use of historical method here. The approach to history in this thesis is distinctive in that it aims to connect two quite discrete scholarly approaches to nuisance law. On the one hand, there is what can be described as the purely historical approach, consisting of scholarship reflecting on what law was at a given point of time, without attention (or even interest in) the law today.<sup>23</sup> On the other hand, there is present-oriented literature which makes passing reference to historical claims about the present in relation to the past, without looking deeply at primary historical sources, and often without looking at all at secondary historical sources. I am attempting to bridge what is a gap in the scholarship in that regard. It is important to make it clear that this thesis does not engage with traditional historical method.

This thesis does not enter into source criticism,<sup>24</sup> for instance internal criticism (which assesses the credibility of sources). In acquiescence that few documents are accepted as

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<sup>23</sup> For instance, correspondence with Professor Emerita Janet Loengard (on file with author), whose work is central to aspects of this thesis, including standing, revealed (she openly commented) that she knew little of the seminal case of *Hunter v Canary Wharf* ([1997] 2 WLR 684; [1997] AC 655).

<sup>24</sup> GJ Garraghan, *A Guide to Historical Method* (Fordham University Press 1946) 168

completely reliable, it follows that each individual document must go through a process to establish credibility. Accordingly it is impractical to engage in such a process for the myriad of nuisance sources; instead the general credibility – and thus opinion - of esteemed authors is considered rather than weighing up each piece of evidence individually.<sup>25</sup> In addition, the method of synthesis, where individual pieces of information are assessed in context then hypotheses established through a distinct process of historical reasoning, is not used here.<sup>26</sup> Elements of synthesis, for instance, establishing ‘arguments to the best explanation’<sup>27</sup> are outside the remit of this thesis which, of course, has limitations in the space available. McCullagh summarises that ‘if the scope and strength of an explanation are very great, so that it explains a large number and variety of facts, many more than any competing explanation, then it is likely to be true’.<sup>28</sup> The aim of this thesis is not to create such arguments, rather to use, and compare, those already established by legal historians in the existing literature to consider my hypothesis.

A further issue which requires explanation and justification is the place of social (including environmental) history in this thesis. To say that the thesis is classically doctrinal is not to dismiss entirely the relevance of social context. At many points it is essential to situate the law in its social context to understand the meaning of the law, and that is something that nuisance law historians have made palpably clear.<sup>29</sup> There is very little I need to add to what historians have already said about the social context of early modern, and indeed more modern, nuisance law. That is something best left to legal historians and historians using traditional historical method. Certainly, I do not attempt an original exposition of feudal

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<sup>25</sup> See RJ Shafer for a discussion on the advantages and disadvantages of internal and external criticism (*A Guide to Historical Method* (The Dorsey Press 1974), 118).

<sup>26</sup> LR Gottschalk, *Understanding History: A Primer of Historical Method* (Knopf, 1950).

<sup>27</sup> CB McCullagh, *Justifying Historical Descriptions* (CUP 1984), 19.

<sup>28</sup> *ibid*, 26.

<sup>29</sup> Particular reference is made to the works of RC Palmer and SFC Milsom (see Bibliography).

politics, or feudal and post-feudal land tenure. However, as none of the historians of nuisance law look squarely at the environmental context of the law, this is one area where I do make an original claim of sorts. This is that there are ‘modern’ environmental problems that really are identical to ancient ones, and that there is a measure of continuity between the problems being tackled by nuisance law today and those at its origins (and all points in between). Even here, though, it would be wrong to describe the methodology as socio-legal or sociological, or inter-disciplinary and anything that puts distance between doctrinal methods. This is because the evidence of environmental problems common throughout history is contained in nuisance law reports themselves.

What, then, of the place of inter-disciplinary methodologies (sociology of law; socio-legal studies etc), and the use of empirical methodology? An advantage of legal history is the flexibility it offers academics to see the many countenances of law rather than having to depict the nature of law as being all one thing or all another.<sup>30</sup> Therefore a historical analysis of nuisance law is desirable for that reason; arguably a comprehensive analysis of nuisance law is incomplete without a comprehensive account of its historical development, which is, of course, a main contribution of this thesis (see below). The work of legal historians has enriched jurisprudential scholarship but it has forced theorists and legal philosophers to often consider social milieus as a significant feature of law.<sup>31</sup>

We could say that the society ‘shapes’ law, or law ‘influences’ society, or that law and society are ‘mutually constitutive’ giving an organised existence to one another. Still, despite legal historians demonstrating that such propositions are undoubtedly true in some sense, accuracy and/or certainty about the exact nature of, reasons for, or processes by which one

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<sup>30</sup> CL Fisk and RW Gordon, “‘Law As...’: Theory and Method in Legal History” (2012) UC Irvine Law Review 519, 525.

<sup>31</sup> *ibid* 521.

has an impact on the other are generally elusive.<sup>32</sup> Indeed research into law and society are markedly dogged by introspection, dislocation and uncertainty.<sup>33</sup> As such propositions about law and society are at times so elusive it is questionable whether anything can, or should, be said about the causal relationship between law and society.<sup>34</sup> The method of assessing the impact of society and law on one another can be placed under the term 'evolutionary functionalism'<sup>35</sup> where legal history invites or demands distinct and demonstrable claims about causal relationships. But this has serious conceptual limitations, particularly in the case of law and society.<sup>36</sup>

Black letter law implies a mechanistic analysis of legal rules in abstraction from the social problems out of which they emerged thus the distinction between doctrinal and black letter law must be realised in the context of this research. The research has social legal elements as it engages - albeit broadly - with social changes over an eight century period. Hence a doctrinal analysis of this sort cannot be extant from considerations regarding the relationship between law and society, setting it aside from strict black letter research. There is an element of both a historical and contemporary analysis of the social, economic and political factors leading to the development of the law and legal process present within this thesis but it does not take 'sociology of law' or 'socio-legal' approaches to the letter of nuisance law and how it has evolved. It is only necessary to acknowledge, for instance, that the law had to adapt to the decline of feudalism, the demographic catastrophe of the 'Black Death', the shift from predominantly agrarian to urban society, the advent of industrialisation and so on, rather than

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<sup>32</sup> *ibid* 523.

<sup>33</sup> CM Campbell and P Wiles, 'The Study of Law and Society in Britain' (1976) 10 *Law and Society Rev* 547, 548.

<sup>34</sup> Fisk and Gordon (30) 523.

<sup>35</sup> RW Gordon, 'Critical Legal Histories' (1984) 36 *Stan L Rev* 57, 59.

<sup>36</sup> Fisk and Gordon (30) 523.



give an account of social history through a study of the law or to attempt to understand law as a social phenomenon.

The sociology of law is traditionally concerned with ‘social engineering through the existing legal order’ rather than ‘explaining that order or transcending it by critique’.<sup>37</sup> Sociology of law methodology does not readily fit the doctrinal approach taken in this thesis. Sociology of law extends from mainstream sociology and proposes to go beyond the lawyer’s focus on legal rules and legal doctrine by remaining exogenous to the existing legal system. This means that the focus of study is not concerned with the legal system, per se, rather to understand the nature of society through the study of law. Accordingly sociology of the law constructs a theoretical understanding of the legal system ‘in terms of the wider social structures’.<sup>38</sup> Whilst this means that the emergence, articulations and purpose of the law, legal prescriptions and legal definitions are treated ‘as problematic and worthy of study’<sup>39</sup> the focus of this research is, in the main, a substantive analysis of nuisance doctrine, thus not exogenous to the legal system. That said the ‘elementary commitment’ of sociologists of the law to further an understanding of law in terms of the wider social order has broad connotations within this thesis but does not encompass the methodological emphasis; the doctrinal study of law here only provides glimpses of the nature of society over the epochs and does not challenge the existing social or legal historical literature.

## **5. Overview of this research**

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<sup>37</sup> CM Campbell and P Wiles (33) 549.

<sup>38</sup> CM Campbell and P Wiles, ‘The Study of Law in Society in Britain’ (1976) 10 Law and Society Review 547, 553; R Banakar and M Travers, *Introduction to Theory and Method in Socio-Legal Research* (Hart, 2005) xi.

<sup>39</sup> *ibid*

Chapter 2 takes its starting point from Lord Goff's claim in *Hunter* regarding his 'basic position'<sup>40</sup> on standing – based on extremely fragile historical grounds<sup>41</sup> – that there is a requirement for occupiers of land to have a proprietary interest (in that land) to sue in private nuisance. This claim is made on the assumption that there was a need to show title to realty in the assize of novel disseisin – the action from which nuisance is generally considered to originate. This denotes that mere possession of land is not enough to have standing thus spouses, de facto partners or children that occupy property as a home are excluded from the tort. High court activity during the latter half of the twentieth-century, right up to the Court of Appeal decision in *Hunter*, suggested a less austere stance to standing should prevail that debatably better reflects the fabric of modern households: according to Lord Cooke occupation as home seemed to be the requisite benchmark for standing.<sup>42</sup>

This topic, it is argued, lends itself well to using a historical perspective to examine modern private nuisance law in England and Wales. Such justification is not apparent when, at first, using Maitland and Milsom as examples, the difficulty of finding academic consensus regarding the feudal legal framework is explored. Justification for using a historical perspective to examine the modern tort arises when it is acknowledged we need to look at the vicissitudes of Case (representing the introduction of the modern epoch) as a template for modern nuisance law. A predicament exists because the structure, purpose and even the origins of novel disseisin is uncertain: commentary is bursting with inconsistencies of opinion from esteemed legal historians thus utilising the action as a basis to structure the modern law is examined. We are left in the unfortunate position where we cannot say categorically which school of thought concerning the Assize is right – we can only speculate. The research investigates the best available compromise using materials and commentary from Glanvill to

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<sup>40</sup> *Hunter* (23) [687- 88].

<sup>41</sup> Mainly FH Newark's, 'The Boundaries of Nuisance' (1949) 65 LQR 480.

<sup>42</sup> *Hunter* (23) [715-9].

Bracton then through to Blackstone, Maitland and then finally Palmer. Using a number of additional respected commentators within the investigation, this chapter engages with in excess of eight-centuries of first-hand accounts, based on the relevant case law, and resultant scholarly historical opinion.

It is suggested that looking to assize of novel disseisin, as Lord Goff does in *Hunter*, represents a step too far in the evolution of nuisance law. It is a juncture in time that is beyond ancestral recollection and a period open to incessant conjecture. In addition the structure of the writ system was guarded in the sense that it masked the facts behind the case and the social interplays that drove claimants to litigation in the first place. More recent historical philosophy contends that the development of property law relates explicitly to social phenomena.<sup>43</sup> A rigorous examination of the meaning of property suggests that the position was complex but it would seem ‘title’ in the sense of a ‘proprietary right’ served no practical purpose for a significant period under the Assize. It is contentious, to say the least, to assert ‘property’ related to anything more than a relationship between tenant and lord based on profound mutual obligations: to conceptualise that relationship as nascent ownership has little, if any, support. The origins of ‘property’ divulge that the law is not merely a reflection of society and social customs (hidden behind the writs) but rather an interaction between mores and law.<sup>44</sup> Without an investigation into the manner in which societal needs drove legal change we are left with an incomplete picture of the legal history. In a tort that is often accused (or celebrated) as being protean in nature ignoring the societal nexus to legal development is a crucial omission thus it will be seen that adopting the assize of novel disseisin as the template for the modern law is questionable on a number of levels.

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<sup>43</sup> RC Palmer, ‘The Origins of Property in England’ (1985) 3 Law & Hist. Rev. 1, 4.

<sup>44</sup> RC Palmer, ‘The Economic and Cultural Impact of the Origins of Property’ (1985) 3 Law & Hist. Rev. 375, 375.

Lord Goff's 'historical' claim hence embodies, albeit inadvertently, the rationalisation for investigating the past. Caution nonetheless must be exercised when ascribing modern perceptions on historical settings as there is a high risk of affording anachronistic meanings for the benefit of a modern audience. Considering the binding impact that an unsound historical claim can have on the common law, Lord Goff's assertion regarding a need to show title to realty today is based on his historical interpretation reveals, ironically, there is a need for a fresh look at perceived juridical historical foundations based on modern findings. Put differently, Lord Cooke's concern with modernising the law could be redefined as a concern with revisiting aspects of the law's past. In that sense this chapter sets the tone for the thesis holistically.

Chapter 3 takes as its starting point the *public* nuisance case of *Corby v Corby*,<sup>45</sup> insofar as it addressed private nuisance. In *Corby* the Court of Appeal stepped off the relevant issues to maintain, without binding authority, that personal injury was excluded from the domain of private nuisance, whilst at the same time maintaining its actionability in the public nuisance.<sup>46</sup> Focusing on the specific issue of personal injury in private nuisance this chapter considers actionability in the modern tort from a historical perspective. It is patent that 'bodily security' has played an enduring part in nuisance law analysis over the centuries thus it is necessary to inquire whether various *dicta* - extraneous to private nuisance actions – has for all intents and purposes excluded 'personal injury' from the tort. The issue of injury to the person as a consequence of interference to the amenity (or economic) value of land has yet to be decided by the Supreme Court (or, for that matter, previously in the House of Lords). Despite Newark's choice words ('bodily security') that distinguish 'personal injury' - in the sense of negligence - from an injury associated with proprietary rights, a 'developing school

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<sup>45</sup> *Corby* (3).

<sup>46</sup> *ibid.* *Corby* also concerned negligence and breach of statutory duty.

of thought' has come to the fore which doubts the place of this *type* of injury as an actionable private nuisance.<sup>47</sup>

Again, this argument has been stimulated by Newark's article and subsequent comments made by Lord Goff in *Hunter*.<sup>48</sup> Justification for the exclusion of personal injury relies on the premises that there is a pure form of the tort that protects only the use and enjoyment of land and that private nuisance is solely a tort to land. Historically both these notions are debatable. First it is possible that early actionability suggests something different to the claimed 'pure form' of nuisance because, initially, nuisance (under novel disseisin) was utilitarian in that it protected rights in land in a practical sense. Those practical safeguards were associated with protecting the free tenement guaranteed by the seigniorial relationship between lord and tenant rather than comfort and enjoyment, which the assize of nuisance later protected (Bracton, Milsom, Loengard, Holdsworth and Murphy). But, of course, the natural development of nuisance law – according to societal needs (its essence) – betrays the pure form of the tort. Second, from early on there is evidence that the lord's acceptance represented 'security under law' which naturally protected the tenant's physical well-being by right. Later in the sixteenth to seventeenth-centuries health (extending to mental health) and physical well-being were intrinsic to the development of nuisance in Case: certainly, by *Aldred's Case* they were entrenched as necessities of habitation and thus actionable.<sup>49</sup> At this crucial, formative time to modern nuisance law - even into the eighteenth century - the sensory perceptions of the people shaped cultural and practical responses including legal development which the case law visibly reflects.<sup>50</sup> In the nineteenth-century judges spoke of guarding the 'comfort of physical existence' on property as being essential to the theory of

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<sup>47</sup> Newark (41) 481.

<sup>48</sup> *Hunter* (23) [687-8] and [692].

<sup>49</sup> 77 ER 816; (1610) 9 Co. Rep. 57; B & M 599.

<sup>50</sup> Emily Cockayne, *Hubbub: Filth, Noise & Stench in England 1600-1770* (Yale University Press 2007).

nuisance.<sup>51</sup> There is, for these reasons, little historical support for a pure form of the tort as advocated by Newark.

It is argued that the historical evidence suggests the evolutionary path of nuisance law inherently safeguarded physical security first as a right of the seigniorial relationship then as a necessity of habitation. As such not only has nuisance law traditionally regarded bodily security as a protected interest, there is arguably no historical justification for its exclusion. But the problem has far deeper doctrinal undertones for the tort. From at least the time of Bracton a judicial balancing exercise concerning conflicting users of land evolved. The end product of that substantial juridical evolution - that surmounted the writ system, the assizes and actions on the case - was the reasonable user test. The reasonable user test has, of course, been used ever since to establish whether an alleged interference transcends the threshold necessary to give rise to an action in nuisance.<sup>52</sup> The delicate matter of actionability was hence fashioned over a period of centuries around the manner in which humans utilised and exploited their land. That was until the judiciary elected to make the test redundant in a number of private nuisance actions where instead they adopted a stance of assessing the type of harm to ascertain actionability (which is revisited in chapter four).<sup>53</sup>

Doctrinally assessing the type of harm in such a manner is subversive of private nuisance law and is reminiscent of the language (and doctrine) of negligence.<sup>54</sup> It is in such circumstances that physical damage to the person (and land) that need to focus on fault-based conduct has become relevant, thus attracting a negligence analysis. Surprisingly, types of physical damage have undergone close scrutiny and their removal as protected interests has been suggested. In

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<sup>51</sup> *St Helens Smelting Co v Tipping* 11 ER 1483; (1865) 11 HL 642 (Mellor J).

<sup>52</sup> G Cross, 'Does Only The Careless Polluter Pay? A Fresh Examination of the Nature of Private Nuisance' (1995) LQR 445, 449.

<sup>53</sup> Maria Lee, 'What is Private Nuisance?' (2003) LQR 298.

<sup>54</sup> See Lee, *ibid*; and Gearty (2).

essence a highly nuanced test to assess actionability that developed over centuries (including the distinction between amenity and physical damage in *Tipping*) has been abandoned in favour of the fashionable tort of negligence and thus mutated into a matter of liability first, when never before has liability been a prerequisite of the reasonable user test.<sup>55</sup> The change of judicial tack that focuses now on the type of injury (or ‘actionable heads’) rather than reasonable user – in a neighbourhood context - has facilitated the assimilation of the new tort of negligence into the old tort of private nuisance. In turn, this has enabled ‘actionable heads’ to be removed, in a judicial sleight of hand. Unfortunately the incompatibility of nuisance doctrines from negligence language has inevitably created confusion throughout the law of nuisance and for aspects of negligence doctrines.

The final stages of the inquiry in this chapter reveals the case law that has been utilised to exclude ‘bodily security’ from private nuisance have either concerned liability under the rule of *Rylands v Fletcher* or public nuisance. Indeed the entire case for removing the ‘head’ as an actionable injury has been based on facts outside the relevant domain using Newark’s comments as historical support. Despite the ruling of *Rylands v Fletcher* happening as late as 1868 it was not until well into the twentieth-century that a series of *Rylands* cases began the slow divorce of ‘personal injury’ from private nuisance. It is unnervingly sardonic in that respect as the strongest proponents for the exclusion of ‘personal injury’ supposedly rely on historical evidence to reinforce notions of their school of thought; the research included in this chapter begs the question whether such support is veracious enough to withstand any form of rigorous historical scrutiny. But, owing to the fact that personal injury is maintained in public nuisance, a more modern question is posed regarding whether the name of the action has not merely been changed? A theoretical and definitional problem exists where

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<sup>55</sup> Cross (51).

pollution affects a number of households. In cases, for instance, *Corby* and *Barr v Biffa*<sup>56</sup> it is legitimate to question whether the nuisance is anything more than a ‘private nuisance’ dressed up to fit the ‘public nuisance’ mould. It would seem that despite the attempts of Newark the boundaries will remain blurred. In conclusion it is posited that there is adequate academic opinion to suggest a prerequisite does not exist for land - or its amenity - to *also* be affected for injury to the person to be actionable.

Chapter 4 takes the starting point of *Cambridge Water v Eastern Counties Leather*.<sup>57</sup> It is somewhat thematic that Lord Goff’s comments in leading private nuisance actions cause controversy at the core of the historical development of private nuisance as seen in recent times. On this occasion his reasoning has had a significant impact on the matter of liability. In fact *Cambridge Water* is significant for it heralded the introduction of the language of negligence proper. Lord Goff declared that negligent conduct is a relevant consideration in the context of nuisance, which would have ramifications in a tort where liability has been traditionally strict; his lordship confirmed the introduction of what is argued in the chapter to be the historically alien concept of reasonable foreseeability, based on the notion of the hypothetical reasonable man.<sup>58</sup>

Links are made with Chapter 3 as the decision in *Cambridge* has created doctrinal confusion by an unnecessary blurring of the boundaries that has proven problematic on various levels for *both* torts. The reasonable user test, for instance, has never been a prerequisite for establishing liability per se; rather it was a means of ascertaining whether an activity is deemed actionable, if so, it would then incur strict liability: since *Cambridge* it can be asserted that the strict liability element of the tort has been removed and the reasonable user

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<sup>56</sup> Note (5).

<sup>57</sup> Note (7).

<sup>58</sup> *ibid* [299] (Lord Goff). See also J Murphy, *The Law of Nuisance* (OUP 2010).



test altered. This chapter argues that the fundamental doctrine of reasonable user needs to adapt when a negligence type analysis regarding reasonable conduct is adopted to ascertain liability, further evidencing an unsatisfactory cross-infection of principles. When the extent of the cross-infection of negligence into the entire tort of nuisance is considered the logic behind Lord Goff's reasoning is difficult to fathom. We can argue – as Lord Cooke in *Hunter* suggested – that his judgments are policy driven, perhaps, to find neatness and symmetry or that he simply does not have an adequate awareness of the history on which he places so much onus in his decisions. Regardless of whether one, both or even neither those arguments are correct, if he truly intended to take private nuisance back to its foundations the historical investigation in this thesis certainly raises doubts regarding Lord Goff's reasoning.

It is the limited circumstances in which a negligence analysis is conceivably required in nuisance - arguably this is restricted to physical damage not created by the defendant – that it is evidential nuisance could equally be treated in negligence. Such reasoning is thus questioned. For instance, in the case of *Smith v Littlewoods*,<sup>59</sup> where fire started by trespassers caused physical damage to property, Lord Goff palpably could not differentiate between negligence and nuisance. In *Goldman v Hargrave*,<sup>60</sup> a case that has proven problematic to nuisance, where fire caused physical damage to property by an act of God, the facts attracted a negligence analysis but were ultimately considered to be under the remit of private nuisance: *Smith* was clearly considered as a case of negligence. This chapter therefore addresses the conceivably unnecessary negligence analysis of nuisance outside what was a decision by Lord Wright to make an exception – in exceptional circumstances - for those defendants that have had an action thrust upon them for no fault of their own.<sup>61</sup>

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<sup>59</sup> [1987] AC 241.

<sup>60</sup> [1967] 1 AC 645.

<sup>61</sup> *Sedleigh-Denfield v O'Callaghan* [1940] AC 880.

Traditionally there had been a stringent separation maintained by the courts with respect to the distinction between nuisance and trespass, and thus it is curious (and to an historian confusing) for modern day courts to disregard distinctions that brought about the emergence of negligence as separate tort. This research makes a case that misunderstanding the deep rooted historical aspects of nuisance law that make it disparate from the emergence of tort of negligence explains a number of problems, and to a significant extent, owing to a clear conceptual independence. Once we look at the development of negligence from a historical perspective, its emergence as a separate tort reveals negligence type liability is incompatible with the imposition of strict liability because elements of the enquiry to ascertain liability are fundamentally different.

Again, the chapter investigates the impact of societal change on the development of private nuisance. An insight into Palmer's work on The Black Death provides strong foundations regarding why liability had to evolve owing to demographic catastrophe – society had to be coerced to fulfil their obligations and the law developed to accommodate that necessity. It is patent from the research that the development of liability was influenced heavily by societal interplays with the common law which further affirms the conceptual independence of nuisance from negligence. The distinction between 'reasonableness' in the sense of carelessness is explored (i.e. the negligence aspect presented in *Cambridge Water*), and reasonableness as it applies to the consequences of acts, careless or otherwise (as it is traditionally understood within the paradigm of private nuisance law). Reasonable user is scrutinised by investigating the development of the test before considering the term 'reasonable' in the twentieth-century and its possible ramifications for the future considering the blurring of its meaning in the context of nuisance.

History is utilised slightly differently in this chapter than from the others, in that it explores the significance of *Tipping* as a legally binding precedent which the House of Lords overlooked in *Cambridge*. The ratio of *Tipping* is that someone who causes physical damage to the property of a neighbour is ‘strictly’ liable. That is to say, it is explicit in that authority that a defendant is liable notwithstanding that they have exercised reasonable care in relation to the activity that is the subject of the nuisance complaint. By contrast, in *Cambridge*, a defendant who has not been careless (and who has not reasonably foreseen injury) is not liable. The House of Lords had the power to overrule *Tipping* in *Cambridge* (under the Practice Direction of 1966<sup>62</sup>), but overruling a binding authority – of course - requires a special procedure. That procedure was not followed in *Cambridge* and thus it is doubtful that the reasonable foreseeability rule is good law here: certainly *Tipping* was not overruled. All that can be said is that *Tipping* left open a ‘non-strict’ liability rule for amenity nuisance, which was an obiter aspect of the case (the case only concerned physical damage).

Chapter 5 deals with injunctions and takes the starting point of *Watson v Croft*<sup>63</sup> and the award of the injunction by the High Court in *Coventry v Lawrence*<sup>64</sup> based on it. The decision in *Croft* seemingly affirmed two issues; first defendants in private nuisance are likely to face an injunction to stop activities that infringe their neighbours’ proprietary rights; and second, principles concerning awarding damages in lieu of an injunction are well settled law in line with the late nineteenth-century case of *Shelfer v City of London Electric Company*.<sup>65</sup> From the outset it is clear that the matter of statutory defence is not a focus of the research as we are concerned here with situations where it is ‘left to the common law to provide an

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<sup>62</sup> Practice Statement (House of Lords: Judicial Precedent) [1966] 1 WLR 1234 (LC Lord Gardiner).

<sup>63</sup> [2009] EWCA Civ 15 QB; All ER (D) 197.

<sup>64</sup> Note (22).

<sup>65</sup> [1895] 1 Ch 287, [322-3].

answer’.<sup>66</sup> The Supreme Court in *Coventry* has endorsed the primacy of an injunction and the limited relevance of regulation, but with some caveats that are examined.

Unusually, in the scheme of what is topical in this thesis, injunctions have not continuously figured throughout its evolutionary path. Despite injunctions being introduced in the fourteenth-century as an instrument of control or coercion, their development as a specific remedy for environmental protection in the tort is relatively late owing to difficulties associated with their procurement and the fact that only damages were available in actions on the case for nuisance – thus private nuisance - until the nineteenth-century. In spite of that fact, it is important to investigate their development from an early medieval concept as one of the legal innovations required to coerce citizens in order to preserve traditional society after the Black Death had desolated the population of England and Wales. It is that development that cemented the foundations of injunctive relief in equity as a discretionary remedy. The research then follows the development of injunctions from Equity to the law courts that responded to a specific injustice that had become endemic in nuisance law by the end of the eighteenth-century. Claimants typically faced a potential infinite barrage of actions from activities already deemed unlawful by the courts because there was no provision to force defendants to cease, for instance, polluting their neighbour. Wealthy individuals (and the emerging corporations) had free reign to pollute which paved the way for a series of statutory amendments, which came to a head in the nineteenth-century, to bring the injunction into the realm of law from chancery.

There is some debate (discussed in the chapter) as to how far, if at all, the ‘strict’ approach in *Shelfer*, as applied in *Croft* and *Coventry*, is justified and indeed what the current approach is

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<sup>66</sup> *Dennis v Ministry of Defence* [2003] EWHC 793 [757] (Buckley J)

after so many opinions were expressed on this point by the Supreme Court in *Coventry*. Lord Sumption in *Coventry* called for abandonment of *Shelfer* and to some extent a reverse presumption in favour of granting equitable damages instead of an injunction., and thus for a departure from the nineteenth century position.<sup>67</sup> However, that did not commend itself to most justices of the Supreme Court, with Lord Mance emphasising the importance of injunctions where interference with the right to enjoyment of a home is being remedied. Lord Mance's view is argued to fit best with the paradigm developed in my thesis.

Chapter 6, the concluding chapter, reflects on these specific studies in the use of history as a whole. First, the issue of an 'essence' is addressed. Does the law have an essence that can be discerned in some original position historically? Or, posed differently, is there a point in the deep history of nuisance theory that can be used as a starting point for a linear depiction of its history? Seemingly nuisance's past clearly reveals a story of evolution, change, and adaptation (albeit that there is a recognisable identity to the law throughout) that raises doubts whether there is a 'point zero'. Arguably if there is a juncture to which the genesis of the *modern* law of private nuisance can be attributed it is after the decision of *Cantrell v Church*<sup>68</sup> when the assize of nuisance and *quod permittat prosternere* became for all intents and purposes obsolete. It was then that the judges began to structure the modern law in actions on the case for nuisance.

Second, the manner in which the law's 'pasts' (in the plural) have been utilised is considered. It is concluded that the past is manipulated to suit the 'policy' of today's courts, which is to limit private nuisance and to leave space for established regulatory laws and their expansion and the hegemonic tort of negligence. A succinct example of policy manipulation in practice

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<sup>67</sup> RA Buckley, 'Injunctions and the Public Interest' (1981) 44 MLR 212, 214.

<sup>68</sup> *Cantrell v Church* (1601) B & M 588; Cro. Eliz. 845; 78 ER 1072 (Ex. Ch.).

is the House of Lords decision to overturn the Court of Appeal in *Hunter*. This example is best illustrated by the McGillivray and Wightman piece that was written and published in the intermediary period when the appeal in that case was on going.<sup>69</sup> The piece (chapter) is unique in that it was able to investigate standing in private nuisance in light of an alternative reality concerning how the law once stood (in the modern history). Although we, as academics, may make contentions of what the law would be like if a specific aspect of that law was to change it is somewhat different to approach such a change when it has actually occurred – it would seem the reality of a living example changes one's outlook. McGillivray and Wightman were able to take stock of the temporary situation. This research determines in light of their contentions that interests in land seen as emanating from a collective right of occupation rather than an individualistic proprietary interest changes the nexus between humans and land and the manner in which the tort is utilised in the role of environmental protection.

It is also concluded this research reveals that private nuisance is in a precarious position, perhaps the worst it has ever experienced in its long existence. Access to justice issues aside, the cross-infection of the language of negligence, that began through a small number of cases debatably better suited to negligence (*Smith*), has been shown to affect the tort at a doctrinal and structural level and represents the biggest threat to the future of private nuisance - not only regarding its efficacy as an environmental tort – but as an individual legal entity. If the problems addressed in this thesis are reviewed with a strong, accurate historical grounding and the issue of the cross-infection of the language of negligence ameliorated then the situation would be entirely different. The law of nuisance could be regarded in its simplest doctrinal form.

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<sup>69</sup> D McGillivray and J Wightman, 'Private Rights, Public Interest and the Environment' in T Hayward and J O'Neill ed. *Justice, Property and the Environment* (Ashgate 1997).

If the right to sue better reflects the modern fabric of households to an occupancy-based stance that is more ecocentric it can transcend - perchance redefine - 'interests' in land from an economically centred perception. Actionability is, perhaps, best viewed from both a historical and modern perspective. If we consider a very early period in the torts evolution, for instance the time of Bracton, comparing his almost infinite natural rights of seisin to Murphy's modern description of what is actionable ('any on-going or recurrent activity or state of affairs that causes substantial and unreasonable interference with a claimant's land'<sup>70</sup>) it can be asserted that there is a simplicity regarding actionability that has been consistent almost entirely throughout, where the 'type' of harm is irrelevant and, instead, an inquiry concerning conflicting users of land has been decisive. The simplicity lies in the nature of compromise inherent in nuisance theory. Liability – of course – in its traditional sense is strict and simply imposed when a user of land is deemed unreasonable because the activity has transcended what their neighbour ought to be expected to endure.

Palpably the simplicity in expecting to be awarded an injunction unless clearly defined exceptions (*Shelfer*) favour damages in lieu is self-evident. It is the search for simplicity in this research that has exposed a paradox. Why is it that the courts have affirmed the nineteenth-century position in relation to injunctions (where a simple set of principles based on a premise of fairness from within parliament and the courts can be followed), but not liability, actionability or standing? There is no easy answer. But searching for the straightforward from the massive lineage of nuisance law – with the exception of the most distant medieval genesis that is beyond our grasp – the most confusion has manifested in the last hundred or so years. Indeed, one could say my overall conclusion is that the courts have

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<sup>70</sup> '[or] with his use and enjoyment of that land' (Murphy (57) 5).

not used history in a way that simplifies, or clarifies, the law. The use or misuse has muddied the waters. Nuisance deals with complex neighbourly disputes which is difficult enough without the added confusions of modernising an ancient tort by offering modern solutions that simply do not transcend the ancient/modern divide. There will always be difficulties using problematic historical analysis to shape the current law but we should be wise not to distort the old doctrines and meaning of nuisance law that have proven robust enough to stand the test of time; they are not about to yield for the sake of symmetry or neatness now any more than in the past. Attempts to force that upon the tort are ultimately the problem not the remedy.



## Chapter 2

### Standing

#### 1. Introduction

In Chapter 1 the core architecture of private nuisance was identified as being who can sue, in respect of what injuries, on what basis in terms of liability, and with what remedy. In order to elucidate a formative nuisance doctrine – what I term the ‘simple form’ of nuisance - with which to compare, and against which to evaluate, today’s doctrine, this chapter focuses on who can sue in private nuisance taking a deep historical perspective. In identifying the simple form it is necessary to identify certain shifts in the law over history to expound the notion that the law has to some extent responded to major societal changes and thus the law evolves according to societal needs and mores. Whilst searching for this simple form, the issue of who can sue in private nuisance provides an illustration that it can be found at the very beginning of the law’s evolution. It is contended that the simple form and essence of private nuisance reveals a perception of intrinsic simplicity in the tort and that that simplicity has been visibly lost within our period of living memory owing to misuses of nuisance’s rich history that first structured the law. The issue of standing in contemporary terms provides us with model example of that contention.

The contemporary law regarding who has the right to sue in private nuisance was asserted by the House of Lords in *Hunter v Canary Wharf Ltd*.<sup>71</sup> Their Lordships held, by a majority (Lord Cooke of Thorndon dissenting), that in general only persons with exclusive possession

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\* I am grateful to Professor Emerita Janet Loengard (Moravian College, USA), Professor Anna Greer (University of Waikato, New Zealand), Professor Jenny Steele (University of York) and Dr. Ben Pontin (Bristol Law School, UWE) for their kind assistance on this chapter.

<sup>71</sup> [1997] 2 WLR 684; [1997] AC 655.

can sue.<sup>72</sup> According to Lord Goff, that category of person includes freeholders, leasehold tenants, even licensees with exclusive possession, but excludes the spouses, de facto partners or children that occupy property as a home.<sup>73</sup> The decision to style the modern land law principle of exclusive possession as being the qualification for who can sue was, for all intents and purposes, an attempt to re-establish an ancient relationship between land law and incipient tort principles that are echoes of the twelfth-century.

The proprietary element within the action that is believed to be the template for modern private nuisance - the assize of novel disseisin (*assisa novae disseisina*<sup>74</sup>) - was somewhat disparate from today. From the outset we must recognise that 'exclusive possession' is a modern concept in nuisance terms and was not stated as the qualification for standing to sue in private nuisance until the end of the twentieth-century, in *Hunter*.<sup>75</sup> The plea rolls indicate that assize of novel disseisin offered protection in the king's court but to an extremely specific type of tenant: those who held a free tenure.<sup>76</sup> Exclusive possession, a right that is good against the world, is a concept dressed up to impersonate complex ancient land law doctrines that only manifest a frivolous similarity to the feudal legal framework. Despite the

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<sup>72</sup> Owners of an easement or a profit à prendre (incorporeal hereditaments, for instance fishing rights on a river), reversioners and mortgagees (not considered in *Hunter*) are all examples of interests that can afford standing despite not needing exclusive possession or to be in actual occupation – exclusive possession can even be attained by trespassers (Lord Templeman in *Street v Mountford* [1985] AC 809). See P Giliker, 'Hunter v Canary Wharf: A Return to the Roots of Private Nuisance' (1997) NILQ 389 for an in-depth perspective of those who have standing in private nuisance; and J Steele, 'Being There is Not Enough - The House of Lords Puts the Brakes on Nuisance in the Home' (1997) 9 JEL 345, 383-5.

<sup>73</sup> [1997] AC 655 [687], [688] and [692] (as per Evershed J in *Newcastle-under-Lyme Corporation v Wolstanton Ltd* [1947] Ch 92, [106] – [108]).

<sup>74</sup> Literally meaning a 'recent dispossession'. Also seen as '*assina de nova dissaisina*' in the Pipe Rolls from 1183 (eg Pipe Roll Henry II, 14).

<sup>75</sup> There are some 19th century uses of the 'exclusive possession' formulation in the context of lease or license, though 'occupation' (occasionally 'exclusive occupation') is considerably commoner (e.g. compare *Allen and others v Liverpool Overseers* (1874) LR 9 (QB) 180-181 with *Smith and others v Seghill Overseers* (1875) LR 10 (QB) 422).

<sup>76</sup> Seised in the sense of being 'in quiet enjoyment' (TFT Plucknett, *A Concise History of the Common law* (Butterworth & Co, 1956), 358). See RC Palmer, 'Personal injury in private nuisance: the historical truth about actionability of "bodily security"' (2009) 21(6) ELM 302,

need for a tenant to be (seised) in demesne,<sup>77</sup> which we may compare to being in actual possession today, a tenant only had a right against an individual - usually his lord – not the world.<sup>78</sup> The need for free tenure was not an arbitrary refusal to protect property rights from those without exclusive possession, far from it; the tenure was part of an arrangement between lord and tenant: it was the relationship between them that demanded protection not title to property per se.<sup>79</sup> The law of nuisance has long transcended the seigniorial requirements essential to holding land freely in a feudal domain and the assize of novel disseisin.

The natural evolution of nuisance law away from feudalism seemingly runs parallel with societal changes over the centuries and thus queries whether such an austere standard as exclusive possession should be employed today. According to Professor Robert Palmer the chronicle of the development of property law ‘relates explicitly to social phenomena’.<sup>80</sup> The genesis of property reveals that the law is not merely a reflection of society and social customs but rather an interaction between mores and law.<sup>81</sup> He states, ‘law is after all bureaucratic force tightly focused on particular aspects of social relationships’.<sup>82</sup> Unfortunately rules of law that are distinct bureaucratic manifestations are applied strictly without regard to persons or social values.<sup>83</sup> In consideration of an ever more informed public concerning environmental matters the decision in *Hunter* effectively weakens the efficacy of private nuisance, arguably denying environmental social justice. Lord Cooke recognised this

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<sup>77</sup> JS Loengard, ‘Free Tenements and Bad Neighbours; the assizes of novel disseisin and nuisance in the king’s court before the Statute of Merton (1236)’, (1970 unpublished thesis). Available from the University of Columbia archives, USA on Microfilm.51. Hereinafter: ‘Free Tenements’.

<sup>78</sup> SFC Milsom, *The Legal Framework of English Feudalism* (CUP, 1977), 7, 24, 38 and 58. Hereinafter: *Framework*; and RC Palmer, ‘Feudal Framework of English Law’ (1981) 79 Michigan Law Rev 1130, 1134-5. Hereinafter: ‘*Framework*’.

<sup>79</sup> Milsom *ibid* 38.

<sup>80</sup> RC Palmer, ‘The Origins of Property in England’ (1985) 3 Law & History Rev 1, 4. Hereinafter: ‘*Origins*’.

<sup>81</sup> RC Palmer, ‘The Economic and Cultural Impact of the Origins of Property’ 3 Law & Hist Rev 375, 375.

<sup>82</sup> Palmer (10) 47.

<sup>83</sup> Palmer *ibid* 19.

in his dissenting judgment<sup>84</sup> and drew attention to the present day societal mores and necessities that require a more liberal benchmark to sue than exclusive possession: he advocated occupation of a property as a home.<sup>85</sup>

An element essential to Lord Goff's reasoning in *Hunter* rests in his acceptance that there was a requirement for a plaintiff to 'show some title to realty' in order to bring an action in novel disseisin. This formed part of his 'basic position'<sup>86</sup> and was seemingly founded on the contentions of Professor Newark in 'The Boundaries of Nuisance'.<sup>87</sup> There are authoritative legal historians who profess that *originally* it is mere conjecture that there was a need to show a title to realty in novel disseisin; seemingly being put in seisin by a lord was sufficient.<sup>88</sup> Essentially the modern idea of proving title is to view the feudal legal framework with eyes tainted by modern perceptions.<sup>89</sup> We apply our own experiences but can only guess what the actors did and said at the time as they rarely, if at all, stated their assumptions or described the framework in which their lives were led.<sup>90</sup> This notion is compounded, particularly at the time relevant to Lord Goff's 'basic position', by the fact that the case reports were merely a statement of systemic writs extant of the facts and circumstances that instigated the actions in the first place. Both Milsom's and Palmer's social examinations of the legal feudal framework and the evolution of 'property' within it severely undermine his findings.<sup>91</sup>

Whereas novel disseisin can be demarcated as a 'real' action - dealing with matters pertaining to property - it is understood to have been possessory<sup>92</sup> rather than a proprietary in nature, or

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<sup>84</sup> *Hunter* (1) [711] (Lord Cooke).

<sup>85</sup> *ibid* [723]. This could be extended to occupancy of a sufficiently substantial nature (see 713).

<sup>86</sup> [1997] 2 WLR 684, [687] - [688].

<sup>87</sup> (1949) 65 LQR 480 - 90.

<sup>88</sup> Milsom, *Framework* (8) 24 and 40

<sup>89</sup> Palmer, *Origins* (8) 4-5; Milsom *ibid* 40-1.

<sup>90</sup> Milsom *ibid* 1.

<sup>91</sup> Palmer *Origins* (10) 22-4; and Milsom *ibid*, 21-25 and 46-47.

<sup>92</sup> Novel disseisin was one of the four possessory (or petty) assizes. They were Novel Disseisin, Mort d'Ancestor, Darrein Presentment (last presentation) and Utrum (whether) or Writ Juris Utrum. See RC Van Caenegem, *Royal Writs in England from the Conquest to Glanvill: Studies in the Early History of the Common Law* (Selden Society, 1959) vol 77, 262; AFK Kiralfy, 'The Action on the Case: an historical survey of the

in other words, it concerned protecting seisin of land (loosely termed as ‘possession’ of land) not title to property. In reality property right was the antithesis of the feudal framework where seigniorial feudal relationships dictated land-holding. It will be revealed that a number of commentators assert that this was indeed the case, despite novel disseisin later playing a proprietary role.<sup>93</sup> This does not mean that the reestablishment of private nuisance as a tort based on land law should be challenged; it is broadly defensible to argue *Hunter* as a ‘conservative positioning of private nuisance as a tort against property’<sup>94</sup> however, as John Wightman contends: ‘the importance of *Hunter* is not that it opens vistas, but that it closes them’<sup>95</sup> thus ignoring the traditional interaction between law and social mores.

Importantly the decision by the Lords in *Hunter* has inhibited the role private nuisance can play in environmental protection because they have turned the common law away from attempts to develop an understanding of the relationship between individuals and land in terms other than proprietary interests. We may assert that novel disseisin actually functioned for the benefit of personal relationships:<sup>96</sup> indeed, ‘personal relationships and the tenures dependant on them were essentially different from property rights’.<sup>97</sup> While Lord Goff was right to state (using Newark’s contention) that private nuisance is ‘a tort directed against the plaintiff’s enjoyment of rights over land’ Newark’s statement - posited in 1949 - implies

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development of the Action up to the year 1700, in light of the original plea rolls and other unpublished sources’ (1951), published thesis (no longer in print), 241 and 504; FW Maitland, ‘The Beatitude of Seisin Part I’ [1888] CLJ 407, 412; FW Maitland, *The Forms of Action at Common Law: A Course of Lectures* (CUP 1958), 27-33 (hereinafter: *Forms of Action*).

<sup>93</sup> F Pollock & FW Maitland, 2 *The History of English Law* (Lawbook Exchange 2001), 44: Herein after *HEL* (in two volumes). The most authoritative academic support for the concept of nuisance growing up within real actions is provided by John Baker (see JH Baker, *An Introduction to Legal History* (Butterworths 2002), 422) but his opinion on this issue does not concur with William Blackstone’s definition (Commentaries III, 117 and 118) or the series of lectures delivered by FW Maitland on the forms of actions (supported by his and collection of articles) who describes nuisance as a both a personal and possessory action (FW Maitland, *Forms of Action* *ibid*, Lect. i, 7; Lect. v, 60-64; and Lect. vi, 65). See also CHS Fifoot, *History and Sources of the Common Law: Tort and Contract*, (Stevens & Sons 1969), 5; SFC Milsom, *Historical Foundations of the Common Law*, (Butterworths 1981), 138 (hereinafter *HFCL*); JS Loengard, ‘Free Tenements’ (7), 18-51 (available from the University of Columbia archives, USA on Microfilm).

<sup>94</sup> M Lee, ‘*Hunter v Canary Wharf* (1997)’ in P and C Mitchell (eds) *Landmark Cases in Tort* (Hart 2010), 311.

<sup>95</sup> J Wightman, ‘Nuisance – The Environmental Tort: *Hunter* and *Canary Wharf* in the House of Lords’ (1998) 61 MLR 870, 870

<sup>96</sup> Palmer, *Origins* (10) 4; see also Palmer, *Framework* (8), 1134-5; and Milsom, *Framework* (8) 42 and 63.

<sup>97</sup> Palmer *ibid*; and Milsom, *ibid* 38.

meanings entirely different from the nature of ‘right’ in twelfth-century novel disseisin where ‘the question of *right* could not be raised’.<sup>98</sup> The medieval meaning of ‘right’ loosely equates to the modern perception of ‘title’ and should not be understood in the context Newark intended: title in the sense of ‘proprietary right’ served no contemporaneous practical purpose at the inception of the Assize.<sup>99</sup>

It is clear that the key element used by the Lords to decide the outcome in *Hunter* was the fundamental character of nuisance but only Lord Goff expressly held that novel disseisin was the source. Lord Goff used its nascent character and joined the majority to use weak substantial arguments, which are easily surmountable, to put in place a kind of ‘category barrier’ that has proven difficult to surmount.<sup>100</sup> Whilst it makes more sense to seek a juncture in legal history that better suits the origins of *modern* nuisance law, such as when Case fully supplanted the Assize (following the decision in *Cantrell v Church* in 1601<sup>101</sup>), Lord Goff laid down a claim that must be examined. The feudal world needs some investigation to determine whether or not Lord Goff was correct to employ novel disseisin in order to help substantiate the need for exclusive possession to sue in private nuisance today.

This chapter surveys a number of those principles that suggest the need to be cautious concerning the straightforward invocation of twelfth-century concepts in contemporary law. It must be acknowledged that it is dubious to rely upon the same doctrines that were superseded following many decades of judicial activity in the courts that ultimately was intended to move away from medieval legal constraints. The assizes of novel disseisin and nuisance and the *quod permittat prosternere* writ (and other forms of medieval action that

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<sup>98</sup> Emphasis added. See SFC Milsom’s ‘Introduction’ to Pollock and Maitland, *History of English Law* (CUP 1968), xxix. Note that this introduction (and a select bibliography) by Milsom is in a reissue of the second edition of *The History of English Law*; arguably the history to which they refer and Pollock and Maitland’s conclusions should only be read in light of Milsom’s introduction – his observations are essential to a holistic understanding of the period.

<sup>99</sup> Milsom, *Framework* (8) 39, 40, 41-2; and Palmer, *Origins* (10) 4.

<sup>100</sup> Wightman (25) 875.

<sup>101</sup> (1601) B & M 588.

dealt with nuisance type situations<sup>102</sup>) became obsolete by the early seventeenth-century,<sup>103</sup> with the advent of *Case*. Accordingly, the reality of Lord Goff's attempt to take the tort back to its foundations (without previously attaining a proper understanding on the legal medieval framework) was a position the courts had striven to abandon for centuries.

Perhaps the reasoning behind Lord Goff's predecessors attempts to consign proprietary and personal aspects 'under the same legal heading' in *Case*,<sup>104</sup> thus creating the nexus between humans and land, were overlooked by his Lordship and the majority in *Hunter*. Judicial activity in the early modern era gave nuisance law the breathing space it required to develop free from certain outmoded and often problematic medieval land law constraints. Fundamentals aside for the moment, the modern judiciary has endeavoured to take the law back to its foundations – the same foundations their earlier counterparts sought to leave behind. The Lords in *Hunter* had, perhaps inadvertently, made an anachronistic connection between nascent *nocumenta* (nuisances) when ultimately the term 'nuisance' did not exist as

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<sup>102</sup> Milsom stated in his *Legal Introduction to Novae Narrationes* that 'four separate kinds of law-suit must be considered'. They were the assize of nuisance (this had to include novel disseisin as they were inherently linked), heard by the justices of assize; viscontial writs of nuisance, where sheriffs dealt with wrongs not covered by the assizes; writs that concerned markets and fairs, heard by the Bench; and *quod permittat* writs 'which seem to be appropriate when the action is not between the original parties but their successors in title' (it was a variant of the proprietary action known as the writ of right). See SFC Milsom, *Novae Narrationes* (Selden Society: vol. 80, 1963), xcvi. According to Fifoot a variant of the Writ of Right, a real action designed to ascertain title of property, known as the *quod permittat* form of a praecipe writ was utilised to protect the appurtenances of free tenements 'without which the estate would be sterile' (see Fifoot (23) 3-4). On this early form of action see Glanvill Bk. XII, cap. 9, 13, 14 (set out in Fifoot *ibid*, 12-13). In addition in the 13th century, and for some time thereafter, many actionable nuisances were assimilated by *quare* writs (*ostensurus quare*) 'to show wherefore'. These flexible writs were issued for a number of cases that involved *nocumenta* where an assize would not lie or was simply not brought. They were worded very similarly to writs of novel disseisin (JRL Milton, 'The concept of Nuisance in English law: a study of the origins and historical development of the concept of nuisance law from its earliest beginnings to the end of the nineteenth-century' (1978) unpublished thesis available from the University of Natal, South Africa, 20 (especially note 68) and compare GE Woodbine 'Origins of the Action of Trespass' (1925) 34 YLJ 344-8 with Loengard (7) 313). Evidentially 'viscontial writs for nuisance' were a product of the thirteenth-century, for instance, nowhere in Van Caenegem's *Royal Writs in England* (22) does he mention that viscontial writs of nuisance antedate the assize of novel disseisin; see also Loengard *ibid*, 186. In addition there is no mention of the viscontial writ for nuisance in Glanvill. See J Reeves, *History of the English Law*, 4 vols. 2<sup>nd</sup> ed. (E Brooke 1787).

<sup>103</sup> However note that Coke commented at footnote (A) in *Penruddock's Case* ((1597) 5 Co. Rep. 101a) that the writ of *quod permittat* was already obsolete: 'This writ is now out of use, for at this day all actions for ways, commons, nuisances, and the like, are turned into actions on the case, or the right may be tried upon trespass' (he refers back to this case in *Baten's Case* (1610) 9 Co. Rep. 53b when a writ of *quod permittat* was brought).

<sup>104</sup> See Baker (23) 426.

an ‘offense’<sup>105</sup> and when our ancestors’ relationship with land - dominated by feudal subordination and profound obligations - was entirely disparate from contemporary living.<sup>106</sup>

The early modern judicial activity included making nuisance more broadly available to subjects by disposing of the requirement to be seised of a free tenement (often mistaken for the modern term ‘freehold’<sup>107</sup>). In essence those judges had established a proprietary link to land beyond the earlier feudal constraints dictated by the seigniorial relationship. Property – the antithesis of feudal relations – and ownership had evolved since the advent of novel disseisin but nevertheless the early modern judges chose to liberalise *locus standi* in private nuisance to persons who were excluded protection under novel disseisin. Lord Goff’s proposition regarding the need to show title to realty, in truth, regresses the law several centuries to before the early modern period of history, even before the inception of novel disseisin, to the Compromise of 1153 between Duke Henry (later Henry II) and King Stephen.<sup>108</sup> He consequently (and unwittingly) constructs an anachronistic argument about the nature of seisin and the assize to justify his stance on standing. Logically the historical foundations relevant to ascertaining modern standing rest in the period when actions on the case for nuisance developed (post-*Cantrell v Churche*).

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<sup>105</sup> We should acknowledge that nuisance (*nocumentum*) was not a name for an “offence” in Glanvill, the pipe rolls or plea rolls of the time (JS Loengard, ‘The Assize of Nuisance: Origins of an Action at Common Law’ [1978] CLJ 144, 158-159 (especially note 44)).

<sup>106</sup> Palmer, ‘Origins’, above note 10, 4-5.

<sup>107</sup> The original writ required a wrong to be *ad nocumentum liberi tenementi sui* (to the nuisance of his free tenement): the early stages of the development of novel disseisin, as evidenced by the plea rolls, were extant of the term ‘freehold’. Free tenement has been consistently mistranslated to mean ‘freehold’ and created false term anachronistic to the origins of private nuisance (for instance, JR Spencer in ‘Public Nuisance – a Critical Examination’ ([1989] CLJ 55, 57) quotes a translation by Fifoot (23) 11) – this is merely one example of many that demonstrates how great legal historians have influenced the modern commentator with an unfortunate personal translation that alters the contemporaneous meaning of ‘free tenement’ this is analysed in greater depth below.

<sup>108</sup> The Compromise represents the first royal intervention between lords and their accepted tenants (Palmer, *Origins* (10, 46). The result of the Compromise of 1153 resolved the warfare endemic during the tempestuous reign of Stephen (1135-1154). In short injuries that happened in Stephens reign were forgotten and thus look back to a time where ancestor would have last been loyal at the death of his Henry I in 1135. Using 1135 as the standard meant any actions of Stephen would be irrelevant and any past support for him would be regarded as a disqualification under Henry IIs reign. The Compromise dictated that a deceased’s heir would be overlooked and a claimant’s alleged ancestral possession in 1135 accepted – if the lord agreed, of course (see Palmer, *Framework* (8) 1143-4).



Whereas Lord Goff defines the keystone of standing as ‘exclusive possession’, it will be shown that there is very limited authority to support this notion. Certainly, the small number of nineteenth and twentieth century cases cited by him fail to ground the judgment in *Hunter* in precedent. In particular, the majority (and prevailing) stance is based on a narrow interpretation of the ‘much-maligned’<sup>109</sup> decision in *Malone v Laskey*<sup>110</sup> in which it was held that standing is not afforded to ‘a person who has no interest in property [or] no right of occupation in the proper sense of the term’.<sup>111</sup> *Malone* did not refer explicitly to exclusive possession as the proper meaning of a right of occupation, and thus the majority’s reasoning on this point is based on ‘mere’ inference.

The remainder of this chapter begins with highlighting the problem of using medieval doctrines owing to an understandable lack of academic consensus then continues with a discussion on the use (and ‘mis-use’) of medieval history in Lord Goff’s so-called ‘fundamental review’<sup>112</sup> of common law authority. Then we engage in a reappraisal of Lord Goff’s decision by elaborating significant imperfections in certain specific evidence upon which he relies, including the academic authority of Professor Newark in ‘The Boundaries of Nuisance’<sup>113</sup> and judicial authority in *Malone v Laskey*.<sup>114</sup> In conclusion it is argued that the majority decision in *Hunter* is unsatisfactory and that the question of standing requires revisiting by judges. A fuller understanding of the ‘basic position’ historically supports the dissenting opinion of Lord Cooke who whilst accepting that private nuisance is concerned with land, nonetheless recognised the interaction between law and mores by delineating important social elements and established laws that require a more liberal stance to standing. He deemed in light of the unsatisfactory approach of disqualifying spouses and other family

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<sup>109</sup> J Steele (1) 379.

<sup>110</sup> [1907] 2 K.B 141. *Malone* distinguished the decision in *Foster v Warblington UDC* [1906] 1 KB 648.

<sup>111</sup> *ibid* 151 (as per Sir Gorell Barnes).

<sup>112</sup> JF Clerk and WHB Lindsell, *Clerk and Lindsell on Tort* 19th edn (Sweet & Maxwell 2006), 1176 (20. 24).

<sup>113</sup> Upon which Lord Goff founded his ‘basic position’ regarding standing ([1997] 2 WLR 684, 687- 688).

<sup>114</sup> [1907] 2 KB 141.

members in modern conditions that substantial occupation, rather than proprietary right, is an adequate nexus between human and land for someone to have standing to sue in private nuisance. It is possible for the law to work within the land-based paradigm of the past yet, in spite of that, to continue to evolve in light of changing social realities and regarding what rights relative to land – particularly environmental rights - are to be protected.<sup>115</sup>

## 2. The Quandary of Inconsistency of Historical Opinion

The harsh reality is that a standout conclusive and authoritative account of the assize of novel disseisin does not exist, therefore, inevitably, the ability to provide a definitive account of specific elements of nuisance law from within the Assize is considerably limited. It is unrealistic to use an area of law - as Lord Goff did - where there is no consensus regarding its origins, purpose or how it functioned. This genuine non-consensus is demonstrated by the works of FW Maitland and SFC Milsom<sup>116</sup> which is comprehensively broached by Palmer in his book review of Milsom's 'Legal Framework of English Feudalism' that was, in part, a 'respectful' polemic of Maitland.<sup>117</sup> Their conflicting opinions best illustrate the insurmountable task of finding accord on the modern law of nuisance using novel disseisin as the template. Maitland ran out of time to complete his lifework and if read in isolation we miss important concepts, particularly philosophical, thus we get an incomplete picture of societal influence on the development of law as he did not contribute beyond the legal framework. Milsom on the other hand was concerned with the people, their ideas and the law

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<sup>115</sup> See Lord Cooke [1997] 2 WLR 684, 711. C Gearty, 'The Place of Private Nuisance in a Modern Law of Torts' [1989] 48(2) CLJ 214. J Steele, *Tort Law: Text, Cases and Materials* (Oxford, 2007), 670-2. Palpably these examples represent just a small number of academics and the judiciary commonly labeling private nuisance as the 'environmental tort'.

<sup>116</sup> Milsom described Maitland as an 'extraordinary man', who had laid 'the foundation of all that we know about the history of the common law' (See Milsom's introduction to *HEL*, above note 28, lxxi). However, Milsom also stated Maitland was someone with whom he was destined to 'argue for much of my life' born out of an intellectual struggle with the legacy of Maitland and what he calls a 'superhuman myth' (SFC Milsom, 'Maitland' (2001) CLJ, 60 (2), 265-270. Milsom also describes Maitland's works as an 'indestructible memorial' in *Framework*, above note 8, 1).

<sup>117</sup> See generally Palmer, 'Framework', above note 8.

in contemporary context thus the social mores were entwined within his conclusions. It is for that reason that Milsom's account is seemingly more reliable but we should not accept either completely without the contributions of others such as Palmer, Thorne, Sutherland, Baker and Loengard.<sup>118</sup>

Albeit outside the ambit of this chapter (being a subject that deserves a thesis in its own right to consolidate the issues), some attempts to define elements of novel disseisin have made crucial mistakes in the eyes of other legal historians regarding the assize's original purpose<sup>119</sup> and the manner in which it functioned. This has occurred over a vast period of legal history subsequently such attempts have logically had adverse effects on the understanding the Assize has had on the modern law of nuisance. In fact on occasions 'nuisance' as an entity is given scant consideration by some of the most influential commentators of the Assize.<sup>120</sup> This may be explained by the complexities of elucidating the elements of the assize itself without the added burden of explaining supplementary situations it had never been intended to deal with. Whichever school of thought one adopts there is no mention that dealing with harms to the free tenement was a formative component of novel disseisin: certainly the assize 'came to be used in a wider range of circumstances than first envisaged'.<sup>121</sup>

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<sup>118</sup> Palmer states that Milsom's *Framework* is impressive in that it relates the development of the law to 'popular morality and decisions of normally intelligent men reacting to particular problems. He too prefers the account of Milsom over Maitland but posits 'we should not accept either completely' (Palmer, 'Framework', above note 8, 1140).

<sup>119</sup> For instance there is conjecture that the assize was originally intended to be a criminal action but this has not been widely accepted. The direct evidence is small in quantity but nonetheless powerful and is in harmony with Glanvill's account (Van Caenegem, *Royal Writs*, 87, 297-8; SE Thorne, 'The Livery of Seisin' (1936) LQR 345, 358; Palmer *ibid*, 1150; and Milsom, *Framework*, above note 8, 178).

<sup>120</sup> For instance, Milsom dedicates only one sentence in his 'Legal Framework of English Feudalism' but importantly he deduces within that sentence that there are seigniorial incongruities where novel disseisin is concerned with nuisances (Milsom, *Framework* *ibid*, 13). Pollock and Maitland only mention nuisance cursorily on three occasions over two volumes; one of those occasions was to say it was a supplement of novel disseisin (a matter to which we will return), thus the law also protected enjoyment of rights over neighbours; and another that refers to Bracton's test for actionability: the requirement for *damnum et injuria* (Pollock and Maitland, *HEL* (23) 53 and 534).

<sup>121</sup> Milsom, *Framework* *ibid*, 166.

It is suggested that activities *ad nocumentum ad liberi tenementi sui* (to the harm of his the free tenement) were one such variant not originally conceived when Henry II made his assize. In the late twelfth and early thirteenth-centuries a formal concept of nuisance did not exist; all that can be said for certain is an action existed for the protection of specific harms to free tenements (assize of novel disseisin for free tenements).<sup>122</sup> Interferences that fell short of actual disseisin demanded a ‘constructive eviction’<sup>123</sup> (constructive disseisin) to be created in order for novel disseisin to be utilised to redress *nocumenta*. The possessory action of the assize of novel disseisin (for *nocumenta* and common pasture) was thus moulded to guard against a small number of interferences with seisin that fell short of genuine disseisins.<sup>124</sup>

The dilemma of there being no consensus on many issues regarding novel disseisin will become apparent within the next sections and support a central premise that Lord Goff’s decision to build a case to set the benchmark for standing on proprietary interests using the Assize as being flawed. There are two important challenges to his decision; first, despite his contention, the Assize was not symbolic of the ‘essence of nuisance’<sup>125</sup> because what was actionable then evidently does not correlate with modern nuisance theory; second, the fundamental possessory character of novel disseisin was antithetical from proprietary interest in both medieval and modern terms. Ultimately contradictions regarding the framework of novel disseisin will have consequences on our perceived understanding of nuisance’s origins if we accept anachronistic and conceptually incongruent contentions.

The disparate schools of thought of Maitland and Milsom regarding the Assize referred to below have in effect created divisions in the world of legal historians and accordingly

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<sup>122</sup> Milton (32) 38. It is evident that the procedure of the assize of nuisance (a name not known during the twelfth-century when novel disseisin was inaugurated) was determined by novel disseisin (Loengard, ‘Free Tenements’ (7) 267).

<sup>123</sup> Kiralfy (22) 56.

<sup>124</sup> It should be acknowledged that the academic consensus is that the term ‘assize of nuisance’ is of later origin and the correct term for the incipient action was the ‘assize of novel disseisin for nuisance’ (Loengard (35) 158-9).

<sup>125</sup> *Hunter* (1) (Lord Goff), 687.

affected the development of the entire history of law; palpably this has enveloped the evolution of private nuisance despite the unfortunate reality that the theory of nuisance in embryonic terms was foreign to the Assize. Whilst often Milsom would accept Maitland's premise on a matter he would readily reject his conclusion. These types of differences have ensured there is reservation regarding most theory concerning the development of novel disseisin and in turn the development of nuisance law is continuously capable of being engulfed by those disputes.<sup>126</sup> Lord Goff's adoption of the Assize to construct his 'basic position' for standing – without referring to the relevant historical debate – is a steadfast example.

In reality the actual influence the Assize has had – or should have had – on modern nuisance is to a large respect superficial, no matter how loud academic and judicial murmurings are to the contrary. The right to sue is a succinct example of how very different modern nuisance law is from its meagre beginnings as an appendage to the ancient assize. Novel disseisin's medieval limitations kept in check by early land law dogmatism seemingly confused by seigniorial relationships and manorial customs concerning land and legal jurisdiction were patent and prevented a robust tort from emerging until in the advent of Case and the subsequent development of actions on the case for nuisance, when such medieval dogma had been superseded.

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<sup>126</sup> The development of actions on the case in the thirteenth-century that concern theories surrounding the effect of chapter 24 of the Statute of Westminster II (1285) is an example of stark disagreement between academics that even created a measure of agnosticism. The disagreement revolves around the phrase '*in consimili casu*' (in a similar case) from which Mr Landon names three schools of thought: the modernists, the revolutionists and traditionalists (PA Landon, 'Action on the Case and the Statute of Westminster II', 52 LQR 68). Briefly, 'modernists' think the action on the case originated from chapter 24 of the Statute (see JB Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Harvard University Press 1913), 492; E Jenks, *A Short History of English Law: From the Earliest Times to the End of the Year 1911* (Taylor & Francis 1928), 137; and R Sutton, *Personal Actions at Common Law* (Butterworths 1929), 292-7) 'revolutionists' 'will have nothing to do with the Statute' whilst the 'traditionalists' believe actions on the case preceded the Statute but their development were enhanced by it. For a discussion regarding this discourse and the various protagonists of different schools of thought see Fifoot who comes to the conclusion that ultimately, regardless of the differing viewpoints, actions on the case were a creation of judicial fiats and their engagement with the development of the common law (Fifoot (23) 66-78).

We must have an open mind regarding the accuracy of accepted beliefs, particularly when assumptions are the basis for judicial reasoning from eras where no academic consensus exists, and for good, obvious reasons. We must question the veracity of claims that would see novel disseisin as anything more than just a foundation from which the law of nuisance was clumsily built upon. The Assize itself was conceived in the deep past during the era of feudalism which was a remote period far greater than our ancestral recollection; arguably this stark reality explains the lack of consensus between extraordinary minds.

### **3. Examining the History Utilised by Lord Goff in *Hunter***

It is commonly accepted that the origins of the modern tort of private nuisance are ancient; a degree of consensus exists that it originated during a Council held in Clarendon in 1166 (known as the Assize of Clarendon) but there is speculation regarding whether the document produced actually mentioned novel disseisin: the document has not survived.<sup>127</sup> There is nevertheless general consensus that the assize of novel disseisin was an enactment made during the reign of Henry II but an exact dating is not possible;<sup>128</sup> all that we can say for certain is King Henry ‘made his assize against disseisin’<sup>129</sup> at some point between the end of

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<sup>127</sup> The various theories regarding the conception of novel disseisin are beyond the scope of this paper but for a concise discourse regarding the subject see Milsom (8), 138; Van Caenegem, *Royal Writs* (22) 284; DW Sutherland, *The Assize of Novel Disseisin* (Oxford 1973) 7; Loengard (35) 164-5; 1 Pollock & Maitland, *HEL*, (23) 145-6; Milton (32) 6-7 and 19; HG Richardson and GO Sayles, *Law and Legislation from Aethelberht to Magna Carta* (Edinburgh 1966), 109; Lady DM Stenton, *English Justice Between The Norman Conquest and the Great Charter 1066-1215* (Allen & Unwin, 1965), 39-42; Kiralfy, *Potter’s Historical Introduction of English Law*, (Sweet & Maxwell, 1977), 504; Loengard (7) 18-51; DA Ibbetson, *Historical Introduction To The Law Of Obligations* (OUP 1999), 98; Plucknett (6) 111; and in general FW Maitland ‘The Beatitude of Seisin Part I’ [1888] CLJ 407.

<sup>128</sup> Royal assizes (*assisa*, translated as enactments, constitutions or decisions) came to be known as assizes (or assise) named by the enactment which had created them (RC Van Caenegem *ibid*, 82). Van Caenegem stated: ‘A certain confusion is hard to avoid, since the phrase ‘assize of novel disseisin’ can for example mean the royal enactment instituting a special procedure against unlawful recent disseisins, or the jury summoned in that context, or the whole proceeding to repress recent unlawful disseisins. This last sense is the most usual’. Therefore ‘assize’ in the context of novel disseisin should be seen to mean ‘action’ or ‘process’ (*ibid* 86).

<sup>129</sup> Sutherland (57) 8.

1155 and the beginning of 1166;<sup>130</sup> there are contentions for a later date for the form of the procedure as described in Glanvill.<sup>131</sup>

The issue of dating is the first illustration that investigating novel disseisin historically is extremely problematic thus utilising it as provenance for modern law should be an exercise performed with extreme caution. The fact that the enactment that established novel disseisin has been lost to time consigns us mainly to conjecture regarding the manner in which the action came into existence and denotes that the only truly effective means of gauging what the law entailed - in the absence of distinct evidence to the contrary - is to read the plea rolls that have survived in conjunction with Glanvill. Sadly, those plea rolls provide no certainty in relation to 'what created a nuisance...or even what rights a landholder had in his own tenement'.<sup>132</sup> Such ambiguities and the absence of a 'definable wrong' called 'nuisance',<sup>133</sup> represent a difficult foundation for informing the present through the past. The substance of the law was hidden behind scant examinations of the facts in records that were obsessed with the procedure of the Writ System where only the final decision, 'a blank verdict for one side or the other' was seen beyond the writ.<sup>134</sup> Writs were 'practical pieces of machinery' with a direct and rational relationship between the facts of an action and the mode of proof; early law-suits were concerned only with the procedure initiated by the original writ.<sup>135</sup>

It can be asserted that generally the impression of the then contemporary law has been built on systematic interpretations of guarded cases where nascent nuisance law can only be understood to have protected practical rights over land that included its appurtenances,

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<sup>130</sup> See Sutherland for a comprehensive and authoritative evaluation concerning the dating of the assize of novel disseisin (ibid 5-18). Maitland cited a case in a roll of 14 Hen. II that suggests that the Assize was in force by 1168 (Maitland (22) 411).

<sup>131</sup> Sutherland ibid.

<sup>132</sup> Loengard (7) 271.

<sup>133</sup> Loengard (35) 158-9 (note 44).

<sup>134</sup> Milsom, *Framework* (8) 1-2 & 5.

<sup>135</sup> ibid, 2.

(without such rights the notion of land-holding would have been sterile<sup>136</sup>). The circumstances surrounding each case are extant as is the social milieu that has been clearly visible in reports since the advent of Case, thus, arguably, the important issues concerning the reasons why actions were brought in the first place and the relationships between the parties are absent.<sup>137</sup> These issues are invisible under regimented writs using the legal academics and lawyers' traditional method of focusing purely on the law;<sup>138</sup> Milsom and Palmer offer a more holistic viewpoint by examining the interaction between social mores and the law.<sup>139</sup>

Janet Loengard's thesis is a helpful contemporaneous analysis because it places the relevant plea rolls under the microscope with the result of portraying a principally concise insight regarding how nascent nuisance law functioned in daily life as a supplement to the assize of novel disseisin, prior to a time when the assize of nuisance, in name, existed.<sup>140</sup> However, little of the formal structure of society is captured because she concentrates only on the legal sources. We can draw upon certain robust works that together offer a vivid - albeit often conflicting depiction - of scholarly opinion, much of which is discussed in this chapter, but again the important social milieu is rarely mentioned. Nevertheless, utilising these works we can be confident that the assize of novel disseisin provides, in part, the nascent origins of private nuisance; indeed it has been argued that it is where many 'experiments were made in the sphere of what is now the law of nuisance'.<sup>141</sup>

We can contend the entire story of nuisance law is missing without reference to the Assize; Loengard goes as far to say that to explain nuisance law without it would be to 'present

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<sup>136</sup> Fifoot (23) 4.

<sup>137</sup> For a comprehensive evaluation of how the social mores and relationships are missing from the rolls that have reached us see Milsom's *Framework* (8) 58-63.

<sup>138</sup> To enhance an understanding of how rigid the system was, if writs were worded incorrectly - even in the slightest - it would be fatal to the cause.

<sup>139</sup> For an investigation into the social phenomenon in relation to the social-legal structure surrounding novel disseisin see generally Milsom, *Framework* (8); and Palmer, *Origins* (10).

<sup>140</sup> Loengard (35) 158-9 (note 44). In the context of this chapter see particularly, Loengard (7) 18-51.

<sup>141</sup> Fifoot (23) 5.



nuisance like a cut flower, without its roots'.<sup>142</sup> But, of course, without any succinct insight into the social structure that drove tenants to the courts the societal needs that have compelled this notoriously protean sphere of law are absent from our enquiry. Without the whole picture we cannot be certain as to why judges, lawyers and litigants turned their backs on the nascent nuisance mechanisms as nuisance law evolved. There would certainly have been a social impetus behind the conceptualisation of the law thus without an understanding of the structure of social-legal Angevin (Plantagenet) England in the twelfth and thirteenth centuries we miss the all-important detail that property law related explicitly to social phenomenon.<sup>143</sup>

It may be suggested that if Lord Goff had a grasp of property and feudal relationships in Angevin England then he surely would have been more cautious regarding his forthright stance regarding nuisance and the need for a proprietary interest being based on novel disseisin. 'Property was antithetical to twelfth-century feudal relationships' – the concept of property only appeared around 1200;<sup>144</sup> thus title is arguably merely an abstract modern concept assigned to nascent nuisance for the purposes of a contemporary understanding. In truth in possessory actions, such as novel disseisin, 'discussion could not go behind the facts alleged by the claimants, behind the possession from which the story started'.<sup>145</sup> The feudal relationship concerned 'profound mutual obligations' based on a seigniorial relationship following a grant of land by a lord to a man for his services (which could be merely an economic rent). Claims to land therefore were for 'the benefit of a personal relationship'; those relationships and tenures that were at the mercy of them were fundamentally different to property rights.<sup>146</sup> Property (title) was hence the antithesis of feudal relations as it

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<sup>142</sup> Loengard (7) 3.

<sup>143</sup> Palmer, *Origins* (10) 1.

<sup>144</sup> *ibid*, 4. cf JC Holt, 'Politics and Property in Early Medieval England', 57 (1972) *Past and Present* 3; JC Holt, 'Feudal Society and the Family in Early Medieval England: I. The Revolution of 1066', 32 (1982) *Transactions of the Royal History Society* 193; and JC Holt, 'Notions of Patrimony: Part II', 33 (1983) *Transactions of the Royal History Society* 193.

<sup>145</sup> Milsom, 1 *HEL* (23) xxix.

<sup>146</sup> *ibid* 5; and Milsom, *Framework* (8) 42 and 63.

determined who could exercise power in society: the power of the lords would have been relinquished if title was apportioned to their tenants.<sup>147</sup>

In a certain sense – as Lord Goff identified<sup>148</sup> - novel disseisin defines the essence of early private nuisance which today plays a part in safeguarding the enjoyment of rights associated with landholding. It may represent the formative stage of where ‘a plaintiff’s enjoyment of rights over land’<sup>149</sup> began but evidently that is where the nexus between modern nuisance and novel disseisin ends. It must be understood that novel disseisin was not the only action that dealt with *nocumenta* during the medieval era, it can be argued that the situation was such because nuisance, as a concept, has an inherent requirement to incorporate personal aspects of landholding under the heading of a property-based action. Accordingly medieval people and lawyers naturally sought avenues of redress for their grievances that were not protected under strict writs and limited actionable heads, indeed a more suitable means of redress than what already existed, under novel disseisin, was needed.<sup>150</sup> The familiar pattern of people seeking redress, where on the face of things it does not exist, is a matter of history repeating itself as each century passes and thus explains - in part - the tort’s protean nature.

Modern torts – thus the modern form of private nuisance – are an ‘offspring’ of ‘action on the case’ which started to develop during the latter part of the fourteenth-century.<sup>151</sup> To reiterate; the historical issues relevant to the modern law in tort should more logically be centred on actions on the case for nuisance, particularly, in the context of this chapter, upon the more liberal stance concerning standing following *Cantrell v Churche* as the social mores and their consequences are visible. There were only two rudimentary legal concepts in the twelfth century: wrongs and obligations. Damages were sought for wrongs whereas obligations look

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<sup>147</sup> Palmer, *Origins* (10) 47; see also Milsom, *Framework* ibid 183-6.

<sup>148</sup> *Hunter*, (1) 687-8.

<sup>149</sup> ibid 687 quoting Professor Newark (17) 482.

<sup>150</sup> Note (32).

<sup>151</sup> For the dating see RC Palmer, *English Law in the Age of the Black Death* (1993) Chs 24-25 and Appendixes 22-24. Hereinafter: *Black Death*.

properly towards performance and ‘remedies for wrongs increasingly suppressed elemental ideas of obligation’.<sup>152</sup> Both concepts, despite modern conceptions, are different: although the non-fulfilment of an obligation may be a wrong the two cannot conceptually conjoin. Thus nuisances (wrongs) do not fit - at a fundamental level - in an action that is designed to recognise an obligation as no wrong has been committed;<sup>153</sup> to borrow Milsom’s words, ‘the fit is obvious, or it is wrong’.<sup>154</sup> The remaining sections on the Assize serve merely as a further explanation as to why medieval law is an unsatisfactory template to formulate modern doctrines, thus is a reassessment of Lord Goff’s ‘basic position’ is appropriate.

#### **4. Seisin and right: possession or title?**

The character of novel disseisin within the feudal framework is both intricate and highly contested; clearly the contrast between ‘seisin’ and ‘right’ is the subject of a very substantial debate.<sup>155</sup> Seisin itself has been described as a ‘famous battleground’ and today the line between possession and ownership is difficult to place.<sup>156</sup> Whilst that full debate is far beyond the concern of this chapter the concept of whether to be in seisin was to be in possession of land - thus seisin equating to enjoyment of property – or ownership in the sense of right (bestowing a title) is at the crux of Lord Goff’s decision to restrict standing in private nuisance to those with a proprietary interest good against the world. It therefore needs to be ascertained, as far as possible, whether seisin represented ‘protection that can be called

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<sup>152</sup> Palmer, *Origins* (10) 8 (particularly note 30).

<sup>153</sup> *ibid.*

<sup>154</sup> Milsom, *Framework* (8) 13.

<sup>155</sup> With in-depth contributions by J Biancalana, *The Origin and Early History of the Writs of Entry* 25 (2007) *Law and History Review* 513; Palmer, *Origins* (10); Palmer *Black Death* (81); and Palmer, *Framework* (8); see also F Joüon des Longrais, *Études de droit anglais. I: La Conception anglaise de la saisine du XIIe au XIVe siècle*. (Jouve 1924); DW Sutherland (57).

<sup>156</sup> J Hackney’s book review of SFC Milsom’s ‘*Historical Foundations of the Common Law, Second Edition*’ (1984) 5(1) *Journal of Legal History* 79, 83.

possessory<sup>157</sup> or a seigniorial relationship that was sufficient to bring an action in novel disseisin, or alternatively whether indeed a title (right) was required to be shown at all.

The debate concerning seisin and right is entwined by complex feudal concepts influenced by Roman, and to a degree, Canon Law.<sup>158</sup> Whilst the wider debate is no concern of this thesis, in the context of the Lords in *Hunter* accepting that there is a requirement to have a proprietary interest to sue in private nuisance - as being laid down in novel disseisin - the subject demands some attention. The historical evidence and academic commentary lends little support to Lord Goff's decision. Bracton and abundant records of royal courts in the thirteenth-century have acquainted us with 'seisin' and 'right' which have been labelled 'as abstract concepts' and 'untidy versions of possession and ownership'.<sup>159</sup> Palpably to the modern audience the terms 'seisin' and 'right' are more aptly described, and better understood, as 'possession' and 'ownership' which can survive as proprietary rights good against the world *in rem* (real actions).<sup>160</sup> Unfortunately that modern perception of 'ownership' does not reveal the proprietary peculiarities of English medieval land law hidden within the possessory remedies;<sup>161</sup> property rights that are 'good against the world' do not best suit the medieval template, they fit Roman language. The biggest difficulty in our

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<sup>157</sup> Milsom, 1 *HEL* (23) xxviii.

<sup>158</sup> Maitland argued that 'definitely possessory remedies were not native to English law and they 'bear witness to the influence of alien jurisprudence of Roman law working either directly, or through the medium of Canon Law' (Maitland, 'Beatitude' (22) 411-2); Sutherland (57) 21-2.

<sup>159</sup> Milsom, *Framework* (8) 37.

<sup>160</sup> Milsom posited that in Roman language usage *dominium* and *possessio* were *in rem* but when the pair are read in English they equate to the *in personam* action (Milsom, *Framework*, *ibid*, 165). Real and personal actions are diametrically opposed – one is brought against or about a thing (property), the other can affect the defendant's personal rights and interests concerning his or her property. In *personam* (personal) actions are against specific persons who are summoned to answer the complaint made against them whilst actions *in rem* (real) would be appropriate if title to property is the issue. On the surface Bracton seemingly suggested that novel disseisin fits better the *in rem* action but it is also possible to infer from his Treatise that the Assize is a mixed action; the fact that he has a heading for novel disseisin alone that does not convey an explanation one way or the other only confuses the issue further (Bracton, *De Legibus*, in Thorne ed., 292-5). Nonetheless – as Maitland observes - Bracton's viewpoint becomes clear: as novel disseisin was the only action where a tenant could recover both land and damages it is a personal action founded on tort (Maitland (22) 415 (he cites Bracton, f. 104 and 164b)). See also Maitland, *Forms of Action* (23) 7 who uses Blackstone's definitions in 3 *Commentaries*, 117-8). If this is the case the fundamental 'proprietary' element asserted by the Lords in *Hunter* is in doubt.

<sup>161</sup> Milsom, 1 *HEL* (23) xxviii.

modern eyes viewing medieval land law is the confusion caused by the Roman influence of possession and ownership; on the one hand we have *possessio* that represents possession, on the other *proprietas* (or *dominium*) which connotes a type of ownership.

Through a modern lens we unwittingly imagine a transformation of elementary seigniorial legal ideas in the new assize and assume that during the unintended and unforeseen transfer in jurisdiction<sup>162</sup> from baronial courts to the royal courts that the disputes - and the terms in which they were conducted in the baronial courts - transformed directly to the Assize unaltered but Milsom professed that the royal courts were made to work by their own rules.<sup>163</sup> Novel disseisin was modelled on seisin and right which characterised different proceedings arguably because the terms could be 'taken as translations or equivalents to the Roman terms of '*possessio*' and '*dominium*'. Therefore, as Milsom contends:

[w]e have imagined seigniorial courts in the twelfth century as dealing in rights *in rem*, rights good against the world. But rights cannot be good against a seigniorial world, only a Roman or a modern world; and it is this assumption that has misled us the most, and perhaps created most of our difficulties.<sup>164</sup>

It is these difficulties that have arguably been overlooked by Lord Goff. If what Milsom professes is correct, and his contention is read in conjunction with Donald Sutherland, Lord Goff's 'basic position' is on precarious grounds if he is intent on utilising the period as justification. The historical element of his decision is dependent on an interest in land that was 'good against the world' in order to reconcile novel disseisin with exclusive possession.<sup>165</sup> If, at the time, it was not possible for rights to be good against the world in the seigniorial system (only retrospectively borrowing Roman law principles) then according to Sutherland the right to exclude was unrealistic in novel disseisin. In his words, the 'Roman

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<sup>162</sup> *ibid* 36.

<sup>163</sup> Milsom, *Framework* (8) 36-7.

<sup>164</sup> *ibid* 37.

<sup>165</sup> The right of exclusion – good against the world – is a central element to exclusive possession in the modern law. See *Street v. Mountford*. [1985] 1 AC 809 then cf *Bruton v London and Quadrant Housing Trust* [1998] QB 834 [845] with the House of Lords decision in *Bruton* [2000] 1 AC 406.

terminology' only provided a 'convenient adjective':<sup>166</sup> despite some warrant in Glanvill (and later Bracton) this Romanesque language has been in doubt ever since.<sup>167</sup> It must be understood that the historical evidence is indicative that property rights did not appear until around the turn of the thirteenth-century; in 1176 the forward-looking Assize of Northampton carried the pro-feudal desirability of robust feudal relationships introduced by the Compromise of 1153.<sup>168</sup>

Sutherland was forthright stating that *possessio* and *dominium* were 'distinct juridical [Roman] concepts with no middle ground between them'.<sup>169</sup> He maintained that *possessio* and *dominium* were categories of substantive law whereas seisin and right could be contrasted and categorised as procedural concerning a continuum. Seisin (possessory) involved recent disseisins and recent facts whereas right (proprietary) looked to the less well-known and more difficult to prove facts - unimportant to a recent disseisin – regarding who had the oldest title. It was noted in the introduction that the question of right could not in general be raised in possessory actions.<sup>170</sup> However the implications of the Compromise in 1153 suggest that there was an alternative distinction between seisin and right prior to the assize of novel disseisin and perhaps later provided the exception for title to be raised.<sup>171</sup> There is certainly evidence of a distinction between seisin and right (*seisina* and *ius*) between

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<sup>166</sup> Sutherland (57) 42.

<sup>167</sup> Milsom, 1 *HEL* (23) xxviii.

<sup>168</sup> See Palmer, *Origins* (10) 4 and 8. Palmer explains the requirement for 'property' being independent of seigniorial relationship, he stated, 'Property as a legal phenomenon occurs only when an individual's claim to a parcel of land is not dependant on his own strength or on a personal relationship: when title is protected by a bureaucratic authority according to set rules. Property derives from the state; it cannot exist prior to state' (Palmer *ibid*, 7).

<sup>169</sup> Sutherland (57) 42

<sup>170</sup> Milsom, 1 *HEL* (23) xxix.

<sup>171</sup> Palmer, *Framework* 1142-3 and 1149. See above note 38. The conditions of the Compromise produced an anomaly where although there was a tenant accepted by a lord - thus a tenant in seisin – which was 'all the feudal world knew' in the context of title (see next section) there was an outsider who was not accepted by the lord but who nevertheless had 'right'. According to Palmer, 'it was a right founded in the past – 1135 to be precise – but in the nature of an expectation. It could be enforced only at the current tenant's death'. It would seem that despite the anomaly that the lord could compromise on the position forced upon him by a royal intervention where, usually, all three parties could find satisfaction (Palmer *ibid*, 1144-5).

1154 and 1161 in a case (not novel disseisin) based on hereditary seisin from 1135<sup>172</sup> that is indicative that there was not only a distinction prior to the Assize but that distinction was not one between possession and ownership.<sup>173</sup>

In Sutherland's opinion novel disseisin stood at the bottom of a hierarchy of actions under the writ of right at the top;<sup>174</sup> whilst one was a possessory action and the other a proprietary action they were nonetheless merely stages on a hierarchy suggesting they were part of a procedure rather than separate substantive categories of law. If this was truly the case then novel disseisin would have been detached from the Roman terms thus conflicting with the notion that seisin could have been be good against the world. Although some lawyers understood seisin and right as substantive categories, thus seisin as a category of Roman *possession* and right a category of *proprietas*, much confusion was to come when right in property seemed to have vanished from the law by the late thirteenth-century when actions of right fell out of use.<sup>175</sup>

The contemporaneous issue, in part owing to the Compromise that handed him the Crown, was caused by the juridical policy of Henry II;<sup>176</sup> there were now two different essential concepts in land law: right and seisin.<sup>177</sup> Arguably, we can deduce that the haphazard translation of the two Roman concepts into English Law, where before there was only the all-important seisin, played a role in fashioning two respective actions: the possessory and proprietary actions. The older 'writ of right' was an example of a proprietary action that dealt

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<sup>172</sup> Cited by Palmer (ibid 1148) as: A Saltman, Theobald, Archbishop of Canterbury 389-90 (Charter No. 167) (years 1154-61).

<sup>173</sup> Palmer ibid, 1149.

<sup>174</sup> Pollock and Maitland, 2 *HEL* (23) 74-5.

<sup>175</sup> See Sutherland (57) 42. cf Pollock and Maitland, 2 *HEL* ibid, 72-8; SFC Milsom, *Historical Foundations of the Common Law* (Butterworth & Co 1981), 119-22 (hereinafter: *HFCL*); and Joüon des Longrais (85) 63-9 regarding these confusions. Milsom observed the wording of writs by the fourteenth-century was to allow the 'original possessory remedy to perform a proprietary function' (Milsom ibid, 138) but he later acknowledged the institutional problem this caused in novel disseisin stating a 'great artificiality' had been created and that the assize had been 'consciously exploited' by lawyers as a ruse to avoid the slow, expensive and troublesome proprietary action of the writ of right (ibid 157-8).

<sup>176</sup> Thorne (49) 358; Palmer, *Origins* (10) 2.

<sup>177</sup> TFT Plucknett, *Year Books, 5 Edward II* (Selden Society, vol. 63), xxxv.

with litigation regarding right (when seisin had been withdrawn or violently lost in the distant past<sup>178</sup>) whilst the assize procedure – with its possessory actions - was ‘devised to deal with questions of seisin’.<sup>179</sup> essentially novel disseisin concerned matters regarding ‘recent evictions’ and *nocumenta* (nascent nuisance) were considered an adjunct to that action.

Following contributions by the likes of Sutherland, Van Caenegem, Milsom and Maitland we can infer that novel disseisin was a possessory action concerned with incidents of seisin.<sup>180</sup> Maitland, to whom novel disseisin brought a ‘transfer of jurisdiction of over disputes concerning abstract property rights’ from the manorial court to the king’s court,<sup>181</sup> asserted the difference between right and seisin by separating the requirements of the two actions. Whilst the proprietary actions such as the writ of right decided whether someone or their ancestor was seised as of right<sup>182</sup> in novel disseisin, a possessory action, it was enough to be disseised of free tenement ‘and of *right* there is no talk’.<sup>183</sup> It is clear that the deciding factor was being seised (or in possession) in demesne of a free tenement.<sup>184</sup> As Palmer posited examining Milsom’s notions of a ‘Feudal Framework’:

...[E]arly litigation was not horizontal: not owners defending title to property against equals. Early litigation took place in a world and according to a model that was strictly hierarchal. The assize of novel disseisin, the assize of mort d’ancestor [again possessory], and the writ of right patent were conceptually upward: they were tenants claims against lords [and visa versa].<sup>185</sup>

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<sup>178</sup> See Maitland, *Forms of Action* (23) 7; Van Caenegem, *Royal Writs* (22) 262-3 (who cites Glanvill, xiii, 32-9) and 306-9; Loengard (35) 145.

<sup>179</sup> Van Caenegem *ibid*, 311 (see particularly note 1). Possessory assizes were a new expedient and expeditious process that provided a different route than the old notoriously drawn-out and cumbersome proprietary assize, the writ of right. In Glanvill novel disseisin was stated as ‘swift and efficient’ (Glanvill, XIII, 32-39). For example, Loengard described the assize as ‘justice administered with speed and simplicity’ which was terse and clear (Loengard *ibid*, 144, 145, 157-158 and Van Caenegem *ibid*, 262).

<sup>180</sup> Sutherland (57) 40-42. Van Caenegem *ibid*, 311.

<sup>181</sup> Palmer, *Framework* (8) 1133.

<sup>182</sup> *ut jus et hereditatem suam*.

<sup>183</sup> Emphasis added. Maitland, *Forms of Action* (23) 7 and 28; and Milsom *ibid* 119.

<sup>184</sup> See Loengard’s analysis below (page 57).

<sup>185</sup> Palmer, *Origins* (10) 3.



We can be confident that *initially* title - representing an abstract property right called seisin - was not an issue regarding bringing an assize: 'property' was yet to transcend seigniorial relationships.<sup>186</sup> In reality, in stark contrast to Lord Goff's proprietary claims, for Milsom's seigniorial hierarchy to function properly someone without seisin – thus title - had to be able to bring the assize. This makes sense if, as Palmer acknowledged in his review of Milsom's 'Framework', lord's found it increasingly dangerous to determine some issues of grants in his own jurisdiction.<sup>187</sup>

Milsom's contentions on this matter generate an interesting discourse concerning who could, or indeed actually did, bring an action in these disputes between tenant and lord. He advocates that anyone could bring an assize in novel disseisin; it was a matter of whether they would win.<sup>188</sup> In certain circumstances lords needed an assize to proceed in order for them to explain to the recognitors that an 'interloper' had not been seised or that a possession lacked the vestigial element required for seigniorial assent. If a lord ejected someone then allowed an assize to continue the recognitors would justifiably find his favour – the plaintiff would not have been unlawfully disseised without judgment if he was never seised in the first place. If the lord had summoned the person ejected in his own court he may well be seen as acknowledging some tenure; as seisin was an abstract right in the lord's courts protected by his warranty he would be wise to allow royal justice to take its course.<sup>189</sup>

Maitland differed from Milsom, Palmer and Sutherland in this respect believing that seisin was influenced by Roman law.<sup>190</sup> He assumed that 'right' and 'seisin' were comparable to the Roman concepts of *dominium* (right) and *possessio* (possession), thus were concepts of the

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<sup>186</sup> See note 95.

<sup>187</sup> Palmer, *Framework* (8) 1139.

<sup>188</sup> Milsom, *Framework* (8) 55.

<sup>189</sup> *ibid* 54-8; see also, 21-3 (particularly in relation to note 6 on page 22).

<sup>190</sup> Hackney posited: 'Maitland has missed the implications of the seigniorial dimension, and so had, as we have since been told in a British Academy appreciation, got the twelfth century "wrong"' (see J Hackney (81) 82; he did not cite the British Academy source).

same preceding order. To Pollock and Maitland our land law was almost entirely about consequences of seisin: in their opinion seisin, in crude terms, simply meant possession and was rooted in the Latin concept of *possessio*.<sup>191</sup> They nonetheless believed that possession was viewed by lawyers of the time in a manner that distinguished seisin (*possessio*) from any proprietary right (*proprietas*) equivalent to an abstract ownership. SE Thorne acquiesced with their contention positing that Roman distinctions were becoming familiar to contemporary lawyers who understood the Assize ‘protected possession and no more’.<sup>192</sup>

Milsom on the other hand disputed this notion stating ‘we must not assume...that at the time lawyers were identifying the substantive concepts involved, *dominium* with the right and *possessio* with seisin’.<sup>193</sup> Joüon des Longrais spoke of the confusions and quid pro quos that bedevil the subject owing to contemporary lawyers’ attempts of working with the Roman concepts of *possessio* and *proprietas*; he was of the opinion that such attempts were to no avail. He had a point: we can imagine common lawyers thinking of elaborate constructions where writs are ‘somewhat possessory’ and actions which are ‘mixed of right and possession’ – neither reconciled the Roman concepts with the quirks of feudal England.<sup>194</sup>

Joüon des Longrais nonetheless contended that during the late twelfth-century seisin corresponded to right rather than possession.<sup>195</sup> This argument has received much criticism; of note is Woodbine's polemic in his notes to his edition of Glanvill.<sup>196</sup> It is evident that prior to Glanvill the distinction between ‘seisin right’ and ‘seisin possession’ was not clear cut but the distinction after Glanvill is practically undeniable.<sup>197</sup> Thorne (without citation<sup>198</sup>) stated

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<sup>191</sup> Pollock and Maitland, 2 *HEL* (23) 29-30.

<sup>192</sup> SE Thorne (49) 358.

<sup>193</sup> Milsom, *Framework* (8) 165; cf Hackney (120) 81 and 82-3.

<sup>194</sup> Joüon des Longrais (85) 178.

<sup>195</sup> *ibid* 45, 57.

<sup>196</sup> See GE Woodbine's notes to his edition of Glanvill, *Tractatus de legibus et consuetudinibus regni Anglie* (Yale University Press, 1932), 262 and 281-2.

<sup>197</sup> Thorne (49) 359 (note 45).

<sup>198</sup> *ibid* 354-5.

that there was a clear distinction – firm in Glanvill - between seisin and right (*saisina* and *ius*). Nonetheless he objects to seisin being the type of ‘pure Roman possession’ that corresponded almost completely with *possessio* but rather a pure medieval concept not easily distinguishable from right.<sup>199</sup> But, as it will become apparent, in the context of becoming any abstract property right, according to Milsom seisin was outside royal control in the Assize, it was a matter to be determined by seigniorial justice within the baronial courts – it was not a matter for novel disseisin in royal courts.<sup>200</sup>

It is hard to deny English ‘right’ some of the properties of Roman ‘ownership’ but it differs in obvious and important respects from *proprietas* and could be defined only in terms of seisin. Beyond that it is not easy to see how far consensus goes. The ‘lion’s share’ of commentators regard the establishment of the assize as being responsible for a contrast between right and seisin to which ‘possessoriness’<sup>201</sup> was not entirely inappropriate; and that this, the purely factual content of an assize verdict, and the use of Roman language amalgamate to transform seisin into something very like *possessio*.<sup>202</sup> The concept of property ownership was thus at its embryonic stage. In that respect, and in the context of our investigation, there is an argument that to be in seisin equated to being in possession of land and that possession was protected by the royal courts. The alternate stance is that we can regard the safeguarding of seisin protected tenants against their lords away from the jurisdiction of the manor courts, a type of judicial review or perhaps court of appeal; this is the contention to which the next section will turn. Regardless of which theory we advocate both provide weak foundations for claims that there was a nascent requirement to show title of realty to bring an action in novel disseisin.

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<sup>199</sup> *ibid* 355.

<sup>200</sup> *ibid* 357.

<sup>201</sup> Pollock and Maitland, 2 *HEL* (23) 74.

<sup>202</sup> See Select Bibliography and Notes by Milsom in Pollock and Maitland, 1 *HEL* (28).

In light of the foregoing analysis, suggesting as it does, that if someone needed to prove title then another action was available for that purpose: the writ of right. Later the assize of mort d'ancestor<sup>203</sup> and the writ of entry<sup>204</sup> also dealt with title disputes. Hence we have succinct evidence that, at least initially and for the rest of the twelfth-century, there was not a need to show title to realty – particularly in the modern sense - to bring the Assize; this obviously extended to complaints concerning *nocumenta* under the action. Lord Goff avers wholly to the Roman law concept of *proprietas* that, not being defined in terms of seisin, had an uncomfortable fit within English law; his assertions in *Hunter* would appear to be contrary to a large proportion of consensus regarding the structure of the early actions.<sup>205</sup> But any relevant historical repudiation of his Lordship's claims should not stop at refuting proprietary requirements, the interesting observations by Milsom and Sutherland that cast doubt upon whether there could be a right to exclude the world in the seigniorial courts (or for a considerable time on the assize) raises doubts regarding Lord Goff's insistence of exclusive possession to have standing in private nuisance today. In essence the evidence above suggests his utilisation of novel disseisin as the foundation for his basic position was misconceived. The feudal social mores relevant to the legal framework that controlled them were alien to contemporary living and modern tort; a brief - but often overlooked - examination of the social environ in which the legal framework existed will bring to light why the epoch should not be the template to construct doctrines for private nuisance in the modern day.

## 5. Policy and Novel Disseisin: 'Feudal' or 'Anti-Feudal'?

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<sup>203</sup> For the assize of mort d'ancestor see Van Caenegem, *Royal Writs* (22), 316; and Lady Stenton (57) 43. Both writers emphasise the initial orientation of the assize as an interference between lord and tenant. cf Milsom, *HFCL* (23) 134-7; and Pollock and Maitland, 2 *HEL* *ibid*, 56-62 and 74.

<sup>204</sup> See Milsom in *Novae Narrationes* (32) cxxxii. For the thirteenth-century relationship between writs of entry and writs of right see G. J. Turner in *Brevia Placitata*, lxxvii (*Brevia Placitata*, ed. G. J. Turner and TFT. Plucknett (Seld. Soc. vol. 66, 1947), lxxiii). On the original place of the writs of entry in relation to other remedies see Stenton (57) 50; and ND Hurnard, 'Did Edward I Reverse Henry II's Policy upon Seisin?' (1949) 64 *English Historical Review* 529.

<sup>205</sup> 'As between lord and tenant and within the lordship, there is hardly room for any deeper proprietary concept. Seisin itself connotes not just factual possession but that seigniorial acceptance which is all the title that can be' (Milsom, *Framework* (8) 40).

Novel disseisin itself had a deep-seated political<sup>206</sup> and financial impetus behind its conception as imposed by Henry II according to - and following - his ascendancy to the Throne.<sup>207</sup> In Maitland's opinion<sup>208</sup> the Assize was created to protect seisin in the sense of possession of land - when feudalism was the foundation of English society representing the quintessential feudal framework.<sup>209</sup> Maitland advocated that Henry believed he had to strike a blow at feudalism to strengthen his position as king;<sup>210</sup> which would suggest that Maitland saw novel disseisin as an 'anti-feudal' institution. He argued that Henry attempted to take as much litigation as possible concerning land into his courts thus starve the feudal courts, centralise justice and fill his coffers;<sup>211</sup> a modern observer may be drawn into an understanding that being seised of free tenement was under royal control - this would seem to be an error. The viewpoint that Henry II was a strong king who distrusted feudal power is seemingly a myth; he did after all come to the Throne by compromise rather than conquest.<sup>212</sup>

Maitland's theory that Henry II's motivation behind creating novel disseisin was possibly an attack on feudalism, in the sense of being directly aimed to enlarge royal jurisdiction at the expense of feudal power, is heavily, and with devastating effect,<sup>213</sup> contested by Milsom. Professor Milsom's line of argument was that the purpose of the Assize was 'anti-feudal', not because of any jurisdictional conspiracy but - quite the opposite - in the sense of being directed against improper feudal action. In comparison he also viewed it as intensely 'feudal' in that it induced a due process between lord and tenant, a form of judicial review, as it were,

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<sup>206</sup> Thorne (49) 358.

<sup>207</sup> Palmer, *Origins* (10) 8-24. Protecting seisin of free tenement was how Henry II circumvented the lord's monopoly on incidents of land-holding (Milsom, *HFCL* (23) 123 and 145); cf Maitland (22) 413.

<sup>208</sup> Maitland (18), 413. According to Maitland, that the avowed Plantagenet motivation behind the novel disseisin was to provide the poor and weak with the opportunity to bring actions against the rich and powerful so they were able to work the land and benefit from its fruits. According to Milsom novel disseisin indeed gave tenants the courage to bring such actions (Milsom, *HFCL* *ibid*, 139; and see section below).

<sup>209</sup> According to Pollock & Maitland it was 'perfectly feudalized' (2 *HEL* (23) 235).

<sup>210</sup> cf Palmer regarding the build-up to the Assize of Northampton (*Origins* (10) 13).

<sup>211</sup> If his aim was indeed to starve the feudal courts it would abate the strength of the relationship between lord and tenant whilst create robust ties between himself and his subjects; arguably this process would help unite the people (Maitland (22) 412-413).

<sup>212</sup> See Milsom, *Framework*; and Palmer, *Origins* (10) 13.

<sup>213</sup> Palmer, *Framework* (8) 1146.

of the actions within the lords' court upon which the whole structure was thought to lie; hence to make feudalism function properly rather than to attack it.<sup>214</sup>

SE Thorne, partially in accord with Milsom, took a feudal stance and stated: 'to say that Henry deliberately set out to protect possession in order to deprive the baronial courts of their jurisdiction is completely to misunderstand the conditions of the time'.<sup>215</sup> Milsom's apparent understanding of those conditions was that the Assize represented a mechanism to stop abuse of lords in their courts where before no sanction existed.<sup>216</sup> The matter is unresolved but the lords readily used novel disseisin thus it was seemingly as important to them as it was to 'the humblest freeman'.<sup>217</sup> The only thing we can say for certain is that the jurisdiction of novel disseisin was restricted to royal proceedings away from the lords' influences.

Milsom's feasible contention regarding novel disseisin being a form of judicial review – a nascent example of a common law action to protect the rule of law, as it were – has interesting implications for Lord Goff's contention regarding nascent standing. On balance, today judicial review has a broad ambit concerning sufficient interest and is extended not only to those affected in a substantial manner or in cases where no more appropriate challenger exists but also to 'legal persons': hence organisations (such as trade unions and NGOs) may have sufficient interest.<sup>218</sup> McGillivray and Wightman opine in discourse following the Court of Appeal decision in *Hunter* about the opening up of 'space for common

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<sup>214</sup> Milsom, *Framework* (8) 37, 39-41, & 57; Milsom's Bibliography and Notes in Pollock and Maitland, 2 *HEL* (Liberty Fund, 2010) and his Introduction essay in the Cambridge University Press's 1968 reissue of the same book.

<sup>215</sup> Thorne (49) 358.

<sup>216</sup> Milsom, *Framework* (8) 36.

<sup>217</sup> Milsom explains the speed at which novel disseisin 'extended from its original purpose of protecting tenant against lord' (ibid 26-7); see also Thorne ibid, 358 (note 42).

<sup>218</sup> If the person challenging the decision can say that he is affected by it and there is no more appropriate challenger, and there is substance in his challenge, the court will not usually let technical rules on whether he has sufficient interest stand in its way (*The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators*, 4<sup>th</sup> Edition, 2006, Treasury Solicitor, para 3.4, referring to the case of *R v DPP ex parte Bull and Another* [1998] 2 All ER 755 (QBD) in which Amnesty International UK was held to have standing).

interest groups, as well as individuals<sup>219</sup> in order to challenge regulatory failure through private nuisance thus acting as an unofficial judicial review of public authority.<sup>220</sup> The possibility of such eventualities following the continued liberalisation of the right to sue may well have been a motivation behind the policy decision to restrict standing in the House of Lords.

Whatever Henry's motivation, creating the *possessory assizes* drew litigation into his courts; but the scope of to whom he could extend the protection of novel disseisin was intricate and founded according to the deep-seated feudal principles. Arguably Henry sought to provide the right to seek redress to as many freemen as feudalism would allow.<sup>221</sup> Maitland postulated that Henry may have created novel disseisin in order for the 'blessedness of possession', or in other words, the sanctity of being seised of free tenement was protection by the royal courts due to royal ordinance.<sup>222</sup> This may have been the case regarding the function of the action but then again the manner in which a tenant became seised - and its subsequent nexus with seisin and right - is a matter of considerable dispute, but for now it is important to recognise that the possessory assizes were a judicial technique ordained to protect seisin (as possession) when seisin was the cardinal point of land law and the basis of economic life.<sup>223</sup>

## 6. Nascent 'Standing'

The feudal principles surrounding being seised of a free tenement are essential to understanding the differences between contemporaneous social mores surrounding novel disseisin and modern societal conditions in which private nuisance now exists. The problem in the context of standing is that the issue has not, as far as I know, been part of substantial

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<sup>219</sup> D McGillivray and J Wightman, 'Private Rights, Public Interests and the Environment' in T Hayward and J O'Neill ed. *Justice, Property and the Environment: Social and Legal Perspectives* (Ashgate 1997), 144, 156.

<sup>220</sup> See generally D McGillivray and J Wightman *ibid*, 144-56.

<sup>221</sup> Milton (32) 13; Loengard (7) 51-71. Some land disputes reached the royal courts only through *tolt* and *pone*.

<sup>222</sup> Maitland (22) 413. See (58) above.

<sup>223</sup> Van Caenegem (22) 262. As Coke CJ stated: "...for until he is seised of land life is nothing but work, pain and upheaval; but when he has obtained seisin, he may settle and rest" (CJ Coke, 6 Co Rep 57b; Palmer (6) 304 (note 38); and Pollock & Maitland, 2 *HEL* (23) 30 and 46).

discourse. Of course historians are unlikely to investigate medieval ‘standing’ in order to compare it to modern conditions in private nuisance (if there was a corresponding right during that period). Certainly, if consensus cannot be found on the assize’s origins, purpose and function then it makes sense that *locus standi* has been to a large extent overlooked. Indeed evidence, as will be seen, regarding the existence of a succinct right to sue in novel disseisin is difficult to isolate, it is more probable that certain seigniorial relationships ensured success under the assize than bestowing a right to sue.

It is generally accepted that there was a benchmark for ‘standing’ in novel disseisin that was based on a ‘freehold’ interest and it is assumed - but nonetheless uncertain - that both the defendant and the plaintiff were required to be ‘freeholders’.<sup>224</sup> It is suggested here that the term ‘freehold’ is an etymological progression more palatable for the modern audience that misrepresents the fact that land had to be held freely. According to Milsom the matter of a tenement being free was pivotal to success under the assize; indeed the ‘free tenement’ relates to the status of the tenant – whether s/he is free or unfree – rather than a right, per se. A free man who held land in villeinage could be disseised by the lord as of will; it was sufficient enough for a tenement to be unfree for the lord to be successful in the Assize.<sup>225</sup> Thus a tenant needed to hold land freely (as a freeman) to be protected.<sup>226</sup> Accordingly the issue of free tenement (*liberum tenementum*) dictated success on the assize rather than having ‘freehold’ bestowing standing of sorts. We will return to this issue.

Janet Loengard’s analysis in her thesis that focused solely on the period is entirely devoid of the term ‘freehold’. The only reasonable inference to be drawn from such an omission is that

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<sup>224</sup> Milsom advocates that the nature of early reports hide the fact that most defendants were the in fact the lords thus in a vast number of cases it would certain that the lord would have seisin. Nevertheless, Sutherland expressed that a defendant could be: ‘man or women, noble or commoner, free or serf, layman or cleric: any person alive, in fact except the king and his agents acting under his express command’ (Sutherland (57) 2).

<sup>225</sup> Milsom, *Framework* (8) 22-3 .

<sup>226</sup> Milsom, *Framework*, ibid, 22-3, 55 and cf 167 (in the case of mort d’ancestor); Sutherland (57) 2. ‘In medieval society men were either free or unfree’ (Milton (32) 8, particularly note 28).



‘freehold’ was simply not an element of novel disseisin. In recent correspondence Loengard confirmed that she doubts that a twelfth or thirteenth-century meaning can be attributed to freehold.<sup>227</sup> She wrote that ‘no one ever speaks of ‘freehold’ or ‘freeholder’ in the plea rolls’. Instead she affirms that uniformly the reference is to a ‘free tenement’<sup>228</sup> and indeed we can apportion an element of misinterpretation to the frequent use of ‘freehold’ over ‘free tenement’ when we look at Glanvill and a specimen writ where he specifically writes in terms of *ad nocumenta liberi tenement sui*, which translates as ‘harm to his *free tenement*’ rather than ‘freehold’.<sup>229</sup> a number of commentators including Fifoot have substituted free tenement for freehold in their translation but it should not be inferred that this etymological shift creates a nascent benchmark for standing.<sup>230</sup>

Loengard’s thesis and Milsom’s ‘Framework’ include rare insights regarding novel disseisin based on meticulous interpretations of the plea rolls (and Glanvill).<sup>231</sup> We would expect that today’s requirement of exclusive possession to be less austere than any medieval equivalent, particularly considering the limitations bestowed by feudal principles and the extension by Case beyond those with a free tenement.<sup>232</sup> Then again, whilst the ambit has expanded in terms of land law, the nascent impetus regarding litigation in novel disseisin was far more liberal than is commonly presumed today. There were indeed numerous types of tenements and/or feudal relationships that existed which would not support an assize. At this juncture it is pertinent to reiterate that *locus standi* has evolved with societal nuances over time and that

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<sup>227</sup> On file with the author.

<sup>228</sup> Maitland recognised that freehold was not relevant to novel disseisin and only began to ‘slowly creep in’ to and ‘imply a certain kind of proprietary right’ during the time of Bracton (Maitland, above note 18, 430). In respect of ‘freehold estate’, Pollock and Maitland do not attribute that term until when the Year Books begin (circa 1268) from the language used by lawyers of the period (Pollock & Maitland, vol (ii), 11 (e.g. YB 20-1 Edw. I, p. 39)).

<sup>229</sup> Glanvill Bk 13, cap 35.

<sup>230</sup> Fifoot’s translations of sample writs are a succinct example of this in practice (Fifoot (23) 11-22).

<sup>231</sup> Milsom’s ‘Framework’ should be read in light of Robert Palmer’s polemics regarding his observations (Palmer, *Framework* (8)).

<sup>232</sup> This extension followed the developments in the late sixteenth and early seventeenth-centuries that culminated with the decision in *Cantrell v Church* (1601) B & M 588; Cro. Eliz. 845; 78 ER 1072 (Ex. Ch.). See Chapters 1, 3, 4 and 6.

it is problematic, if not undesirable, to apply feudal principles directly to the modern fabric of society: it is imprudent to relate modern interests and estates in land to the feudal relationship between land and lord.<sup>233</sup>

The ability to be successful under the assize started with a requirement for a tenant to be seised in demesne, which we may compare to being in actual possession today but not as a right that was good against the world (as exclusive possession bestows) rather against an individual, for instance, the lord.<sup>234</sup> In medieval terms being in demesne was a tenurial distinction that was utilised, *inter alia*, to exclude those entitled to a service (usually the lord) from a tenure that equated to a free tenement – they would be in seisin but not in demesne. Thus when a lord received rent from someone who was seised in demesne the lord would be seised only of services and thus an assize brought by him would fail.<sup>235</sup> The expression ‘of his free tenement’ (*de libero tenemento suo*) in the original writ was, we assume, initially intended to exclude tenants in villeinage (*villanum tenementum*) and termors<sup>236</sup> from having a footing in the assize<sup>237</sup> because - never being seised - their possession lacked the seigniorial relationship necessary to create free tenements.<sup>238</sup>

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<sup>233</sup> Applying term ‘estate in land’ to the twelfth-century should be done with the utmost caution. The term ‘fee simple in possession’ was seemingly only emerging thus if we are to use the term ‘estate’ it should probably not be extended beyond the ‘estate for life’. For a comprehensive contribution to the development of estates in land see generally SE Thorne, ‘English Feudalism and Estates in Land’ (1959) CLJ 193.

<sup>234</sup> Palmer, *Framework* (8) 1134-5.

<sup>235</sup> Loengard (7) 51-2.

<sup>236</sup> ‘Leaseholder’ should not be confused with custody: a lessee for life or lives (rendering an economic rent) did have ‘free tenement’ and the Assizes if the tenant was free; it is only the lessee for years (termor) who is excluded. While the termor plainly could not be successful in novel disseisin, it is not obvious that there is any obstacle to the bailiff or guardian being successful by using the name of the ‘freeholder’ but it is clear that an assize would not be successful in another’s name (Bracton, f. 167b 168 and f. 209b; Glanvill (Woodbine’s ed.), 231; see the Somerset Pleas, 71. The entry is in Assize Roll 755, Mem. 6). See Fifoot (23) 9; Leongard, *ibid*, 59; Bracton f. 167b and 168; and Glanvill (Woodbine’s ed.), 290). To characterise leaseholders as holding ‘in custody’ is problematic. See J Biancalana, ‘Thirteenth-Century Custodia’ (2002) 22 JLH 2, 14: custodia starts with the position of the guardian, and is extended by analogy to use to describe trust-like devices. The termor has merely a contractual right against his lessor.

<sup>237</sup> Maitland (22) 435.

<sup>238</sup> Pollock & Maitland, 2 *HEL* (23) 36. See the term *tenet terram in dominico suo* (Pollock & Maitland (6) vol (i), 233). cf Loengard (7) 51-52; Milton (32) 54; Stenton (57) 124 (Assize Roll 817, Mem. 4); and Milsom, *Framework* (8) 55-6.

Loengard identifies a characteristic of being seised of a free tenement was to hold for life, or alternatively hereditarily (in fee). It is outside the ambit of this thesis to expound the nature of customs of inheritance (where the heir will normally be put in on the death seised tenants) but a brief annotation regarding ‘fee’ is necessary for a holistic understanding of the mutual obligations between tenant and lord. It is also pertinent to say that customs of inheritance are, perhaps, the source of discussions concerning ‘proprietary right’ and ownership being forced upon a feudal world that ‘knew nothing of property right, only mutual obligations’ by modern commentators who are not legal historians familiar with the epoch.<sup>239</sup> ‘Property’ did not start to emerge until circa 1200, as will become apparent (see also page 49 above).<sup>240</sup> Obligations such as dower and *maritagium* corresponded to a right against the lord (not a property right against the world) to be seised but questions of right, in the modern sense, are inevitably transferred to the medieval setting when customs of inheritance clash.

It would seem that having fee was entering into a ‘relationship of subordination’ where in all matters – even those concerning the tenants family, such as marriage – were dominated by the lord as guardian: default in obligations would forfeit the fee.<sup>241</sup> It is clear that the heir’s succession to be seised of a free tenement was an important element of the relationship. The ‘fee’ was the price of a man, who in return was maintained for life with provisions for his widow and heir.<sup>242</sup> The widow’s dower (dos) was merely a portion of a life tenure<sup>243</sup> that was a product of the obligation between the deceased tenant and the lord that also included the heir’s portion. This scenario is indicative of the central role of the seigniorial relationship through-out the twelfth-century where the fee portion was precarious, to say the least, and dictated according to the acceptance of the lord rather than fee being a title to property in

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<sup>239</sup> Palmer, *Framework* (8) 1134.

<sup>240</sup> Palmer, *Origins* (10), 4 and 22; and Thorne (163) 195.

<sup>241</sup> Palmer *ibid* 4-6.

<sup>242</sup> *ibid* 5

<sup>243</sup> Pollock and Maitland state emphatically that dower and curtesy were interpreted as life interests (Pollock & Maitland, 2 *HEL* (23, 38 and 53). See also Loengard (7) 53. For Glanvill’s account of dower see Glanvill, VI, 58-59.

perpetuity. The lord's relationship was with the loyal tenant. When he died the lord could accept another man and marry off the widow again: the heir's loyalty was a matter of course having been raised in the lord's service.<sup>244</sup> The husband's seisin had ended with his death hence at this juncture in history fee was only de facto hereditability, of sorts, where lordly acceptance was crucial to holding land freely.

Loengard identified dower (*dos*), curtesy,<sup>245</sup> *maritagium*, fee farm and fee tail as free tenements by which someone could hold freely:<sup>246</sup> provided that free tenement was in demesne and obligations to the lord were met they would be protected by novel disseisin. It is difficult to apply the formation of those manorial obligations to modern nuisance law as the social-economic and political conditions palpably no longer exist following the demise of the manorial system, but they do serve as stark examples of the essence of being protected by the assize. They do not translate precisely as interests that afforded standing per se but nonetheless convey the realities of land-holding in an unfamiliar social regime far beyond ancestral recollection. However, there is a succinct continuum that the evolution of novel disseisin reflected responses to the societal mores in which they existed.

Loengard's analysis is important in the context of the present discourse for two distinct reasons. First, she demonstrates exclusive obligations that were a product of the feudal framework entirely anachronistic to modern private nuisance law. Second, when her research is read in conjunction with the original writs a longstanding misinterpretation is revealed regarding freehold being the original benchmark of entitlement to sue in novel disseisin. In truth, on occasions, commentators substitute 'free tenement' by the term 'freehold' and in much commentary the terms are visibly used interchangeably. Certainly it is easier for the

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<sup>244</sup> Palmer, *Origins* (10) 5-6.

<sup>245</sup> Pollock and Maitland state emphatically that dower and curtesy were interpreted as life interests (Pollock & Maitland, 2 *HEL* 38 and 53). See also Loengard *ibid* 53. For Glanvill's account of dower see Glanvill, VI, 58-59. Contrary to Loengard (*ibid*) and Pollock and Maitland (*ibid* 38) It can be seen clearly from the *Curia Regis* that novel disseisin was the form of action used in claims involving curtesy (but cf Milsom, *HFCL* (23) 254).

<sup>246</sup> Loengard, 'Free Tenements' (7) 51-6.

modern commentator to utilise ‘freeholder’ instead of – in context - ‘a freeperson who is seised in demesne of a free tenement’: it does not exactly roll off the tongue. That interplay has nevertheless created confusion and impacted upon the modern perception of nascent nuisance law which has transcended onto who can sue today.

## **7. The Effects of Novel Disseisin on Seisin**

The fundamental dogma of seigniorial relationships between lord and tenant are the strongest indication that Lord Goff erred in his attempt to reconcile his basic position with the need to show title to realty in novel disseisin. He plainly fails to appreciate the essential societal differences relevant to the reign of Henry II and that of contemporary living. The control the lord had in the familial setting is telling concerning the contemporaneous social mores. In a time when ‘the serious business of marriage’ had yet to be complicated by the notion of romance<sup>247</sup> a man’s familial and personal interests were in fact subordinated to his lord. The question is was it Lord Goff’s intention to model modern standing on a time when, if a woman wanted to be assured a life tenancy, or in other words have a share of the highest ‘title’ that a feudal world would convey, she had to rely on her lord to either marry her to a loyal tenant or remarry her to another on the event of his death? It would certainly be a novel approach to interpreting ‘exclusive possession’ but at least it was a period when – unlike when *Malone* was decided – the wife was not considered subservient to her husband. The intrinsic nature of familial matters within seigniorial relationships during the twelfth and thirteenth-centuries are a world apart from today but nonetheless seem central to this investigation.<sup>248</sup>

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<sup>247</sup> AWB Simpson, ‘Their Litigious Society’ (1984-5) 83(4) Michigan Law Review, 682,

<sup>248</sup> The curious circumstances surrounding fines known as *gersumas* are an illustration of the entirely incongruent familial settings between seigniorial and those that were to follow. According to Loengard the *Curia Regis* Rolls suggest that ‘if a man could marry off his daughter or sister without paying a fine [*gersuma*], the presumption was that the tenement was free’ (see Loengard, ‘Free Tenements’ (7) 56-8). In light of Milsom’s and Palmer’s analysis of the rolls referred to in this chapter it is likely that such fines applied to kin that were not heirs.

When a tenant died the lord became guardian of his heir (rather than his widow) thus, before land was functionally hereditary as a rule of law, loyalty could effectively be passed down the generations more readily than land. The essential part of the lord's warranty at the beginning of any seigniorial relationship was that land came at a price: that price was the man's 'fee'. Therefore the fee element of the bond was dependant on sustaining mutual obligations; palpably those obligations were onerous on the tenant. Palmer maintains that the measure of strength within feudal relationships was the lord's disciplinary power that rested in his ability to strip a tenant of his fee for disloyalty (or non-performance of services).<sup>249</sup> It is feasible to build the impression that the dilution of seigniorial power ran parallel with the heritability of free tenements becoming more secure on account of the bureaucratic authority (that derived from the State according to fixed rules<sup>250</sup>), which later became increasingly incongruent with social mores.<sup>251</sup> What must be understood is that until the point when property was created by state regulation the remedy a tenant sought was restoration of a free tenement thus to rectify a wrong to land as an element of a relationship not to 'property' in the sense of ownership or title: this was the essence of societal requirements and the nature of property when novel disseisin was introduced and when nuisance is said to have originated.<sup>252</sup>

The seigniorial relationships between lords and tenants were no doubt essential to the construction of the original writ for novel disseisin. It sought redress for wrongs to free tenements and was worded to exclude villein tenants and those tenants that held property only for a term of years (termors) from the Assize.<sup>253</sup> Presumably the original point of excluding villeins was part of a (perhaps increasing) tendency during that period to analogise villeins to

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<sup>249</sup> Palmer, *Origins* (10) 6.

<sup>250</sup> *ibid* 7.

<sup>251</sup> *ibid* 19.

<sup>252</sup> *ibid* 7; and J Hackney's Milsom book review (86) 83.

<sup>253</sup> Pollock and Maitland, 2 *HEL* (23) 36.

Roman chattel slaves owned by the manorial lord.<sup>254</sup> Pollock and Maitland stated that it was not intended; neither would it be tolerated, for men holding in villeinage to be afforded protection in the royal courts.<sup>255</sup> They also argued that termors did not have seisin because they were viewed as parties to a contract; having merely a contractual right against his lessor.<sup>256</sup> This so-called 'contractual right' conflicts with Milsom's view of seigniorial relationships being equivalent to contractual obligations that needed to be enforced.<sup>257</sup> Such a conflict of opinion may be attributed to a matter of mere metaphysics;<sup>258</sup> regardless, it is seemingly consensual that villeins and termors were not protected by novel disseisin. The termors contractual position is interesting considering Lord Goff's basic position: many of those who have exclusive possession today are parties to a contract thus, if we transpose modern conditions onto medieval ones, those with a term of years (or periodic lease) would not have had standing in novel disseisin, but would today in private nuisance.

We know the central element to landholding was seisin. The concept of seisin and what it meant to be seised of free tenement is, despite being open to conjecture, of profound importance to the fundamental nature of novel disseisin. Maitland commented: 'when it is remembered that substantially seisin is possession, no more no less, then the old law becomes explicable'.<sup>259</sup> Conversely, in Milsom's opinion to be 'seised' meant originally, and at the time of the instigation of the assize and Bracton, to have been put in by the lord, not to be in possession in the sense of Roman *possessio*.<sup>260</sup> It would seem logical to infer that Milsom's line of thought as to the status quo ante the assize of novel disseisin best describes the

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<sup>254</sup> PR Hyams, *King, lords and peasants in medieval England: the common law of villeinage in the twelfth and thirteenth centuries* (Oxford University Press, 1980).

<sup>255</sup> Pollock and Maitland, 2 *HEL*, 36

<sup>256</sup> *ibid.*

<sup>257</sup> Palmer, *Framework* (8), 1130.

<sup>258</sup> cf Palmer's overview of Milsom's distinction regarding contractual obligations from ownership (Palmer *ibid.*, 1135).

<sup>259</sup> FW Maitland, 'The Mystery of Seisin' *LQR* October (1886), 371.

<sup>260</sup> Milsom, *Framework* (8) 24.

meaning of acquiring seisin but the impact of the assize was fundamentally significant to land law and subsequently to the development of nuisance law as an adjunct of novel disseisin.

Prior to the assize of novel disseisin conceptually the matter of seisin did not concern a property rather it was a seigniorial relationship between lord and his tenant over a parcel of land. There was no larger proprietary idea in a manorial court than being seised of land by the lord that presided over it.<sup>261</sup> The lord would be seised of the whole manor then subinfeudate parts of the manor by accepting tenants, the lord would retain seisin in fee (of his lord) but a seigniorial relationship existed between lord and tenant where the tenant would be seised (in demesne) for life. In this sense Milsom is contending that seisin signifies not just a factual possession but a seigniorial acceptance where no other title could exist; there was no room for any further proprietary concept,<sup>262</sup> hence, for instance, if a termor was ejected it was the lessor (usually the lord) that was disseised and had the assize to restore him.<sup>263</sup> To argue that the tenant (including his lord) had a heritable right in this feudal world where the delivery of property was an arrangement between lord and tenant<sup>264</sup> is academic until it became a 'fee interest' derived from the State.

Palpably within the manorial courts villeins and termors had the right to seek redress within their lords' jurisdiction for whatever wrongful invasion or encroachment. The lord would clearly on occasions be deciding upon whether particular tracts of land belonged to one tenement or another.<sup>265</sup> There is an argument that the point really in dispute in novel disseisin (and the assize of mort d'ancestor<sup>266</sup>) was the freedom of the tenement, or in other words, the status of the occupier.<sup>267</sup> Was he a freeman or was he 'unfree' incapable of being seised by

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<sup>261</sup> Milsom, *HFCL* (23) 120.

<sup>262</sup> Milsom *ibid* 40.

<sup>263</sup> Pollock and Maitland, 2 *HEL* (23) 36.

<sup>264</sup> Milsom, *HFCL* (23) 24

<sup>265</sup> Milsom *ibid* 41.

<sup>266</sup> *ibid* 167.

<sup>267</sup> *ibid* 22.



the lord? In reality we are looking for the seigniorial acceptance and the factual possession that connotes seisin therefrom. According to Milsom proprietary language within a seigniorial relationship – between the seised and seisor – was out of place in a relationship that was essentially concerned with reciprocal obligations fixed at the time when it was forged.<sup>268</sup> When the lord put someone in seisin essentially he ‘bought’ a man - one could say it was a bargain between two people<sup>269</sup> – the price was a life’s service (possibly only an economic rent) but in return the seised would gain a life tenure. Unless the tenant did not fail in his service he would enjoy a free tenement for life; when he dies (in the absence of heritability) the lord will make an arrangement with a new man.<sup>270</sup>

Seemingly it was enough for the tenement to be ‘unfree’ for a lord to succeed in novel disseisin.<sup>271</sup> Matters regarding title to a tenement would not arise during the tenure of a tenant who properly fulfilled his obligations. It was at the point a tenant failed in his service (his obligation) that the lord would disseise him. This was done initially by custom and later by the Assize when he could only do so by due process, that was what the disciplinary justice novel disseisin was geared to secure.<sup>272</sup> Seigniorial relationships were about the beginning and the end of tenures and the relevant question would be *who* should be seised in the first place; such a question was pertinent only to manorial courts. It was in the manorial courts that proprietary jurisdiction and deeper notions of proprietary developed not in the royal courts (hence actions on novel disseisin).<sup>273</sup> This strengthens the theory that initially there never was a need to show title in novel disseisin, contrary to Lord Goff and his contemporaries in *Hunter*.

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<sup>268</sup> Milsom, *Framework* (8) 39.

<sup>269</sup> J Hackney (86) 83.

<sup>270</sup> Milsom, *Framework* (8) 39.

<sup>271</sup> *ibid* 22-3.

<sup>272</sup> *ibid* 39.

<sup>273</sup> *ibid* 41.

It was over time the assize altered seigniorial relationship between lord and tenant in the sense that the scope of seisin had separated 'title' from 'lordly acceptance'. In a manner of speaking the feudal ladder was 'flattened out',<sup>274</sup> changing the nature of seisin. When the lord was taken out of the equation of this vertical structure of society - by the assize of novel disseisin - seisin had become an abstract property right in terms of both legal protection and economic function rather than an acceptance by a lord creating a relationship *in vivos*; the relationship between the person and the thing had transcended the seigniorial relationship and changed the order of seisin to suit the new action.<sup>275</sup> In essence the discretionary character of the feudal relationship had been destroyed by novel disseisin: novel disseisin had destroyed the feudal world<sup>276</sup> - land ceased to be an element of a feudal relationship and became 'property' without the erstwhile 'precarious quality of fee'.<sup>277</sup>

If Milsom and those he influenced are correct - despite eventually destroying seigniorial order<sup>278</sup> - novel disseisin was initially a form of judicial review that fundamentally safeguarded feudal relationships. At the heart of feudalism was a lord's ability to put into seisin those whom he chose, but novel disseisin later distorted the meaning of being 'seised'. After a period the assize focused on the moment when the seisin had been granted instead of the active acceptance of the lord. Seisin had become nounal ignoring the action of 'seising' and the relationship that was forged between tenant and lord.<sup>279</sup> Subsequently what began as a method of due process to protect seisin emerged a property right - gradually good against

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<sup>274</sup> Milsom, *HFCL* (23) 120. cf J Hackney (86) 83.

<sup>275</sup> Milsom, *Framework* (8) 40. Milsom observed: 'the remedies began as safeguards of the unquestioned order of things, with novel disseisin, for example, providing a kind of judicial review. They were to destroy the seigniorial order' (ibid 37).

<sup>276</sup> Palmer, *Framework* (8) 1136.

<sup>277</sup> Palmer, *Origins* (10) 8

<sup>278</sup> Palmer states that novel disseisin may be attributed to destroying the feudal world (Palmer, *Framework* (8) 1136).

<sup>279</sup> In Hackney's review of Milsom's 'Foundations' he wrote: 'The lord who originally bought men with land, and was a *dominus* of men only, now finds that his people own their land. Seisin had begun as a relationship between man and lord, not man and land. The verb precedes the noun and one was seised of land by a lord, so that one who was not accepted by a lord was not seised' (J Hackney (86) 82).

the world – that came about by juristic accident. Within the evolution of land law there was subtleness to the establishment of ‘property’;<sup>280</sup> both Palmer and Milsom give the impression that it was created by accident through a combination of socio-political and juridical interplays reconciled by nascent bureaucracy rather than by design.<sup>281</sup> According to Milsom the lord-tenant relationship that was antithetical to property continued until the time of Bracton<sup>282</sup> but his chronology is uncertain; Palmer put a date on the arrival of ‘property’ circa 1200 thus seigniorial relevance arguably began to dissipate slowly after that juncture.<sup>283</sup>

## 8. Nascent ‘Ownership’

Maitland stated it is erroneous to think of seisin as ownership, or as any modification of ownership; seisin was only possession.<sup>284</sup> Palmer’s interpretation of Milsom’s ‘Framework’ went a little further averring that ‘land was held - not owned - in return for services’, at least until 1200.<sup>285</sup> SE Thorne seemingly acquiesced with this position.<sup>286</sup> Maitland’s minimalist formulation is a rudimentary description of seisin as the notion of ‘mere’ possession negates to recognise the seigniorial assent required.<sup>287</sup> What is important to understand is that the king owned all land (otherwise he would not be king<sup>288</sup>). He was the highest rung on the

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<sup>280</sup> *ibid.*

<sup>281</sup> Although both authors specifically refer to the accidental element to the development of property it is necessary to read their works in conjunction to fully appreciate the evolutionary process, particularly in the context of socio-political mores driving legal change. See generally Milsom, *Framework*, *ibid*; *Foundations* (23); Palmer, *Framework*, *ibid*; *Origins* *ibid*; Black Death (81); and *The Whilton Dispute, 1264-1380: A Social-Legal Study of Dispute Settlement in Medieval England* (Princeton, 1984).

<sup>282</sup> Milsom, *Framework*, 104 and 136-7 (see *Framework* and Chapter 4 in general).

<sup>283</sup> Palmer, *Origins* (8) 4 and 22; see also Thorne, ‘English Feudalism’ (163) 195.

<sup>284</sup> Maitland *ibid* 360 and 371; Pollock & Maitland, 2 *HEL* (23) 2-3. Today land remains retained by the crown the highest interest (title) in land that can be attained today is the fee simple absolute in possession: which is not ownership (note 74). Irrespective, the notion of ownership to the modern psyche represents true ownership, despite the reality that the crown retains ownership.

<sup>285</sup> Palmer, *Framework* (8) 1134; and *Origins* (10) 4 and 22.

<sup>286</sup> Thorne initially used the military fief as an example to refute Maitland’s claims that land was not heritable prior to 1200 (Thorne, ‘Estates in Land’ (163) 195).

<sup>287</sup> See J Hackney (86) 82. Refer to note 120 above for a full quote in which Hackney opines that Maitland got the twelfth-century ‘wrong’ in this context.

<sup>288</sup> Compare Hackney, *ibid*, 83. He states, ‘Present day usage seems to turn on a degree of legally protected economic control but it does not seem to be as highly refined as the notion of possession...We can simply measure the content of the twelfth century against our usage and decide whether we see ownership...If there is some other definition of ownership which excludes all vertical relationships, and so the modern long leaseholder, we need to be told it. At a lower level, it is not clear whether we are supposed to take all land in

feudal ladder and ultimately he distributed manors to lords - who were themselves tenants - then all 'rights in and to its lands are derived from him [the lord]'.<sup>289</sup> Remarkably, this was a reality that was never entertained by Glanvill or Bracton – a lack of consideration which has arguably helped fuel modern confusion regarding contemporaneous title.<sup>290</sup> Being seised of a free tenement represented a state of being that mimicked a personal and economic relationship with land. Van Caenegem believes seisin was the basis for economic survival. He stated:

Land was everything to everybody. To lose one's land, or in other words, to be disseised of one's tenement, was as fatal a blow as losing one's job in a society which knows no unemployment insurance. It was, economically speaking, the worst thing that could happen to anybody.<sup>291</sup>

We must try to see early nuisance in the context of its time, if that is at all possible. In the same manner that freehold does not truly represent incipient standing, having seisin was quite distinct from, and may be sharply opposed to, proprietary right or any equivalency of ownership (until at least 1200) thus 'freehold' did not relate to nascent ownership either.<sup>292</sup>

A freehold proprietary interest in the modern sense was of no significance to standing at that time; crucially, seisin was already a legally protected 'title' but it could be usurped by a right that reverted back to the Compromise of 1153.<sup>293</sup> According to Palmer, as an illustration of the lord's problem of the Compromise, by 1205 a rule of law 'proper' ensured that a man need not answer for his free tenement without a royal writ but Milsom saw this still as only a 'correct statement' without more evidence.<sup>294</sup>

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England to be ownerless, though not up for grabs, or whether it was all owned by the king, and whether anyone owned chattels.

<sup>289</sup> Milton (32) 3 who quotes P Vinogradoff, *The Growth of the Manor* (The Macmillan Co., 1905); Pollock & Maitland, 1 *HEL* (23) 594; and FW Maitland, *The Domesday Book and Beyond* (London: 1965), 140

<sup>290</sup> Pollock & Maitland, 2 *HEL* (23) 2.

<sup>291</sup> Van Caenegem (22) 262.

<sup>292</sup> Pollock & Maitland, 2 *HEL* (23) 33.

<sup>293</sup> Note (38) above.

<sup>294</sup> Milsom, *Framework* (8) 59; Palmer, *Origins* (10), 19; and *Framework* (8), 1137-8.

The historical material that has been considered herein suggests there is no foundation for Lord Goff's stance regarding a need to show title in realty to sue in private nuisance emanating from novel disseisin: ultimately that decision was taken in *Hunter* and any correlation between exclusive possession and the assize fictional. Certainly, by the beginning of the eighteenth-century there was scarce precedent to suggest title (right) was a requisite in novel disseisin, initially at least; in fact seisin - in every stance considered - was separate from *ius*. Even if the incidents of the Compromise are taken into account seisin and right were exclusive. In 1704 the court in *Tenant v Goldwin*<sup>295</sup> cited a number of cases as authority that seemingly supports that novel disseisin's doctrine favoured seisin over title.

The advent of Case brought a liberalisation in the law particularly in regard to standing as it was extended to leasehold interests. Furthermore, the case law of the nominate reporting era - illustrated by examples such as *Aldred's Case* and *Jones v Powell*<sup>296</sup> - reveals an increasing concern for the courts to protect habitation (*habitatio hominis*), which had become a central right over land. It would be misleading to state that a right to inhabit was equivalent to a title to land, nor exclusive possession. It is clear that title in this sense is abstract and incidental to humankind's natural instinct to protect habitation.

## 9. A Summary of Lord Goff's use of Medieval History

Using Professor Newark's contentions in the 'Boundaries of Nuisance'<sup>297</sup> Lord Goff expressed the opinion that the genesis of nuisance law is fundamental to standing in the contemporary tort.<sup>298</sup> Lord Goff was correct to deduce from Newark and preceding case law that the 'essence' of private nuisance lay in the protection of a 'plaintiff's enjoyment of rights

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<sup>295</sup> (1704) 2 Lord Raymond's Reports 1089; 1 Salkeld's King's Bench Reports 21.

<sup>296</sup> In the original of pleadings of *Aldred's Case* (1610) 9 Co. Rep. 57b (*Aldred v Benton*) the health of 'other persons' (including servants) was at issue whilst the health of the inhabitants of the entire household was central in *Jones v Powell* HLS MS, 1083, fo 50v (see commentary by in JH Baker & SFC Milsom, *Sources of English Legal History* (Butterworths 1986), 600-2).

<sup>297</sup> (1949) 65 LQR 480.

<sup>298</sup> *Hunter* (1), 687-8.

over land’;<sup>299</sup> but it is questionable whether that ‘essence’<sup>300</sup> derives from novel disseisin. If a commentator decides to utilise novel disseisin to maintain elements are central to the structure of modern nuisance, flaws in any such hypotheses will quickly be exposed. ‘Experiments’<sup>301</sup> may have been undertaken within the assize but, in the scheme of the antiquity of the theory of nuisance, the period in which it was the preferred manner in which to redress nuisances is relatively small: the assize did not suit nuisance thus litigants quickly sought alternative means to remedy wrongs. Without an adequate grasp of the intricacies of the assize in accordance with seisin it is improbable that will be recognised.

Lord Goff’s judgment gives the impression that novel disseisin was formative rather than a source of reference.<sup>302</sup> The method of utilising history beyond ancestral recollection to explain and expound a legal doctrine is both unsound in principle and is fraught with difficulty in practice. It therefore represents a step too far for the purposes of providing historical context to establishing the meaning of the modern law – private nuisance is ultimately a modern tort and no longer an appendage of an ancient *land* law fiat that was unsuitable even at the time. It is highly dubious in light of the foregoing analysis that Lord Goff should have attempted to use novel disseisin to provide the foundations of standing.<sup>303</sup> In doing so he placed himself in a position where he needed to interpret both centuries of unhelpful (that is to say guarded ‘unexplained general verdicts’<sup>304</sup>) and a plethora of conflicting academic conjecture.<sup>305</sup>

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<sup>299</sup> (1949) 65 LQR 480, 482.

<sup>300</sup> *Hunter* (1), 687.

<sup>301</sup> Fifoot (23) 5; and CT Flower, *Introduction to the Curia Regis Rolls 1199-1230* (Selden Society, vol. 62, 1943) ch. 18 (XVIII).

<sup>302</sup> See Milton (32) xxxix.

<sup>303</sup> *Hunter* (1), 687.

<sup>304</sup> Milsom, *Framework* (8) 57.

<sup>305</sup> Private nuisance was conceived before the system of modern law reporting – even long before the Nominate Report era - during an ominously difficult period for the modern scholar. The Nominate Reports were themselves often unclear; sometimes judgments appear not to have been entered hence we have to make an educated deduction as to what the judges held (see Baker & Milson (226) 605 where *Jones v Powell* (14) is an

To open up a connection beyond our contemporary understanding with a system of governance that is entirely unfamiliar and incompatible to the modern structure does not provide strong grounds to construct an account of private nuisance in any sense. In essence, to use novel disseisin in this manner is an attempt to frustrate the natural development of the law ignoring both the profound changes driven by actions upon the case for nuisance and centuries of changing societal evolution that have culminated in our contemporary needs. Arguably modern private nuisance should not replicate medieval law in any circumstances rather it is suggested that it is unsatisfactory to translate medieval concepts into the modern law; the investigation that has proceeded provides, at least a measure, of testimony to the contention.

The process of examining medieval law for support of any claim about the essence of modern law requires extensive research and rigorous historical analysis. Rather Lord Goff relied upon a single questionable historical source – ‘The Boundaries of Nuisance’ - to maintain his contention that there is a requirement to show a proprietary interest to sue in contemporary private nuisance. This was methodologically unsound. Although it must be conceded that Newark lead us to the correct epoch of nuisance law (Case) where public, common and private nuisance, for all intents and purposes, merged and finally re-emerged as separate torts, it was during the development of Case that we are more likely to find what better fits the ‘essence’ of modern nuisance law not, where Lord Goff contends, in the medieval epoch. The case law from during the development of Case furnishes us with an insight to the social mores surrounding litigation; the type of insight that is missed in the early rolls and hidden from Lord Goff.

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example). The difficulty of differing written language contained within the reports is an obvious example of such difficulties: English, French and Latin were all commonly employed by reporters interchangeably.

It is contended that Lord Goff was misled by Newark's interpretation of the period to which he defers; a period that is under-researched by legal historians for the purposes of expounding the origins of private nuisance. The lack of such research palpably makes sense because 'nuisance' did not exist as an actionable wrong in Glanvill, the pipe rolls or in the plea rolls even the assize of nuisance did not exist in name.<sup>306</sup> *Nocumentum* was not an actionable wrong merely a specific act done to the harm of the free tenement.<sup>307</sup> A robust argument exists that the twelfth and thirteenth-centuries are not the relevant centuries to present an incipient account of *modern* nuisance. It was not until the fourteenth-century that Case began to develop and it would not be until the early seventeenth-century that we find the true origins of what we today call modern nuisance law.

It is difficult to use the contemporaneous cases as precedent to shed light on standing in novel disseisin as the 'right to sue' was concealed behind mechanical writs that were concerned only with the complaint and its resolution. Only after following attempts such as those by Milsom and Palmer that engage with the social mores that surrounded the development of the feudal framework, can we get a glimmer of how society and law functioned together, and thus acquire a reasonably sound account of the coexistent law. Lord Cooke in *Hunter* referred to the subject of standing as a previously 'unsettled issue'; we can argue that statement was indeed correct and extended into deep history.<sup>308</sup> Whilst later cases can offer some insight into standing the plea rolls, pipe rolls and Year Books do not include or focus upon such information. Indeed after 1205 the right to sue in novel disseisin better translates as the right not to be sued unless the claimant sought a royal writ.

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<sup>306</sup> Loengard (35) 158-9 (note 44). See generally Loengard (7) 18-51.

<sup>307</sup> *ibid* 159 (note 44).

<sup>308</sup> *Hunter* (1), 717.



Milsom seemingly advocates that anyone with a link to land could bring an assize, even the termor, the question was whether they would win the action.<sup>309</sup> Of course, the termor - similar to the villein - is understood to be one of the people excluded from the assize by the original writ but Milsom makes a good case that the Lord could utilise novel disseisin in his favour to quash any claims to proprietary right. In such cases it is manifest that the ability to bring an action was necessarily wide in ambit. The social interpretation of the feudal legal framework by Milsom and Palmer is revelatory casting doubts on what was assumed from solely reading surviving writs prior to their accounts without the reality of social mores which would have had profound implications.

It can be maintained that John Baker's 'Introduction to Legal History' is the current *standard* legal history textbook where he arguably offers a differing opinion regarding the underlying supposition of this article as he implies the assize was a proprietary action. To be fair to Baker there can be only conjecture as to whether he meant novel disseisin was a proprietary assize as he merely remarks that 'the concept [of nuisance] grew up with the real actions'; he made little reference to novel disseisin thereafter.<sup>310</sup> In light of the opinion of the above commentators, who engage fully with novel disseisin, it is hard to dispute that *initially* novel disseisin was essentially a possessory assize.<sup>311</sup> It was only juridical accident that afforded novel disseisin a brief proprietary function by which time Case had begun to evolve and all but a few types of nuisance were addressed by the assize. Lord Goff's reasoning to affirm private nuisance as a tort to land, based on Professor Newark's contentions, suggests it was founded on an understanding that novel disseisin was a proprietary action where a plaintiff was required to show title.<sup>312</sup> True, it was always an action concerning land but initially it is reasonable to assume either that possession (seisin) rather than title (right) was the principle

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<sup>309</sup> Milsom, *Framework* (8) 22 (note 6) and 55.

<sup>310</sup> Baker (23) 422.

<sup>311</sup> See also DR Coquillette, 'Mosses From an Old Manse' (1979) Cornell LR 64(5) 761, 766.

<sup>312</sup> Newark (17) 480 - 90. See also *Hunter* (1) 688.

behind dealing with interferences with land-holding or, owing to the seigniorial relationship depicted by the likes of Milsom, Sutherland and Palmer that property was the antithesis of feudal relationships where title was a foreign language. Neither of their accounts supports Lord Goff's contention.

The basic requirement to have standing emanated from being seised in demesne of a free tenement; it was a legally protected interest but not in respect of actual title of land, as reference to Loengard will confirm. It is thus contentious to assert there was a requirement to show a legal interest to seek redress in novel disseisin. On that pretext the modern austere stance that denies standing to those who occupy a property as a home - because they cannot show title – needs to be reevaluated by the Supreme Court at the earliest opportunity. If first we strip away obsolete feudalistic nuances of seigniorial relationships then work on the premise that people are entitled to occupy a home by demonstrating a substantial link to the property - in the spirit of the judicial reasoning prior to their Lordships in *Hunter*<sup>313</sup> and the contentions of Milsom and Palmer - then there is an argument that modern society dictates that such occupants need protection from a tort based on land: private (and public) nuisance is the obvious choice.

## **10. The Development of Case – The Impact of Social Evolution**

The 'subtheme' concern in this chapter suggests there is the requirement to examine the development of Case in order to ascertain the correct origins of modern private nuisance and thus put forward a theory regarding who has the right to sue in the modern tort. The vicissitudes of Case owing to its subtle changes and variations as it developed are thus essential to this analysis: it is proposed that the nature of legal change and the development of trespass on the case into Case are the bedrock of modern nuisance law (and other torts). Despite the fact that actions on the case – that dealt with wrongs done indirectly or

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<sup>313</sup> See section 4.

consequentially - were used scantily in relation to the Assizes during the fourteenth and fifteenth centuries trespass on the case was an integral component of the law adapting to social change and economic circumstances across the centuries. Together with *assumpsit*, trespass on the case was a legal action that was conceived, in part, to utilise the law as a mechanism to control society.<sup>314</sup>

According to Palmer the development of Case was a direct product of policy implementations and ‘not the product of litigation strategy or of doctrinal evolution’.<sup>315</sup> In fact he, and Milsom, state that parts of the law developed by accident by acts that had unintended consequences,<sup>316</sup> and as Palmer’s book ‘English law in the Age of the Black Death’ demonstrates, circumstances forced upon society necessitated legal change. The Black Death was an example of when the nature of seisin and free tenement, if not began to dissolve, certainly procured a different role underlying the supposition that societal changes – thus social policy - dictate legal evolution. For instance, the ‘demographic catastrophe’ somewhat evaded the need to be ‘put in by the lord’ as the diminished population left tracts of land vacant and the ‘landless’ occupied empty tenements: the level of demand to relocate a skilled workforce arguably superseded manorial customs.<sup>317</sup> The point Palmer makes is that:

...[T]he important decisions were not being made in the common law courts [king’s courts] at all, but rather in chancery and council;<sup>318</sup> moreover, the changes did not proceed from legal thought but were decisions by officials made in accordance with governmental policy in direct response to social factors.

Actions on case were thus, arguably, the product of policies that were implemented rather than any litigation strategy or doctrinal evolution. The common law area to which nascent

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<sup>314</sup> Palmer, *Black Death* (81) 141.

<sup>315</sup> *ibid.*

<sup>316</sup> Palmer, *Origins* (10) 47; Milsom, *Framework* (8) 36-7 and 185-6.

<sup>317</sup> Palmer, *Black Death* (81) 139.

<sup>318</sup> Where writs were formulated under the influence of the chancellor who had an increasing prolific role (see Palmer, *ibid* 104-7 and 139).

nuisance was to evolve developed as a result of socio-legal changes: according to social and political influences that shaped policy.

Case was by nature far removed from the Assizes that were a mechanism for controlling seigniorial relationships which created an unforeseen shift of jurisdiction.<sup>319</sup> The Assizes' feudal constraints help explain their swift usurpation by actions on the case for nuisance as soon as litigants could elect for it instead. Case was more certain, that is, less prone to the unintended consequences and it addressed the facts pertinent to each case rather than being dominated by regimented writs. Whereas judges will no doubt consider that doctrine and litigation strategy have directed these changes, or in other words, significant changes were the product of the machinations of lawyers and common law justices in court they would have to assume that the law exists in a vacuum and that society remains still while their doctrines evolve – the Black Death, at the beginning of Case's evolution, perhaps its 'Big Bang' event, suggests this was simply not the situation.<sup>320</sup> Perhaps Palmer unwittingly foresaw the decision in *Hunter* when he commented:

That the old forms changed to fit the new indicates that the new writs did not develop analogically from analytically similar situations but from policy decisions.<sup>321</sup>

Lord Cooke's policy connection in *Hunter* echoes Palmer's thoughts regarding the development of the common law despite his lack of historical analysis. In addition, ironically, his dissenting judgment implies that the decision to restrict standing to those who could show title to property was in the end a choice of policy 'between competing principles'.<sup>322</sup>

Lord Cooke did not elaborate on this comment but we can infer that the competing principles related to the competing issues of economic growth and environmental protection. The Court

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<sup>319</sup> Milsom, *Framework* (8) 36.

<sup>320</sup> *ibid* 139-44.

<sup>321</sup> *ibid* 144.

<sup>322</sup> *Hunter* (1) 711 (Lord Cooke).

of Appeal decision that was the culmination of acceptance of modern societal change and the affirmation of the judge's decision in the late sixteenth and seventeenth-century to extend standing – which policy then demanded - unquestionably presented private nuisance with the potential to safeguard environmentally motivated litigation on a large scale. If we return to the introduction and remind ourselves of John Wightman's comments regarding the decision in *Hunter* closing 'vistas', to Wightman this was 'restoring normal service':<sup>323</sup> certainly restricting the ambit of standing has inhibited the role private nuisance can play in environmental protection. The majority decision turned the common law away from attempts to develop an understanding of the relationship between individuals and land in terms other than proprietary interests as a part of the growth economy. Interests that recognise the nexus of humankind and land beyond the growth economy could return private nuisance to its role of, as Conor Gearty professed, 'protection of the world'.<sup>324</sup>

## 11. Analysing Lord Goff's historical reasoning

The above analysis challenges Lord Goff's assertion in *Hunter* that historically standing in nuisance required a proprietary interest. His assertion was founded, in part, on extremely fragile historical grounds. In the search for academic historical evidence to support his conclusions based on case law, Lord Goff chose to rely largely on opinion expressed in Professor Newark's article 'The Boundaries of Nuisance'.<sup>325</sup> The article was principally a short critique of nuisance law in light of the evolution of the more modern tort of negligence. Clearly, the sheer complexity of the history of private nuisance demands a more intricate analysis on its own merits. Newark sought to establish the doctrinal boundaries between

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<sup>323</sup> J Wightman (25) 870.

<sup>324</sup> C Gearty (45) 216. Of course Gearty's comment regarding private nuisance's place in a modern law of torts and its environmental role is largely sardonic in respect of any policy decision because his article is cited in Lord Goff's judgment in the context of restricting the ambit of private nuisance further (*Hunter* (1), 692).

<sup>325</sup> Note (17).

nuisance and negligence in terms, inter alia, of the former's concern with interests in land.<sup>326</sup> Newark's contentions were used as justifications for Lord Goff's 'basic position' which posits that the 'essence' of the tort lies exclusively against land and thus 'some title to realty' must be shown in order to sue.<sup>327</sup>

#### **a) Newark's Analysis**

Newark regarded incipient nuisance as proprietary in nature to the exclusion of the obvious possessory character inherent within novel disseisin. His position was clear professing that a plaintiff required evidence of 'title to realty' in order to sue.<sup>328</sup> In light of the evidence set forth in this chapter we can be confident that Newark's contentions detrimentally mislead Lord Goff in that respect as it was crucial to the structure of his basic position. Newark's assertion that private nuisance is 'directed against the plaintiff's enjoyment of rights over land' is again generally accepted as accurate but it lacks clarity regarding what he considers as 'rights' worthy of protection.<sup>329</sup> Indeed there is a case that his statement is inadequate and needs to be extended, particularly in modern terms, to include being directed against the value and/or utility of land. Newark's intention behind his thesis was to categorically assert that nuisance was a pure tort to land but we cannot say that he did not attempt to delineate 'rights over land' owing to his sub thesis that claims interference with 'bodily security' as being incapable of diminishing rights, value or amenity of land (this is discussed in depth in Chapter 3).

Newark's overall understanding of the history of nuisance is found wanting in many respects thus it is important to recognise that his article is not an authoritative account of medieval common law, despite his contentions about the epoch. Lord Goff, however, laid down the

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<sup>326</sup> Newark also sought boundaries through bracketing liability for personal injury exclusively into the tort of negligence – unsuccessfully, in light of the *Corby Group Litigation* (see Chapter 3).

<sup>327</sup> *Hunter* (1), 687-88.

<sup>328</sup> Newark (17) 481.

<sup>329</sup> See Chapter 3.

modern law without such recognition. Some of Newark's errors will be considered in later chapters, nevertheless there are issues specific to Lord Goff's basic position in *Hunter* that require consideration here. His assertion that disseisin was 'a *trespass* according to whether the act was done on or off the plaintiff's land' – as a pretext to assert the essence of nuisance is a tort to land - has directly affected the benchmark of modern standing because Lord Goff builds his basic position in a sequential manner after proclaiming Newark's contentions as historical fact.<sup>330</sup> Part of that 'historical fact' lay behind Newark's insistence that 'nuisance could never be committed on the plaintiff's land'.<sup>331</sup> That claim is simply not true. The assize of novel disseisin and nuisance during the twelfth and a significant portion of the thirteenth-century were the same action; the name assize of nuisance per se did not exist by name.<sup>332</sup> The site of the injury was irrelevant until the assize of nuisance was recognised as an separate action, possibly by Bracton, until then the actual writ was amended to deal with different forms of the same action, or in other words, the action did not change the writ did.<sup>333</sup> Regardless, Newark believed trespass dealt solely with injuries on the plaintiff's land but both nascent trespass and novel disseisin existed on a parallel – not exclusive – plain. Trespass (and trespass on the case) could be used on occasions as a substitute action for novel disseisin.<sup>334</sup> The situation was not that trespass was the appropriate action for harms created on plaintiffs land rather trespass could sometimes be treated as disseisin if they so preferred.<sup>335</sup>

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<sup>330</sup> *Hunter* (1) 687-8 (Lord Goff). Italics added.

<sup>331</sup> Newark (17) 481-2.

<sup>332</sup> See Loengard (35) 158-9 (especially note 44); GJ Turner *Brevia Placitata*, (134) cxix; Stenton (57), 42 (59).

<sup>333</sup> Loengard *ibid* 160. She cites Glanvill, Book XIII, 37.

<sup>334</sup> The relationship between trespass and novel disseisin is extremely complex which, from the latter fifth of the fourteenth-century, marked the beginnings of the end for the 'venerable' assize that passed out of use by around 1500 (Sutherland (57) 176 (read Chapter V, 169-203)).

<sup>335</sup> For an explanation of the actions that shared and could act as substitutes for novel disseisin see Sutherland who describes five different possibilities (Sutherland *ibid* 170-6).

During the nascent period of novel disseisin there were only a small number of harms capable of protection;<sup>336</sup> the site of injury could feasibly be on the plaintiff's land. There is no evidence (that I am aware of) that asserts during the twelfth and the early thirteenth-century there was a rule of law that states nuisance could not be on the plaintiff's land. In fact, considering the feudal idiosyncrasies within the seigniorial relationship, it makes sense that Bracton constructed the test of election to ensure that actions were not too remote for the concept of novel disseisin when the assize of nuisance had found its own identity some time during the thirteenth-century.<sup>337</sup> But this was probably to keep the king's court from being clogged up (whilst spreading jurisdiction under the assize out to local jurisdiction) not an exercise to explain that *nocumenta* were harms to land.<sup>338</sup>

His comment about the sulphurous chimney being a nuisance because it prevents someone using their garden is confusing.<sup>339</sup> Whilst he recognises that interference with the utility of land is an actionable nuisance he concludes that this is the reason why a title to realty must be shown. It is difficult to appreciate why Newark came to his conclusion but we can be certain he failed to recognise that novel disseisin protected different types of possession including 'untitled' possession.<sup>340</sup> The same can be said of Newark's principal concern to expose the myth of personal injury being actionable within a nuisance framework, based also on

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<sup>336</sup> Note (31). Despite his comments that the new writ varied in diverse ways Glanvill gives us evidence of nuisances that were solely incidental to ponds, banks and hedges (built or destroyed). He implies there were others (Glanvill, Book XIII chapters 34-6); see Sutherland *ibid* 63 (and Note D, 216); and Loengard (7) 201 and 276).

<sup>337</sup> According to Fifoot, Bracton mentioned the 'new remedy' for the first time. Election between novel disseisin and the assize of nuisance was dependent on the 'site of the injury': where the injury emanated from the plaintiff's land novel disseisin was appropriate whereas when the site of injury was on the defendant's land it was the assize of nuisance. In 1359 Bracton's test to determine the boundaries of nuisance was abandoned. In an anonymous case where the defendant argued that damage caused by a diverted watercourse was done on the plaintiff's land and thus the assize of novel disseisin rather than nuisance was the appropriate action was rejected and henceforth nuisance was *again* actionable on the either parties land (See Fifoot (23) 9, 11 and 21). This arguably was the juncture when nuisance became a separate wrong (*ibid* 11).

<sup>338</sup> Sutherland (57) 63.

<sup>339</sup> Newark (17) 489; and *Hunter* (1), 688.

<sup>340</sup> For a discussion on this point see Maitland (22) 428-431; see also 'The Beatitude of Seisin', Part II, 434 (see section 2(d)).



assumptions about the relationship between nuisance and land law.<sup>341</sup> A great transformation of the nuisance concept occurred as a result of significant changes in the social and economic milieu over the centuries. It came to pass that land-holding was no longer an adjunct of seigniorial relationships but abstract interests alien to seisin. Social mores such as personal physical welfare and the well-being of the human beings were in need of protection to meet contemporary societal needs, and Case delivered in that respect.<sup>342</sup>

Newark claimed that ‘in true cases of nuisance the interest of the plaintiff which is invaded is not the interest of *bodily security* but the interest of liberty to exercise rights over land in the amplest manner’.<sup>343</sup> He used this statement as a means by which to distinguish personal injury from private (and public) nuisance and his exclusion of personal injury was justification offered to explain, in circular fashion, why nuisance is a tort solely to land. Once again, however, it can be questioned what is meant by ‘rights over land in the amplest manner’ such as to include or exclude a particular category of injury. This could mean that someone who has a licence to use land can enforce that use value by means of a nuisance action, bringing an action for interference with comfort, enjoyment, and even personal injury. It does not necessarily mean (as Newark supposes) that it is only people with the most ample rights – involving title to realty – can sue.

In essence, the usurpation of the older forms of action by actions on the case embodies the culmination of judicial activity – that commenced in the fourteenth-century – which reacted to changing societal mores as feudalism declined. The advent of *Cantrell v Church*<sup>344</sup> which allowed those with a termor interest in land – thus someone outside the manorial relationship between tenant and lord – to bring an action in nuisance is evidence that a title to realty was

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<sup>341</sup> See Chapter 3.

<sup>342</sup> Milton (32) 108.

<sup>343</sup> *ibid* 482; and *Hunter* (1) [688]. Italics added.

<sup>344</sup> *Cantrell v Church* (1601) B & M 588; Cro. Eliz. 845; 78 ER 1072 (Ex. Ch.).

not the essence of protecting rights in land. It is posited that the simple form of nuisance law evolves according to societal needs and *Cantrell* is representative of that. Clearly the societal norm in 1601 was such that the courts needed to recognise that the protection of proprietary rights was not exclusive to those with a type of interest in land that was dependent upon a relationship between lord and tenant, or, in other words, a title to realty and the ambit of ‘standing’ was extended accordingly. In light of the decision in *Cantrell*, it can be argued that Lord Goff’s basic position regarding the right to sue in private nuisance being dependent upon title to realty is a misuse of history. The importance of this notion is best illustrated through three cases that supported Lord Goff’s decision in *Hunter* (based on Newark’s contentions).

#### **b) The Supporting Trilogy**

To reinforce his basic position, Lord Goff cited a trilogy of purportedly supporting cases:<sup>345</sup> *Sedleigh-Denfield v O’Callaghan*,<sup>346</sup> *Read v J. Lyons & Co. Ltd.*,<sup>347</sup> and *Tate & Lyle Food & Distribution Ltd. v Greater London Council*.<sup>348</sup> Despite his claim that these cases are ‘authoritative statements which bear out [the] thesis of Professor Newark’,<sup>349</sup> it is telling that he elected not to elaborate on these cases any further in his judgment: almost certainly none of these cases unequivocally substantiates Newark’s contentions nor verifies Lord Goff’s basic position. For instance, despite the error of Lord Wright (in *Sedleigh-Denfield*) in stating that the assize of novel disseisin was a real action (which would support Newark’s thesis),<sup>350</sup> the remainder of the judgment suggests that ‘occupation’ is a central element to standing. Lord Goff cited the same paragraph that Pill LJ cited in the Court of Appeal to assert that

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<sup>345</sup> *Hunter* (1), 688.

<sup>346</sup> *Sedleigh-Denfield v O’Callaghan* [1940] AC 880, 902-3.

<sup>347</sup> *Read v J. Lyons & Co. Ltd* [1947] AC 156, 183.

<sup>348</sup> [1983] 2 AC 509.

<sup>349</sup> *Hunter* (1), 688. Lord Goff cites Lord Wright in *Sedleigh-Denfield*, 902-03; Lord Simonds in *Read* *ibid* [183]; and Lord Templeman in *Tate & Lyle*, 536-537. He also refers to Fleming in *The Law of Torts* (Sydney 1992), 416.

<sup>350</sup> *Sedleigh-Denfield*, *ibid* 902.

‘occupation of property’ gave the capacity to sue in private nuisance and therefore represents the ‘essential character’ of standing.<sup>351</sup> Lord Wright stated: ‘[w]ith certain anomalous exceptions...*possession* or *occupation* is still the test’.<sup>352</sup> This may explain the lack of any further engagement by Lord Goff with the paragraphs he cited in *Sedleigh-Denfield*, for the case is not supportive of his position.

Quoting *Read* (essentially a case concerned with dangerous escapes under the rule in *Rylands v Fletcher*<sup>353</sup>), Lord Goff focuses attention on Lord Simonds’ judgment at page 183 of the Appeals Cases report. It is debatable which part of the judgment is intended to support Lord Goff’s basic position (founded on Newark’s contentions). After close scrutiny we can isolate the ambiguous statement:

For if a man commits a legal nuisance it is no answer to his neighbour that he took the utmost care not to commit it. There the liability is strict, and there he alone has a lawful claim who has suffered an invasion of some proprietary or other interest in land.<sup>354</sup>

Representatives for the plaintiffs regarded ‘some proprietary *or other interest in land*’ to reconcile the test for standing as ‘occupancy of a property as a home’.<sup>355</sup> The ambiguity of Lord Simonds’ statement is patent, as previously both sides attempted to use it to substantiate their position in *Hunter* (preceding the House of Lords decision). It is important to note that nowhere in *Read* is there any reference to novel disseisin or to incipient standing requiring a title of realty - one would expect that such a reference would be essential to ‘bear out’ Newark’s thesis..

Once again, *Tate & Lyle* is neither expanded upon by Lord Goff nor mentions novel disseisin requiring a title to realty to sue. In the relevant pages cited (536-7) Lord Templeman applied

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<sup>351</sup> [1996] 2 WLR 348, 365.

<sup>352</sup> *Sedleigh-Denfield* (275), 902-3. Italics added.

<sup>353</sup> (1868) LR 3 HL 330.

<sup>354</sup> Lord Lloyd directly referred to this paragraph (*Hunter* (1) 698).

<sup>355</sup> *ibid* 680.

*Booth v Ratte*<sup>356</sup> which stated that either an owner or a 'licensee' has standing in private nuisance. The case should, nonetheless, be distinguished from *Hunter*, as the type of 'private right' that is under discussion. Riparian rights emanate from having a proprietary interest but a licensee can include someone falling short of someone with exclusive possession. Lord Templeman spoke of the need to prove a 'private right' to protect riparian rights under nuisance or negligence but it is difficult to interpret a private right, in the context of *Tate & Lyle*, as a title to realty in the same sense as in *Hunter*. Fishermen who are members of a fishing club can have the right to protect a private 'riparian' right and to sue in nuisance but such a right is unlikely to be construed as such a wide category of persons having exclusive possession. In light of that and the fact that Lord Templeman spoke in terms of *occupation* and *possession* rather than proprietary interest, private right can easily be construed as the right to occupy - even to be there - rather than a requirement to have exclusive possession. It is clear that none of these cases emphatically support either Newark's contentions or Lord Goff's basic position – in truth it is difficult, except in the case of *Sedleigh-Denfield*, to even reconcile them with true cases of private nuisance. There remains the issue of influence that *Malone* had on the majority in *Hunter* and the ratio of that case that seemingly supports their opinion.

Representatives for the plaintiffs in *Hunter* questioned whether *Malone* was wrongly decided, at least with respect to past precedent. The question they asked the Court of Appeal was: 'was there ever a need to prove a legal title to be qualified to sue in private nuisance'? It has been shown that the question may be answered in the negative; historically there arguably never was such a requirement and by 1704 in *Tenant v Goldwin*<sup>357</sup> this had remained the case, therefore *Malone* was incorrectly decided in that respect. The essential problem with

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<sup>356</sup> (1890) 15 App Cas 188, 190-1.

<sup>357</sup> *Tenant v Goldwin* (1704) 2 Lord Raymond's Reports 1089; 1 Salkeld's KB Reports 21.

overruling *Khorasandjian v Bush*,<sup>358</sup> other than the issue that a resident daughter was considered to be merely present on land,<sup>359</sup> was that the Lords ignored the true development of nuisance law.

The amalgamation of nuisance law when Case supplanted the Assizes and the centuries of private (common) and private nuisance being used interchangeably prior to them emerging as separate areas of the nuisance family is of profound significance to today's nature of the tort. Public nuisance has deep historical antecedents but today public nuisance has all the attractions of private nuisance without two major limitations – narrow standing and exclusion of personal injury.<sup>360</sup> The case law since the latter half of the nineteenth-century has focused more on private nuisance, thus arguably public nuisance and its nexus with its private right sibling has been largely ignored by commentators. But recent cases such as *Corby*,<sup>361</sup> and *Biffa*,<sup>362</sup> indicate that public nuisance is on the rise whilst private nuisance is in decline. It is suggested that the decision in *Hunter* to restrict standing has caused a resurgence of common law public nuisance to circumvent that hurdle, particularly in group litigation scenarios.

Sir Gorrel Barnes held that someone without a title in property cannot 'maintain an action for nuisance'.<sup>363</sup> However in *Simpson v Savage*<sup>364</sup> it was decided in fact that 'occupiers' may sue. Despite Sir Gorrel Barnes arguing that no authority had been cited to the contrary he failed to provide any authority to substantiate his opinion that a plaintiff required title to land to have standing. Further, the other judges, Fletcher Moulton and Kennedy LJ failed to cite any authority that there was a need to show title to sue. The fact is that the close nexus between

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<sup>358</sup> [1993] QB 727.

<sup>359</sup> Lord Hoffmann did not state *Khorasandjian* was wrongly decided rather it was best described as a case for harassment rather than nuisance.

<sup>360</sup> The personal interest aspect will be examined in chapter 3. See also Palmer (6).

<sup>361</sup> *Corby Litigation Claimants v Corby Borough Council* [2008] EWCA Civ 463. *Corby* also concerned breach of statutory duty.

<sup>362</sup> *Barr and others v Biffa Waste Services Ltd* [2009] EWHC 1033.

<sup>363</sup> *Malone* (40), 151.

<sup>364</sup> (1856) 140 ER 143.

private and public nuisance during the vicissitudes of Case and the significance of the decision in *Cantrell v Church* had been ignored or overlooked. *Cantrell* was effectively judicial recognition that the seigniorial requisite need to be seised in demesne, discussed above, in order to be successful in a nuisance type action was a distant memory of feudalism.<sup>365</sup> Termors – those with a term of years or periodic lease – that were fundamentally barred in the land-based Assizes now had the right to sue.

The significance of the case of *Cantrell v Church* should never be underestimated because, in line with societal nuances and the external events that had influenced them over the centuries, the case changed the destiny of nuisance law forever. This is the juncture in history that arguably represents the ‘point zero’ for modern nuisance law. In short an essential fundamental element of novel disseisin significant to nascent nuisance had been removed. Whereas the original writ had to include the words *ad nocumentum liberi tenementi sui* (to the nuisance of his free tenement) the seigniorial nexus inherent within feudal principle that gave substance to those words had been alleviated;<sup>366</sup> the plaintiff no longer had to be a ‘freeman’. Lord Goff failed to make that connection because he lacked the requisite historical knowledge.

The great fundamental import of the ‘freeman’ connection to the existence of a ‘free tenement’ to being bestowed protection by novel disseisin cannot be accentuated enough; it is a central element to this discourse if the essence of nascent ‘standing’ is to be understood. As it has been argued above, ‘proprietary interest’ was likely to have been foreign to the language of the system and the status of a person in the context of the manor pivotal to the ability to be seised a free tenement. Following *Cantrell* there was now a new fundamental nature of private nuisance because it was severed from its seigniorial land law past. The case

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<sup>365</sup> Fifoot (23) 95.

<sup>366</sup> W Blackstone, *Commentaries of the Laws of England* (1765-9), Book III (On Private Wrongs), ch. 13 (Of Nuisance), 221.

law throughout the seventeenth, eighteenth and most of the nineteenth centuries are mostly extant of the issue of standing which is why the judges in *Malone* failed to find precedent for their reasoning. The decision in *Hunter* to utilise *Malone* could be described as judicial ‘sleight of hand’ but in light of this investigation the fundamental flaws behind their reasoning identifies the illusion of imposing medieval doctrine entwined in contemporaneous principles onto modern doctrines considering contemporary living conditions and societal needs.

The point also needs to be made that it can be argued *Malone* was entirely distinguishable from *Hunter* on its facts and that *Malone* should be restricted to those facts.<sup>367</sup> *Malone* was concerned with personal injury caused to the wife of a subtenant with no proprietary interest; in fact the judgments are extempore and almost entirely on liability in negligence. The husband was only permitted to live there as a condition of his employment and thus could lose his dispensation to reside at the property at any time. But, interestingly, if we attempt to conceptualise the scenario into the twelfth-century, owing to the due process enforcing manorial custom through novel disseisin, it would have been harder to evict Mr Malone (the plaintiff’s husband). As a freeman Mr Malone’s employment (lordly acceptance) would have been regarded as service to his lord (creating the seigniorial relationship) thus we can infer he would have been seised in demesne of a free tenement and would have had the protection of the assize. Accordingly Mr Malone (and his plaintiff wife) could only have been evicted in a manner that was protected by the royal court – justly *and* with judgment unless he relinquished his services or failed in their execution. Of course, Mrs Malone’s ‘harm’ would not have been of a type recognised in novel disseisin, as will become apparent in the following chapter, but an idiosyncrasy of utilising *Malone* as precedent to deny standing in modern private nuisance is plain to see.

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<sup>367</sup> *Hunter* (1), 660-1.

As a final note about this case, it should not be readily assumed that the ‘rather light treatment of a wife’<sup>368</sup> - referred to in *Malone* - which excluded her from having standing – was anything other than ‘unacceptable’<sup>369</sup> at the time when the case was decided. Though her treatment was highly criticised by a number of judges both prior to and during *Hunter*, female emancipation had broad support in its peaceful incarnation back then, at least where advocates, such as Mrs Malone, were willing to work within legal procedures and rule of law. We can only speculate as to whether the judgment would have withstood the scrutiny of the House of Lords at that time, but what is most crucial is that this never was a clear authority for limited standing to sue in private nuisance.

## 12. Conclusions

On the face of things, following *Hunter*, when a husband and wife and their children attempt to bring an action against their neighbour(s) for interferences to the family home questions will be asked concerning the nature of their proprietary interest. Each will inevitably be required to *prove* that s/he has an adequate interest in order to sue in private nuisance. However McBride and Bagshaw<sup>370</sup> posited that normally someone who enjoys or asserts de facto exclusive possession is not required to prove the right, but we can go farther if we are willing to embrace the original conception of nuisance law found in novel disseisin, particularly that professed by Milsom and Palmer. If indeed property right was antithetical to twelfth-century feudal relationships it can be assumed that the requisite interest to be protected under the assize was implicit unless the existence of a free tenement was challenged. It has been suggested, in line with Loengard, Milsom, and Palmer that the issue in such circumstances was pertaining to whether the ‘tenant’ was free or ‘unfree’. This palpably does not apply to modern conditions but the *assumption* of free tenement could be

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<sup>368</sup> *Motherwell v Motherwell* (1976) 73 DLR (3d) 62, [77] (as quoted by Pill LJ in the Court of Appeal (see [1997] AC 655, 713); see also *Khorasandjian v Bush* [1993] QB 727.

<sup>369</sup> *Hunter* (1), 713.

<sup>370</sup> NJ McBride & R Bagshaw, *Tort Law* (Longman 2008), 394.



applied to de facto exclusive possession today. Arguably the courts decided in *Cantrell* that mere possession was the benchmark for standing when they recognised that manorial constraints regarding free tenement had been superseded by contemporary society.

A strong case has been made that the essence of private nuisance, forged in novel disseisin, was designed to give redress to those in actual possession of a free tenement. Being seised equated – in a modern sense - to already having a legally recognised interest which required no proof of title unless the actual right to seisin was being challenged. This strongly suggests that everyone could bring an assize in novel disseisin; it was a matter of whether they would win – if the question was asked about whether a plaintiff was a villein they would often withdraw and place themselves in mercy of the court.<sup>371</sup> The fundamental characteristic of the law remained: it either protected possession that arguably found its roots in Roman law or regulated seigniorial relationships. Today when commentators and judges mention possession in terms of land law they often think of ‘exclusive possession’ as per the Law of Property Act 1925 as construed by the courts.<sup>372</sup> Yet it is not at all clear that the intention of Parliament in enacting this legislation was to limit the number of victims of nuisance who could seek a common law remedy – which is the effect of *Hunter*.

The method of analysis in this article differs from Lord Cooke’s dissenting opinion (agreeing with Pill LJ in the Court of Appeal) but nonetheless arrives at the same conclusion. For Lord Cooke the problem with the majority reasoning in *Hunter* was that it failed to recognise that the law needed to move with the times and to embrace a more liberal conception of standing than in the early twentieth century and the centuries before. *Malone* in particular should no longer be viewed as good law by virtue of its embodying an outdated policy according to

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<sup>371</sup> Milsom, *Framework* (8) 21-3. There are many examples of unexplained withdrawals but there is evidence that the question of whether someone was free of merely the defendant’s (the lord’s) villein.

<sup>372</sup> 1925. Ss.1(1)(a) and (b).

which wives were subservient to their husbands.<sup>373</sup> The argument above is that the past is not quite as big an obstacle to liberal standing as Lord Cooke believed and is the perfect role model for the law being driven by changing social mores. ‘Being there’ in the sense of enjoying a nexus with land, particularly in regards to habitation, can be traced back to the origins of the law. Unfortunately Lord Cooke is as mistaken as Lord Goff regarding what the past says about who can sue today. William Drapper Lewis once stated that ‘If a rule of law has apparently no foundation in reason, we usually find that history gives us, if not a reason carrying its own justification, at least an explanation’, it would seem that this does not collate with the modern law on standing in private nuisance.<sup>374</sup>

The conventional perception that environmental protection is best obtained through the attenuation of private activities through legislation in the interest of the public ignores the benefits that can ensue from mounting privately initiated actions, whether against other private individuals, large corporations or government bodies. To argue that effective environmental protection can only truly be obtained through government initiated regulations and planning controls to is entirely short-sighted. The Court of Appeal Decision in *Hunter* rediscovered the nexus between humans and land exposing a potential pluralistic approach to modern environmentalism where both private and public law can play their role. Of course, in the past, private nuisance has been hailed as an effective means for individuals to protect the environment but the affirmation that something other than a proprietary interest was required to seek redress for environmentally harmful activities revealed an extra aspect of private nuisance’s potential as the environmental tort. McGillivray and Wightman immediately

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<sup>373</sup> *Hunter* (1), 713 (Lord Cooke); see also *Motherwell* (297), 77.

<sup>374</sup> WD Lewis ‘Injunctions against Nuisances and the Rule Requiring the Plaintiff to Establish His Right at Law’ (1908) 56 University of Pennsylvania Law Review and American Law Register 289.

recognised that private nuisance not only protected spouses and children in their homes but that there was room for common interest groups to have standing.<sup>375</sup>

This thesis seeks the proposition that an inherent simplicity exists within the doctrines of private nuisance and whilst there is palpably an abundance of historical materials that expound the simplicity argument, the issue of standing is not immediately obvious. As such an in-depth analysis over numerous centuries has been required to expound the various facets of the right to sue in relation to changes in societal needs. This chapter shows that the societal nuances which encompassed the law and those that drove changes in it have been visibly lost within our period of living memory owing to misuses of nuisance's rich history that first structured the law. Undeniably, the narrower ambit concerning the right to sue in private nuisance has weakened the torts 'green' credentials in a modern setting. As such, the House of Lords decision in *Hunter*, omits to recognise the relationship between changes in law and engagement of the law according to societal needs (in contrast to the Court of Appeal ruling). Formative junctures across the epochs have been overlooked arguably generating confusion about private nuisance's purpose and scope today. In essence, by curtailing the right to sue, this modern development in nuisance law has broadly weakened the common law's capacity to function as recourse for environment-type harm, as it affects individuals in occupation of land, and thus their ability to adequately remedy pollution of the natural environment.

Drawing on historical materials we are exposed to the notion that, despite attempts to develop the law in modern decisions, opportunities have been missed to continue on a path of broadly adequate protection of interests in land affected by environmental harm. The attempt to move the law forward by narrowing the class of person capable of bringing an action in private

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<sup>375</sup> D McGillivray and J Wightman, 'Public Rights, Public Interest and the Environment' in T Hayward and J O'Neill ed. *Justice, Property and the Environment: Social and Legal Perspectives* (Ashgate, 1997), 144- 160.

nuisance has, in reality, taken a step back in relation to the level of environmental control nuisance has conferred for centuries. In the next chapter the issue of ‘actionability’ is tackled by centring on the historical aspects regarding the actionability of person injury in private nuisance. In a similar fashion to this chapter, it begins with the modern case law that contradicts the manner in which the law has evolved and then makes the case regarding how modern decisions have misused the history and in turn demonstrates how the proper use of history can be positively helpful in developing the law of nuisance.

## Chapter 3

### Actionability

#### 1. Introduction

In the 2008 *public* nuisance case of *Corby Litigation Claimants v Corby Borough Council*<sup>376</sup> Ward, Dyson and Smith LJJ stepped off point to address the question of the actionability of personal injury in *private* nuisance. Following various obiter dicta in *Hunter*<sup>377</sup> and also the dicta of Lord Hoffmann in *Transco Plc v Stockport Metropolitan Borough Council*,<sup>378</sup> the judges in the Court of Appeal in *Corby* were in agreement that personal injury is not a protected interest in *private* nuisance.<sup>379</sup> The court's philosophy on this point was heavily informed by the analysis of Newark's article 'The Boundaries of Nuisance'.<sup>380</sup> Newark professed that the 'problems' associated with private nuisance law were being caused by 'an improper extension' of the tort to include injuries to the person. His historical appraisal of private nuisance led him to the conclusion that it is a profanation of the tort to perceive it as an avenue for redress for injuries to the person. He criticised what was, in his opinion, an 'erroneous belief' that nuisance actions are 'a suitable remedy for recovering damages for personal injury'. He stated emphatically that:

This is a heresy which is equally offensive to the legal historian and the jurist. In true cases of nuisance the interest of the plaintiff which is invaded is not the interest of bodily security but the interest of liberty to exercise rights over the land in the amplest manner.<sup>381</sup>

This statement has become well utilised by modern Law Lords. It even forms part of the basis of Lord Goff's 'basic position' regarding who has the right to sue in the tort (discussed in

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<sup>376</sup> [2008] EWCA Civ 463. *Corby* also concerned negligence and breach of statutory duty.

<sup>377</sup> [1997] AC 655. See in particular Lord Goff of Chieveley, 692 (see also Lord Lloyd [696]); and Lord Hoffmann, 707–08.

<sup>378</sup> [2004] 2 AC 1.

<sup>379</sup> See in particular Dyson LJ (1), 340.

<sup>380</sup> [1949] LQR 480.

<sup>381</sup> *ibid* [489] (*italics added*). See also *Corby*, 340.

depth in the previous chapter).<sup>382</sup> Despite its ambiguity, being capable of supporting both schools of thought regarding the actionability of ‘personal injury’,<sup>383</sup> Newark’s statement is nonetheless an enduring part of modern nuisance law analysis. Commentators and judges alike seemingly regard it as invaluable to the modern understanding of past aspects of private nuisance; however, it is debatable that the statement withstands rigorous historical scrutiny. In actuality it constitutes a mixed collection of historical truths and untruths, a misnomer, one could say, and is an example of why the tort is, to borrow Newark’s own words, so ‘immersed in undefined uncertainty’.<sup>384</sup>

In *Hunter* Lord Goff and Lord Lloyd made general assertions that normally negligence was the proper tort to sue for personal injuries.<sup>385</sup> Undeniably personal injury represents the subject matter of a large body of negligence law. However the actionability of physical injury caused by nuisances to those with the requisite interest in land has not been resolved authoritatively by the Supreme Court, so there is some uncertainty about the actionability of this head of damage and whether it has a place in private nuisance: certainly it has a place in public nuisance.<sup>386</sup> Indeed Lord Hoffmann - in the same case - somewhat challenges his counterparts’ opinions after considering Lord Westbury’s comments in the seminal case of *St Helen’s v Tipping*.<sup>387</sup> He draws attention to the fact that in the past ‘actions in respect of the discomfort or personal injury’ has been actionable where such injury is a consequence of interference with land. He states:

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<sup>382</sup> *Hunter* (2), 687. See chapter 2.

<sup>383</sup> Compare *Corby* (1) with J Murphy, *The Law of Nuisance* (OUP 2010) 64. The ambiguity centres on the meaning of ‘amplest manner’.

<sup>384</sup> See Newark (5) 480 who quotes Erle CJ’s judgment *Brand v Hammersmith Railway* (1867) LR 2 QB 233, 247.

<sup>385</sup> *Hunter* (2), 692 and 696.

<sup>386</sup> See generally *Corby* (1); *Barr and others v Biffa Waste Services Ltd* [2009] EWHC 1033; *R v Rimmington* [2006] 1AC 459 (conjoined with *R v Goldstein*); and *AB v South West Water Services Ltd* [1993] QB 507; [1993] 2 WLR 507.

<sup>387</sup> 11 ER 1483, (1865) 11 HL 642; see *Hunter* (2), 705 (Lord Hoffmann).

In the case of nuisances ‘productive of sensible personal discomfort’, the action is not for causing discomfort to the person but...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.<sup>388</sup>

Lord Hoffmann is hence pointing out that whilst a claim for personal injury in negligence terms would fail - as there is no right to claim in those circumstances in private nuisance – someone should not be prevented from seeking to enforce their common law right to be uninhibited by any substantial diminution of the amenity value of property.

When we consider the modern commonly adopted description of private nuisance, ‘an unlawful interference with a person’s use or enjoyment of land, or some right over, or in connection with it’<sup>389</sup> it is patent that its composition is wide in scope. The definition falls short of providing a succinct outline of the interests that are protected thus lending a degree of legitimacy to an argument that a doctrinally pure form of the tort exists. Newark’s influential argument advocates private nuisance should not go beyond protecting interferences related to the use and enjoyment of land or rights associated with land-holding.<sup>390</sup> Nonetheless, very early on in the evolution of nuisance law, it was evident that there were other protected interests. For instance, in 1330 in *Dalby v Berch*<sup>391</sup> physical

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<sup>388</sup> *Hunter* (2), 706.

<sup>389</sup> The modern ‘description’, devised by Winfield (see ‘Nuisance as a Tort’ (1931) CLJ 189, 190), was first used in the high courts by Lord Scott in *Read v Lyons* [1945] KB 216 [236] and was affirmed by Lord Goddard CJ in *Howard v Walker* [1947] 2 All ER 197, 197E and 199 and by Windeyer J in *Hargrave v Goldman* (1963) 37 A.L.J.R 277, 283 (affirmed [1967] 1 AC 645). RA Buckley cited Winfield’s eleventh edition of *Winfield on Torts* (page 18) whilst the description in its most current form (at the time of writing) can be found in WVH Rogers, *Winfield and Jolowicz on Tort* (Sweet and Maxwell 2010) 712.

<sup>390</sup> John Murphy refers to the etymological basis for asserting nuisances were restricted to wrongs that only affected the ‘annoyance value’ of landholding owing to the word nuisance deriving from the Latin word ‘nocumentum’ and the old English word ‘noysaunce’. As such ‘juridical orthodoxy’ arguably suggests that private nuisance should be restricted to interferences with the use and enjoyment of land (Murphy (8) 61). He quotes C Gearty ‘The Place of Private Nuisance in a Modern Law of Torts’ 48(2) (1989) CLJ 214; and Newark (5); see also D Ibbetson, *A Historical Introduction to the Laws of Obligations* (OUP 1999) 101. See also Chapter 4.

<sup>391</sup> (1330) YB Trin, 4 Edw III, fo 36, pl 26; 4 Lib Ass 3. The facts of this early case are strangely reconcilable with the nineteenth-century seminal House of Lords case *Tipping* (above note 12) which places us in no doubt

damage to land was clearly an actionable protected interest beyond the use and enjoyment of land.

Despite recent judicial and academic murmurings to the contrary<sup>392</sup> it is traditional that the law of private nuisance protects other interests than a narrow interpretation of Winfield's description stipulates.<sup>393</sup> Probably related to the familiar problem of establishing a precise definition for the tort, we are placed in open territory regarding what is actionable (the 'measure of actionability'). Unfortunately, any assertion that attempts to encapsulate the entire essence of the tort will likely be inadequate owing to the inherent difficulties of capturing 'the highly nuanced approach that must be adopted in order to grasp fully what is, and is not, protected'.<sup>394</sup> In light of modern reservations about its actionability this chapter focuses on the debate regarding 'personal injury' as a protected interest in private nuisance. Notwithstanding the tort protects other interests, such as interferences with the use or enjoyment of land and its servitudes or damage to property and chattels, it will be explained that safeguarding 'bodily security' is indivisible from landholding at a fundamental level, despite some modern claims to the contrary.<sup>395</sup>

The general measure of actionability that insists interferences must be substantial to constitute a nuisance is conceivably personified by activities that harm one's health or physical well-being. The debate about excluding damage to the person becomes intriguing in that respect as it is hard to imagine a more substantial interference to proprietary interests

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that 'material injury to property' is actionable (see Murphy, *ibid*, 61). In *Tipping* damage to hedges, trees, shrubs and fruit were deemed to be actionable, in *Dalby* fruit trees in the garden were desiccated 'so that they would not bear fruit' and an action lay (See JH Baker & SFC Milsom, *Sources of English Legal History* (Butterworths 1986) 596 (n 19) and 600. *Dalby v Berch* was cited by Coke CJ in *Aldred v Benton* (*Aldred's Case*) BL MS Add 25209, fo 211v).

<sup>392</sup> See in particular Lord Goff in *Hunter* (2), 692; C Gearty (15); and Newark (5).

<sup>393</sup> Murphy stipulates that the interests protected by private nuisance include interferences with the use and enjoyment of land; physical damage to land; damage to the person; damage to chattels; economic loss; and servitudes (Murphy *ibid* 59-72).

<sup>394</sup> Murphy *ibid* 59-60.

<sup>395</sup> *ibid* 59-73.



than to the ‘comfort of physical existence on that property’.<sup>396</sup> Further to that point, interference that causes personal injury acts simultaneously as evidence that a substantial diminution of the amenity value of land has occurred;<sup>397</sup> ‘consequences which become or are prejudicial to person or property’ are adjudged as actionable interests.<sup>398</sup> Interferences are deemed substantial enough to equate to an actionable nuisance when either the ‘comfortable or profitable occupation’ of a dwelling is unreasonably effected.<sup>399</sup> For instance, when someone is prevented from relaxing in their garden owing to noxious fumes causing health problems there is diminution in relation to *both* comfortable and profitable occupation. At the turn of the twentieth-century actionable nuisances were certainly assessed in such a manner.

In the preceding chapter, despite a strong case against exclusive possession being the requisite interest to sue in private nuisance, it is not difficult, in certain circumstances, to allude to their Lordships’ decision to adopt an austere stance towards standing in the tort. An anomaly exists that circumvents the austerity of standing being restricted to a proprietary interest in private nuisance. Whereas occupiers of a home will find themselves without remedy in the private embodiment of the law they may well find that they have a remedy in public nuisance; this was the situation in *Corby* and it is by no means an isolated case in point. A theoretical and definitional problem exists where pollution affects a number of

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<sup>396</sup> *Tipping* (12) (Mellor J). See AWB Simpson ‘Victorian Judges and the Problem of Social Cost: *Tipping v St Helen’s Smelting Company* (1865)’ in his *Leading Cases in the Common Law* (OUP 2001) 187.

<sup>397</sup> *Murphy* (8) 64.

<sup>398</sup> *Halsbury’s Laws of England* (LexisNexis 2012), vol 78, 102. This highlights a distinguishing trait of nuisance from trespass which can bear close resemblance (*Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch 84; *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343 (CA)). Loosely, the distinction between nuisance and trespass is that ‘in trespass the immediate act which constitutes the wrong causes an injury to the sufferer’s person or damage to his property or amounts to dispossession, whereas in nuisance the act itself often does not directly affect the person or property of another, but has consequences which become or are prejudicial to his person or property’ (*Reynolds v Clark* (1725) 1 Stra 634; *Weeton v Woodcock* (1839) 5 M & W 587, 594; *Haward v Bankes* (1760) 2 Burr 1114; *Kine v Jolly* [1905] 1 Ch 480, 487–488, CA, per Vaughan Williams LJ; see also *Scott v Shepherd* (1773) 2 Wm Bl 892; *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218, [1955] 3 All ER 864 (HL); *Home Brewery Co Ltd v William Davis & Co (Leicester) Ltd* [1987] QB 339, sub nom *Home Brewery Co Ltd v William Davis & Co (Loughborough) plc* [1987] 1 All ER 637.

<sup>399</sup> *Jolly* *ibid*, 489 (as per Vaughan Williams LJ and affirmed in the House of Lords [1907] AC 1); see also *Colls v Home and Colonial Stores Ltd* [1904] AC 179.

households. In cases such as *Corby* and *Barr v Biffa*<sup>400</sup> it is legitimate to question, on the facts of the cases, whether the nuisance is anything more than a ‘private nuisance’ dressed up to fit the ‘public nuisance’ mould. Alternatively, it is legitimate to question whether it is truly possible that there could ever be a personal injury in the home that is not in reality a private nuisance. The question can be posed in another way: will there ever be a situation where the facts replicate or are similar to those in *Corby* and *Biffa* that public nuisance does not come to the rescue to sidestep standing issues? For the sake of coherence, we must examine the unacceptable situation where personal injury is actionable in public nuisance but not in private nuisance.

The following section examines the long-established nexus between human beings and the land they occupy as a home. It is suggested that nuisance theory is inexorably intertwined in land-holding and since the sixteenth-century nuisance law has always been concerned with – or is based upon – matters regarding health and mental well-being. The section proceeds by discussing the actionability of comfort and enjoyment in early modern law and the development of the ‘necessity rule’. That discussion challenges Professor Newark’s famous thesis in ‘The Boundaries of Nuisance’<sup>401</sup> that sought to position ‘personal injury’ solely in the context of negligence. Then the modern measure of actionability is scrutinised before building the case for injury to the person as a protected interest in modern nuisance law. It will be shown that attempts to exclude personal injury from private nuisance have emerged exclusively in the realm of public nuisance and under the rule *Rylands v Fletcher*.<sup>402</sup> Before the concluding remarks the amalgamation of nuisance law as a single entity during the evolution of Case is examined in order to elucidate the contention that personal injury should not be restricted to public nuisance alone.

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<sup>400</sup> *Barr* (11).

<sup>401</sup> Newark (5).

<sup>402</sup> *Rylands v Fletcher* (1868) LR 3 HL 330. (*Rylands & Another v Fletcher* (Court of Exchequer Chamber) LR 1 Ex 265 (1866)).

## 2. The Significance of Bodily Security within Nuisance Theory

‘Home’ is an evocative term for everyone as it is the embodiment of the handful of precious ingredients that coexist to create the place where we live. It provides shelter; a sense of belonging; the means to grow food; and a source of water – all the right ingredients for a healthy way of life. In essence, ‘home’ is the place where the conditions for the biology and chemistry which enables our physical being to function properly are present. Although the term ‘home’ is not something innately human (as all flora and fauna require an essential list of ingredients to provide an environment in which they can thrive) private nuisance is a forum unique to us - as human beings – that has developed to protect our interests in the land, thus furnishing us with the conditions necessary for a healthy environment. Although we cannot state categorically from the regimented writs (discussed in the preceding chapter) we can, nonetheless, make some assumptions concerning our medieval ancestors’ relationship with land that furnished them with bodily and financial security. It was a time when the seigniorial relationship between lord and tenant and the importance of being seised of land was vital to prosper, thus we can infer that bodily security was a natural element of what evolved into ‘property’ and beyond - being disseised was enough to make our ancestors vulnerable to both physical and financial hardship.<sup>403</sup>

The analysis in Chapter 2 identifies novel disseisin as the ‘grass roots’ of nuisance law. In light of that analysis, it can be posited that being seised of a free tenement was conceptually something more than a ‘title’ in land that granted access to the royal court - it is perhaps better described as a ‘state of being’. The ideology behind a lord’s acceptance of a tenant into free tenure provided a status that was synonymous with ‘security under law’. That status

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<sup>403</sup> See generally Chapter 2. RC Van Caenegem, *Royal Writs in England from the Conquest to Glanvill: Studies in the Early History of the Common Law* (Selden Society, 1959), vol 77, 262. As Coke CJ stated: “...for until he is seised of land life is nothing but work, pain and upheaval; but when he has obtained seisin, he may settle and rest” (CJ Coke, 6 Co Rep 57b; RC Palmer, ‘Personal injury in private nuisance: the historical truth about actionability of “bodily security”’ (2009) 21(6) ELM 302, 304 (note 38); and 2 Pollock & Maitland *History of English Law*, (Lawbook Exchange 2001), 30 and 46).

ensured that the most important contemporaneous rights – manifested in lands and tenements - were protected. To medieval man, being seised of a free tenement not only bestowed standing in the Assize and in society but determined also his physical well-being. ‘Security under law’ as a precept henceforward naturally encompassed ‘bodily security’ as a protected right. It can be asserted that at a fundamental level ‘bodily security’ was an integral element of the feudal seigniorial relationship that created a free tenement.<sup>404</sup> Centuries later that remained the situation. For example, at first instance in the seminal case of *Aldred v Benton*<sup>405</sup> (*Aldred’s Case*<sup>406</sup>) in 1610 Coke CJ remarked that ‘a man builds for habitation, for health and for ornament. If a man does anything which hinders another’s habitation<sup>407</sup> or health an action lies; but not if he hinders his pleasure’.<sup>408</sup>

Cockayne observes that ‘sensory perceptions’ of the people during the seventeenth and eighteenth centuries ‘shaped cultural and practical responses’.<sup>409</sup> Coke CJ’s reasoning in *Aldred* reflects that sentiment. Actionability in private nuisance evolved representing the connection between interests in land-holding and interests of the physical person;<sup>410</sup> the physical integrity of land and the physical integrity of the person have been inexorably linked - born out of instinct – as a natural aspect of the built and natural environment. Milton observed that during the sixteenth-century:

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<sup>404</sup> DW Sutherland, *The Assize of Novel Disseisin* (Clarendon 1973) 2; see Van Caenegem, *Royal Writs* *ibid.*

<sup>405</sup> HLS MS 2069 fo 206v; BL MS Add. 25209, fo 211v. See also *Bland v Moseley* (1587) which was quoted by Coke in *Aldred* 9 Co Rep 58; and Baker & Milsom (16) 601(note 9) and 603.

<sup>406</sup> 77 ER 816; (1610) 9 Co Rep 57; B & M 599.

<sup>407</sup> Although in the original report it was actually stated as ‘inheritance’ it is believed this was an error and should be read as ‘habitation’. Nonetheless ‘health’ was not an issue for debate and not considered to be an error. See Baker & Milsom *ibid* 600 (note 13).

<sup>408</sup> Emphasis added. HLS MS 2069 fo 206v; BL MS Add. 25209, fo 211v. See also *Bland v Moseley* (1587) which was quoted by Coke in *Aldred* 9 Co Rep 58. See also Baker & Milsom *ibid.*

<sup>409</sup> E Cockayne, *Hubbub: Filth, Noise & Stench in England 1600-1770* (Yale University Press 2007), 15–21.

<sup>410</sup> See D Ibbetson (15) 98; and JS Loengard, ‘The Assize of Nuisance’ [1978] CLJ 144, 161-3.

Cultural changes in English society [as a result, in part, of the enclosure movement<sup>411</sup>] led to the formulation and recognition of new interests of land holding, involving many claims to the integrity of the land unit and the comfort and *physical welfare* of its occupants.<sup>412</sup>

In essence Milton was referring to the concept of nuisance and the echoes of its evolutionary path from the ‘state of being’ afforded by seisin of land to a transformation of abstract interests - such as the ‘personal physical welfare and well-being of the human organism’ – driven by social mores.<sup>413</sup> Professor Palmer provides evidence of social events, particularly demographic catastrophes, influencing and moulding legal change. It would seem the inexorable nexus between land and humankind merely adjusted in accordance with each concurrent societal state of affairs across the epochs,<sup>414</sup> at least until the twentieth-century when well-ordered negligence principles came to the fore. Ultimately – if *Corby* and *Biffa* are upheld in any future Supreme Court action – eight centuries of nuisance law that developed around societal nuances (one of which was the need to protect the health and well-being of landholders) will be supplanted. Whilst the judges in *Corby* and *Biffa* have preferred a negligence analysis and chosen to remove personal injury from private nuisance (but not public nuisance) and place it into negligence, it is questionable whether they had a grasp of the fundamental nexus between land-holding and ‘bodily security’.

Fundamentally, that removal is a misinterpretation of the traditional character of private nuisance (essential to the simple form of nuisance law). It can be asserted that this is a misuse of history and, perhaps, an improper manner in which to develop the tort. The only apparent

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<sup>411</sup> The enclosure movement heralded a transformation of private nuisance and was ‘part of the great economic development that opened the modern era’ (P Mantoux *The Industrial Revolution in the Eighteenth-Century* (London 1928), 156). It helped supplant the manorial system (thus the customs and regulations of manorial communities) by a steady flow of enactments that, according to Milton, ‘signaled the destruction of the old system of co-operative agriculture’ (Milton, ‘The concept of Nuisance in English law: a study of the origins and historical development of the concept of nuisance law from its earliest beginnings to the end of the nineteenth-century’ (1978) unpublished thesis, 110).

<sup>412</sup> Milton, *ibid* [emphasis added].

<sup>413</sup> *ibid*.

<sup>414</sup> RC Palmer, *English Law in the Age of the Black Death 1348-1381* (The University of North Carolina Press 1993).

justification for this development is the cross-infection of negligence into nuisance. It is suggested that the more ‘fashionable’, well-ordered doctrines of negligence provide a quick fix to the difficulties (under discussion in this thesis) that have developed in private nuisance in recent times. Further, it is argued that much of those difficulties have emanated from misuses of history of this type. The removal of bodily security as a protected interest from the tort provides a succinct example of this in practice. This will now be demonstrated.

Roscoe Pound considered the five natural interests of the physical person.<sup>415</sup> Among those interests were the protection of the body from direct or indirect injury; maintenance of bodily health; and the protection from direct or indirect injury of one’s mental health. Thus Pound identifies human beings’ natural desire to strive for freedom from annoyance which interferes with not just physical comfort but also mental poise. Importantly, Pound characterised the instinct to protect physical and mental health, essentially, as protecting property rights, thus his three anthropocentric interests reveal bodily security and mental welfare as being entirely anthropomorphised in the concept of ‘property’. As such the law of nuisance has traditionally served to protect what is *necessary* to habitation and we can surmise that health is a necessity of ‘property’.<sup>416</sup>

In *Allison v Merton, Sutton and Wandsworth Area Health Authority* the plaintiff’s sleep was affected to such a degree by the incessant noise and vibrations from the defendant’s boilers that she developed depression. She sought an injunction and was successful on grounds to preserve her mental health.<sup>417</sup> The *Allison* case is important for two reasons: first, it highlights our strong instinct to safeguard our well-being holistically; and second, ‘personal injury’ extends to mental well-being in private nuisance. ‘Property’ has clearly been the legal

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<sup>415</sup> R Pound, ‘Interests of Personality’ 28 (1915) Harvard LR 343, 355-6.

<sup>416</sup> Milton (36) 126 (note 154).

<sup>417</sup> [1975] CLY 2450. Note this case was won on grounds of injury to health despite depression – at that time – not being measured in terms of health.

manifestation of a safeguarding platform for human self-preservation in all guises. *Allison* is not an isolated example where an intrusion that caused mental anguish gave rise to an actionable nuisance. In both *Thompson-Schwab v Costaki*<sup>418</sup> and *Laws v Florinplace Ltd*<sup>419</sup> the close proximity of a brothel and a sex shop (respectively) caused mental upset and the mere presence of those premises were deemed to be actionable on that ground. Thus private nuisance traditionally protects occupiers, not simply against physical damage to their property, but likewise against nonphysical interference with their enjoyment of their land).<sup>420</sup> Gerry Cross labelled ‘mental upset’ as a nonphysical interference but logically depression and mental upset are under the general umbrella of health. Bearing in mind *Thompson-Schwab* received House of Lords approval in *Hunter* we must question why mental well-being is considered to be a protected interest whereas physical injury to the person is not: surely actual physical injury should, at the very least, be on a level setting as something that can offend.<sup>421</sup>

Our ancestors recognised the best means of securing the paramount human facets was to secure habitation: we can argue that the situation is similar today. It is a general principle that ‘every person [with the requisite interest] is entitled, as against his neighbour, to the comfortable and healthful enjoyment of the premises owned or occupied by him’.<sup>422</sup> Debatably any argument that disputes the inescapable nexus between human and land and the interests that connection naturally generates have weak foundations. One could venture as far as to say that the contention that ‘personal injury’ is not actionable in private nuisance because it is a ‘tort to land’ is little more than quibbling over semantics. It is suggested here

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<sup>418</sup> [1956]1 WLR 335.

<sup>419</sup> [1981] 1 All ER 659.

<sup>420</sup> Cross observed that: ‘The matters protected include, amongst other things, freedom from unduly intrusive noise, freedom from excessive vibrations, freedom from excessive dust and fumes, freedom from unreasonably noxious smells, freedom from mental upset and so on’ (G Cross, ‘Does Only The Careless Polluter Pay? A Fresh Examination of the Nature of Private Nuisance’ (1995) LQR 445, 448-9).

<sup>421</sup> See, for instance, *Hunter* (2) 686 (Lord Goff).

<sup>422</sup> *Halsbury’s Laws of England* (23) 124.

that recognition of bodily and mental security as crucial proprietary interests should be, again to borrow Professor Newark's words, defended rigorously 'against all comers'.<sup>423</sup>

Certainly there are numerous examples over the centuries where the courts were explicit regarding the relationship between 'bodily security' and human habitation. In *Hales' Case* in 1569 Mounson commented:

The first and chiefe use of an house is to defend men from the extremity of the winde, and weather. And by the receipt of comfortable light, and wholesome aire, into the same to preserve man's body in health. Therefore who so taketh from man so great a commodity as that which preserveth man's health in his castle or house doth a manner as great wrong as if he disseised him altogether of his freehold [sic].<sup>424</sup>

It is important to reiterate the point in fact from above and the previous chapter, that being seised of a free tenement represented a 'state of being' denoted by a personal and economic relationship with land (and lord) when 'land was everything to everybody'.<sup>425</sup> The sheer prominence of land as a personal and economic entity cannot be understated. Thus to analogise the preservation of health and well-being alongside being seised of a free tenement, as Mounson did, highlights the nexus between man and land (and health and status) at an early stage of the modern tort.

A definite impression during the sixteenth, seventeenth and eighteenth-centuries can be formed that 'bodily security' was a protected interest inherent to landholding. Accordingly injury to health would invoke an action in nuisance law. This brings us back the question as to why the development of negligence should provide justification to remove such an inherent proprietary interest. Social historian Emily Cockayne (quoting Mounson in *Hales' Case*) explains how lands, including dwellings, were conceived fundamentally in health

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<sup>423</sup> Newark (5) 489.

<sup>424</sup> See Mounson, 'A Briefe Declaration for what manner of speciall nusance a man may have his remedy' (1636), 1; Cockayne, (34) 139; and Baker (16) 592-3.

<sup>425</sup> Van Caenegem, *Royal Writs* (28) 262.



terms. Precedent in the courts continued to support such a notion. Shortly after *Aldred's Case*,<sup>426</sup> Jones J in *Jones v Powell* reasoned:<sup>427</sup>

I conceive that an action on the case lies if someone suffers special prejudice...as Jones has in this case – for his air is corrupted, which is a prejudice to his body, since his health is thereby taken away; and his papers and writings are spoilt, so that he [being a registrar] is deprived of his maintenance and livelihood. So judgment should be given to the plaintiff.<sup>428</sup>

This small selection of *ratio* from the sixteenth and seventeenth-centuries is debatably conclusive (rather than indicative) evidence concerning the holistic value of landholding – land was not merely viewed as a thing to be owned, indeed the concept of ownership did not start to develop until approximately half a century after the earliest experiments with *nocumenta* (nuisance) began,<sup>429</sup> but alternatively something that provided the foundations for bodily and economic security as ‘natural incidents’ of landholding protected by actions for nuisance.<sup>430</sup>

Notwithstanding the importance of *Cantrell v Church*<sup>431</sup> (when both proprietary and personal aspects of nuisance could truly be said to have come together ‘under the same legal heading’<sup>432</sup>) the case did not clarify what interests should be protected in nuisance. But the

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<sup>426</sup> *Aldred* (16); Cockayne (34) 139.

<sup>427</sup> (1629) HLS MS, 1083, fo 50v.

<sup>428</sup> In this case, the plaintiff appears to have recovered damages for ill-health occasioned by air pollution and for damage to goods/chattels, contrary to Newark’s analysis. He was clearly of the opinion that damages for personal injury should not be recoverable in private nuisance, only negligence, and according to his third recommendation for reform damages for goods/chattels should be recoverable in trespass (Newark (5) 490).

<sup>429</sup> See Chapter 2. CHS Fifoot, *History and Sources of the Common Law: Tort and Contract* (Stevens & Sons, 1969), 5; and CT Flower, *Introduction to the Curia Regis Rolls 1199-1230* (Selden Society, vol 62, 1943) ch. 18 (XVIII). RC Palmer, ‘The Origins of Property in England’ (1985) 3 Law & Hist Rev 1, 4.

<sup>430</sup> JH Baker, *An Introduction to Legal History* (Butterworths 2002) 426.

<sup>431</sup> (1601) B & M 588. The decision in this *Cantrell* is generally considered the juncture when the assize of nuisance was supplanted by actions on the case (for nuisance). and. This affirmed the ‘right of election’ between the two writs and discarded the division; thereafter the older decisions were, in Fifoot’s view, ‘no more than memories’ (n 56) and while this may be an exaggeration, it is certainly true that private nuisance had breathing space to develop independently of ancient writs.

<sup>432</sup> JH Baker (55) 426.

formative decision concerning actionability came less than a decade later in *Aldred's Case*:<sup>433</sup> *Aldred* is considered the lead case of the time: it continues to have an influence on modern judges today.<sup>434</sup> William Aldred had freehold possession of a house and piece of land (31 feet long and 2.5 feet wide) in Harleston, Norfolk. The land was situated next to the hall and parlour of his house. On the east side of the land the defendant, Thomas Benton, possessed a small orchard where he erected a pig-sty. Topical to this chapter, the case was contested on the grounds of 'a fetid and unwholesome'<sup>435</sup> stench (from Benton's newly erected pig-sty) that rendered Aldred's home uninhabitable. It was claimed his servants and other persons who lived there could not stay 'without danger of infection'.<sup>436</sup> Owing to the fact that Aldred was successful in his claim it is important to understand the judges' interpretation of nuisance doctrine - at the birth of *modern* nuisance law - that resulted in a successful appeal (on arrest of judgment) on the grounds essentially of a *risk* to health.

'Personal nuisances' where there was a *fear* of infection were recognised from early on in the development of actions on the case, possibly from the beginning. Baker recognised that such cases had earlier been 'remedied in local courts' which emphasises – prior to royal protection under the Assize – health was inexorably linked to 'home'.<sup>437</sup> In cases that involved smell, for instance from lime-kilns, there was a heightened fear of infection, as such, because not every interference could be deemed a nuisance, the fear of infection played a vital role in the

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<sup>433</sup> There are a number of aspects of *Aldred* that are beyond the scope of this chapter but see generally DR Coquillette, 'Mosses From an Old Manse' 64(5) (1979) Cornell LR 761, 761–821.

<sup>434</sup> For instance, Lord Hoffmann in *Hunter* ((2) [709]) used it as precedent that there is no common law right to light (9 Co Rep 57b). See also *Bury v Pope* (1587) 1 Cro Eliz 118.

<sup>435</sup> JH Baker (55) 429; and Baker *SELH* (16) 600.

<sup>436</sup> The case was also contested on the grounds of interference with ancient lights owing to the close proximity of the pig-sty.

<sup>437</sup> Baker (55) 428-9

nascent balancing act (of competing user of land) between someone having the freedom to do what they want with their land and the obligation not to harm their neighbours land.<sup>438</sup>

Safeguarding health was a necessity of habitation, or expressed differently, personal injury could be the deciding factor in regards to actionability. The risk of infection or injury to one's health had a vital role in what became Baron Bramwell's rule of reciprocity.<sup>439</sup> The rule of reciprocity (and rule of reasonableness) evolved into the reasonable user test (see Chapter 4<sup>440</sup>) out of the need to establish 'whether the interference alleged surmounts the threshold of interference necessary to give rise to an action in nuisance'.<sup>441</sup> Baker remarked that Aldred would have been well served to emphasise the danger of infection from the 'pollution' that emanated from Benton's newly erected pig-sty but regardless Benton was held liable, not for interfering with comfort and enjoyment, but for 'infecting' the air.<sup>442</sup>

The notion of types of pollution affecting the health of plaintiffs as being nuisances has, without doubt, a long lineage. Baker avers that activities in certain cases from the late fourteenth-century were considered nuisances; for instance, where potable water supplies were polluted or dwellings infected so they were rendered uninhabitable.<sup>443</sup> Certainly for a significant period actions on the case - specifically for pollution - were one of the most common forms of nuisance action which reflected the lack of public health regulations and times when standards of hygiene were poor;<sup>444</sup> there were a number of different unwholesome activities that would give rise to a nuisance action.<sup>445</sup> But the advent of

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<sup>438</sup> This is exemplified in cases in the sixteenth and seventeenth-century and was a consequence of miasmatic theory that was prevalent until the nineteenth-century.

<sup>439</sup> *Bamford v Turnley* (1862) 3 B & S 66,

<sup>440</sup> Chapter 4 incorporates a detailed historical analysis of the reasonable user test.

<sup>441</sup> Cross (45) 449.

<sup>442</sup> Baker (55) 429.

<sup>443</sup> Baker *ibid*, 428-9.

<sup>444</sup> Emily Cockayne describes how health was not a prime concern of the authorities until the mid to late eighteenth-century owing to ever increasing industrialisation and urbanisation taking priority; it was down to the individual to seek redress where health was a concern (Cockayne (34) 244-5).

<sup>445</sup> Baker remarks that nuisance was brought against: 'butchers who did not adequately dispose of blood, offal and carrion...tanners and glovers whose lime-kilns emitted poisonous fumes which destroyed pasture and fruit

regulatory law – that can be argued to be better suited to safeguarding health - did not curtail the potential of the private nuisance action as an alternative means to protect ‘bodily security’. If we consider the famous example of *Hale’s Case* (where nonfeasance was actionable) then we start to paint a vivid picture of the necessarily wide scope of the nascent tort: a tort that put health as a cornerstone of actionability. Mounson stated that: ‘if one who has a horrible sickness be in my house, and will not depart, an action will lie against him; and yet he taketh not any air from me, but infecteth that which I have’.<sup>446</sup> Labelling ‘bodily security’ as ‘personal injury’ (in the language of negligence) with the outcome that it is no longer actionable in private nuisance is demonstrably a deviation from orthodox nuisance law.

Ultimately actionability has been, for centuries, conditional upon the ‘necessity rule’.<sup>447</sup> As a result a limitation was put on the natural rights of seisin: an interference not only had to be construed as a legal wrong (*injuria*), the courts would maintain that damage (*damnum*) was required to be done to a ‘thing of necessity’ associated with a free tenement. What amounted to a thing of necessity was a matter of judicial discretion and what amounted to an actionable nuisance turned on whether an activity went beyond the threshold of what someone ought reasonably to be expected to endure.<sup>448</sup> Crucially, securing salubrious conditions for those seised of land was not challenged as a thing of necessity. On the facts of *Aldred* the court held that the smell of the pigs and the restriction of light from the pig-sty interfered with things of necessity, that is, necessity of light (*‘necessitas lumis’*) and clean air (*‘salubritas aeris’*);<sup>449</sup> to qualify that ruling it was held that ‘things of delight’ were not considered a necessity and were thus not actionable. Although an early example of judicial reasoning

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and drinking water, and against dyers for corrupting the air and water with their chemicals...[and] private householders for keeping leaky or ramshackle latrines in inconvenient places (Baker (55) 430).

<sup>446</sup> *Hales’ Case* (1569) B & M 592, 593 (Mounson); see also the mouldy cheese case of *Wiseman v Denham* (1623) Palm 341.

<sup>447</sup> Coquillette (58) 776; and Baker (55) 430.

<sup>448</sup> *Aldred* (16) 58b; 77 ER 820-1. See Baker *ibid*, 430.

<sup>449</sup> *Aldred* *ibid*, 58a.

putting limitations on liability in nuisance, it is significant that necessity is associated with the natural environment, and the environmental conditions on which ‘ample’ enjoyment of rights in land rests; for that reason *Aldred* may be described as one of the earliest environmental nuisance actions.<sup>450</sup>

It is straightforward to see how references to ill-health in the context of air pollution at this time should be interpreted. Sulphurous smoke was associated then, as now, with coughing and spluttering, and it is possible that it was believed then, as now, to be a cause of respiratory complaints. What may be lost on a modern audience is that at this time the mere smell of fumes was considered an agent of harm.<sup>451</sup> This was an age of miasma theory, in which odours were linked causally with disease. It was believed that unwholesome or corrupted air, when breathed in, was the source of ill-health. Placing these cases in the context of miasma theory strengthens the interpretation of case law as incorporating, from its original conception, remedies for ill-health. The complaint against odours from a piggery (in *Aldred*) and noxious fumes from sea-coal combustion (in *Jones*) were, I suggest, at core concerned with threats to health - reminiscent of public health issues - rather than injuries caused by negligent behaviour. The pretext of the damages is thus entirely distinguishable.

Newark’s article was principally a short critique of nuisance law in light of the evolution of the more modern tort of negligence. His observations regarding the actionability of personal

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<sup>450</sup> The environmental connotations of early seventeenth-century cases, in particular the right to *salubritas aeris* were passed down the centuries. This was particularly evident during the latter part of the nineteenth-century as a response to the environmental harm caused to health and property by pollutants forged by the Industrial Revolution. See eg *Hole v Barlow* 4 C B (N S) 334, *Bamford* (64) and *Tipping* (12).

Coyle and Morrow in S Coyle, K Morrow *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart Publishing 2004) believe that environmental law should be understood through an adapted model of proprietary rights that recognise the intrinsic value of natural resources rather than their purely instrumental value. This theory can easily be translated to proprietary rights. Nonetheless as it has been observed that modern private nuisance focuses principally on the ‘use and enjoyment’ of land rather than the intrinsic value of proprietary rights (see J Steele, *Tort Law: Text, Cases and Materials* (OUP, 2007), 671). Coyle and Morrow’s theory is in reflection of the more general theory that today environmental protection is first and foremost a welfare-based public interest issue, which is a misunderstanding of how environmental protection should function.

<sup>451</sup> Cockayne (34) 206–29 (particularly 210–14).

injury outwardly concentrated on clear examples of injuries that fit the negligence mould. It is important to readdress his contentions in that context. In consideration of the contemporaneous credence placed upon miasmatic theory, corrupting salubrious air would have been conceived as a genuine threat to health. Newark's conclusions, founded on excluding 'personal injury' outside of that context, are at best weak, and at worst entirely misconceived. Jurisprudence requires that his inaccuracies are readdressed prior to using them as reliable authority, albeit a little belated for Dyson LJ following his judgment in *Corby*. It is patent from Dyson's comments that he, like his counterparts in *Hunter* and *Cambridge*, thought interpreting the law of private nuisance required a historical analysis to take the tort back to its foundations.<sup>452</sup> But unfortunately, for the sake of accurate historical content, he, like Lord Goff, turned to Newark's article. Drawing on the critique in this chapter, it would be interesting to see how these matters would be addressed in the future if a specified claim for damage to the person (in an actual *private* nuisance action) came before the Supreme Court.

### **3. The actionability of comfort and enjoyment in early modern law**

We have seen that in the early modern epoch it was assumed, and sometimes explicitly acknowledged, that smells, smuts and the like which harmed health were thereby actionable. It is one thing to argue that a healthy unpolluted environment is crucial to the enjoyment of land, but what of Newark's thesis that remedy rests exclusively within negligence? The crux of Newark's thesis in the context of excluding personal injury as a protected interest lies behind his remarks that:

In *true* cases of nuisance the interest of the plaintiff which is invaded is not the interest of bodily security but the interest of liberty to exercise rights over land in the amplest manner. A sulphurous chimney in a residential area

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<sup>452</sup> As Maria Lee recognised in 'What is Private Nuisance?' (2003) LQR 298,

is not a nuisance because it makes them cough and splutter but because it prevents them taking their ease in their gardens.<sup>453</sup>

This well utilised statement has been interpreted to support conflicting stances concerning the actionability of ‘personal injury’. For instance, John Murphy’s interpretation is indicative that personal injury can be evidence of a diminution of amenity value of land whilst Lord Goff’s obiter in *Hunter* raises doubts concerning the actionability of personal injury in a land-based tort.<sup>454</sup>

It would be a serious error for Newark to have not only failed to recognise an aspect of actionable nuisance that is integral to the original conception of the law (ie ‘bodily security’), but to have presented his argument regarding the ‘true’ action of private nuisance using nuances of ‘pleasure’ betrays its conception from the renaissance period. His portrayal entirely contradicts the ‘necessity rule’ by implying that being prevented from taking one’s ease in the garden (as a ‘thing of delight’) can justify an action in nuisance. There was a ‘repeatedly contested issue’ throughout the sixteenth-century concerning ‘whether the law took any notice of things of pleasure’.<sup>455</sup> The problem is that Newark overlooked the relevant case law, and how it developed, which concerned how much (or little) enjoyment of land was strictly necessary such that the law ought to protect it.

Wray LJ in various cases of this period was in the thick of the issue. It can be observed after analysing a series of cases from the late sixteenth century that initially Wray was a proponent of things of delight being actionable, but later he amended his view in line with the necessity rule. In *Hales’ Case*<sup>456</sup> Wray and Manwood LJJ had opposing opinions regarding whether

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<sup>453</sup> Newark (5) 488-9. Emphasis added.

<sup>454</sup> Murphy (8) 64 and *Hunter* (2), 688 and 692.

<sup>455</sup> Coquillet (58) 771 (note 46).

<sup>456</sup> *Hale’s Case* (71). See Mounson, above note 49. A French manuscript has never been discovered. The only known report is KU MS D152(5) (1569) (also in English). See Baker (16) 592 (note 78). See also report LI MS Maynard 87 fo 51 (Trin 1569).

things of pleasure where actionable.<sup>457</sup> In Manwood LJ's view the debate centred upon the maxim *sic utere tuo ut alienum non laedas* pertaining to 'things of profit' and was not actionable in the context of 'things of pleasure'.<sup>458</sup> Wray's argument was that if too much light was obscured or clean air made insalubrious then a house resembled a 'dungeon' and thus the enjoyment of land was affected to a degree that was actionable. Manwood evidently agreed that if light was completely blocked and/or airflow suppressed an action would lie, on the other hand he believed the amount of light/air obscured was the decisive element to actionability. Wray was of the opinion in *Hales' Case* that in the context of the common law:

one should not hurt the Freeholder of another, and no greater hurt, grievance, or damage can be done to any man's Freehold, then to take away the light and ayre thereof, which is comfortable, & commodious for him, for when this light, and ayre are taken from him, his house remaineth as a dungeon.<sup>459</sup>

Thus Wray LJ believed, at this point in time, that things of pleasure were significant to the enjoyment of property rights as any degree of interference would suffice as an actionable nuisance. Manwood LJ differed in his opinion. His judgment provided an early account of the necessity rule, which attempted to clarify the rule that something needed to be necessary for the habitation of man in order to be actionable. In response to Wray's judgment he stated:

I will agree with you, that if all your windowes were stopped, that an action will lie, and where you say *sic utere ut alienum non laedas*, this is not meant of things of pleasure, but things of profit. And here is not any part of your house consumed, but herein a let of your pleasure only, for which your action is not maintaineable...[sic]. And the civil laws say, that two lights on the former part and back of a house are sufficient...neither hereby any offence or hurt is done unto Mr Hales, for this house is not thereby impaired. And therefore I think his action will not lie.<sup>460</sup>

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<sup>457</sup> *ibid.*

<sup>458</sup> For the conditions which provided the distinction between things of pleasure and profit see JH Baker, *Reports of Sir John Spelman, Part II* (Selden Society 1977), vol 94, 35–36.

<sup>459</sup> Mounson (49).

<sup>460</sup> *ibid.* See Baker (16) 596 for best modern example. See also Monson's *Declaration* *ibid.*, 20-1.



By 1587, now as Chief Justice, Wray had evidently altered his position regarding the actionability of things of pleasure. In *Bland v Moseley*<sup>461</sup> he held:

It is a hard prescription to stop up lights, for that is a great benefit to the house, and windows have three advantages: prospect, air and light. One may build in restraint of another's prospect, air or light, but not so as to take away his light: though he may diminish it, so long as he leaves sufficient light for the house.

This judgment suggests a change in attitude from *Hales' Case*; he is starting to talk in terms of 'necessity'. In an action for loss of prospect, he held that matters of delight (including prospect) were not matters of necessity such as to fall within the necessity rule that:

for prospect, which is matter only of delight, and not necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect...[But] the law does not give an action for such things of delight.<sup>462</sup>

The debate surrounding things of necessity and pleasure was coming to a head and the new era of actions on the case in nuisance ushered in a settlement. Coke's judgment in *Aldred* proved seminal on the matter. Something which is commendable need not be something that is necessary; 'necessary' is an absolute minimum, and it is minimum 'standards' that the new action was to protect. Taking his cue from Wray CJ in *Bland v Moseley*, the new Chief Justice Coke concluded - in *Aldred* - that things of pleasure were not actionable in nuisance.<sup>463</sup> The timing of the two Chief Justices agreement on that point in fact is significant because the two cases spanned the supplanting period of Case over the assize of nuisance. The judgments therefore represent a 'before and after shot', as it were, of the state of nuisance during that crucial time. It is clear that Coke intended to expand upon and clarify the necessity principle. Prior to citing Wray he avowed that four things are 'desirable' for

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<sup>461</sup> (1587) HLS MS 16 fo 402; CUL MS li 5 38 fo 249.

<sup>462</sup> *Bland* (30).

<sup>463</sup> *Aldred* (16) 58b.

habitation.<sup>464</sup> Those ‘desirables’ were *habitatio hominis*, *delectation inhabitantis*, *necessitas lumis* and *salubritas aeris*. Coke CJ, in his famous statement, held:

And now it was moved in arrest of judgment, that the building of the house for hogs was necessary for the sustenance of man: and one ought not to have so delicate a nose, that he cannot bear the smell of hogs...but it was resolved that an action for it is (as the case is) well maintainable; for in a house four things are desired *habitatio hominis*, *delectation inhabitantis*, *necessitas lumis* and *salubritas aeris*, and for nuisance done to three of them an action lies...[sic].<sup>465</sup>

His method of first laying down the four desirables of habitation before elucidating what is necessary has interesting connotations for the necessity rule and how ‘enjoyment to land’ is perceived as the preeminent protected interest today. Although we cannot be certain of the intended meaning of Coke’s *ratio* regarding the four things that are desirable for human habitation and his statement, ‘for a nuisance done to three of these an action lies’, there are only truly two feasible interpretations.<sup>466</sup> What is clear is that he did exclude one ‘desirable’ before stating what was actionable. The question is: did he intend that exclusion to be a rule of law or merely a matter of fact specific to *Aldred’s Case*?

Some have interpreted Coke’s statement as being fact specific. That is to say, that all four ‘desirables’ were actionable but Aldred only suffered injury to three (to the exclusion of *delectatio inhabitantis*). My interpretation is that Coke was making a statement of law. *Habitatio hominis* is translated as the habitation of man, *necessitas lumis* as the need for light and *salubritas aeris* as wholesome air. The translation for *delectatio inhabitantis* is the delight (or enjoyment<sup>467</sup>) of the dweller. Caution needs to be taken when interpreting that translation. The fact that *inhabitanis* is used instead of *terra* or *terrenum* (ie land) raises questions regarding the ‘enjoyment of land’ (thus *delactatio terra*) interpretation that it is

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<sup>464</sup> *ibid* 58a.

<sup>465</sup> *ibid* 57 and 58a. Emphasis added.

<sup>466</sup> *ibid* 58a.

<sup>467</sup> Other probable translations include ‘pleasure’, ‘amusement’ or ‘even amusement’.

commonly accepted to imply. The significance of this translation regarding early actionability in private nuisance rests at both first instance and the case on arrest.

It is logical to surmise that Coke's intention was to make the distinction between what is desirable and what is necessary for habitation. In essence he was saying whilst A, B, C and D are desirable only A, B and C are actionable because they are necessities of habitation. In asserting that an action would lie for three of the four 'desirables' to the exclusion of *delectatio inhabitatis* (delight of the dweller) he affirms the settled dispute from the previous century regarding things of pleasure not being actionable. After considering the prior judgments in *Hale's Case* and *Bland* and the consequential cases, for instance *Jones*, we have enough precedent to support Coke's intention in *Aldred* was to make a statement of law that laid down the necessity rule.<sup>468</sup> Indeed, a century and a half later William Blackstone was quoting *Aldred* in the context that enjoyment was not an actionable nuisance: 'But depriving one of a mere matter of pleasure...as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance'.<sup>469</sup>

It should be stressed that this argument is not advocating that so called 'amenity' nuisance has no foundation in nascent nuisance (before it patently became part of the law in the nineteenth century<sup>470</sup>). The law here is protean - in line with the simple form of the tort identified within this thesis - and thus, it is self-evident that actionability has altered with the times, indeed the original heads of injury in the varying forums for redressing nocumenta are practically unrecognisable to us today. But, on occasions throughout its protracted history, the law has travelled full circle. Newark constructs the modern tort of nuisance in a very different manner from early modern judges making concessions for pleasurable things; seemingly his dilemma reflects that of the sixteenth-century judges. Nevertheless, Newark's

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<sup>468</sup> For example *Hales' Case* (71); *Bland* (30); and *Jones v Powell* (1629) HLS MS, 1083, fo 50v.

<sup>469</sup> W Blackstone, 3 *Commentaries* (1765-9), 217.

<sup>470</sup> *Tipping* (12); *Sturges v Bridgman* (1879) LR 11 Ch D 852.

historical critique is flawed by virtue of its superficiality and its neglect of *relevant* authority. It asserts that the original conception of nuisance law is one thing and not another, when some, and perhaps much, of the evidence he ignores suggests quite the opposite.

Newark's portrayal of nuisance is often contradictory. Terms such as 'liberty' to express the 'ample manner' in which someone can enjoy their property and relax in their garden have their sheen taken off somewhat when, in effect, and as he advocates, bodily integrity and mental well-being is excluded from protection. It is nonsensical to imagine 'exercising rights over land in the amplest manner' if those rights do not safeguard the health of the person(s) who create the proprietary rights in the first place. Put in another way, the medieval and early modern concept of man building dwellings for the primary reasons of guarding against weather and to preserve health<sup>471</sup> - that represents a fundamental necessity for the purpose of nuisance law - should, on Newark's authority, have no bearing in the modern law, surprisingly at a time when high court activity professes to return private nuisance back to its foundations (as evidenced in *Hunter*).<sup>472</sup> It is important to emphasise that Newark's article was principally a short critique of nuisance law in light of the evolution of the more modern tort of negligence. It sought to establish the doctrinal boundaries between nuisance and negligence in terms of the former's concern with interests in land, including bracketing liability for personal injury exclusively into the tort of negligence.<sup>473</sup> Newark's positioning of 'personal injury' in the context of negligence for the purposes of his thesis misses the larger picture and the inexorable nexus between human beings and land in nuisance terms.

#### **4. The Modern Measure of Actionability**

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<sup>471</sup> *Hales' Case* (71). See Mounson (49) 1; Cockayne (34) 139; and Baker (16) 592-3.

<sup>472</sup> Lee (77) 301.

<sup>473</sup> Unsuccessfully, in light of *Corby Group Litigation*. Professor Newark is plainspoken on this matter and states it is 'extremely simple...negligence is not an element in the tort of nuisance' (Newark (5) 487).

In 1931 Percy Winfield, the architect of the modern description of private nuisance, stated that the tort is incapable of precise definition, ‘and considering its historical origin we should be astonished if it were’.<sup>474</sup> Jenny Steele posits that it is generally accepted that the courts cannot provide a distinct definition for the tort.<sup>475</sup> Whilst it is beyond the ambit of this chapter to fully engage with the problematic ramifications of an indistinct definition for private nuisance, undoubtedly the perceived inherent difficulties have consequences concerning the issue of establishing the ‘measure of actionability’, or, in other words what is actionable. Maria Lee remarks the tort is inhibited by historical factors that ‘address only activities and effects on land’.<sup>476</sup> Despite the fact that an amount of historical restrictions based on the nexus between human beings and land make perfect sense in a tort that concerns interests in land, we must question whether the degree of those restrictions, as established in *Hunter*, goes beyond a rational measure of actionability. Accordingly the manner in which the crucial observation that ‘nuisance is a tort against land’<sup>477</sup> is interpreted is essential to ascertaining what is actionable.

Considering over eight decades have passed since Winfield first provided his description, without an adequate improvement, Steele’s remarks about the difficulty of providing a distinct definition are hard to dispute. Whilst Winfield’s description, ‘an unlawful interference with a person’s use or enjoyment of land, or some right over, or in connection with it’ remains the judges’ most utilised depiction of what embodies private nuisance, John Murphy’s recent (2010) description (‘any on-going or recurrent activity or state of affairs that causes *substantial* and *unreasonable* interference with a claimant’s land or with his use and

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<sup>474</sup> PH Winfield (14) 189.

<sup>475</sup> Jenny Steele observed that the statement has been deemed to be a description rather than a definition. She rightly attributed this to the fact that nuisance actions are often decided by referring to previous decisions to settle the intricacies of particular circumstances rather than turning to an ‘abstract definition’ (Steele, *Tort law* (75) 601).

<sup>476</sup> Lee (77) 324.

<sup>477</sup> *Hunter* (2), 702 (per Lord Goff). Similarly Scarman LJ commented that ‘nuisance is a wrong to property’ *Bone v Seale* [1975] 1 All ER 787, 794.

enjoyment of that land'<sup>478</sup>) arguably offers a marked enhancement, but it still has its problems; indeed it seemingly remains the fact that a succinct definition for the tort is frustratingly beyond our grasp.

It is noteworthy that Murphy inserted that harm should be of a type that is 'substantial' (or not merely 'trifling') into his description. Modern commentators - such as Murphy - have generally embraced that notion and have, in effect, introduced it into the general domain of private nuisance, thus partially revising Winfield's description from an academic standpoint.<sup>479</sup> Indeed it is explicit from a significant body of the case law that the courts have generally adopted the stance that interferences should be substantial and not merely trivial. On the other hand it is evident from the formative case of *Hunter* that this is not always the case as 'substantial interference' is sometimes not capable of being a nuisance no matter how extreme the interference suffered by the claimant.<sup>480</sup>

Another popular 'revision' of Winfield's description, probably owing to the central role of reasonableness of user within private nuisance, is substituting the phrase 'unlawful interference' with 'unreasonable interference' but this has caused doctrinal problems owing to an unwarranted overlap with negligence. The nuisance/negligence paradigm is analysed in depth in Chapter 4 in regards to liability, but it is important to understand at this juncture that the introduction of the language of negligence, particularly following Lord Goff's decision in *Cambridge Water v Eastern Counties Leather*,<sup>481</sup> has created an unnecessary blurring of the boundaries between negligence and nuisance; accordingly, it has created certain problematic doctrinal issues in private nuisance. The main issue regarding actionability in this respect

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<sup>478</sup> Murphy (8) 5. Emphasis added. See (14) for Winfield's description.

<sup>479</sup> Murphy *ibid*, 34; SF Markesinis and BS Deakin, '*Markesinis and Deakin's Tort Law*, (OUP 2003) 455; see also Steele (75) 601. The modern take on this tradition emanates from the the rule of 'give and take and live and let live' between neighbours that took shape in the 1860s (see Bramwell B in *Bamford* (64)). See also *Tipping* (12), 654 (Lord Wensleydale); and *Sturges* (95), 863 (Thesiger LJ).

<sup>480</sup> See, *Hunter* (2), 685-6 (Lord Goff); 709-11 (Lord Hoffmann); and 727 (Lord Cooke). See also *Baxter v Camden London Borough Council* [2001] 1 AC 1 (particularly Lord Millett) and *Lee* (77) 318.

<sup>481</sup> *Cambridge* [1994] 2 AC 264.

centres, arguably, upon the manner in which ‘reasonableness’ in traditional (historical) nuisance terms has begun to be interpreted in negligence terms. This, of course, adds to the difficulty of providing a succinct definition of private nuisance.

The cross-infection of terms has, in effect, changed the essence of the reasonable user test, which was traditionally used to establish whether an alleged interference transcends the threshold necessary to give rise to an action in nuisance. Negligence-type ‘reasonableness’ terms, in which the notion of the hypothetical ‘reasonable man’ is fundamental (and thus the concept of reasonable foreseeability), has essentially altered the reasonable user test. Where before judges balanced conflicting interests in land in order to assess ‘actionability’ (if any interference was deemed actionable then liability was strict), following *Cambridge*, the test now ascertains liability first, when never before has liability been a prerequisite of the reasonable user test.<sup>482</sup> This aberration of the test has confused the issue of actionability further and has produced an additional obstacle to providing a succinct definition of private nuisance.

It is perhaps the difficulties of providing a succinct definition that judges have chosen to adopt the negligence analysis into the torts doctrines but, as Chapter 4 explains, this has proven problematic, especially when the ‘simple form’ of nuisance, elucidated in this thesis, is taken into account. Although part of the simple form suggests that the law evolves according to societal needs, and thus an aspect of that form is the inherently evolutionary character of nuisance, it is debatable whether adopting doctrines that alter the simple form of nuisance law is the correct manner in which to develop the tort. This is an example of an unacceptable use of history. If we examine Winfield’s theses we can argue that nuisance law has developed along regressive lines in recent decades and attempts to develop the law in

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<sup>482</sup> G Cross, ‘Does Only The Careless Polluter Pay? A Fresh Examination of the Nature of Private Nuisance’ (1995) LQR 445, 449.

modern decisions have missed opportunities to continue on a path of broadly adequate protection of interests in land affected by environmental harm. In effect this chapter (and the next) reveal a trend of negligence doctrines infecting the pure form of nuisance law and thus the simplicity of its doctrines.

We can gain an enhanced understanding of the contextual significance behind Winfield's description from his seminal article 'Nuisance as a Tort', where it was first illustrated.<sup>483</sup> The phrase 'an unlawful interference', when read in isolation, palpably fails to convey his intended meaning because it does not specify what constitutes *unlawful* for the purposes of the tort. On the face of things this is problematic but becomes clearer when read in conjunction with the contextual nuances within the article where it originated. Winfield seemingly understood that the unlawfulness of an interference - that creates an actionable nuisance - was not an investigation into the 'type of harm' rather whether an injury diminished the value of property *and* the comfort and enjoyment of it to be considered unlawful.<sup>484</sup> This was determined by applying the 'rule of reasonableness'<sup>485</sup> to the circumstances of each case and balancing competing land uses.<sup>486</sup> Thus Winfield was of the opinion that the meaning of 'unlawful' was depicted by the *manner* and *scale* in which interferences occurred - thus the nature of the damage - to protected interests rather than seeking a specific type of injury.<sup>487</sup>

After examining Winfield's words 'or some right over, or in connection with it' and the historical evolution of nuisance law from the original actionable nuisances (under the assize

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<sup>483</sup> Winfield (14).

<sup>484</sup> *Tipping* (12), 642 (Mellor J). See Winfield *ibid*, 200 (especially note 70).

<sup>485</sup> J Oldham, *English Common Law in the Age of Mansfield* (The University of North Carolina Press 2004), 248.

<sup>486</sup> *ibid* 254.

<sup>487</sup> It may be argued that the 'diminution of the value of property' should be included in the description to support such an interpretation of Winfield's intentions but if we look at the article and the matter holistically his description was devised during a period when indeed the courts remained focused on balancing the conflicting proprietary interests of defendant and claimant rather than, what is demonstrably happening in the courts today, on the 'type of harm' that may facilitate an action (see Lee for a discussion on this point (77) 298).



of novel disseisin) it is clear that there was never a pure doctrine that protected merely the ‘use and enjoyment of land’ but since Case, at least, it has always been enough if an interference ‘renders the enjoyment of life and property uncomfortable’.<sup>488</sup> Whilst Winfield visibly recognised that ensuring the use and enjoyment of land is an essential component to what is an actionable nuisance it is manifest from his description in ‘Nuisance as a Tort’ that actionability is not straightforward and a number of interests are protected by the tort.<sup>489</sup> Identifying those interests is an essential exercise to assess the measure of actionability but it can be asserted that interferences to land that amount to personal injury are both substantial and unreasonable.

R. A. Buckley pondered whether the tort should be available for personal injury<sup>490</sup> and it was recognised by David Hughes that doubt had been cast by Professor Newark in ‘The Boundaries of Nuisance’<sup>491</sup> regarding private nuisance as the proper remedy for ‘personal injury’.<sup>492</sup> Nonetheless he concedes: ‘[t]hat the most should be said in such circumstances is that an occupier of land may be able to recover in nuisance for damage to the person...where land or its enjoyment is also affected’.<sup>493</sup> Thus Hughes never interpreted Newark’s article as being capable of removing ‘damage to the person’ from the tort completely. Certainly, Newark stated in his conclusion that ‘damage to the person...cannot *in itself* amount to a nuisance’.<sup>494</sup> In this statement he concedes that in true cases of nuisance, if the enjoyment of rights in land is affected, then personal damage is actionable. Steele is partially in agreement

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<sup>488</sup> *R v White* (1757) 1 Burr. 333 (Lord Mansfield).

<sup>489</sup> Certainly developments in nuisance law during sixteenth, seventeenth and eighteenth centuries rendered the notion of nuisance in very broad and flexible terms, in fact William Blackstone described it as ‘anything that worketh hurt, inconvenience or damage’ (3 Blackstone, *Commentaries*, 214. See Oldham (108) 251). With this in mind, the segment of Winfield’s description that reads: ‘the use and enjoyment of land or some right over, or in connection with it’, is not as indistinct as it initially appears when actionability is perceived as flowing from balancing conflicting interests between neighbours, or in other words, striking a balance between competing users of land.

<sup>490</sup> RA Buckley, ‘The Law of Nuisance’ (Butterworths 1981) 4.

<sup>491</sup> Newark (5). See also *Corby* (1), 488.

<sup>492</sup> See D Hughes, *Environmental Law*, (Butterworths 1992) 27. He also expanded and, like Newark, included damage to goods and chattels in this observation.

<sup>493</sup> *ibid*.

<sup>494</sup> Newark, 490. Emphasis added.

with Newark and Hughes but suggests further that injunctions and damages should be available for damage to the person ‘in respect of the loss of amenity value, just as there would be for other interference with comfort and enjoyment’. From Steele’s contentions (regarding any conclusions that should be drawn from *Hunter*) we may deduce that there is not a prerequisite for land - or its amenity - to *also* be affected for injury to the person or health in order to be actionable.<sup>495</sup> This relates to, and somewhat qualifies, Murphy’s modern description of what is actionable where, as long as interference causes *substantial* and *unreasonable* harm, *any* on-going or recurrent activity that adversely affects a claimant’s land (or his use and enjoyment of that land) an actionable nuisance exists.<sup>496</sup>

## 5. The Case for Injury to the Person

If it is truly the case that harms injurious to health are no longer to be considered an actionable head under private nuisance then there has been a shift in the juridical reasoning concerning the necessity rule and subsequently the measure beyond which something is tolerable (and lawful). From a juncture when the judiciary spoke in terms of interferences to land not needing to be as severe as to cause an injury to the person in order to be actionable (in line with the necessity rule) they have seemingly shifted towards personal injury simply not being actionable in nuisance. This is problematic, for in the ‘celebrated’<sup>497</sup> case of *Gerard v Muspratt*<sup>498</sup> where Sir Cresswell Cresswell<sup>499</sup> laid down a theory of nuisance law that was extremely influential: indeed, it was incorporated to direct the jury in the lead case of *St Helens Smelting Co v Tipping*.<sup>500</sup> He declared that ‘the law [private nuisance] did not tolerate

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<sup>495</sup> Steele (75) 641.

<sup>496</sup> See (103) above.

<sup>497</sup> Simpson (21) 186.

<sup>498</sup> See the account of the case in the Lancaster Summer Assize (as *Gerard, Bart v Muspratt*) held on Monday 31/08 and Tuesday 01/09/1846; reported in the Liverpool Mercury Supplement (04/09/1846 ed.), 2. See below (206).

<sup>499</sup> 20 August 1794 – 29 July 1863.

<sup>500</sup> *Tipping* (12).

any injury to health and property of another'; Mr Justice Mellor's direction to the jury in *Tipping* went thus:

I tell you that if a man by an act – either by the erection of lime-kiln, or brick-kiln, or copper works, or any works of that description – sends over his neighbour's land that which is noxious and hurtful to an extent which *sensibly* diminished the comfort and value of the property, and the *comfort of existence* on the property, that is an actionable injury.<sup>501</sup>

That direction summarised the character of private nuisance concerning the measure of actionability. John Murphy, nearly a century and a half later, averred to the premise that persons would be deprived of a comfortable existence *on* a property if personal injury were to be suffered.<sup>502</sup> Mellor J's comments to the jury using the Cresswell theory of nuisance encapsulates all the elements of actionability through identifying the protected interests: namely, things injurious to the amenity value of property, the economic value of the property itself, and the well-being of the person from whom the proprietary rights generate. What is important here is that Mellor J - in line with Sir Cresswell Cresswell's judgment - separated the 'appreciable'<sup>503</sup> diminution of 'comfort and value of the property' from 'comfort of existence on the property' as actionable heads. Surely this is, at least, illustrative of an acceptance that the person is coupled with the protected interests under the tort.

Sir Frederick Pollock later discussed the concept of 'comfort of existence on the property' advocating, whilst positing that injuries must be something more than trifling, that injury to

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<sup>501</sup> See Simpson (21) 187 on this point.

<sup>502</sup> Murphy (8) 63-5.

<sup>503</sup> Interestingly, Simpson describes probably the best, if not the most logical, interpretation of the meaning of 'sensible' made famous in *Tipping*. Citing Gale & Whatley on Easements (CJ Gale and TD Whately, *A Treatise on the Law of Easements* (Halsted and Voorhies 1839), 284 and 285) and *Parker v Smith and Others* ((1833) 5 C & P 438; 172 ER 1043) he comes to the conclusion that 'sensible' means 'appreciable' (Simpson *ibid* 187).

the person and activities that caused malady denoted the definitive protected interest. His comments underline the juridical shift described above. He stated:<sup>504</sup>

It is not necessary to constitute a private nuisance that the acts or state of things complained of should be noxious in the sense of being injurious to health. It is enough that there is a material interference with the ordinary comfort and convenience of life - 'the physical comfort of human existence' - by an ordinary and reasonable standard;<sup>505</sup> there must be something more than mere loss of amenity,<sup>506</sup> but there need not be positive hurt or disease.

In consideration of the Cresswell Cresswell theory of nuisance, Pollock's remarks and John Murphy's description of modern nuisance<sup>507</sup> there is a strong argument that the consensus has shifted regarding actionability. Lord Macmillan's remarked that 'whatever may have been the law of England in early times I am of the opinion that as the law now stands an allegation of negligence is in general essential to the relevancy of an action of reparation for personal injuries'.<sup>508</sup> Where once an activity was not required to injure the person to be actionable, today – to some – personal injury is simply not actionable. The justification for that shift in attitude it would seem is because of the difficulties the courts have separating nuisance doctrine from the dominant language of negligence that became overbearing in the twentieth-century.<sup>509</sup>

However, the apparition of injury to the person still glimmers in private nuisance, arguably because it is so central to its quintessence. As recently as 1980 Megaw LJ made passing reference to the abundance of previous case law which implied personal injury is actionable.

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<sup>504</sup> Sir Frederick Pollock, *The Law of Torts a Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law* (Stevens and Sons, 1895).

<sup>505</sup> *Walter v Selfe* 4 De G & Sm [315], [321] and [322], 20 LJ Ch 433 (Knight-Bruce V-C 1851); *Crump v. Lambert* (1867) 3 Eq. 409.

<sup>506</sup> *Salvin v North Brancepeth Coal Co.* (1874) LR 9 Ch 705, 44 LJ Ch 149; see judgment of James LJ LR 9 Ch 709 and 710.

<sup>507</sup> 'Any on-going or recurrent activity or state of affairs that causes *substantial* and *unreasonable* interference with a claimant's land or with his use and enjoyment of that land' (Murphy (8) 5. Emphasis added).

<sup>508</sup> *Read* (14) [170-1] (Lord Macmillan).

<sup>509</sup> See Chapter 4.

He stated: ‘There is, I think, *ample authority* that, if I have a right of abatement, I have also a remedy in damages if the nuisance remains unabated and causes me damage *or personal injury*’.<sup>510</sup> In reality the perceived status quo of actionability in private nuisance holistically has substantially altered and ‘personal injury’ is a ‘symbol’ of that change. Maria Lee avers that the ‘notion of reasonableness’ where the courts were concerned with the reasonableness of the defendant’s user and the unreasonableness of interference with the claimant (‘reasonable user’), or in other words the traditional balancing exercise between competing interests in land embodied by Baron Bramwell’s rule of give and take<sup>511</sup> (which had steadily developed since at least the time of Bracton), has become ‘redundant and misleading in many cases in private nuisance’. The side-lining of the balancing of interests (discussed in detail in the following chapter in regards to liability) has effectively been substituted by what *type of harm* invokes actionability.<sup>512</sup> It can be stated that this represents a fundamental doctrinal shift.

In the spirit of John Murphy’s description of modern nuisance, if an injury can be perceived as resulting from an on-going or recurrent activity (or state of affairs) and deemed a substantial and unreasonable interference with a claimant’s land or with his use and enjoyment of that land then the ‘type of harm’ should be irrelevant.<sup>513</sup> We have seen that traditionally a doctrinal trait of private nuisance has been to protect interests necessary to habitation; the type of harm did not feature unless it was a thing of pleasure in which case there would not be an actionable nuisance – guarding bodily security cannot be termed as a thing of pleasure, rather it is a thing central to the whole concept of habitation. To present it as something merely desirable is irrational; in consideration of Murphy’s description personal injury can only be excluded if it is deemed a thing of pleasure. And, if the injury is caused

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<sup>510</sup> *Leakey v National Trust* [1980] QB 485 [523] (Megaw LJ). Emphasis added.

<sup>511</sup> Or reciprocity between neighbours.

<sup>512</sup> Lee (77) 298-9.

<sup>513</sup> Murphy (8) 5. Emphasis added.

by negligent conduct, if it still corresponds to an actionable nuisance, then the claimant should be entitled to remedy in either tort.

It is pertinent to stress that the Lords in *Tipping* could not have anticipated the procured dominance of the tort of negligence in the following century to assert explicitly that ‘personal injury’ is actionable in that judgment. It was taken as read. Of course, Newark’s thesis was written at a juncture when negligence had matured following a period where a generalisation of the law was sought,<sup>514</sup> thus was reasoned in hindsight, as it were, out of frustration for the complexities of private nuisance which appeared exacerbated in the face of the newer more ‘principled’ tort of negligence.<sup>515</sup> Nevertheless the evidence does suggest that safeguarding bodily security in nuisance law was considered the norm; one could say, like any legal ultimate, it went unnoticed without appropriate analysis.

When negligence became fashionable, as the following chapter discusses in depth, the language associated with it cross-infected nuisance doctrines. In the instance of ‘personal injury’ as a term it took on the meaning applicable in the tort of negligence. It was in that manner that ‘the person’ has suffered a slow separation from nuisance, but using cases that did not concern private nuisance. That was until *Hunter* which, according to Lord Bingham in *Transco* (together with *Cambridge Water*),<sup>516</sup> ‘strongly fortified’ the decisions taken in those extraneous cases to exclude the erstwhile protected interests. Assertions concerning private nuisance being a land-based tort are without doubt accurate but that does not equate to the person being excluded. Lord Bingham’s interpretation of *Hunter* and *Cambridge* identifying the tort as ‘directed, and directed only, to the protection of interests in land’ fails to reflect

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<sup>514</sup> Out of that search came the universal test for the duty of care in *Donoghue v Stevenson* [1932] AC 502 (J Steele (75) 142-3).

<sup>515</sup> Newark (5) 480; and Lee (77) 298.

<sup>516</sup> Lord Bingham remarked: ‘in each of which [*Cambridge* and *Hunter*] nuisance was identified as a tort directed, and directed only, to the protection of interests in land’ (*Cambridge* (106), 9 and *Hunter* (2), 692).

that personal physical integrity is a fundamental protected interest in land. In that respect nuisance has always been concerned with – or based upon – matters regarding health.

## **6. The Need for a Supreme Court Re-evaluation of Bodily Security**

In his obiter remarks in *Hunter*, Lord Goff addressed a ‘developing school of thought that...personal injury claims should altogether be excluded from the domain of nuisance’.<sup>517</sup> He bore Professor Newark, nearly fifty years previously,<sup>518</sup> as the ‘forthright proponent’ of that ‘developing’ approach to actionability. Newark’s outspoken comments sought to establish the doctrinal boundaries between nuisance and negligence - in terms of the former’s concern with interests in land - including bracketing liability for personal injury exclusively into the tort of negligence.<sup>519</sup> He contended that it is irrational for any type of personal injury to be placed in private nuisance<sup>520</sup> and that the problems in the tort are a consequence of the law being set on the ‘wrong track’ in the sixteenth and seventeenth-centuries by including claims for personal injury. It is contended here that that claim is somewhat implausible: his inference that personal injury belonged to negligence at that time is historically inaccurate; negligence was still, to a large extent, merely a mode of committing numerous tortious activities not a separate tort.<sup>521</sup> Again a topic fully explored in the next chapter, the general consensus is that negligence did not emerge as an independent tort until the early eighteenth-century. Thus to suggest personal injury belonged to the ‘tort of negligence’ at a time it did not exist is a critical error. It is also noteworthy that between 1535 and 1794 there were only

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<sup>517</sup> *Hunter* ibid [692].

<sup>518</sup> Newark’s reasoning reflects an era when respect for private property was probably at all-time low (following the end of World War II) whilst collective resolutions of public problems was at a peak. It was a time when the status quo was for local councils to purchase massive tracts of private land at rock-bottom prices to rebuild the nation’s infrastructure. Concern for private rights at that juncture was palpably not high on the agenda thus ‘The Boundaries of Nuisance’ must be read with considerations of post-war Britain in mind.

<sup>519</sup> Unsuccessfully, in light of *Corby Group Litigation* (1).

<sup>520</sup> Newark (5) 489.

<sup>521</sup> See Chapter 4 and generally: Fifoot (54) 156-66; and MJ Pritchard ‘Trespass, Case and the Rule in *Williams v Holland*’ [1964] CLJ 234. See also Ibbetson (15) 97-8.

two cases of the type Newark objected to thus the problem – as he envisioned it - was hardly ubiquitous:<sup>522</sup> one could say those examples were the exception rather than the rule.

Lord Goff's comments (in *Hunter*) - including his reference to Newark - have, on the face of things, forced the exclusion of personal injury from private nuisance through a succession of *dicta* in a number of cases, that are in the main extraneous to the central tort.<sup>523</sup> The key cases (other than *Hunter* itself) that have in essence excluded personal injury have been *Read v Lyons*, *Cambridge Water*, *Transco* and *Corby*. In *Read*, *Cambridge*, and *Transco* liability under the rule of *Rylands v Fletcher* was under consideration by the House of Lords. Albeit outside the scope of this chapter, the influence – indeed the relevance – of these cases to private nuisance is ‘highly contentious’ as the notion that *Rylands v Fletcher* is ‘a special form of nuisance’<sup>524</sup> is uncertain.<sup>525</sup> Without a doubt the incorporation of the rule under those auspices divides both the judiciary and academics.<sup>526</sup> Arguably it would be ideal if *Rylands* could be separated from private nuisance as there are too many demonstrable differences between them. Certainly, the ups and downs in case law regarding personal injury not being actionable under the rule itself offer no definitive authority that private nuisance should follow suit.

Moving onto the other key cases, *Corby* is a case of public nuisance decided in the Court of Appeal and *Hunter*, whilst decided in the House of Lords, did not directly concern the issue

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<sup>522</sup> Newark (5) 483-5.

<sup>523</sup> Interestingly the United States courts interpret private nuisance as including injury to the person: in *Zamzok v 650 Park Avenue Corporation* the essence of a private nuisance was deemed to be the creation or continuation of an activity on one property that causes a compensable injury to something or *someone* on another property (*Zamzok v. 650 Park Ave. Corp.*, 80 Misc.2d 573 (Sup.Ct. NY Co. 1974). Emphasis added).

<sup>524</sup> *Transco* (3) [35] (Lord Hoffmann). In the same case Lord Bingham asserted that ‘the rule in *Rylands v Fletcher* is a sub-species of nuisance’ (ibid, 9). Lord Goff in *Cambridge* stated that the rule was an extension of private nuisance (*Cambridge* (3), 304). See further notes 141-2 below.

<sup>525</sup> There is a strong argument that *Rylands v Fletcher* status as a sub-species of private nuisance is controversial (Murphy (8) 7; see also J Murphy, ‘The Merits of *Rylands v Fletcher*’ (2004) 24 OJLS 643; and D Nolan, ‘The Distinctiveness of *Rylands v Fletcher*’ (2005) 121 LQR 421.

<sup>526</sup> Murphy ibid. There is, of course, strong judicial and academic support that the rule is a sub-species of private nuisance (See Lord Simonds in *Read* (14), 183; *Cambridge* (106), 304 (Lord Goff); and Lord Bingham and Lord Hoffmann in *Transco* (3), 9 and 35 respectively).



of personal injury. Owing to the absence of an authoritative case that specifically deals with the issue, in essence, a series of *Ryland v Fletcher* type cases, a public nuisance case and Newark's article have been determining the place of personal injury in private nuisance in recent times. Subsequently one could say the jury is still out, as it were, concerning the actionability of physical damage to the person. It is certainly noteworthy that 'high-level authority' on the status of personal injury in the law of nuisance has not been directly through case law on private nuisance.

It generally goes without comment that the important questions regarding personal injury in private nuisance are debated outside its own domain. In *Transco*, Lord Bingham acknowledged that actionability of 'personal injury' in private nuisance has yet to be authoritatively decided at the highest level.<sup>527</sup> Nearly a decade later such a case has yet to materialise. In spite of that fact and in light of the decision in *Corby*, the judiciary are seemingly suggesting the grounding of personal injury should be exclusively in negligence (whilst it remains actionable in public nuisance).<sup>528</sup> Critically, Murphy maintains that the reasoning behind actionability is such that 'as long as the harm complained of can plausibly be made referable to the diminution in the amenity value of the land, there can be no objection to a nuisance action being mounted' in private nuisance.<sup>529</sup>

The historical lineage of health being central to actions on the case for nuisance is well-established hence it is difficult to sympathise with a notion that would see 'personal injury' excluded from the tort entirely. Despite judicial murmurings and academic commentary that doubts its status as a protected interest the issue remains undecided, prolonging divisions in judicial and academic opinion. Lord Bingham in *Transco* accepted that the matter had been

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<sup>527</sup> *ibid.*

<sup>528</sup> As per the decision in *Corby* (1).

<sup>529</sup> Murphy (8) 63.

left open in *Perry v Kendricks Transport Ltd*<sup>530</sup> but that was inconsistent with the earlier decisions of *Shiffman v Order of the Hospital of St John of Jerusalem*;<sup>531</sup> *Hale v Jennings Bros*;<sup>532</sup> and *Miles v Forest Rock Granite Co (Leicestershire) Ltd*.<sup>533</sup> In each of those cases damages for personal injury were considered to be actionable. However in response to Lord Macmillan's opinion in *Read*<sup>534</sup> Lord Bingham expressed doubts whether personal injury claims lie within the boundaries of the tort.

Lord Hoffmann stretched the law a little further in the same case, albeit primarily to ensure that it did not extend to *Rylands* liability:

I think that the point is now settled by two recent decisions of the House of Lords: *Cambridge Water*, which decided that *Rylands v Fletcher* is a special form of nuisance and *Hunter*, which decided that nuisance is a tort against land. It must, I think, follow that damages for personal injuries are not recoverable *under the rule*.<sup>535</sup>

It is unsatisfactory to use Lord Macmillan's *dicta* in *Read* as binding authority in private nuisance terms for two important reasons: first, by his own admission, the action was 'one of damages for personal injuries' in the sense they were caused by negligence thus distinguished from an interference 'made referable to the diminution in the amenity value of the land' and, second he expressly denied that the rule under *Rylands v Fletcher* applied. On both accounts, if one is to acquiesce with *Rylands* liability being a 'sub-species' of private nuisance, *Read* is

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<sup>530</sup> [1956] 1 WLR 85, 92 (Parker LJ).

<sup>531</sup> [1936] 1 All ER 557. A case decided on grounds of negligence but *obiter* comments by Atkinson J suggest the case could also invoke the rule under *Rylands v Fletcher* (thus *Rylands* did extend to personal injury; see 562).

<sup>532</sup> [1938] 1 All ER 579 (the defendants were liable without proof of negligence on their part, as the principle of *Rylands v Fletcher* applied thus *Rylands* extended to personal injury without an element of negligence).

<sup>533</sup> (1918) 34 TLR 500. It was held the duty of the owner of a quarry who brought explosives on to his premises rendered him strictly liable for all the results of the explosions on his own land, and if they escape from his land and cause damage he is liable, whether he had been guilty of negligence or not.

<sup>534</sup> *Read* (14), 170-171.

<sup>535</sup> *Transco* (3), 18. Emphasis added. In *Read* Lord Simmonds commented that 'so closely connected are the two branches of law that the text books on the law of nuisance regard cases coming under the rule in *Rylands v Fletcher* as their proper subject' (*Read* *ibid*, 183). In *Cambridge*, Lord Goff's counterparts agreed with his remarks that the rule was essentially an extension of nuisance to deal with isolated escapes (304). Then in *Transco* Lord Bingham referred to the rule as a 'sub-species' of nuisance and Lord Hoffmann remarked that *Rylands* liability is considered to be 'a special form of nuisance' (*Transco* (3), 9, 18 and 35).

distinguishable.<sup>536</sup> Further Lord Hoffmann's comments where he utilises *Hunter* to state it is a tort 'against land' ignores the detail that injury to the person can be diminutive to the amenity or pecuniary value of land. Such subtle judicial sleights of hand are the tip of a much deeper problem concerning the issue of safeguarding bodily security in private nuisance as an essential protected interest.

Lord Macmillan's remarks (mentioned in the previous section<sup>537</sup>) about personal injury being actionable in the past infer that situation has changed owing to the vicissitudes of modern negligence. Those remarks fundamentally conflict with the reasoning of Slesser and Scott LJ in *Hale* where they concluded, based on contemporary academic opinion, that:

The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence.<sup>538</sup>

In that sense Lord Macmillan's comments clearly advance nuisance towards capitulating to the newly acquired dominance of the modern tort of negligence to the detriment of older, long-established doctrines under nuisance law. In that sense it can be argued that negligence is now steering nuisance rather than running in a separate channel. In essence he set the tone for things to come: cases that are distinguished from private nuisance have undoubtedly influenced its structure and doctrines. The evolutionary path of the rule under *Rylands v Fletcher* has visibly played a pivotal role in the long drawn-out divorce of personal injury from private nuisance. In reality, such are the interplays in the courts, it would be more accurate to assert that the rule under *Rylands v Fletcher* does not support claims for personal injury rather than private nuisance itself, which is to a degree disconcerting when we consider the connotations for the central tort.

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<sup>536</sup> *Read* (14) 170.

<sup>537</sup> Above (133). *Read* *ibid* 170-1 (Lord Macmillan).

<sup>538</sup> In *Hale* (157) 582 and 584 respectively), Slesser LJ and Scott LJ quoted this definition in *Salmond on Torts* (9th Edn). Compare Blackburn J's judgment in *Rylands v Fletcher* (27) 279).

The series of cases mentioned by Lord Bingham (*Miles, Hale, and Shiffman*) were indicative that personal injury (whether assessed under negligence principles or not) should be actionable under the rule of *Rylands*. The other case cited by his lordship (*Perry*) alludes to an important reason as to why that should be the situation: in certain circumstances (where exceptions to the rule do not exist<sup>539</sup>), and in the absence of negligence, someone could suffer personal injury for no fault of their own and be without remedy.<sup>540</sup> It is true that in *Read* Lord Macmillan, Lord Porter and Lord Simonds all doubted whether the rule under *Rylands* extended to cover personal injuries, but the final decision on the matter, as Parker LJ pointed out, was expressly left open, he stated: ‘as the matter stands at present, I think we are bound to hold that the defendants are liable in this case, quite apart from negligence’.<sup>541</sup> This comment requires examination in the context of Newark’s remark that nuisance is used to bolster up doubtful cases of negligence.<sup>542</sup> Parker LJ infers that injuries to the person in nuisance have their own identity thus have been incongruent from personal injury in negligence; there is a strong case for arguing against the marriage of terms. Disputably it is a consequence of negligence’s final push to become a fully developed tort in the twentieth-century<sup>543</sup> that conditions for the uncomfortable union were created but, regardless, damage to the person can evidently be inflicted by wrongs without the element of negligence.

In *Ribee v Norrie* a question that faced the Court of Appeal was whether negligent interference with land may give rise to a claim in both negligence and nuisance (as well as for

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<sup>539</sup> ‘It has for a long time been an exception to the rule if the defendants can show that the act which brought about the escape was the act of a stranger, meaning thereby, someone over whom they had no control... In a *Rylands v Fletcher* case the plaintiff need only prove the escape. The onus is then on the defendants to bring themselves within one of the exceptions. Once they prove that the escape was caused by the act of a stranger, whether an adult or a child, they escape liability, unless the plaintiff can go on to show that the act which caused the escape was an act of the kind which the occupier could reasonably have anticipated and guarded against.’ (*Perry* (155) 92-3 (Parker LJ)).

<sup>540</sup> *Perry* *ibid* 92 (Jenkins LJ).

<sup>541</sup> *ibid*. Lord Hoffmann remarked that: ‘dicta in *Read* cast doubt upon whether the rule protected anything beyond interests in land. At 170-1 Lord Macmillan was clear that it had no application to personal injury and at 180 Lord Simonds was doubtful (see also *Transco* (3) 18).

<sup>542</sup> Newark (5) 489.

<sup>543</sup> See Chapter 4.

an escape from land under the rule in *Rylands*);<sup>544</sup> however, the judges ‘refused to enter into a discussion’ regarding whether the claimant could recover for personal injury. Maria Lee recognises the confusion in the Court of Appeal that year was plain to see: in *Railtrack v Wandsworth London Borough Council* the court rejected the *Leakey*<sup>545</sup> approach was restricted to physical damage to property.<sup>546</sup> they stated, ‘where there is physical damage to land...or injury to a claimant...it may be easier...to prove that the threat amounted to a nuisance’.<sup>547</sup> *Railtrack* was decided under public nuisance. Following the decision in *Corby* affirming that ‘personal injury’ is actionable in public nuisance but at the same time maintaining that it was not a ‘type of injury’ actionable in private nuisance an important historical issue is introduced concerning the nexus between the two modern torts during the vicissitudes of action on the case for nuisance. That issue has a modern undertone that raises a theoretical and definitional problem, particularly where pollution affects a number of households.

The facts in *Corby v Corby* and *Barr v Biffa*<sup>548</sup> were such that there was interference to multiple individuals that occupied property as a home without a proprietary interest. Owing to the austere stance concerning standing in private nuisance discussed in Chapter 2 they were, in essence, forced to seek remedy in public nuisance. Therefore it is a legitimate point to assert that the nuisance was nothing more than a ‘private nuisance’ dressed up to fit the ‘public nuisance’ mould in order for claimants to sidestep the standing restrictions. In the vast majority of these cases there is justification to suggest that there could never truly be a situation where injury to the person in the home cannot theoretically be defined as a private nuisance, especially if Murphy’s modern description is adopted. In reality where the facts

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<sup>544</sup> *Ribee v Norrie* (2001) 33 HLR 69.

<sup>545</sup> See Lee (77) 303-8; D Wilkinson, ‘*Cambridge Water Company v Eastern County Leather Plc*: Diluting Liability for Continuing Escapes’ (1994) 57 MLR 799, 807.

<sup>546</sup> *Railtrack v Wandsworth LBC* [2001] EWCA Civ 1236.

<sup>547</sup> See Lee (77) 306.

<sup>548</sup> Above (1).

replicate (or are similar to) those in *Corby* and *Biffa* bringing an action in public nuisance is necessary to sidestep the issue of standing in private nuisance. This poses the question whether it is an acceptable situation where personal injury is actionable in public nuisance but not in private nuisance. The issues discussed in this chapter suggest that this is an unacceptable use of history. The exclusion in private nuisance certainly lacks coherence. As is topical in this thesis, when we look to the past for a measure of coherence it would seem that the modern law has diverted away from its evolutionary path as seen in simple form of nuisance. The development of nuisance as a single entity during Case provides evidence that human health was an all-encompassing interest across the sphere of law and questions why today personal injury should be restricted to public nuisance alone.

The notion that ‘bodily security’ should not be protected as an independent interest in private nuisance lacks foundation and is illogical enough to suggest any future decision in the Supreme Court to that effect could only be policy driven, perhaps in the same manner as it was in *Hunter*. The potential capability of pollutants harming health, but at the same time not causing physical damage to property, is arguably too feasible to ignore: certainly in the context of excluding what is a fundamental aspect of holding land. After all, humans are in the fortunate position to be able to speak out when insalubrious conditions exist that affect them as a physical entity whereas natural objects cannot; a degree of stewardship is required for natural objects in that respect.<sup>549</sup> In addition, damage to land may well be too subtle to notice prior to any human health concerns emerging, and, indeed, can take longer to manifest. Damage to land (or consequent diminution of amenity value) can continue for years unnoticed, by which time it is often too late for restorative justice.<sup>550</sup>

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<sup>549</sup> See Chapter 5.

<sup>550</sup> For instance, see *Cambridge Water*. Eastern County Leather were deemed not liable in respect of damage caused by the continuing escape of P.C.E. from its land occurring at any time after such damage had become foreseeable (*Cambridge* (106) 306-7 (Lord Goff)). See Chapter 4 for a discussion of the defendant-friendly

## 7. The private/public nuisance paradigm

Under close scrutiny Newark's influence on modern judges is somewhat surprising. His use of predominantly embryonic negligence cases that, by his own admission,<sup>551</sup> were contested on negligence grounds was certainly distinguishable from *modern* private nuisance. Personal injury caused by plaintiffs falling down 'cellar flaps' and tripping over obstructions on highways should indeed only be labelled as negligence actions. These cases in reality did little to support his notion to exclude personal injury from private nuisance. But, it is especially noteworthy that, despite in the main approaching 'nuisance law' as a single sphere of law, it is extraordinary that he fails to recognise the blurring of the 'functional line',<sup>552</sup> between private, common and public nuisance during a significant period that he covers. This oversight exacerbates the unwarranted influence of his article.

The evolution of Case reveals the often overlooked contemporaneous status quo concerning the visible blurring of the 'functional line' between private, common and public nuisance. Few commentators – as far as I know only James Oldham and John Spencer - engage with the importance of the interplays between the nuisance law family during that crucial period of its evolutionary path when 'the judges as well as the writers had occasion to talk about common nuisance in the same breath as private nuisance' and it was a defence 'for someone sued for private nuisance to show that it was really a public one'.<sup>553</sup> Professor Spencer explained the blurring of the 'jurisdictional line' thus:

If what the defendant had done affected the plaintiff only, this was a matter for the courts of common law, but if it affected the whole community it was exclusively a matter for the local criminal courts, and the common law courts relented to the extent of allowing a person who had suffered special damage from a common nuisance to

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lacuna that has been created where liability is not imposed for continuing damage (that resulted from the awareness of prior unforeseeable damage) owing to Lord Goff's extension of the exemption intended for *Sedleigh-Denfield* type liability in regards to continuing nuisances (Wilkinson (170) 807). For an in-depth analysis of restorative justice see Chapter 5.

<sup>551</sup> Newark (5) 484-5.

<sup>552</sup> Oldham, *ECL* (110) 251.

<sup>553</sup> JR Spencer, 'Public Nuisance - A Critical Examination' (1989) 48 CLJ 55, 59.

bring an action on the case; and so ensured that judges in civil cases continued to talk about common nuisance.<sup>554</sup>

Newark outwardly fails to penetrate the much deeper issue regarding nuisance law during that period: whilst there were internal divisions between what are today called public and private nuisance they were (unless by indictment<sup>555</sup>) part of the same form of action (then action on the case) and then later action on the case for nuisance.<sup>556</sup> Newark only distinguishes between private and public nuisance by tendering private nuisance as a tort to land and public nuisance as a crime, completely omitting that public/common nexus with private in the king's (civil) courts.<sup>557</sup> Although private and public nuisance eventually emerged from Case as separate entities (common nuisance waned<sup>558</sup>), Newark was short-sighted in the sense that he failed to identify that much of the law of nuisance was amalgamated as a single concept during the period he examined. The significance of his omission is exacerbated because established commentators treat it as a single entity (as do the

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<sup>554</sup> *ibid*, see also page 74.

<sup>555</sup> The local criminal courts and the king's civil courts were clearly mutually exclusive (JR Spencer, *ibid*).

<sup>556</sup> The distinction between the different nuisance concepts seemingly rested upon jurisdiction in consideration of the type of damage. If plaintiffs could show there had been an actionable damage they would be successful in the sense of a private suit. They would also be successful in an action on the case for nuisance (previously an action on the case) if they could show they had suffered 'greater damage or inconvenience... than the generality of the public' (per Lord Denning in *Southport Corporation v Esso Petroleum Ltd* (23) 196). If, however, in Case, such 'special damage' could not be shown it was an indictable offence triable in the court leet ('For any obstruction to a public highway, which is a public nuisance, though such should obstruct the party's business, an action on the case cannot be maintained by the party so obstructed: the only remedy is by indictment' (*Hubert v Groves* (1794) 1 Esp 148; 170 ER 308)). Whether the actions of the defendant were antisocial in nature was important.

<sup>557</sup> Newark (5) 482-3.

<sup>558</sup> Although it is often assumed that 'public' nuisance was also known as 'common' nuisance there was a clear distinction for a time, particularly for jurisdictional reasons where common nuisances were not triable in court leets where public nuisances were prosecuted (Ibbetson (15) 106). Viner stated: 'Publick [sic] is that which is to the nuisance on the whole realm. Common is that which is to the common nuisance of all passing by' (*A General Abridgment of Law and Equity* (GJJ & J Robinson 1793) 16:20; In the Justinian Institutes it was expressed that nuisance was threefold '1. Publicum sive generale, 2. Communae. 3. Privatum sive speciale' (2 Inst. 406); see *Coke on Littleton*, Co Liit 56a, 250; Baker (55) 433; and compare J Oldham who stated the 'distinction was never clear' and typically the terms were used synonymously (Oldham, *ECL* (110) 250 (note 8)).



law reports throughout that period) - Ibbetson went a little further and questioned whether the nuisance actions can be separated at that time.<sup>559</sup>

Ibbetson's doubt regarding a separation of the torts, Oldham's and Spencer's discourse regarding the blurring of the functional line and the manner in which 'nuisance' is treated in the law reports is indicative that there was a merging of the entire law of nuisance during that vital formative period. As such we should be mindful of the modern definition of 'public nuisance'. According to Archbold's Criminal Pleadings:

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.<sup>560</sup>

Owing to the interplays between what are now private and public nuisance during Case, and in light of the foregoing analysis, it is contended it is difficult to justify separating matters pertaining to health of human beings from one tort but not the other. The manner in which 'public nuisance' becomes a tort, thus distinguishable from a crime, is significant to defining nuisance as a tort holistically.<sup>561</sup>

The commonality of nuisance was seemingly identified by Holt CJ in *Iveson v Moore* (1699) where actionability within the nuisance family turned on 'particular rights'.<sup>562</sup> The particular right in a private suit would be specific to occupation or possession of land whereas in a

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<sup>559</sup> Ibbetson (15) 106.

<sup>560</sup> Archbold *Criminal Pleading Evidence & Practice* 2013 Ed. Chapter 31 - Offences Against Public Morals and Policy, para 31-40. JR Spencer cites the 42nd ed., (1985), para. 27-44 which is similar: 'Every person is guilty of an offence at common law, known as public nuisance, who does an act not warranted by law, or omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects'. What is common to both definitions of public nuisance is, inter alia, the fact that it is an offence to 'endanger the life, health, property or comfort of the public' (Spencer (177) 55-84).

<sup>561</sup> See above (182) and (184).

<sup>562</sup> Holt CJ stated that 'actions upon the case for *nuisances* are founded upon *particular rights*; but where there is not any particular right, the plaintiff shall have no action'. Emphasis added (1 Ld Raym 486, 492-3).

public suit an action on the case for nuisance would depend on the ‘damage’ being special, that is an injury peculiar to the plaintiff from any other King’s subject<sup>563</sup> – ‘everyone who brings an action shall have it proportional to his right’.<sup>564</sup> The modern concept of public versus private nuisance was entwined and palpably many of the doctrines were shared: safeguarding ‘bodily security’ was ubiquitous. Baker observed that ‘many forms of private nuisance became public when committed in a city or town; for example, piling rubbish in public places so as to increase the risk of plague, setting up butcher’s stalls in the street and leaving entrails in the gutters, or generating industrial fumes.’<sup>565</sup> Interference with health (and pollution) is clearly visible as an actionable head in actions on the case for nuisance throughout the English Reports.

Despite the divisions – some of which are not resolved today – public, common and private nuisance were one sphere of law remedial under actions on the case for nuisance where personal injury was integral to the concept of nuisance. The reality of the situation, as recognised by Denning LJ in *Southport Corporation v Esso*,<sup>566</sup> was that whilst some activities, that would today be labelled as either a public or private nuisance, circa 1535 (the time to which Newark referred) *both* would have been actions on the case (later for nuisance) – that nexus preceded 1535, remained for centuries, and even today is sometimes difficult to reject.<sup>567</sup> Newark remarked:

And then Fitzherbert J went on to give an illustration which sent subsequent generations wrong in their law: ‘As if a man make a trench across the highway, and I come riding that way by night, and I and my horse together fall

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<sup>563</sup> *ibid* [489] (Gould J) and [493] (Holt CJ).

<sup>564</sup> *ibid* [493]. See *Fineaux v Hovenden* (1599) Cro Eliz 664 where it was held that an action for a nuisance will not lie unless the plaintiff has a particular right or suffers special interest; see also *St John v Moody* Trin 27 Car 2 Rot; 1 Vent 274. Romer LJ commented in *Attorney General v PYA Quarries* that: 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 (*Attorney General v PYA Quarries Ltd* [1957] 2 QB 169).

<sup>565</sup> Baker (55) 433.

<sup>566</sup> *Southport* (23) 197.

<sup>567</sup> Anon. (1535) YB Mich, 27 Hen 8, f 27, pl 10; this case can be found in Fifoot (54) 98.

in the trench so that I have great damage and inconvenience in that, I shall have an action against him who made the trench across the road because I am more damaged than any other man.’ At this point we have moved into the realm of personal injuries and away from the original conception of nuisance...<sup>568</sup>

Newark failed to grasp that ‘public’ nuisance has deep historical antecedents that evolved with ‘private’ nuisance (initially as *nocumenta*) within the realms of actions on the case from around the mid to late fourteenth-century.<sup>569</sup> Instead, Newark saw the birth of public nuisance when the language of negligence was beginning to infiltrate the law of torts.<sup>570</sup> He fell short of recognising the importance of the role that special damage played in the development of nuisance or there was little or (on occasion) no difference between a private nuisance and a private action for a public nuisance prior to the emergence of two separate nuisance actions from Case.<sup>571</sup>

It was made clear in the previous chapter that the original concept of nuisance grew out of medieval land law where the assize of novel disseisin was a judicial tool to protect tenants from their lords. Personal injury was extant in that judicial process but health and well-being centred on the seigniorial relationship between lord and tenant. In addition, whichever way Newark labels (or terms) injury to the person, protecting health remained central to the theory of nuisance after it had shook free from the grip of medieval land law. Newark proceeded to argue that personal injury, or ‘bodily security’, falls solely within the province of negligence. Yet to argue that the legal historian, if not the jurist, must understand it as falling to a greater or lesser extent exclusively within negligence is highly misconceived and problematic, for reasons which are explained, but not least the significantly late advent of negligence as a tort.

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<sup>568</sup> Newark (5) 483 (see also *Corby* (1) 341).

<sup>569</sup> For dating see Palmer, *Black Death* (39) chapters 24-25 and Appendixes 22-24.

<sup>570</sup> See Dyson LJ in *Corby* case (1) 340; and Newark (5) 481-2.

<sup>571</sup> See Lord Wright in *Sedleigh-Denfield v O’Callaghan* [1940] AC 880, 910 regarding the use of these terms.

Newark was correct that the essence of nuisance lies in the fact that it is a tort to land: ‘or to be more accurate it was a tort directed against the plaintiff’s enjoyment of rights over land...incommode him in [that] enjoyment...you commit a nuisance’.<sup>572</sup> Prior to incipient nuisance becoming a tort in its own right it was embodied in land law thus to say it was anything other than a tort to land would be inaccurate. However to take bodily security out of the concept of land-holding – arguably the founding principle for building habitation - is entirely illogical. Newark makes an excellent case that negligence is alien to nuisance but has no basis for removing bodily security, the epitome of comfort and convenience, from the ambit of what can be considered one’s quiet enjoyment of land.

Newark’s attempt to reduce protecting ‘bodily security’ on one’s land to the realms of negligence pre-empts a pressing modern dilemma within private nuisance regarding actionability (and subsequently liability<sup>573</sup>) which can be attributed to the steady trickle of negligence principles into an action where they have no place.<sup>574</sup> The relationship between nuisance and negligence has blurred a ‘doctrinal dimension’<sup>575</sup> of nuisance by instigating questions concerning the *type of harm* (ie whether it is physical or non-physical damage) which in turn has created the lingering confusions concerning the conduct of defendants where before it played no part. Not only has physical damage to the person been placed under scrutiny as a *type of harm* that should be excluded but so too has physical damage to property.<sup>576</sup> Maria Lee identified that this has indirectly made the reasonable user test redundant and misleading in many cases of private nuisance. Thus the cornerstone of ascertaining whether an alleged intrusion transcends the threshold of interference necessary to give rise to an action has been diluted. In light of Lee’s contention, the foregoing analysis

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<sup>572</sup> Newark (5) 482.

<sup>573</sup> See Chapter 4.

<sup>574</sup> See generally C Gearty ‘The Place of Private Nuisance in a Modern Law of Torts’ [1989] 48(2) CLJ 214; M Lee (77); and J Steele, ‘Private Nuisance and the Environment: Nuisance in Context’ 15(2) (1995) Legal Studies 236.

<sup>575</sup> Gearty *ibid* 217.

<sup>576</sup> Lee and Gearty. See *Hunter* (2) 692 (Lord Goff); and Steele (75).

and the discussion in Chapter 4, we should query whether the solution to many of modern nuisance's problems would be to remove principles 'subversive' to nuisance's doctrines than any head that is essential for a fully functioning environmental tort.

The ensuing chapter describes in detail that the balancing of interests between claimant and defendant has been a constant of *true* nuisance law actions throughout its evolution. Following a 'rule of reasonableness' that was ubiquitous by the eighteenth-century Baron Bramwell laid down the reciprocity test in *Bamford*; later, Lord Wright stated: 'A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with'.<sup>577</sup> Those remarks are reminiscent of Bracton in the thirteenth-century. If we are to preserve nuisance's presiding doctrinal characteristic of balancing interests between neighbours we must question negligence's role in the tort. It is suggested that it is more logical to remove principles such as foreseeability of harm and fault-based conduct (central to negligence) than protected interests that were fundamental to nuisance law during its evolution in Case, from which private nuisance emerged.<sup>578</sup>

The lack of due care or any recklessness on the part of a defendant is irrelevant in continuing a nuisance therefore perfectly careful and/or deliberate conduct can be actionable.<sup>579</sup> Accordingly when injuries occur on property from, for instance, noxious fumes, chemical spills or any pollutant from commercial or domestic activity then any resultant injury to person or health is capable of amounting to an actionable nuisance.<sup>580</sup> As Mr Justice Rinfret held: 'pollution is always unlawful and, in itself constitutes a nuisance'.<sup>581</sup> When an injunction is sought to prevent such nuisances, negligence principles such as 'foreseeability

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<sup>577</sup> *Sedleigh-Denfield* (194) 903.

<sup>578</sup> Lee (77) 299. See also chapter 4.

<sup>579</sup> *Cambridge Water* (106) 299 (Lord Goff); see also *Gillingham v Medway (Chatham) Dock Co Ltd* [1993] QB 343; and Steele (75) 601-3

<sup>580</sup> Steele *ibid* 641.

<sup>581</sup> *Malcombe Forbes Groat and Walter S Groat v The Mayor, Alderman and Burgesses, being the Corporation of the City of Edmonton* [1928] SCR 522, 532 as quoted by E Brubaker in *Property Rights in Defence of Nature* (Earthscan 1995), 39.

of harm’ are irrelevant, thus ‘bodily security’ has no bearing on ‘personal injury’ synonymous with negligence in comparable circumstances. Newark advocates that damages in ‘the realm of personal injury’<sup>582</sup> should be confined to negligence but it is incumbent on the tort scholar to question how interferences with ‘bodily security’ of the kind described by Rinfret can be confined to negligence when negligent or reckless conduct is not germane to the facts.<sup>583</sup>

The manner in which both Newark’s and Lord Goff’s comments have been utilised – particularly in *Corby* – is conflicting. For instance, if Ward, Dyson and Smith LJ interpreted Lord Goff as maintaining personal injury should be removed as a protected interest why did they retain its status as an actionable head in public nuisance? If Lord Goff’s comments are read holistically they omitted his inference that physical damage (to person and land) should be removed from the ‘domain’ of nuisance entirely.

## Conclusions

We must continuously remind ourselves when considering personal injury in private nuisance that there is no binding authority that directly addresses the matter of ‘bodily security’ at the echelon of, what is now, the Supreme Court. How can it be the case that personal injury is firmly established in public nuisance but excluded from private nuisance?<sup>584</sup> The fact that personal injury has been held to be actionable in both the Court of Appeal and House of Lords is a strong indication that that will remain the status quo, especially when we consider the definitional harmony regarding safeguarding human health between the tort and crime.<sup>585</sup> Without removing personal injury from public nuisance claimants will continue to a platform from which to circumvent standing issues in private nuisance. The blurring of the boundaries

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<sup>582</sup> Newark (5) 483.

<sup>583</sup> Newark *ibid* 488-90.

<sup>584</sup> See *Mint v Good* [1951] 1 KB 517.

<sup>585</sup> See *Corby* (1); and *Jacobs v LCC* [1950] AC 361, 374-377 (HL); see also Lord Wright’s dicta in *Sedleigh-Denfield* (194).

between nuisance and negligence that Newark attempted to rectify is not merely set to remain blurred but looks to be exacerbated whilst the courts insist on maintaining a separation between nuisance and negligence without first removing the language of negligence from nuisance: there is a large definitional divide between negligence type ‘personal injury’ and injury to the person in nuisance terms. It is hard to justify perceiving ‘personal injury’ as remedial damage in the tort of negligence alone. It can be posited that justification on that premise is little more than a presentational exercise to restrict litigation into the modern fashionable and principled tort of negligence and, perhaps, to avoid the recent modern intricacies that have, arguably, been imposed upon nuisance law (by the type of historical misuses discussed throughout this thesis).

Similar to any other interference with the comfort and enjoyment of land, personal injuries and damage to health incur a loss of amenity and pecuniary value to a property, indeed it could be logically argued that the serious nature of some injuries to the person should result in damages being increased.<sup>586</sup> Whilst some nuisances are capable of inflicting physical damage to buildings, trees and plants they can damage the health of inhabitants; patently the ‘use and enjoyment’ of one’s land is affected when physical injury occurs owing to ‘unlawful interference’. Therefore it is contended that the obiter comments in *Hunter* supported and seemingly affirmed in *Corby* which suggest that damage to one’s health should not be actionable in private nuisance are, in fact, stark contradiction to a conceivable interpretation of the modern description of the tort, which is bolstered by robust academic opinion and rigorous historical interpretation.

There can be a fine balance between damage to human health and environmental damage as the case of *Cambridge Water* demonstrated. The nuisance in question was a threat to human health from polluted water (owing to chemicals used in the leather tanning process)

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<sup>586</sup> See L Crabb, ‘The Property Torts’ (2003) 11 Tort L Rev 104-18; also Steele (75) 643.

percolating into underground aquifers over a number of years. On the grounds that it would be a greater liability than that imposed for negligence, Lord Goff refused to impart liability on the defendant tanner after latent unforeseen damage had become patent and thus became a continuing nuisance. The traditional common law private rights afforded by proprietorship, considered to be sacrosanct,<sup>587</sup> should conceivably give redress in such instances; the alternative would be, in the absence of foreseeable harm, a situation where injured parties are without redress.

For obvious reasons, in environmental protection terms, denying redress (particularly injunctive relief) simply because the interference was unforeseeable in the past is extremely problematic. Wilkinson commented that Lord Goff's reasoning is indeed questionable when polluters are, for all intents and purposes, given free rein to continue polluting in such circumstances.<sup>588</sup> In human terms however, theoretically, damage to health could be either the first indicator that the drinking water was contaminated or alternatively evidence of an actionable nuisance.<sup>589</sup> It is unjustifiable to grant polluters' immunity from liability in a continuing nuisance on the premise that the damage was not foreseeable many years before the damage was identified as a nuisance; both humans and the environment can suffer as a consequence.<sup>590</sup>

The underlying purpose of this chapter is to demonstrate that 'personal injury' is a protected proprietary interest in private nuisance owing to the long-established nexus between human

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<sup>587</sup> So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community...In vain may it be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even public tribunal, to be judge of this common good, and to decide whether it be expedient or not. 1 Blackstone, *Commentaries*, 35. See further Chapter 5 for an in-depth appraisal of the private versus public right debate.

<sup>588</sup> Wilkinson (163) 807.

<sup>589</sup> This was certainly the case in the unreported but extremely influential case of *Gerard, Bart v Muspratt* (see The Liverpool Mercury Supplement, September 4<sup>th</sup> 1846, 2) where irritation to the eyes was initially reported from muriatic acid and sulphuric acid from alkali works. Better known as *Gerard v Muspratt* the case was a forerunner to the decision in *Tipping* and was the case where the Cresswell Cresswell 'Theory of Nuisance Law' was laid down (see Simpson (21) 187).

<sup>590</sup> Wilkinson (163) 807-8.



beings and the land they occupy as a home. This has become important because the introduction of negligence to the tort proper (following *Cambridge*) means that judges prefer to look at whether the *type* of harm is actionable. But, what is important to understand, in the context of this chapter, is that protecting bodily security is an integral part of a tort that is inherently environmental. Without recognising the nexus between human beings and the land they occupy, particularly as a home, the traditional function of private nuisance affording environmental protection is decidedly weakened. The essence of nuisance dictates that the tort should change according to societal needs; taking the person out of the home, as it were, ignores that society requires a private law mechanism which can initiate private challenges to environmentally harmful activities of their neighbours and there are situations where public bodies must be kept in check by private responses to either unjust or unacceptable decisions. However, by focusing on ‘personal injury’ in the debate surrounding what is actionable in the tort, other unacceptable misuses of history have been highlighted.

Perhaps the most important issue identified in this chapter for the tort as a whole in a modern setting (and its future development) is the negligence/nuisance paradigm, which has demonstrably blurred the boundaries between the two torts and thus created doctrinal complications. The simple form of private nuisance that afforded nuisance law the tools to effect environmental protection across the epochs, in line with the *true* essence of the tort, should continue to protect any potential litigants from environmental harm. Nonetheless, the doctrinal issues concerning the measure of actionability have palpably been affected by the introduction of negligence principles, thus complicating the simple form. Essentially, the aberration of the ‘reasonable user’ test has confused the issue of actionability.

Today, following *Cambridge*, judges must decide whether the *type* of damage is actionable and use the reasonable user test to ascertain whether liability can be apportioned, based on the *hypothetical* reasonable man. That is a clear deviation from the traditional role of the

reasonable user test; it can be argued that the cross-infection of negligence language has altered that time-honoured nuisance principle. Historically, the role of the judges was simple. Based on the circumstances of the case they needed to decide whether there was an actionable nuisance; if that was the situation then liability was automatically incurred. Of course, in both circumstances the role of the judge is ultimately to ascertain whether plaintiffs are liable for their actions, but the addition of negligence principles has changed the manner in which liability is examined.

Before *Cambridge*, liability was traditionally strict - if harm was deemed actionable – and questions as to whether the actions of the plaintiff were negligent or that the type of damage was foreseeable were not an issue. The fact that such issues are now often crucial to apportioning liability means that the reasonable user test (as a means of determining an actionable nuisance) has become less effective in its role of effecting environmental protection. Palpably the nexus between actionability and liability has changed since *Cambridge*; it is to the issue of liability that we now turn (in Chapter 4), where the nuisance/negligence paradigm is examined in detail.

## Chapter 4

### The Nature of Liability – The Nuisance/Negligence Paradigm

#### 1. Introduction

The decision by the House of Lords in *Cambridge Water v Eastern Counties Leather*<sup>591</sup> declared that negligent conduct is, in the specific respect of the foreseeability of the consequences of neighbourly conduct, a relevant consideration in the context of nuisance.<sup>592</sup> The target of this analysis is to assess Lord Goff's remarks in *Cambridge* in order to demonstrate the problems associated with introducing negligence doctrines into nuisance law. It is considered in this chapter that the introduction of the language of negligence into private nuisance has altered conceptual elements of the law of nuisance where liability has been traditionally strict.<sup>593</sup> This has proven problematic on various levels for *both* torts. The relationship between nuisance and negligence has notably received more academic commentary than the other issues dealt with in other chapters, however, the relationship between 'actionability' and 'liability' and the influence of these issues on the notion of reasonableness is a problem that has received less attention. It is contended that where before the test for 'reasonable user' was a matter of 'actionability' the modern focus has shifted away from balancing the interests of litigants and, in essence, altered into a matter of liability. It is argued that this is the direct result of the recent interpretation of 'reasonableness' (by the courts) in negligence rather than nuisance terms.

The standard of reasonableness has continually shifted according to societal needs across the centuries but it is contended that the introduction of negligence into nuisance represents a cross-infection of negligence language that has changed the notion of nuisance-type

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<sup>591</sup> [1994] 2 WLR 53; [1994] 1 All ER 53.

<sup>592</sup> [1994] 2 AC 264, 299 (Lord Goff).

<sup>593</sup> *ibid.*

reasonableness. Thus, in particular, this chapter examines the distinction between ‘reasonableness’ as it applies to the foreseeability of the consequences of conduct (i.e. the negligence aspect presented in *Cambridge Water*), and reasonableness as it applies to the consequences of that conduct (as it is traditionally understood within the paradigm of private nuisance law). It is argued that the decision in *Cambridge* has created doctrinal confusion by an unnecessary blurring of the boundaries between the torts (where a separation has been traditionally maintained by the courts) through the introduction of the alien concept of reasonable foreseeability, based on the notion of the hypothetical reasonable man.<sup>594</sup>

In a tort where a ‘rule of reasonableness’ (the foundations for ‘reasonable user’) has been an essential element of liability since the eighteenth-century, this relatively recent change of assimilating negligence doctrine by the courts has clearly proven problematic for private nuisance, specifically since the ‘rule of reasonableness’ was initially utilised to take into account the effects of snowballing urbanisation and industrialisation.<sup>595</sup> What became ‘reasonable user’ was more a question of reciprocity between neighbours (concerning what they could and could not do to the quality of the neighbourhood) than of liability. This suggests that nuisance cases, more than other areas of law, were ‘susceptible to compromise’ and reference to the reasonableness of the defendant’s use of land in conjunction with the unreasonableness of the interference with the claimant is an inherent quality of such compromise.<sup>596</sup> This trait was famously captured by Baron Bramwell in *Bamford v Turnley*<sup>597</sup> where ordinary use of land was deemed to be such that it should not subject those who use it

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<sup>594</sup> See J Murphy for a discussion of the distinctiveness of reasonable user (a nuisance concept) and the reasonable man whose acts or omissions impact of neighbourly use (*The Law of Nuisance* (OUP 2010) 55).

<sup>595</sup> J Oldham, *English Common Law in the Age of Mansfield* (The University of North Carolina Press 2004), 248 (hereinafter: *ECL*); and J Oldham, *The Mansfield Manuscripts and the Growth of the English Common Law in the Eighteenth Century* (The University of North Carolina Press, 1992) vol. II 882 (hereinafter: *GECL*).

<sup>596</sup> *ibid.* Of the reported cases of Lord Mansfield only around half a dozen involved nuisance law, but his trial notes reveal a different picture where over thirty nuisance actions are mentioned. In a number of those cases it is clear that he adopted a stance of referring cases for referral or arbitration and actively encouraged settlement (see Oldham, *GECL*, 437 and 886).

<sup>597</sup> (1862) 3 B & S 62.

to an action.<sup>598</sup> That forged the rule of ‘give and take, live and let live’ which encapsulates the essence of reasonableness in nuisance terms.<sup>599</sup>

The discernible doctrinal problems caused by negligence language are completely out of proportion considering the small number of nuisance claims that are actually capable of invoking its principles. Typically, it is where liability in damages arises owing to natural causes (acts of God) or by the act of a third party (for which the defendant is not responsible) that the language of negligence is relevant. Negligence, however, *is* a separate tort and its language in nuisance equates to an incidence of liability ancillary to the cause of action. It is advocated that it is unsatisfactory to analyse nuisance using that language in any circumstances; if the need to analyse nuisance in negligence terms arises then negligence is the logical action. The decision in the earlier case of *Sedleigh-Denfield v O’Callaghan*<sup>600</sup> shows that this category of cases only fits into the law of nuisance by ‘grafting’ the concept of duty of care on to it. In the post-*Donoghue v Stevenson*<sup>601</sup> era it is manifest that to establish common law negligence there must be a duty of care.<sup>602</sup>

Nuisance has over the centuries developed its own customised *land-based* doctrine of ‘reasonable user’ that functions as a control mechanism to ensure a threshold between neighbours is maintained to prevent acceptable interferences with a neighbourhood becoming actionable nuisances. As such the reasonable user test evolved from nuisance’s traditional role of protecting competing interests, rather than a prerequisite for liability.<sup>603</sup> Such a balancing act between proprietary interests suggests that no protection against interference

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<sup>598</sup> *ibid*, 83. The distinction between ordinary or reasonable user and socially useful user is not clear; reasonable user probably must be understood as a judicial device for promoting ‘useful’ land uses, or rather not suppressing ones that are useful. See further DR Coquillette, ‘Mosses From an Old Manse’ 64(5) (1979) Cornell LR 761.

<sup>599</sup> *ibid*, 84.

<sup>600</sup> *Sedleigh-Denfield v O’Callaghan* [1940] AC 880.

<sup>601</sup> [1932] AC 502.

<sup>602</sup> *Job Edwards Ltd. v. Birmingham Navigations Co. Proprietors* [1924] 1 KB 341, 357.

<sup>603</sup> G Cross, ‘Does Only The Careless Polluter Pay? A Fresh Examination of the Nature of Private Nuisance’ (1995) LQR 445, 448.

can be absolute (for instance, no one could expect a right not to be interfered with by *any* noise<sup>604</sup>). However the House of Lords decision in *St Helen's v Tipping*<sup>605</sup> deemed the concept of reasonable user immaterial where the relevant injury was physical damage to property, which was followed in *Sedleigh-Denfield*.<sup>606</sup> 'Property damage' (the precise meaning of which is not in issue<sup>607</sup>) seemingly attracted a higher level of protection than amenity damage until, without overruling *Tipping*, a number of cases decided according to the '*Sedleigh-Denfield* line' sought judicial concession where the defendant 'continued' rather than created the nuisance involved. It was at that point the language of negligence began its cross-infection into the doctrines of nuisance.

It may be questioned whether it is suitable for doctrines from separate torts, where liability is approached from opposing spectrums, to be amalgamated. Personal security is absolute and liability imposed when negligence is established in that tort but there is a conduct-specific investigation to ascertain negligence in the first place. In nuisance, however, certain intrusions are to be tolerated as the 'inevitable price of living in an organised society in proximity to one's neighbour'; thus assessing liability is fundamentally opposed.<sup>608</sup> On the other hand, a greater degree of liability is often to be expected in private nuisance, perhaps inescapable, owing to the very fact of landownership or occupation itself. Indeed the point at issue in *Sedleigh-Denfield* where the defendants were liable for adopting damage caused by a trespasser is indicative of a higher standard of liability for landowners in nuisance than would be expected in negligence.

Lord Goff's dicta in *Cambridge* have seemingly blurred the question of strict liability in nuisance law based on a set of limited circumstances (acts of God and the actions of third

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<sup>604</sup> *ibid.*

<sup>605</sup> 11 ER 1483; (1865) 11 HL 642.

<sup>606</sup> 'If it were merely a question of the physical conditions no one would doubt that a case of private nuisance was established' (Lord Wright 902).

<sup>607</sup> But see Chapter 2.

<sup>608</sup> WVH Rogers, *Winfield and Jolowicz on Tort* (Sweet and Maxwell 2010), 714.

parties). He asserted, ‘although liability for nuisance has generally been regarded as strict, at least in the case of a defendant who has been responsible for the creation of a nuisance, that liability has been kept under control by the principle of reasonable user.’<sup>609</sup> His judgment clearly articulates that he did not consider it just or equitable for a neighbour to be liable for injury to another neighbour which was not reasonably foreseeable but,<sup>610</sup> to borrow John Murphy’s words, this raises questions about ‘identifying the precise relationship between the central concept of reasonable user and the notion of unreasonable conduct for the purposes of fault-based liability’.<sup>611</sup> In turn this raises questions concerning the autonomy of nuisance law in relation to negligence law and the efficacy of nuisance for the purposes of environmental protection. In the context of this thesis a resolution of this issue is crucial to nuisance law’s adaptation to modern social mores within a political arena that faces profound environmental challenges.

Palpably a parallel between the hypothetical reasonable man and reasonable user cannot be readily drawn because in negligence ‘fault of some kind is almost always necessary, and fault generally involves foreseeability’<sup>612</sup> whereas something ‘may be done deliberately, and in good faith and in a genuine belief that it is justified’<sup>613</sup> but still be construed a nuisance. This suggests a stricter form of liability is intrinsic within the concept of nuisance; indeed ‘nuisance is, typically, “stricter than” negligence’.<sup>614</sup> The general impression one gets from reading the plethora of dicta<sup>615</sup> on this matter is that the relationship between reasonableness

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<sup>609</sup> *Cambridge* (1) [299]. Quoting Bramwell B, Lord Goff understood acts under which “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:” see *Bamford v Turnley* (7) 83.

<sup>610</sup> For the passages that relate to foreseeability see *Cambridge* *ibid*, 300-01 (Lord Goff).

<sup>611</sup> Murphy (4) 55.

<sup>612</sup> *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound)* [1966] 2 All ER 709; [1967] 1 AC 617, 639 (Lord Reid).

<sup>613</sup> *Sedleigh-Denfield v O’Callaghan* (10), 904 (Lord Wright).

<sup>614</sup> J Steele, *Tort Law: Text, Cases and Materials* (OUP 2007), 602.

<sup>615</sup> For example: Lord Wilberforce stated in *Goldman v Hargrave* ‘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 ([1967] 1 AC 645, 657); in *The Wagon Mound* Lord Reid asserted that ‘Nuisance is a term used to cover a wide variety of tortious acts or omissions and in many negligence in the narrow sense is not

in nuisance and fault in private nuisance is conceptually different.<sup>616</sup> Much of that conceptual disparity is a consequence of the evolution of the two torts.

In section 2 the two very different evolutionary paths of nuisance and negligence are explored. It will be shown that whereas a form of nuisance was very much involved in medieval law, negligence was extant from that period, in fact, the concept of ‘fault’ per se did not play any part in early law and that (when liability later developed) foreseeability of harm pre-dated the notion of duty of care. The true conceptual differences between the modern torts of nuisance and negligence can only be fully appreciated in consideration of their disparate evolutionary paths, including their differing relationship with Trespass (and Trespass *vi et armis*) and the development of liability amidst the evolution of action on the case. However, seemingly there is a common theme that they both evolved, albeit separately, according to societal needs.

In section 3 we return to the modern day and scrutinise the concept of reasonable user, its reciprocal nature and the extent to which it is distinct from ‘reasonable conduct’ is examined. It is argued that the decision in *Tipping* to treat physical damage differently (more strictly) from other kinds of nuisance (which remain grounded in reasonable user principles) lies behind the blurring of nuisance and negligence that is at the heart of the discussion. The confusion arises from the line of cases concerning physical damage arising from third party interventions (following *Sedleigh-Denfield*), which are best interpreted as a limited exception to the strict liability approach in *Tipping* when liability is thrust upon someone through acts of another or by nature. One could argue in light of Lord Goff’s decision in *Cambridge* a new general rule regarding the need for physical harm to be foreseeable has been constructed

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essential. An occupier may incur liability for the emission of noxious fumes or noise *although he has used the utmost care in building and using his premises* (ibid [639]. Emphasis added); and Lord Goff proclaimed ‘if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour’s enjoyment of his land; but if the user is not reasonable, *the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it*’ (*Cambridge* (1), 299. Emphasis added).

<sup>616</sup> ibid, 600.



without overruling *Tipping*. Accordingly judges are now looking to the type of harm instead of the traditional reasonable user test. This, it is argued, has changed the test from a manner of assessing actionability (which would be traditionally strict) into a matter of apportioning liability.<sup>617</sup>

## **2. The Evolutionary Path of Liability**

### **a) The Evolution of Liability and the Emergence of Negligence**

Private nuisance today is only loosely described as a strict liability tort but, as this chapter will explain, nuisance related actions traditionally afforded a stricter standard of liability than its distant cousin negligence. The disparate characteristics of measuring liability between the two torts can arguably be attributed to the fact that they developed independently of one another (and centuries apart) and are accordingly far removed conceptually. One could say that they are conceptually independent. For negligence to emerge, first liability had to develop in order to lay the foundations for its principles that are second nature to the tort scholar today. Nuisance took a different path. Although *modern* nuisance and negligence were both forged in actions on the case their dependency on Case was for different reasons and they emerged later as separate entities; it is only the High Court activity in the twentieth-century discussed below that has, to a certain degree, created the illusion that they are more closely related.

What must be borne in mind is that until the decision in *Cantrell v Church*<sup>618</sup> early in the seventeenth-century after a slow supplanting period (that began proper in the sixteenth-century, despite numerous attempts over the centuries<sup>619</sup>) actions on the case were consistently not permitted for nuisance on the grounds that the new remedy ‘should never be

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<sup>617</sup> See also Chapter 3.

<sup>618</sup> *Cantrell v Church* (1601) B & M 588; Cro Eliz 845; 78 ER 1072 (Ex. Ch.).

<sup>619</sup> JH Baker, *The Reports of Sir John Spelman, Part II* (Selden Society 1977), vol. 94, 232-6.

available' when the assize of nuisance was appropriate.<sup>620</sup> David Ibbetson expressed, 'throughout the sixteenth-century the conservative Court of Common Pleas held to the theory that the action on the case and the assize of nuisance were mutually exclusive remedies';<sup>621</sup> thus, during the formative developmental period of civil liability, nascent nuisance was developing independently of the principles that laid negligence's foundations until Case supplanted the Assize in 1601 by which time 'nuisance was quintessentially a tort'.<sup>622</sup> The tort of negligence on the other hand was yet centuries in the making.

It is outside the remit of this thesis to convey a detailed précis of the development of negligence to the fashionable, hegemonic tort it is today, however a rudimentary understanding is necessary to illustrate the evolutionary differences between nuisance and negligence that have a bearing on their conceptual disparities. Evidently negligence - as we apprehend it today - was a conception entirely unknown to medieval law and subsequently devoid from the origins of the law of torts. Pollock and Maitland unequivocally believed that investigators in search of a medieval law of negligence would be fruitless in their endeavours.<sup>623</sup> Indeed by the time of Bracton there is no more than what can be described as a scant trace of the language of negligence;<sup>624</sup> certainly there was no manifestation of what

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<sup>620</sup> An early example is *Rikhill v Two Parsons of Bromaye* (1400) YB Mich. 2 Hen IV, fo 11, pl 48; B & M 581 where an action on the case was brought and failed because the assize of nuisance was the appropriate action. See DR Coquillette (8) 774; CHS Fifoot, *History and Sources of the Common Law: Tort and Contract*, (Stevens & Sons 1969), 94-5; and DA Ibbetson, *Historical Introduction of the Law of Obligations* (OUP 1999), 103-4.

<sup>621</sup> D Ibbetson, *ibid*.

<sup>622</sup> *ibid* 105.

<sup>623</sup> *ibid* 527. Pollock & Maitland's 'History of English Law' pays little attention to negligence – it only very briefly appears over four pages in volume II whilst volume I is entirely devoid of the subject. In fact they mainly refer to negligence in order to show that it was never heard of in medieval law; at least prior to the reign of Edward I in 1272 where their study ends (Pollock and Maitland, 2 *HEL* (Lawbook Exchange 2001), 476 and 484). They do nonetheless state using the Roman principle of *culpa* (fault) as a previous example that the 'modern English *negligence* [sic]' was 'slowly fashioned' (*ibid* 476).

<sup>624</sup> 2 *HEL* *ibid* 527-8. Fifoot stated: "Bracton did not discuss it, and, despite a few despondent suggestions, there is no real evidence that it interested the local courts". See also PH Winfield, 'The Myth of Absolute Liability' (1926) 42 LQR 184, 184-5.

was to become our contemporary law of negligence which is contended to have only begun to exist as an independent action during the nineteenth-century.<sup>625</sup>

The origins of private nuisance, on the other hand, we know can be traced as far back into legal antiquity as the late twelfth-century and some resemblance of the modern tort can clearly be seen in the civil pleas of the early thirteenth-century.<sup>626</sup> Arguably nuisance can be viewed as a distinct sphere of law from 1359 when Bracton's test 'to determine the boundaries of nuisance and novel disseisin was abandoned'.<sup>627</sup> Whilst it can be argued that nuisance was regarded as an independent action prior to action on the case, that breakthrough nevertheless took place at a time when actions on the case were poised to supplant the assize process. This cannot be said for negligence; its evolution was almost entirely a factor of the vicissitudes of various actions on the case instead of, for a significant measure of time, as part of a different process of law where it had already existed as a separate action.<sup>628</sup>

CHS Fifoot opened his chapter on 'Negligence' by stating: 'It is generally agreed that little or nothing akin to the modern idea of negligence is to be found in the common law before the evolution of Case'.<sup>629</sup> The 'tort' of negligence was seemingly a product of alternation between contrasting elements of Case, thus the gradual unravelling of the implications of different actions on the case, where there was an unruly tangle of differing aspects of evolving spheres of law. In that respect it is similar to nuisance as the concept of negligence was initially dependent on other actions to develop but the differing conditions associated with seigniorial relationships, nascent nuisance and the assize process extraneous to Case

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<sup>625</sup> For a general dating see Fifoot (30) 156-66; and MJ Pritchard '*Scott v Shepherd* (1773) and the Emergence of the Tort of Negligence', Selden Society Lecture, Old Hall of Lincoln's Inn, July 4<sup>th</sup> 1973 (Selden Society 1976); see also DA Ibbetson (30) 97-8.

<sup>626</sup> Examples can be seen in 'Select Civil Pleas vol. I, A.D. (1200-1203)' see Selden Society, vol. 3 (1889).

<sup>627</sup> Fifoot (30) 11 and 23; see *Anonymous* (1359) YB Lib Ass 32 Ed III, pl. 2.

<sup>628</sup> SFC Milsom, *Historical Foundations of the Common Law* (Butterworths 1981), 399. Hereinafter *HFCL*. Sir Percy H Winfield, 'The History of Negligence in the Law of Torts', (1926) 42 LQR 184, 184-185 and 195; MJ Pritchard, 'Trespass, Case and the Rule in *Williams v Holland*', [1964] CLJ 234, 234; and MJ Pritchard, 24-25.

<sup>629</sup> CHS Fifoot (30) 154.

betrays that comparison somewhat. Whereas the concept of nuisance merged into the law as a principle inherent to landholding conditions, needed to be ideal in order for the tort of negligence to manifest from the vicissitudes of case - particularly *assumpsit* (nascent contract) and bailment - and it took centuries for those conditions to exist simultaneously to provide a cogent separate sphere of tort. Prior to that juncture it truly was merely a mode in which most torts could be committed.

In a Selden Society Lecture in 1973 MJ Pritchard identified the conditions that ostensibly produced the tort of negligence. First and foremost it appears that liability in negligence terms needed to develop independently of Trespass (*vi et armis*) in which the requirement for direct forcible injury left no room for remedy in negligence-type injuries.<sup>630</sup> In *Miller's Case*<sup>631</sup> a distinction was made (by both court and counsel) for the first time between 'a special writ of trespass' (which later became known as *Accion sur le Case* or actions on the case) and 'a general writ with force and arms' (Trespass *vi et armis*). *Miller* was nonetheless summarily dismissed on the ground that a 'common writ of Trespass' was available but, two years later, in the *Innkeeper's Case*<sup>632</sup> the experiment was replicated successfully when a traveller's possessions were stolen from his room. The writ against the innkeeper was a writ of Trespass 'on all the matter according to case' for failing to uphold the custom of keeping guests property safe.<sup>633</sup> In *Waldon v Marshall*<sup>634</sup> (where redress for the negligent killing of a horse by a horse doctor was sought) an early example of the functionality of actions on the case, as a 'special writ' of Trespass, distinct from a 'general writ' of Trespass can be seen.<sup>635</sup> It was clear again in *Rikhill v Two Parsons of Bromaye*<sup>636</sup> and *Browne v Hawkins*<sup>637</sup> that the

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<sup>630</sup> See EJ Dix, 'The Origins of the Action of Trespass on the. Case' (1937) 46 YLJ 1142, 1150.

<sup>631</sup> *Miller's Case* (1367) YB 41 Ed III, fo 24, pl 17; see Fifoot (30) 69, 74 and 80; Dix, *ibid*, 1160 and 1164 (note 106); and Pritchard (38).

<sup>632</sup> *Innkeeper's Case* (1369) YB Easter 42, Ed III, fo 24, pl 17.

<sup>633</sup> Fifoot (30) 75; and Dix (40) 1164.

<sup>634</sup> *Waldon v Marshall* (1370) YB Mich. 43 Ed. III, fo 33, pl 38.

<sup>635</sup> Dix (40) 1155.

<sup>636</sup> (1400) YB Mich. 2 Hen IV, fo 11, pl 48.

manner in which the injury was sustained demanded a different action to afford a remedy when liability could not be adapted to fit the *vi et armis* writ.<sup>638</sup>

Pritchard also averred that by the nineteenth-century negligent performance for certain undertakings, callings or offices had existed for centuries<sup>639</sup> but liability for that carelessness was confined to prior relationships (based on occupation). The requirement for a previous relationship between parties for an injury to be recognised suppressed the manifestation of a separate tort of negligence whilst confusing the ambit of Case; indeed the occupation-based side was closely related to *assumpsit* because an informal contractual relationship had been established.<sup>640</sup> Negligence could not exist as an entity unless a form of liability also ensured that damages could be incurred independent of any prior relationships between parties. Furthermore the contractual character to the occupation-based side of Case demanded a specific action on the case *in tort* for negligence. This encouraged an alignment of negligent conduct - entirely in tort - without distinctions between occupation-based performance and injuries caused outside a prior relationship which was achieved by adopting a common standard of care (the reasonable man) and ‘a common technique of pleading’ – the duty of care.<sup>641</sup>

According to Pritchard the emergence of ‘non-relationship negligence’<sup>642</sup> liability began proper in the late seventeenth-century. After a small number of loosely cited cases, which represent strands of its evolution through Case, Pritchard convincingly suggests ‘non-

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<sup>637</sup> (1477) YB Trin. 10, 17 Edw IV, fo 3, pl 2.

<sup>638</sup> Dix (40) 1156-7.

<sup>639</sup> For example *Anonymous* (1409) YB 11 Hen IV, fo 33 pl 60; see Dix *ibid* 1157-62.

<sup>640</sup> RC Palmer suggests that the occupational-based Case writs were formulated like *assumpsit* for periods and he posits further that the reason ‘why they were not formulated permanently in *assumpsit* is unclear’ (RC Palmer, *English Law in the Age of the Black Death 1348-1381* (The University of North Carolina Press 1993), 217). However Pritchard suggests express *assumpsit* was dropped during the seventeenth-century in cases of positive misfeasance; this accordingly allowed such actions to develop in tort separate from contract when consideration had not been provided (MJ Pritchard (35) 22-3).

<sup>641</sup> MJ Pritchard *ibid*, 28-9.

<sup>642</sup> *ibid* 16.

relationship negligence' was initiated by the seminal 'running-down' case of *Mitchil v Alstree*.<sup>643</sup> With *Mitchil* a 'thin trickle' of running-down actions began which eventually became a 'torrent' in the early nineteenth-century helping to prompt negligence to emerge as an independent tort. The case therefore marked the beginnings of liability in negligence that was not only independent of Trespass *vi et armis* but also liability that was distinguishable from the old restrictive need for a prior relationship. Despite the later fusing of occupation-based and non-relationship liability (which created the reasonable man through a common standard of care) first the notion that defendant's had to guard against any consequences of their actions developed, or in other words, a liability developed for what defendants ought to have foreseen.<sup>644</sup> Topical to this discourse regarding the consequences of *Cambridge* and the assimilation of foreseeability it is interesting that foresight of harm preceded a duty of care in the context of liability. Nevertheless by the early eighteenth-century all the conditions required for a tort of negligence existed simultaneously; it was then that the concept of the duty of care developed, subsequent to – and arguably as a consequence of – the issues of liability that had been thrashed out during the evolution of Case.

## 2. b) Social Background to New Liabilities

A central objective of this thesis has been to demonstrate that the 'true essence' of private nuisance lies in the fact it has changed across the epochs in response to societal needs. Seemingly the evolution of liability was also a result of social needs. The societal influence of medieval legal constructs has generally eluded the mainstream of legal history, ironically until relatively recently. SFC Milsom and RC Palmer have engaged with how the social order

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<sup>643</sup> (1676) 1 Vent. 295, 2 Lev. 172, 3 Keb. 650. An unpublished report was provided by JH Baker and is cited as Exeter College, MS 178, 183. The facts of this case revolve around the breaking in of wild horses in Little Lincoln's Inn Fields. The master and his servants acted *improvid* (without foresight), *incaute* (recklessly) and without due consideration for the inappropriateness of breaking in horses in 'a place where people are always going to and fro about their business'. Using conduct that today we would call 'negligent' the principle behind the decision was 'it was the defendant's fault, to bring a wild horse into such a place where mischief might probably be done, by reason of the concurrence of people'. See MJ Pritchard *ibid* 16-17.

<sup>644</sup> MJ Pritchard *ibid* 15.

has consistently been related to and driven the evolution of English common law more than other commentators, but they do not always agree. Equally as Milsom expressly made it part of his life's work to challenge the conclusions of FW Maitland,<sup>645</sup> Palmer has, on occasion, systematically approached Milsom's hypotheses with the same distinct quality of critical examination;<sup>646</sup> Milsom's hypothesis on liability in Case has received a noteworthy measure of that criticism. Milsom's contribution to expounding legal history has been instrumental to current thinking and his influence on other commentators is ubiquitous in modern literature which is, perhaps, why Palmer has outwardly chosen to make Milsom's conclusions central to a number of *his* conclusions. His work 'English Law in the Age of the Black Death (1348-81)' significantly lays open to doubt a number of Milsom's theories concerning liability in Case as they fail to take into account the profound connotations the plague had on law and social mores.

Indeed it is more plausible to accept Palmer's account that professes case writs were issued by Chancery to provide remedies for specific areas of concern (that had been identified following the Black Death) than a manipulation of the law from within the courts. This disputes Milsom's notion that common law judges and lawyers were ultimately left to their own devices to find useful or relevant parts of existing writs to remedy wrongs and mould the common law. Accepting Milsom's contentions that the 'winnowing of pleas' was left to the courts without reference to Palmer would be to accept theory without proper reference to the literature of the debate; this section focuses on Palmer's observations which cannot be ignored owing to the implications of such a huge demographic catastrophe.<sup>647</sup> To ignore any contention that avers to the necessity of enforcing legal changes to preserve society at such a

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<sup>645</sup> Milsom stated Maitland was someone with whom he was destined to 'argue for much of my life' born out of an intellectual struggle with the legacy of Maitland and what he calls a 'superhuman myth' (SFC Milsom, 'Maitland' (2001) CLJ, 60 (2), 265-270); see Chapter 2, part 2 (note 46).

<sup>646</sup> See, for instance, RC Palmer, 'Feudal Framework of English Law' (1981) 79 Michigan Law Rev, 1130.

<sup>647</sup> Compare Palmer's references in chapters 21 and 22 (Palmer, *Black Death* (49)) to SFC Milsom's hypotheses in *Studies in the History of the Common Law* (Cornwall 1985); *HFCL* (37); *The Legal Framework of English Feudalism* (CUP 1977); and JH Baker & SFC Milsom, *Sources of English Legal History* (Butterworths 1986).

time disputably lacks forethought. In essence Palmer raises issues about the dating of Case<sup>648</sup> and, at the same time, refutes Milsom's contentions that there was a fictitious use of forms (including trespass *vi et armis* and incitement<sup>649</sup>) which importantly, in relation to this discourse, masked the nascent evolution of civil liability.<sup>650</sup> With Milsom's refusal to accept that Case predated 1367 came the isolation of significant elements concerning the evolution of certain liabilities; all of which have connotations to modern liability in tort.

Palmer's historical analysis of Trespass on the Case describes a diverse collection of remedies that imposed civil liability. Some liabilities preceded the Black Death but the post plague social demographics forced social policy to establish new liabilities that were essentially harsh impositions - through the law - to coerce people to act responsibly and to perform general ethical and occupational obligations with competence.<sup>651</sup> Royal mandate given to the chancellor to deal with problems in the common law exemplified by the Black Death ensured chancery increasingly issued writs for new situations; Palmer averred to the impressive diversity of situations where chancery, in a ministerial function, provided remedies in the face of crisis.<sup>652</sup> The Black Death thus played a pivotal role in legal innovation that was purposive, in the sense of maintaining civilised society in the wake of 'demographic catastrophe'.<sup>653</sup> What needs to be understood is the most efficient way to tackle the crisis was through central government; in that respect the Chancery was the most equipped governmental agency to retain traditional social order. The sheer diversity of remedies that chancery handled is evidence that it was involved with the problems of society holistically thus it was unlikely that, as Milsom contends, legal change was generated by juridical thought. Throughout this process of legal change civil liability was being structured.

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<sup>648</sup> For a comprehensive account regarding the dating of Case see Palmer (ibid) Chapters 22-25 and Appendixes 22-24.

<sup>649</sup> Palmer, *Black Death* ibid 221 and 230.

<sup>650</sup> Milsom, *SHCL* (57) 27-8.

<sup>651</sup> Palmer, *Black Death* (50) 217.

<sup>652</sup> ibid 282.

<sup>653</sup> ibid 294.



It should not be a surprise, in the absence of negligence, that most liabilities during the development of case writs veered more in accord with a stricter form of liability. Occupation-based liability was often considerably ‘harsh’, for instance, innkeepers’ liability was strict<sup>654</sup> whilst liability in *scienter* writs was also stringent as knowingly keeping vicious dogs ‘was sufficient for damage they *might* do’.<sup>655</sup> The development of negligence was merely an adjunct of the development of actions on the case where varying levels of liability existed for different activities. The early emergence of case writs during the fourteenth and fifteenth-centuries can be described as the arena where varying categories of liability developed; it was from those forms of liability (often based on negligent acts) that the language of negligence developed. Whilst the early sixteenth-century has been described as the ‘Renaissance of the Common law’<sup>656</sup> that later apparent willingness for juridical experimentation with Case - that eventually saw the emergence of a tort of negligence – was, as professed by Palmer, disputably prompted by a deliberate social policy that forced legal innovation after the Black Death.<sup>657</sup>

The new liability, this time not based on any occupation, provided by the *scienter* writ in 1358 is an example of this in practice. According to Palmer *scienter* liability was imposed after the Black Death to ‘coerce people to accept responsibility and thus preserve society’.<sup>658</sup> Initially the writ was provided by Chancery to increase the liability bestowed on those who kept vicious dogs, thus imparted further liability on dog owners for unintentional damage. The nature of *scienter* liability accordingly reflected the broader social concern after the Black Death that citizens should be compelled to ‘abide by their ethical obligations’ whilst

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<sup>654</sup> *ibid* 254-7. *Navenby v Lassels and Staunford* (1368) Record KB 27/428, m 73 and 42 Lib Ass, pl 17; in GO Sayles, *Select Cases in the Court of the King’s Bench* (vol. iv) *Edward III* (Selden Society 1965) vol 82, 152; and Baker & Milsom *SELH* (57) 552-4.

<sup>655</sup> Palmer *ibid* 240. Emphasis added. This foreshadows, often without acknowledgement, the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 (see Chapter 3).

<sup>656</sup> DA Ibbetson (30) 95.

<sup>657</sup> Palmer, *Black Death* (50) 217.

<sup>658</sup> *ibid* 228.

embodying the fact that inadvertent damage should not be permitted without redress; damage that could be foreseen was sufficient to determine liability.<sup>659</sup> *Scienter* was thus an independent liability established in chancery - in accordance with government policy - that addressed a general social problem (initially vicious dogs); in that sense chancery were acting to 'reinforce a social responsibility'.<sup>660</sup>

Seemingly it is 'somewhat defective' to assert that Case was 'a miscellaneous category of remedial wrongs';<sup>661</sup> any such miscellany was restricted to cases of 'indirect and inconsequential injury' where chancery made rational decisions to apportion liability into particular writs on a case to case basis.<sup>662</sup> Ostensibly the different classifications of case writs were not logically related to one another but the need to create liability to tackle perceived problems to ensure social stability provided a corporate purpose that underpinned legal change. Where before remedy was otherwise unavailable liability was created to either coerce competent performance of an occupation, to get people to stand by their obligations or as a response to considerations of justice that were only plausibly remediable without allegations of force and arms.

The distinct 'lack of conceptual unity' is further evidence that Case, at least initially, was a consequence of social policy rather than a matter of conceptual advance. This, of course, adds substance to the notion nuisance law's protean nature (its essence) continued throughout the evolution of Case according to societal needs – its doctrines, therefore, were a product of such needs. In the process of reacting to social problems, chancery introduced new writs that

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<sup>659</sup> *ibid* 228 and 250.

<sup>660</sup> *ibid* 228-9; see also 239. Liability for keeping dogs was apportioned into several succinct liabilities. For instance *scienter* liability was imposed on those owners whose dogs caused damage without participation, when dogs were known to be vicious but the owner kept them regardless. Of course there could be deliberate attacks using dogs; in cases where owners set dogs on another or another's animals they were liable for incitement liability *vi et armis*.

<sup>661</sup> *ibid* 217.

<sup>662</sup> *ibid* 268-71.

provided remedies for those specific areas of concern.<sup>663</sup> Chancery was proactively plugging gaps in those problem areas. Occupation-based liability often could have easily fitted Trespass *vi et armis*, for example, farriers could injure a plaintiff's property forcibly and directly when shoeing a horse. At the same time an informal contractual relationship would have been established to comfortably fit *assumpsit* when the plaintiff entrusted the farrier with his horse. The case of the farrier therefore provides another example of how new liabilities were created by chancery to deal with identifiable social concerns.

Chancery and the courts actively strove towards getting the form of the writ right in order for it to embody a defensible foundation for liability.<sup>664</sup> These strides to find the correct formulation of writs were certainly evident in the development of liability for farriers. At one point chancery ceased issuing writs for six years after experimenting with various formulations that were inappropriate. It was a matter of coercing farriers to assume liability for careless work where, before 1352, their occupation had been shielded from civil liability and furthermore competition would have seemingly ensured competent workmanship in a much larger population.<sup>665</sup> Initially liability of this sort was considered indistinguishable from Trespass *vi et armis*; clearly an injury caused by a nail being driven into a horse's hoof was done forcibly and the injury a direct consequence of substandard work. In the end the case writ was adopted instead of *vi et armis* or *assumpsit* thus legal thought gave way to legal change dictated by the social policy that instigated the need for farriers to be reliable following the mass depletion of the population from the plague.<sup>666</sup>

Outside relationships concerning occupation, classes were formulated in Case because liability was neither based on a relationship nor fitted the mould of *vi et armis* formulations.

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<sup>663</sup> *ibid* 218.

<sup>664</sup> *ibid*.

<sup>665</sup> *ibid* 219.

<sup>666</sup> *ibid*, for a detailed explanation see 219-27.

Palmer describes numerous miscellaneous case writs and offers a degree of caution regarding the ‘nineteenth-century notion’ that associated Case with damages from harm inflicted indirectly or consequentially. Although it is a good generalisation, that ‘test’ could not predict whether a particular situation would fall under the umbrella of Case or Trespass *vi et armis*. This is highlighted by the struggle to find a precise formulation of the immediate/consequential test over the centuries that lead to the decision in *Scott v Shepherd*<sup>667</sup> in 1773, where it was held the Trespass was the appropriate action for immediate rather than consequential injuries.<sup>668</sup> There were certainly identifiable classes of special writs on the case but at no point was there a ‘general distribution of actions’ amongst those classes that produced ‘categories of action with logical precision’.<sup>669</sup>

However, all case writs had a common denominator in that they were implausible within the formulation of *vi et armis* writs, perhaps, prompting the strict separation of the actions and resistance to any overlapping of Trespass and Case for centuries to come.<sup>670</sup> This deliberate separation of Trespass and Case is an illustration of social and legal evolution preventing cross-infection of doctrines between actions. Nuisance and negligence actions often have common denominators, but that is not a juridical justification to distort the doctrines of nuisance owing to the rise of well-ordered (modern) negligence principles. The predecessors of modern judges demonstrably avoided such activities to prevent changing the law.

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<sup>667</sup> (1773) 2 W Black 892; 3 Wils. KB 403.

<sup>668</sup> See Generally MJ Pritchard (37). This judicial reasoning culminated in Lord Kenyon CJ insisting on a rigid application of the test finding it was ‘perfectly clear’ in situations of personal liability where injuries were caused by the immediate act that trespass was the correct action (See *Day v Edwards* (1794) 5 TR 648 and *Savignac v Roome* (1794) 6 TR 125). The test in *Scott v Shepherd* was never formally rejected and until the old common law rules of joinder were abolished by the Common Law Procedure Act in 1852 (15 and 16 Vic, c 76, s 42). Until then trespass remained the ‘proper’ remedy for an immediate injury. However in *Williams v Holland* (1833) it was stated that ‘Where injury is occasioned by the carelessness and negligence of the Defendant, the Plaintiff is at liberty to bring an action on the case, notwithstanding the act be immediate, so long as it is not a wilful act’ ((1833) 10 Bingham 112, 112).

<sup>669</sup> *ibid* 218.

<sup>670</sup> See Ibbetson (30) 96. In 1725 Chief Justice Raymond stated: ‘we must keep up the boundaries of actions otherwise we shall introduce the utmost confusion’ (*Reynolds v Clarke* (1725) 1 Strange 634, 635). The old common law rules of joinder were abolished by the Common Law Procedure Act 1852 (s 41) which gave Trespass as an action for negligently causing damage a ‘further, unintended, lease of life (Pritchard (38) 21).

## Reasonable User Scrutinised

### a) The Development of the Test

The principle of ‘reasonable user’ has early modern origins when it came to the fore to deal with the need to bring equilibrium to an urbanising and industrialising society. Indeed James Oldham noted that Lord Mansfield’s approach to nuisance during the eighteenth-century was to assess circumstances using a ‘rule of reasonableness’ in order for him to take into account the implications of increasing urbanisation and industrialisation. At a time that generally restated and stabilised principles forged in the sixteenth and seventeenth-century the increasingly changing physical landscape and social milieu could not be ignored, which implies an element of environmental control was intrinsic to nuisance actions during those centuries.<sup>671</sup>

Lord Mansfield’s trial notes provide examples that arbitration and settlement were actively encouraged and nearly half of his cases on nuisance involved pollution that were highly contested land-use conflicts.<sup>672</sup> Of course today these conflicting land-use cases would normally be dealt with by planning law, but in those eighteenth-century cases litigants’ interests were visibly balanced on a variety of factors relevant to the circumstances of individual cases.<sup>673</sup> Although Lord Mansfield himself visibly made compromises that

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<sup>671</sup> Oldham stipulated that the eighteenth-century did not see dramatic changes in nuisance law which suggests that the body of law that had built up prior was already functioning in a zoning and planning and control capacity (ibid 248; and Oldham *Manuscripts*, 892). Nuisance law was logically central to land use and control (‘zoning’) prior to the planning laws that developed later; a primary function of nuisance law over the centuries has been to ‘regulate the manner in which men used, exploited and enjoyed’ their land before a statutory framework supplanted that role (JRL Milton, ‘The concept of Nuisance in English law: a study of the origins and historical development of the concept of nuisance law from its earliest beginnings to the end of the nineteenth-century’ (1978) unpublished thesis available from the University of Natal, South Africa, 417).

<sup>672</sup> For a selection of examples see Oldham, *GECL* (5).

<sup>673</sup> Oldham, *GECL* ibid 882 and 886-7. For a general outline on issues concerning planning law and nuisance that are relevant to this thesis see P Bishop and V Jenkins, ‘Planning and Nuisance: Revisiting the Balance of Public and Private Interests’ (2011) 23(2) *JEL* 285; D Heap ‘New Developments in British Land Planning Law – 1954 and After’ (1955) 20(3) *Urban Planning and Housing* 493; JD Ford, ‘Planning A Nuisance’ (1993) 52(1) *CLJ* 15; N Williams, *The structure of urban zoning and its dynamics in urban planning and development* (Buttenheim 1966); CM Haar and MA Wolf, *Land Use Planning and the Environment: A Casebook* (Island Press 2010).

increasingly struck the balance in favour of industrialists,<sup>674</sup> the reciprocal nature of proprietary interests in the sense of the ‘rule of reasonableness’ was clearly taking shape from a status quo of cooperation and concession between neighbours.<sup>675</sup>

Despite only fully emerging during the eighteenth-century, this vital account of reciprocity that frequently asks the courts to balance reasonableness of user against the unreasonableness of interference to plaintiffs, in fact, has much more ancient origins. As discussed by Winfield, it emulates Bracton whereby he spoke of the ‘natural right’ (of seisin) for man to use his land in a manner he wanted but,<sup>676</sup> on the other hand, man was forbidden ‘to do on his land what may harm his neighbour’.<sup>677</sup> This notion later developed into a ‘rule of reason’<sup>678</sup> commonly known by the Latin maxim *sic utere tuo ut alienum non laedas* (so use your land that you do not injure that of another). The ancient, sometimes ill-reputed,<sup>679</sup> but not entirely redundant maxim is a presumptive rule that implies everyone is obligated to use their own property in such a manner as not to injure the property of his neighbour.<sup>680</sup>

Ibbetson refers to the maxim as conveying a ‘duty’ that could be breached but was nonetheless ‘singularly unhelpful’ as a positive test for the scope of liability owing to its wide, undefined ambit.<sup>681</sup> The *sic utere tuo* doctrine undoubtedly leaves unanswered the question of when does an interference become unlawful. In a manner that still makes the

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<sup>674</sup> *ibid*; see also E Cockayne, *Hubbub: Filth, Noise & Stench in England 1600-1770* (Yale University Press 2007) 244.

<sup>675</sup> J Oldham, *English Common Law in the Age of Mansfield* (University of North Carolina Press 2004), 248; and J Oldham, *The Mansfield Manuscripts and the Growth of the English Common Law in the Eighteenth Century* (University of North Carolina Press 1992) 882.

<sup>676</sup> PH Winfield, ‘Nuisance as a Tort’ (1931) CLJ 189, 189.

<sup>677</sup> Bracton, f.232; see Fifoot (30) 8 and 19; Winfield, *ibid*, 189; and *Aldred’s Case* (1610) 6 Co Rep 57b, 59 and *Hales’s Case* (1569); for an account of *Hales’s Case* see Baker & Milsom, *SELH* (57) 592-597. See Ibbetson (30) 106.

<sup>678</sup> *Aldred’s Case* *ibid*.

<sup>679</sup> Erle J portrayed the maxim as ‘an ancient and solemn imposter’ (*Bonomi v Backhouse* (1858) EB & E 622, [643]). In *Winfield and Jolowicz* (18) it was stated that the *sic utere tuo* maxim is unhelpful and misleading, 713.

<sup>680</sup> Winfield (86) 198. In the nineteenth-century in an early form of negligence case Tindal CJ extended this early maxim to express that liability is incurred by the ‘consequences of [one’s] own neglect’ and Vaughan J further imposed a duty on neighbours to deal ‘with his own property as not to injure the property of others’ (*Vaughan v Menlove* (1837) 3 Bing NC 468, 474 and 477); it must be noted that nuisance was not mentioned in this case (see Gearty, 220-1).

<sup>681</sup> Ibbetson (30)106.

ancient doctrine relevant to a modern law of nuisance WVH Rogers answers that question.

He states:

The law repeatedly recognises that a man may use his own land so as to injure another without committing a nuisance. It is only if such use becomes unreasonable that it becomes unlawful.<sup>682</sup>

The natural right of seisin - heralded by Bracton - that a man can do what he likes on his own land provided he does not harm his neighbour's land is thus upheld in the modern setting and qualified by the 'reasonable user test'.<sup>683</sup>

Bracton suggests that landholders were initially under an obligation not to harm their neighbour's property. However, that obligation was not a contractual obligation or notional duty, the type that would impose absolute liability. It was instead akin to a 'duty in fact' where in any particular case the defendant ought to have avoided injury to the plaintiff;<sup>684</sup> as nuisance evolved it transpired that plaintiffs could guard against activities that were potentially harmful by seeking an injunction, thus seemingly the ancient obligation had been reinforced.<sup>685</sup> Private nuisance was designed to and hence has a long tradition of preventing interferences with a plaintiff's rights over land – a tradition that has been bolstered by the evolution of injunctions discussed in the next chapter.<sup>686</sup> Ultimately Bracton's Treatise depicts that from a very early stage liability was measured by balancing conflicting interests

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<sup>682</sup> Rogers (18) 713.

<sup>683</sup> Compare Daniel Coquillette who makes the case that the *sic utere tuo* doctrine was adopted by Coke CJ in *Aldred's Case* to balance social utilities against proprietary interests. In Coquillette's opinion the doctrine was utilised unhindered for two-and-a-half centuries to prevent social utility being used as a defence to a nuisance action (Coquillette (8) 775, 781 and 782 (see generally 772-785)).

<sup>684</sup> See R J Buxton, 'The Negligent Nuisance' (1966) 8 Malaya LR 1, 17 (including note 14); see also W Buckland, 'The Duty to Take Care' (1935) 51 LQR 637.

<sup>685</sup> Winfield asserted that plaintiffs needed to show they had been 'injured by the defendants' ((86) 198) but, as will be seen in Chapter 5, there are occasions where anticipated injury can be such that an injunction can be sought without prior injury (see *quia timet* actions). Generally the law is prepared to 'grant an injunction to inhibit the state of affairs which is thought likely to result in the future' if harm is allowed to continue, hence the tort prevents 'potential' nuisances (RJ Buxton, *ibid*, who cites WA Seavey, 'Nuisance: Contributory Negligence and Other Mysteries' (1952) 65 Harvard Law Review 984, 985).

<sup>686</sup> RJ Buxton (93) 2; see Windeyer J's judgment in *Hargrave v Goldman* (1963) 37 ALJR 277.

between neighbours - the doctrine of reasonable user was a natural, albeit later, consequence to ascertain the outcome of a judicial inquiry in nuisance actions.

Whereas the origins of nuisance suggest an obligation exists not to use your property in a manner that injures one's neighbours that obligation does not confer a duty of care rather, as we have seen, a state of balancing conflicting interests - the issue is protecting the right of quiet enjoyment of one's property, not imposing a duty of care. With that in mind, where Williams and Hepple contend that 'people are under a duty of care not to be noisy',<sup>687</sup> that would be a mistake of analysis. In reality such a duty would be 'unworkable'<sup>688</sup> in practice because everyone living in close proximity of one's neighbours would be minded to constantly keep quiet for fear of breaching a duty of care; palpably this would diminish the amenity value of millions of properties.<sup>689</sup>

Lord Wright's 1940 assessment of the boundaries of nuisance in *Sedleigh-Denfield v O'Callaghan* restates that a reciprocal relationship between neighbours exists. He specified that '[a] balance has to be maintained between the right of the occupier to do what he likes with his own [property], and the right of his neighbour not to be interfered with'.<sup>690</sup> Reciprocity between neighbours has been visibly constant throughout the history of the action thus its importance to nuisance at a fundamental level cannot be understated. Winfield and Jolowicz go as far as to state: 'In fact the whole of the law of private nuisance represents an

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<sup>687</sup> G Williams & BA Hepple, *Foundations on the Law of Tort* (Butterworths 1984) 124.

<sup>688</sup> Rogers (18) 714.

<sup>689</sup> Rogers states (ibid 715-6): 'Some intrusion by noise (or smells or dust, etc.) is the inevitable price of living in an organised society in proximity to one's neighbour, indeed: "[T]he very nuisance the one complains of, as the ordinary use of his neighbour's land, he himself will create in ordinary use of his own and the reciprocal nuisances are of a comparatively trifling character"' (*Bamford* (7) 83 per Bramwell B; see also *Kennaway v Thompson* [1981] QB 88, 94).

<sup>690</sup> *Sedleigh-Denfield* (10) 903.



attempt to preserve a balance between two conflicting interests, that of one occupier in using his land as he thinks fit, and that of his neighbour in the quiet enjoyment of his land'.<sup>691</sup>

Good neighbourliness and keeping the peace are seemingly intimate elements of modern nuisance under the umbrella of reasonableness in its own terms: balancing conflicting interests in land is supposed to be the measure of those terms. The standard of reasonableness is a judicially controlled measure the application of which continually shifts with changing societal needs and legal nuances. Oldham recognised this inherent trait within nuisance in the eighteenth and nineteenth-centuries:

The standard of reasonableness is, of course, ever shifting. In Georgian and Victorian times it was held very low, in thwarting attempts to check some of the highly unpleasant industrial processes considered vital to the nation's economy.<sup>692</sup>

Maria Lee views this type of judicial discretion (applying the reasonable user test) negatively owing, perhaps, to the lack of constraints on judges for determining the measure of reasonableness; she comments, 'free rein is given to judicial value judgements at a number of stages of the inquiry'.<sup>693</sup> However the conceptual characteristic that allows the standard of reasonableness to shift enables the tort to adapt to changing societal mores and aspirations; arguably this is essential to prevent standards redolent of a different age ruling from their graves and dictating what activities are to be considered reasonable in any given generation.

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<sup>691</sup> Rogers (18) 713.

<sup>692</sup> JH Baker, *Introduction to Legal History* (Butterworths 2002) 430; Oldham, *English Common Law in the Age of Mansfield* (5) 258. Note that Baker slightly revises this statement between his 3<sup>rd</sup> and fourth editions to later include the Georgian epoch (see page 488 in his 3<sup>rd</sup> edition or alternatively the variations are quoted in Oldham's *English Law in the Age of Mansfield*, 257-8 and *The Mansfield Manuscripts* (5) 482). cf B Pontin, who claims that the landed elite used nuisance law to achieve an increasingly high level of protection of amenity, thus altering the threshold in favour of the plaintiff ('Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence' (2012) 75(6) MLR 1010).

<sup>693</sup> M Lee, 'What is Private Nuisance?' (2003) LQR 298, 298.

If interference affects a protected interest we must (generally<sup>694</sup>) inquire whether user of land is reasonable in the circumstances. Whether a right of way is blocked, or another amenity of land adversely affected, or even the physical integrity of the land diminished, traditionally in each circumstance a judicial inquiry was instigated to balance conflicting uses of land. The question is whether Bramwell B's rule of 'give and take, live and let live' is to be understood in the sense of 'reciprocity' of interests (the balancing of two residential users' interests) or balancing conflicting interests in the context of an interest in private property use against an interest in industrialisation or urbanisation.<sup>695</sup> According to James Penner, Bramwell B's words invoke 'reciprocity' of interests but Lord Mansfield clearly used nascent reasonable user to strike a balance between the value of increasing industrial activity and urbanisation over smoke and pollution-free air.<sup>696</sup> For environmental protection purposes arguably balancing both 'reciprocity' of interests and conflicting land use are desirable depending on the circumstances of the case – we can only assume Bramwell B's true intentions but considering the timing of the *Bamford* case (during the height of Victorian industrialisation) it would be illogical to dismiss that he would have been mindful of both interpretations of competing interests.

Regardless, the doctrine of reciprocity between neighbours survives the test of time, transcending the centuries, until the twentieth-century where, as Lee identifies, the courts make the decision to focus upon 'the type of *harm* that is required in order to have an action' rather than balancing interests of the parties.<sup>697</sup> Once the focus of the enquiry included the type of harm - which the courts associate with negligence type liability - the conduct of the defendant began to attract attention and the traditional strict liability element of the tort of

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<sup>694</sup> Physical damage to land palpably changes the necessity of inquiring as to the reasonableness of the interference and user, for instance the locality doctrine does not apply in such circumstances (see *St Helens Smelting Co v Tipping* (15) 650).

<sup>695</sup> JE Penner 'Nuisance and Environmental Protection' in J Lowry and R Edmunds ed., *Environmental Protection and the Common Law* (Hart Publishing 2000), Ch. 2, 32. See also Lee (103) 313 (note 79).

<sup>696</sup> See Penner *ibid*, 31-4.

<sup>697</sup> Lee *ibid* 298.

nuisance was inevitably revisited and adulterated. Here we can see the ‘reasonable user test’ - unique to private nuisance – being obscured to consider the issue of liability. The test was not a ‘general prerequisite of liability’. Instead liability was a consequence of an unreasonable use of land that went beyond the threshold of acceptable interference with the plaintiff’s enjoyment of land.<sup>698</sup> In short the reasonable user test was an investigative process to ascertain whether interference suffered is sufficiently serious enough to give rise to an action.

Cross posited:

[T]hat to give the reasonable user test an application outside the context of determining the threshold of interference with the plaintiff’s enjoyment of her land which must be crossed before that interference will be actionable is to misread the case law and to extend unjustifiably the scope and role of the test.<sup>699</sup>

Whereas before reasonable user was a matter of actionability the modern focus that has moved away from balancing the interests of litigants has accordingly misconstrued the case law and distorted the meaning of the reasonable user test: a matter of actionability has in essence morphed into a matter of liability.<sup>700</sup> Indeed Lee argues that the ‘notion of reasonableness has now become redundant and misleading in many cases of private nuisance’.<sup>701</sup> Unquestionably the type of cases she refers to involve negligence-type scenarios; thus we must recognise that negligence principles have been assimilated into the tort, and accordingly a fault-based liability has entered the realms of strict liability. The consequences in terms of doctrinal confusion are explored below.

## **b) The role of ‘Reasonable’ in the Twentieth-Century and Beyond**

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<sup>698</sup> Cross (14) 451. See also Lee *ibid* 313.

<sup>699</sup> *ibid*.

<sup>700</sup> The manner in which Cross and Lee examine the issue of liability in light of the traditional method of ascertaining actionability using the reasonable user test explains the prior distinction between the two as it is understood here (see generally Lee *ibid*; and Cross *ibid* 451).

<sup>701</sup> Lee *ibid* 313.

Amongst claims that nuisance has lost its identity as a strict liability tort<sup>702</sup> and that the notion of reasonableness has become redundant,<sup>703</sup> the most confusing issue of the entire law of private nuisance is conceivably whether or not today liability should be construed as ‘strict’. Following high court activity in the twentieth-century that culminated in *Cambridge* some commentators feel nuisance has been ‘assimilated in all but name into the fault-based tort of negligence, or that it is in immediate danger of such assimilation’.<sup>704</sup> In his judgment in *Cambridge* Lord Goff contributed to the confusion regarding the status of liability in nuisance. He stated that liability for nuisance ‘has generally been regarded as strict’ but then comments that the *strictness* of strict liability is ‘controlled’, varying according to ‘the principle of reasonable user’.<sup>705</sup> We may argue his reference to ‘control’ was an attempt to evoke the impression that there are limits to the strictness of nuisance liability (perhaps even to soften the blow before submitting liability can also vary in strictness according to the role rendered by the foreseeability of damage<sup>706</sup>) but in reality the nature of reasonable user has changed owing to his comments. It is conceivable that his ambiguity regarding the strict nature of nuisance was to facilitate the introduction of a fault-based element into the tort but, whether or not that was the case, it can be posited that Lord Goff reassessed reasonable user and elevated it to the status of a general prerequisite of liability.<sup>707</sup>

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<sup>702</sup> Cross (13) 445; FH Newark ‘The Boundaries of Nuisance’ (1949) 65 LQR 480. See also C Gearty, ‘The Place of Private Nuisance in a Modern Law of Torts’ [1989] CLJ 214; JM Eekelaar, ‘Nuisance and Strict Liability’ (1973) 8 Ir Jur 191; PH Winfield, ‘Restatement of the Law of Torts, Volume IV’ (1940) 18 NYULR 66, 74-75; and Friedmann, ‘Incidence of Liability in Nuisance’ (1943) 59 LQR 63.

<sup>703</sup> Lee (103) 298. Negligence has arguably become the poisoned chalice of private nuisance as it has overburdened nuisance with new principles alien to its long-standing doctrines and new responsibilities that have challenged its very existence. In their section on negligence and nuisance Professors Williams and Hepple controversially suggest that nuisance is merely a branch of negligence (Williams & Hepple (97) 124 (see generally 123-127)); See comments by Lord Parker in *British Road Services v Slater* [1964] 1 WLR 498 [504]; and Gearty *ibid* 215.

<sup>704</sup> Cross (14).

<sup>705</sup> *Cambridge* (1) 299 (see generally Lord Goff’s engagement with Lord Reid’s judgment in *The Wagon Mound* (22) 299-301).

<sup>706</sup> *Cambridge* *ibid* 300-1.

<sup>707</sup> Gerry Cross concludes his article ‘Does the Polluter Pay?’ on this very point (Cross (14) 474).

By the time *Cambridge* reached the House of Lords the nuisance and negligence aspects of the original action had been dropped and liability in regards to the rule in *Rylands v Fletcher* became the focus of the appeal. It is beyond the ambit of this thesis to expound the nature of that rule; however its comparison with reasonable user has powerful ramifications. The focus upon the rule in *Rylands v Fletcher*, in a manner of speaking, switched tests from reasonable user to natural (or ordinary) use of land. Importantly, Lord Goff referred to the point that ‘reasonable user’ and ‘natural user’ had developed into ‘comparable’<sup>708</sup> principles, which explains to a certain degree why he felt it necessary to reassess reasonable user in private nuisance in a case centred on the rule under *Rylands v Fletcher*, albeit without any attempt to redefine natural user.<sup>709</sup>

Cross views a comparison between the two principles that asserts a similarity of function as a mistaken position in regards to the nature of inquiry involved in the reasonable user test and its origins and development within the law. The origins and development of the test described above undoubtedly support his contentions; it is palpable that the test developed from a historic viewpoint of balancing interests which lead to a ‘highly fact specific, contextual decision-making process’<sup>710</sup> to determine the standard of reasonableness. In contrast natural user does not ordinarily enter into such a complex investigation.<sup>711</sup> Rather it ‘simply’ examines the defendant’s conduct regarding an activity then ascertains whether the rule in *Ryland v Fletcher* should apply;<sup>712</sup> this suggests, at least from one aspect, that liability in private nuisance is stricter than under the rule in *Rylands v Fletcher* because there is some limitation concerning the user of land in nuisance.<sup>713</sup> The bottom-line being addressed by judges when ascertaining reasonable user relates to whether interference in those

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<sup>708</sup> *Cambridge* (1) 299.

<sup>709</sup> *Cambridge* *ibid* 309; see also G Cross (14) 456.

<sup>710</sup> Lee (103) 313.

<sup>711</sup> J Steele, ‘Private Law and the Environment’ (1995) 15 LS 236, 252.

<sup>712</sup> *ibid*.

<sup>713</sup> *ibid* 252. However Steele recognises that *Rylands v Fletcher* liability is in fact stricter owing to the reasonable user test not applying in situations where user is deemed ‘non-natural’ (Steele, *ibid*, 253).

circumstances has gone beyond the threshold of reasonableness and to such a degree that an action can be maintained.

The history does not support the view that the real question is whether or not one injures their neighbour.<sup>714</sup> Otherwise the investigation that has been conducted by judges to balance reciprocal interests for centuries would have been an act of wasting. As Rogers professed in *Winfield and Jolowicz on Tort* the law repeatedly recognises that we may use our property in a manner that injures our neighbours;<sup>715</sup> the question is whether the injurious activity is unreasonable and thus assesses the ‘degree of interference necessary to maintain an action’.<sup>716</sup> Gerry Cross’ reference to Melish LJ in *Ball v Ray* is pertinent to this point in discussion:

When, in a street like Green Street, the ground floor of a neighbouring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbour's house, or the noise of a neighbour's children, which are noises we must reasonably expect, and must to a considerable extent put up with.<sup>717</sup>

Extending the reasonable user test to a function beyond determining the degree of interference that people should reasonably be expected to bear in the circumstances betrays the test’s origins of finding reciprocity between neighbours. It logically follows to posit that viewing the test outside a means of determining actionability misconstrues the case law and ‘extends unjustifiably’<sup>718</sup> its long-established scope and role. Steele certainly avers to the reasonable user test being a ‘central element of establishing actionability’ but what is important to understand is that the notion of reasonableness in nuisance is about a two-way

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<sup>714</sup> *Reinhardt v Mentasti* (1889) 42 Ch D 685 [690] (Kekewich J). See Cross (13) 451; see also the majority decision in *Bamford (7)*; *Scott v Firth* (1864) 4 F & F 349; and *Broder v Saillard* (1876) 2 Ch D 692, 701.

<sup>715</sup> Rogers (18) 713.

<sup>716</sup> G Cross (14) 450.

<sup>717</sup> (1872-73) LR 8 Ch 467-471. Cross *ibid* 451. See also *Sanders-Clark v Grosvenor Mansions Co Ltd* [1900] 2 Ch 373, 375-6 (Buckley J).

<sup>718</sup> Cross *ibid*.

relationship where different land uses can be determined as interfering with the other; in contradiction the ‘one-way model of causation’ is an objective test of liability.<sup>719</sup>

It is difficult to dispute that reasonable user and natural use of land have fundamental differences; in fact Lord Goff refers to the comparison that had developed as ‘striking’.<sup>720</sup> Lord Moulton comments in *Rickards v Lothian*<sup>721</sup> brought to the surface an obvious difference, he held:

It is not every use to which land is put that brings into play that principle [non-natural user]. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

The difference between reasonable user and natural use is thus one of reciprocity of interests over hazardousness of activity. It is therefore not surprising that Lord Goff considered the comparison at the very least marked. Interpreting his judgment suggests any ‘similarity of function’ should be viewed narrowly and only tentatively extended beyond the fact that an action can be maintained either ‘notwithstanding that he has *exercised all reasonable care and skill* to prevent the escape from occurring’<sup>722</sup> or ‘even though he may have *used reasonable care and skill* to avoid it’.<sup>723</sup> The imposition of liability can then be conveyed by the courts, strictly one may argue, once unreasonable user or unreasonable use has been established, unless – of course – following *Cambridge* the harm is unforeseeable. That contention is strengthened by Lord Goff’s later discussion on the matter of non-natural use of

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<sup>719</sup> Steele (123) 251-2.

<sup>720</sup> *Cambridge* (1) 299.

<sup>721</sup> *Rickards v. Lothian* [1913] AC 263, 280.

<sup>722</sup> *Cambridge* (1), 299.

<sup>723</sup> *Cambridge* ibid 300.

land in which he was emphatic that the concept of natural use should be controlled by the principle of foreseeability.<sup>724</sup>

Apportioning nuisance liability has reputedly not been straightforward owing to the multifarious nature of ‘reasonable user’ and the ‘complex balancing exercise’<sup>725</sup> it demands. But any measure of clarity that may have been intended was not forthcoming from the leading judgments of last century: certainly, since the Privy Council first believed negligence was a relevant consideration in the context of nuisance liability in *The Wagon Mound (No 2)*.<sup>726</sup> From the *Wagon Mound* began a slow induction of negligent conduct as a factor of fault-based liability (foreseeability) into the doctrine of reasonable user (and subsequently the entire realm of nuisance law), but without a convincing explanation vis-à-vis why in certain situations ‘negligence plays no part’ but in others it has a ‘decisive’ role.<sup>727</sup> Indeed, following *Cambridge Water*, there is no longer a purely strict liability to private nuisance. That judgment is indicative that all injury, whether to amenity or to physical property, is now subject to the conduct requirement of reasonable foreseeability.

#### **4. The legacy of Lord Westbury’s Physical Damage Construct**

In the seminal case of *St Helen’s v Tipping* the House of Lords ‘drew the line’<sup>728</sup> on industrial pollution that caused physical damage to land. On the face of things that line was drawn to protect merely the interests of the landed gentry and rural England from pollution but in practice the implication of the *Tipping* ruling put physical damage to land on a pedestal above amenity damages. Lord Westbury’s account is generally understood to divide nuisances that amount to physical damage of land from amenity nuisances; Murphy agrees

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<sup>724</sup> In order to prevent activities where chemicals are used on premises for industrial purposes being extended to be considered a natural or ordinary use of land (under the exception) whereby such potentially environmentally harmful user would be excluded from liability (*Cambridge* *ibid* [307-8]).

<sup>725</sup> Lee (103) 300.

<sup>726</sup> *The Wagon Mound* (21).

<sup>727</sup> *Goldman* (25) 657.

<sup>728</sup> See *Hunter v Canary Wharf Ltd* [1997] AC 655, 705 (Lord Hoffmann).



emphatically that *Tipping* ‘beyond question, treated cases of physical damage as a class apart’.<sup>729</sup> In *Hunter* Lord Hoffmann read Lord Westbury’s judgment in a slightly different light stating ardently that whilst it did create a divide between physical and amenity damage, it did not produce two separate actions.<sup>730</sup> In slight contrast, according to Lord Hoffmann nuisances that are ‘productive of sensible personal discomfort’ and ones causing ‘material injury to the property’<sup>731</sup> are ‘part of a single tort causing injury to land’.<sup>732</sup> Here Lord Hoffmann is ostensibly recognising that whilst they are both actionable heads under private nuisance, they remain different *categories* of interference.

Irrespective of those slight differences of interpretation the consensus is that physical damage carries a much higher standard of liability than amenity damage. Lord Westbury makes it clear that the doctrine of locality, so pivotal to the reasonable user test, does not apply in cases of physical damage but interpretations of his speech advocate physical damage is exempt from much more than merely assessing the character of the neighbourhood.<sup>733</sup> Jenny Steele professed in light of the ‘accepted interpretation’ of *Tipping*, the application of ‘reasonable user’ in its entirety only applies to nuisances that fall short of physical damage.<sup>734</sup> Palpably interferences causing physical damage to land go beyond the threshold of what is reasonable in any circumstances; as such it would appear futile to engage in the balancing exercise traditional to the reasonable user test. Furlong CJ’s evaluation in the Newfoundland Supreme Court case of *Kent v Dominion Steel and Coal* sums up this perception:

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<sup>729</sup> Murphy (4) 63; P Cane, ‘Justice and Justifications for Tort Liability’ (1982) 2 OJLS 30, 55.

<sup>730</sup> *Hunter* (138) 705-8.

<sup>731</sup> *Tipping* (15) 650 (Lord Westbury).

<sup>732</sup> *Hunter* (138) 707.

<sup>733</sup> *Halsey v Esso Petroleum Limited* affirmed the ‘character of the neighbourhood [was] not a matter to be taken into consideration’ where physical damage to property is caused ([1961] 1 WLR 683, 691).

<sup>734</sup> Steele (24) 609-10; Steele (123) 252; see also Ogus and Richardson, ‘Economics and the Environment: A Study in Private Nuisance’ (1977) 36 CLJ 284, 297 but compare the same article at 299; P Cane (139) 55-6.

[I]t is fair to say that any material injury to property is a nuisance without reference to the circumstances; without enquiry as to the character of the activities carried out, or the neighbourhood or the reasonableness of use and so on.<sup>735</sup>

Seemingly nuisances that cause physical damage to land were bequeathed, one could say, a higher status than amenity damage:<sup>736</sup> almost certainly ‘material injury to property’ was distinguished from personal discomfort to stop activities being carried on with impunity to the destruction of neighbouring property.<sup>737</sup>

It can be posited that the significance of Lord Westbury’s judgment is often viewed in all too narrow a manner, even possibly understated. In light of the remarkable fact that the House of Lords decided not to cite or discuss earlier cases in nuisance law it should be taken into consideration that his Lordship intended to put extra impetus on protecting the physical integrity of land over its use and enjoyment (and any related comfort or convenience). Arguably, in holding that in cases of physical damage to land - in an accepted tort to land – that the reasonable user test is immaterial he was in effect maintaining the traditional stricter liability associated with the tort, conceivably in order to put an emphasis on safeguarding the physical entity over any amenity value. This concept feasibly links to the Cresswell Cresswell theory of nuisance which separated the ‘appreciable’<sup>738</sup> diminution of ‘comfort and value of the property’ from ‘comfort of existence on the property’ that, in line with physical damage to property, places personal physical integrity above amenity value.<sup>739</sup> Arguably it is

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<sup>735</sup> *Kent v Dominion Steel & Coal Corp* (1964) 49 DLR 241, 248.

<sup>736</sup> Murphy has argued that the ‘physical integrity of property is that the protection of property per se tends to enjoy a higher position within the hierarchy of protected interests...than the amenity value of that property (see Murphy (4) 42 (para 2.23); J Murphy ‘Rethinking Injunctions in Tort Law’ (2007) OJLS 509; see also P Cane, *The Autonomy of Tort Law* (Hart Publishing, 1997), 90; and BS Markesinis, ‘Policy Factors and the Law of Tort’ in D Mendes da Costa (ed), *The Cambridge Lectures* (Butterworths 1981).

<sup>737</sup> *Tipping* (15) 650-2 (Lord Westbury). In *Simpson v Savage* it was stated ‘the injury [in the circumstances of that case]...must be to the property, and not to the personal comfort of those residing there: smoke and noises, therefore, differ materially’ ((1856) 140 ER 143, 148).

<sup>738</sup> AWB Simpson, ‘Victorian Judges and the Problem of Social Cost: *Tipping v St Helen’s Smelting Company* (1865)’ in his *Leading Cases in the Common Law* (OUP 2001) 187. See also Chapter 3.

<sup>739</sup> Sir Frederick Pollock, *The Law of Torts a Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law* (Stevens and Sons 1895).

logical that any unlawful interference severe enough to cause ‘material damage’ to land (or the person) would, as a consequence of its severity, extend to any consequential injury concerning the use and enjoyment of land. In that sense, once physical damage to land has been established, liability should be imposed without reference to reasonable user for resultant interference.

The idea that physical damage is to be treated differently (more strictly) than ‘ordinary’ nuisance scenarios (involving impaired amenity) has opened up the theoretical possibility which is explored in more recent literature of it being treated so differently as to fall outside of the nuisance paradigm altogether. Conor Gearty provided a thought-provoking analysis of the role of physical damage in private nuisance in his seminal article ‘The Place of Private Nuisance in a Modern Law of Torts’. He came to the conclusion - in the midst of highlighting the tort’s potency in environmental protection - that cases involving physical damage should be removed from the scope of private nuisance and ‘returned to their proper home’ (in negligence).<sup>740</sup> A justification for that conclusion relies on the premise that redress for physical damage to land originated in the tort of negligence. That analysis is *not* supported by the present one. When Lord Westbury in *Tipping* held that physical damage was actionable on the basis of strict liability, negligence as Gearty understands it did not exist. *Tipping* did not ‘take’ anything from negligence; it ‘simply’ created a bi-focal liability rule for private nuisance, in which physical damage to property was elevated to the status of being intrinsically wrong (and unlawful). It must also be recognised that the potency of private nuisance as environmental tort would be dramatically diluted if the tort did not protect the integrity of land. Maria Lee’s article ‘What is Private Nuisance’ is evocative in that it

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<sup>740</sup> Winfield ‘The History of Negligence in the Law of Torts’ (39) 218.

advocates it is ‘nonsense’ to suggest private nuisance does not cover liability for physical damage, particularly as that type of harm attracts so much analysis.<sup>741</sup>

The idea of all physical damage being intrinsically unlawful encountered problems of a different character concerning the justice and fairness of holding a proprietor strictly liable for injury occasioned by Acts of God or third parties. That is the *Sedleigh-Denfield* scenario alluded to at the outset. It is regrettable that Lord Wilberforce, in addressing this scenario, did not engage explicitly with *Tipping* and rule in the clearest terms that the court was introducing a modification to Lord Westbury’s dictum in relation to a limited category of cases where physical damage to a neighbouring property would not justly attract strict liability. Nonetheless, it is clear enough that this case is exceptional for the plaintiff’s lack of personal responsibility in creating the nuisance, ‘[T]he 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’.<sup>742</sup> If *Tipping* were applied without modification, the defendant would have been strictly liable for damage (caused by flooding) notwithstanding that the problem arose from careless infrastructure repairs which resulted from local authority contractors (as trespassers). That is not what the court in *Sedleigh* decided; it was that injustice which Lord Wilberforce sought to avoid.

In relation to physical damage it drew a distinction between the creation of a nuisance by the defendant and the continuation or adoption of a nuisance created by a third party or natural event.<sup>743</sup> To be liable for a continuation of a nuisance started by a third party the defendant would have to have knowledge of the risk. That, in turn, involves reasonable foreseeability and the language of negligence associated with that, as made explicit by the statement of

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<sup>741</sup> Lee (103) 303.

<sup>742</sup> *Goldman* (25) 623; see also *Smith v Littlewoods* [1987] AC 241, 269.

<sup>743</sup> J Murphy, *Street on Torts* (OUP 2005) 727.

Lord Wright that a defendant's liability extends to a case where 'with knowledge he leaves the nuisance on his land'.<sup>744</sup>

We cannot infer from his judgment that liability between the torts is interchangeable in the sense that there is now a generalised rule of reasonable foreseeability which applies to all actionable nuisance (and all negligence).<sup>745</sup> Lord Wilberforce's observation in *Goldman* that '[nuisance] may comprise a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive'<sup>746</sup> cannot support Lord Goff's dictum in *Cambridge Water*. There is no evidence that the court in *Sedleigh-Denfield* sought to overrule *Tipping* and its strict liability approach to physical damage, which is the effect of *Cambridge*. On the contrary, as *Tipping* is not overruled by *Cambridge*, it is arguable that Lord Goff's opinion on reasonable foreseeability is pure obiter and should not be followed in future.

We are not primarily interested in the further issue of how the 'exceptional' cases of third party intervention should be compartmentalised within the wider tort family. The crucial point is that they are an exception to the rule in *Tipping* and should not be generalised to produce the fault-based approach to all of nuisance that Lord Goff sought; yet, it is worth mentioning the possibility of taking third party 'nuisance' cases out of nuisance and housing them within negligence. For example, by comparing *Goldman v Hargrave* and *Smith v Littlewoods*<sup>747</sup> it is not clear what is gained by treating them as one tort or the other. Whereas the case of *Goldman* is considered to be a nuisance case (the 'headnote' on 'Westlaw' is itself noteworthy as 'nuisance' is not mentioned<sup>748</sup>) Lord Wilberforce could not have been any

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<sup>744</sup> n (16) 905.

<sup>745</sup> '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... the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances' (as per Lord Wilberforce in *Goldman* (25) 663; quoted in *Smith* (152) 269).

<sup>746</sup> *Goldman* ibid 657.

<sup>747</sup> note (153) ([1987] AC 241).

<sup>748</sup> According to Westlaw the case involves: 'negligence; an accidental fire started by lightning and its escape; the spread of fire through occupier's negligence in failing to put it out; occupiers' duty of care towards their

clearer to point out that, in his opinion, if liability existed it rested ‘upon negligence and nothing else’.<sup>749</sup> The facts of House of Lords case of *Smith v Littlewoods* were similar to *Goldman* as fire damage was at issue (but by trespassers who set fire to the defendant’s derelict property) however the claim was brought and analysed on negligence grounds. This suggests that the cases of *Sedleigh-Denfield*, *Goldman* and *Leakey* could have also have been brought in the tort of negligence instead of nuisance. Certainly *Goldman* and *Sedleigh-Denfield* were referred to in *Smith* to ascertain the ‘standard of care’ where fire is caused by ‘an outside agency’.<sup>750</sup>

An occupier of land’s duty to prevent the continuation of damage from a nuisance arises from their current and on-going position regarding the state of the property. Lord Goff’s judgment in *Cambridge Water* in effect changes that duty. In holding that the defendants were liable for the damage after the juncture when it became foreseeable (and thus became a continuing nuisance), as in *Leakey*,<sup>751</sup> his lordship is justifying any future escape merely because the nuisance was unforeseeable many years in the past. As Wilkinson pointed out in his case review of *Cambridge* it is wrong to deny liability in circumstances simply because the damage was unforeseeable in the past – no matter how recently or how far into the past.<sup>752</sup> In the interests of doctrinal integrity, it is argued that it is better to ‘give’ continuation of nuisance scenarios of this sort to negligence, in return for respect for the strict nature of liability for physical damage arising from the ruling in *Tipping*.

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neighbours; occupiers duty to remove or reduce hazards; and standard of care’. Nuisance does not feature. <https://login.westlaw.co.uk/maf/wluk/app/document?&suppsrguid=ia744d05e0000013caa8456085b1524c0&docguid=IB244ED11E42711DA8FC2A0F0355337E9&hitguid=IB244ED10E42711DA8FC2A0F0355337E9&rank=1&spos=1&epos=1&td=1&crumb-action=append&context=6&resolvein=true>

<sup>749</sup> *Goldman* (25) 657.

<sup>750</sup> *Smith* (152) 250 (Lord Griffiths) and 262 (Lord Mackay).

<sup>751</sup> *Cambridge* (1) 307 (Lord Goff).

<sup>752</sup> D Wilkinson, ‘*Cambridge Water Company v Eastern County Leather Plc*: Diluting Liability for Continuing Escapes’ (1994) 57 MLR 799, 807.

Applied to *Cambridge Water*, that ruling creates problems for the outcome of this case. The defendant leather tannery did not initially know that chemicals were leaking into the ground and passing, through groundwater, into the neighbouring land of the claimant, and contaminating the claimant's underground aquifer. But as the damage is capable of being understood as 'physical', lack of knowledge or reasonable foresight is on the authority of *Tipping* irrelevant. Lord Goff suggested that it would be inequitable for the defendant to be strictly liable, but that is not self-evident. Besides, the strict liability aspect of *Tipping* is the case's ratio and it is binding on the court. The result that Lord Goff sought to achieve in *Cambridge* required invoking of the relevant practice direction determining when and how House of Lords judgments are to be overruled. There is no reason why *Tipping* should be overruled, such that the law should be more generous to the 'faultless' defendant today than it was during the industrial revolution.<sup>753</sup>

### 3. Conclusions

Prior to the decision in *Cambridge* two common factors stood out in the category of cases where the assimilation of the language of negligence into nuisance developed: first, each case involved damage which had not been caused by the defendant ('external agent' cases) and, second, that damage was of a physical character. There have not in the author's knowledge, prior to *Cambridge*, been any cases where 'amenity' nuisance was treated as actionable on negligence principles. This is not to deny that nuisance was subject to the language of reasonableness, but that had a special meaning in a nuisance context (that is historically different to its meaning in the context of negligence). That is to say, in the context of amenity nuisance reasonableness is relevant to the injury. And if *Tipping* is followed, reasonableness plays no part at all in the actionability of physical damage. The decision in *Cambridge*

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<sup>753</sup> Lord Wright stated, suggesting those defendants who create all (not just physical) damage are strictly liable: 'If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise' (*Sedleigh-Denfield* (10) 904).

changes this, if indeed it is rightly decided. Liability for physical damage is now debatably no longer strict but based on fault. Liability for amenity nuisance is now based on *two* aspects of reasonableness, one traditional to nuisance, the other imported from negligence: confusion is lingering.

It may be objected that this is a largely academic concern. Does it matter how the *Sedleigh-Denfield* scenario is classified within the tort family? The answer to this is that doctrinal boundaries matter. Negligence has grown up to deal with a modern risk society of great complexity, where potentially injurious activities are to be encouraged so long as they are approached with care. If the only justification for labelling external agent type actions as nuisance is the subjective nature of the enquiry regarding liability then the situation requires extra thought.<sup>754</sup> Nuisance is about safeguarding ‘permanent’ matters of land and the quality of the neighbourhood in which land is located. It is not blind to the need to accommodate industrial risks, but it does so in a different way, and to a more succinct extent than nuisance based on protecting proprietary interests (and that is why it can be understood as a ‘green tort’).<sup>755</sup> That is why *Cambridge Water* is to be considered a doubtful authority, and the third party cases are better fitted into the negligence paradigm - not nuisance - in order to avoid unwarranted doctrinal confusions.

The discernible doctrinal problems caused by the assimilation of negligence language are unacceptable considering the issue of proportionality – the handful of actions where Acts of God and the conduct of third parties have unfairly thrust liability on occupiers of land do not justify the extensive doctrinal damage inflicted on the precariously balanced ancient tort of

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<sup>754</sup> See generally Lee (103) (but particularly, 303); and Wilkinson (162) 808.

<sup>755</sup> It has been argued that the subjective enquiry is more favourable to the less opulent defendant as those defendants with strong financial resources would be open to a greater liability but remarks by Megaw LJ in *Leakey v National Trust* dispute that line of argument, he held that: ‘The extent of the defendant’s duty, and the question whether he has or has not fulfilled that duty, may, it is clear as a matter of English law, depend on the defendant’s financial resources: see the speech of Lord Reid [\[1972\] AC 877](#), 898H. I do not believe that there was any contemplation that in such a case there would be discovery of the defendant’s bank account or any detailed examination of his financial resources’ (*Leakey* [1980] QB 485, 526).



nuisance in a modern world. In view of the problematic effects – so far – of the assimilation of the language of nuisance that seeks to conform to the fashionable dominance of negligence in the post-*Donoghue* era, *Cambridge* can be viewed as a quick fix. If the language of nuisance and negligence are incompatible then problems are sure to arise which has been demonstrated above. The extension by Lord Goff in *Cambridge* of continuing nuisance actions raises further questions and demands a measure of caution regarding the case's status as 'good law'. Considering the extent of the doctrinal cross-infection caused to nuisance by negligence, arguably, the most satisfactory outcome would be to remove *Sedleigh-Denfield* type actions from nuisance and place them in negligence with the emphasis that they are exceptions to the standard of care based on the reasonable man. This would allow individual characteristics of defendant's to form part of a subjective enquiry regarding liability in nuisance.

## Chapter 5

### Injunctions

#### 1. Introduction

Following the Supreme Court's ruling in *Coventry v Lawrence*,<sup>756</sup> there is some uncertainty as to the likelihood that a perpetrator of a nuisance will be enjoined at the discretion of the court. The Supreme Court expressed criticism of the Court of Appeal decision in *Watson v Croft Promo-Sport Ltd*,<sup>757</sup> in which it was held that an application by the wrongdoer to pay damages in lieu of an injunction should only be granted in 'very exceptional circumstances', and never on the basis of the public interest (that the wrongdoer is a 'public benefactor'). It was critical of the root authority from the Court of Appeal, in the nineteenth century, of *Shelfer v City of London Electric Company*.<sup>758</sup>

Although the thesis has largely so far been concerned with who has standing, the legal definition of an actionable nuisance and who is liable, the practical reason why private nuisance is invoked by plaintiffs is as a *remedy*, and that is the focus in this final substantive chapter. In contrast to some other torts, notably negligence, the injunction is today the primary redress sought in private nuisance; it safeguards proprietary rights by prohibiting interference with them. Because of this it is rightly understood as representing the tort's 'best asset' in environmental protection, for it does not 'simply' require the wrongdoer to pay to compensate the victim for the wrong; it requires a change of behaviour to right the wrong which can have far reaching benefits for not only the victim but the wider public in the locality who benefit from the cleaner environment arising from the nuisance's abatement.

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<sup>756</sup> [2014] UKSC 13.

<sup>757</sup> [2009] EWCA Civ 15 QB; All ER (D) 197. In *Watson* the use of the racing circuit by the defendants gave rise to excessive noise and constituted a nuisance. The court weighed the interests of both parties thus the injunction did not cease activities entirely instead the conditions of the injunction reduced the frequency of events where the noise levels were at their most uncomfortable.

<sup>758</sup> [1895] 1 Ch 287, 322-3.

However, as is discussed in this chapter, the potent functionality of injunctions has ebbed and flowed over the centuries.

The analysis begins in the fourteenth-century when societal mores were diluting the last bastions of feudalism and driving legal change. During this period of upheaval, nascent injunctions first emerged as an instrument of control or coercion. For a long time thereafter, there were various difficulties surrounding the procurement of an injunction, and thus coercing the defendant into compliance with their obligations. Indeed this meant that a defendant who, on the balance of things, profited from the nuisance could simply pay to inflict continuing injury on the plaintiff's interests. This created a lacuna in nuisance law that took centuries to rectify (reducing nuisance law to what Calabresi and Melamed later describe - albeit in a different context - as a 'liability rule'<sup>759</sup>). It is explained that this problem became acute in the late eighteenth and early nineteenth century, resulting in various statutory interventions aimed at making it easier for a plaintiff to establish not only liability but an entitlement to protection (a 'property rule' on Calabresi's and Melamed's scheme). The argument is that the nineteenth century developed in a manner that an injunction became available broadly as of right, with very limited exceptions.

Moving into the more modern day, in a reverse evolutionary process, obstacles once again emerged in the twentieth century. In *Miller v Jackson*,<sup>760</sup> Lord Denning introduced a public interest dimension that departed from *Shelfer* following a vision of village green utopia that largely benefited cricket fanatics (so critics argued). In *Watson* and a little earlier in *Regan v Paul Properties Ltd*<sup>761</sup>, the approach of *Shelfer* was re-affirmed, as indeed it had been in

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<sup>759</sup> G Calabresi and AD Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85(6) Harv Law Rev 1089.

<sup>760</sup> [1977] QB 966.

<sup>761</sup> [2007] Ch 135, 44.

*Kennaway v Thompson*.<sup>762</sup> *Regan*, and to some extent *Watson*, were seen as applying very well settled principles and rules to the effect that the public interest is not a reason to grant damages in lieu of an injunction.<sup>763</sup> Lord Neuberger in *Coventry* doubted that the law ever was settled along these lines and considered it wrong to fetter the judge's discretion in this way. One Justice (Lord Sumption) advocated a presumption in favour of granting damages instead of an injunction.

## **2. The Development of Injunctions: From Equity to Common Law**

In the scheme of the protracted evolution of private nuisance law, the discretionary remedy of injunctions is ostensibly a relatively new development but their communal application across much of the common law and within equity was a long and drawn out process that spanned centuries. Chronologically the seeds of the injunction are to be found in the fourteenth-century. The Black Death had a massive impact on England's population, irrevocably changing the social structure and legal systems. The decades following the Black Death were extraordinarily productive in innovative legal activity in all aspects of the law and the institutions that supported the legal system which started with the centralisation of justice under Henry II in the twelfth-century.<sup>764</sup>

Those innovations were required to be coercive to preserve traditional society: control needed to be maintained over the 'lower orders' by coercive legal measures from within the 'upper orders'.<sup>765</sup> Land law changed decisively and part of that change saw the chancellor using newly formalised subpoenas and injunctions to coerce people to fulfil their obligations.<sup>766</sup> Thus injunctions started life as remedies that were effectively coercive measures when

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<sup>762</sup> [1981] QB 88.

<sup>763</sup> 'Shelfer is the best known case. It is a decision of the Court of Appeal. It has never been overruled and it is binding on this court' (*Regan* (6) 35, 35-7 (Mummery LJ)); see also the Chancellor of the High Court in *Watson* (2) 44.

<sup>764</sup> See generally SFC Milsom, *Historical Foundations of the Common Law* (Butterworths 1981), 11-36.

<sup>765</sup> RC Palmer, *English Law in the Age of the Black Death* (University of North Carolina Press 1993) 59.

<sup>766</sup> *ibid* 60.

Chancery ‘became more active in supplying remedies in the common law’ and instrumental in initiating the ‘great expansion’ in tort law.<sup>767</sup> However circa 1350 the coercive ‘tone’ of injunctions was seemingly most visible in manorial courts against ‘unfree’ tenants imposing specific, often severe, penalties for non-compliance.<sup>768</sup>

The Chancellor’s office is central to the development of the injunction: that development has multifarious factors. At the time of the Black Death the chancellor was a principal official of the common law with wide-ranging responsibilities concerning matters that affected it, including issuing writs to initiate litigation in the king’s courts (and orders to sheriffs). Thus the position was pivotal to the nascent development of nuisance law in many respects,<sup>769</sup> aspects that have been discussed at length in previous chapters. The chancellor also – naturally - began to adjudicate matters in chancery where his jurisdiction included deciding upon problematic circumstances that needed to be solved on his conscience, or in other words, at his discretion. This marked the dawn of the discretionary remedy. The chancellor’s jurisdiction in chancery expanded significantly during the fifteenth century, in latter centuries problems of judicial conscience formed a body of law separate from the common law and the law of equity was born.<sup>770</sup> Despite the notion of separate bodies of law being centuries away the development of ‘chancery adjudication’ and the injunction can be ascribed as consequences of the Black Death.<sup>771</sup>

The development of injunctions in eighteenth and nineteenth-centuries, in part, is an account of the final chapter of the procedural changes necessary to advance the English court systems

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<sup>767</sup> *ibid* 104.

<sup>768</sup> *ibid* 106; see also WM Ormrod, *The Reign of Edward II: Crown and Political Society in England, 1327-1377* (Yale University Press 1990) 77.

<sup>769</sup> *ibid* 104-5.

<sup>770</sup> This dual system of jurisprudence remained with us – as strictly separate – until the Judicature Acts of 1873 (36 & 37 Vict Ch 66) and 1875 (38 & 39 Vict Ch 77); pending this point there was a strict division between the two courts. Following the Judicature Acts the common law and equity became sub-divisions of the High Court with the premise of uniformity of procedure and pleadings.

<sup>771</sup> Palmer, *Black Death* (10) 104-8.

fully away from the Middle Ages in line with the advances of social policy.<sup>772</sup> This is evident from the lack of conceptual uniformity in Case, as Palmer professed: ‘At no point was there a general redistribution of actions amongst the various classes to produce categories of action with logical precision’. The concept of nuisance was part of this illogicality driven by societal needs which contrived to leave behind the restrictions of feudalism when Case supplanted it: the piecemeal destruction of the forms of action was probably part of a larger ‘unwritten’ grand design - the dissolution of the medieval law. This could not happen in one fell swoop as was possible with Henry VIII’s dissolution of the monasteries; the remodelling of an entire legal system which took centuries to evolve needed to be far more subtle than a persecution of religious belief perpetrated by a tyrant king. Today the way in which we think about law, and categorise laws, remains deeply influenced by the old forms of action: despite the growth of statute, English law continues to be understood in common law – adversarial – terms.<sup>773</sup> The development of injunctions is the epitome of this in practice. Whilst the merging of the equitable remedy in justice and equity courts was finally provided by statute, the quirks of the common law paved the way for statutory amendments.

We could argue that the dissolution of the medieval law had become inevitable; it would seem that its ending was eagerly anticipated considering the advent of actions on the case for trespass in the fourteenth-century and the subsequent development of Case thereafter, where it would seem social policy was more important than ‘legal thought’ thus fuelling its advance above matters of legal concept. But the old writ system was stubborn and the process in which the Chancery issued writs was formulated in the context of long-existing writs that it

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<sup>772</sup> Palmer *ibid* 218.

<sup>773</sup> J Holland and J Webb, *Learning Legal Rules* (OUP 2010) 13.

struggled to abandon. The issue of apportioning liability, discussed in the previous chapter, would probably have been pivotal to chancery determinations; we cannot be certain.<sup>774</sup>

In the end however the dissolution of the older, centrally feudal, medieval law was relatively fast. The process took a little over half a century and started with an attempt to abolish the old forms of action in order to bring uniformity to the personal actions. This first ‘assault’ on the older writs was made in 1832 by the aptly named Uniformity of Process Act,<sup>775</sup> but further attacks were required. The next wave happened in 1852 by the Common Law Procedure Act<sup>776</sup> and the consequent Common Law Procedure Acts; the final decisive strike came in 1873 by the Judicature Act, an enactment to which we will return. Of course this only dealt with the personal actions: the real<sup>777</sup> and mixed<sup>778</sup> actions also needed to be removed, but their eradication was far less drawn-out: the Real Property Limitation Act in 1833 abolished sixty, only two remained until the Common Law Procedure Act of 1860<sup>779</sup> abolished them.<sup>780</sup>

As actions on the case for nuisance only provided remedy in the form of damages, unlike the assize of nuisance and other writs that addressed nuisance,<sup>781</sup> they did not allow for the abatement of a nuisance.<sup>782</sup> Without a remedy to stop or prevent nuisances continuing there could be a potentially infinite barrage of actions from an unlawful activity with each separate reoccurrence justifying a new claim; wealthy individuals, and the corporations that were

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<sup>774</sup> Palmer, *Black Death* (10) 218.

<sup>775</sup> 2 Will 4, Ch 39 (1832).

<sup>776</sup> 15 and 16 Vic Ch 76 (see section 3 of the Act)

<sup>777</sup> Real actions concerned only real property issues where the plaintiff claimed title to land (see FW Maitland, *The Forms of Action at Common Law* (CUP 1958) 7.

<sup>778</sup> This hybrid action, as it were, demanded both real property and damages for wrongs (ibid).

<sup>779</sup> 24 Vic, Ch 126 (see sections 26 and 27 of that Act where the writ of right of dower and *quare impedit* were abolished).

<sup>780</sup> See Maitland, *Forms of Action* (22) 7-9.

<sup>781</sup> See Chapter 2 (32).

<sup>782</sup> For an interesting discussion regarding cases where self-help was utilised to abate nuisances on occasions see Milton, 103-6. He cites a selection of cases during the seventeenth-century but it would seem owing to the decision by Coke CJ in *Baten's Case* ((1610) 9 Co Rep 53b; 77 ER 810) that if the option of self-help to abate a nuisance was taken then an action on the case would not be available; thus neither would damages for the nuisance.

about to emerge, could clearly benefit from this ‘loophole’. Lord Halsbury reacted to this issue in *Shelfer*, where he commented:

But there is nothing in this case which to my mind can justify the Court in refusing to aid the legal rights established, by an injunction preventing the continuance of the nuisance. On the contrary, the effect of such a refusal in a case like the present would necessarily operate to enable a company who could afford it to drive a neighbouring proprietor to sell, whether he would or no, by continuing a nuisance, and simply paying damages for its continuance.<sup>783</sup>

Blackstone’s ‘commentary’ regarding this ambiguity in nuisance law reveals the uncertainty of the law prior to the ‘loophole’ being closed in the nineteenth century, particularly as the injunction is extant from his text. He asserts categorically that only damages were available ‘on the case’ then states:

Indeed every continuance of a nuisance is held to be a fresh one;<sup>784</sup> and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardness to continue it...the founders of the law...have therefore provided two other actions; the assize of nuisance and the writ of quod permittat prosternere...*but these actions are now out of use, and have given way to the action on the case*...the process is therefore easier [because of the relaxed ambit on standing]: and the effect will therefore be much the same, unless a man has a very obstinate as well as ill-natured neighbour: who had rather continue to pay damages, than remove his nuisance. For in such a case recourse must at last be had to the old and sure remedies, which will eventually conquer the defendant’s perverseness, by sending the sheriff...to level it.<sup>785</sup>

These observations were early recognition that the lacuna was set to become a central issue in the development of nuisance law. Clearly, after a period of time, someone with the requisite interest would be unlikely to be aware of effectively obsolete forms of actions and there also

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<sup>783</sup> *Shelfer* (3) 311 (Lord Halsbury).

<sup>784</sup> 2 Leon pl 129; Cro Eliz 402.

<sup>785</sup> 3 *Blackstones’s Commentaries*, Ch 13, 220-2. Emphasis added.



came a point (1833<sup>786</sup>) that both actions Blackstone referred to were abolished thus a separate action had to be brought in the Court of Chancery to order the removal of or stop a nuisance; the common law outside equity was entirely ineffective at stopping nuisances in situations where there were ‘very obstinate’ neighbours – or rather neighbours that stood to gain from continuing a nuisance.

If the essence of nuisance is interfering with the enjoyment of property then the plaintiff’s inconvenience and damage are increased by the duration of the nuisance; the true object of the older Assizes and writs that dealt with nuisance was the abatement of the interference. The usurpation of the older actions by actions on the case thus created a dilemma because the object of Case to seek compensation for damages was antithetical to its original remedy. Regardless it can be said that whether or not a nuisance was ‘spent or continuing’ was to a large degree irrelevant.<sup>787</sup> The advent of Case, in the context of the theory of nuisance, created a predicament because whereas theoretically damages could be sought – and won – for each individual wrong the nuisance could continue regardless and ‘from the very nature of the acts causing the injury we can hardly imagine a case of nuisance in which an action for damages is an adequate remedy’.<sup>788</sup> Therefore, in the majority of nuisance actions it is desirable to bring a nuisance to an end. However the aspirations of that plaintiff could be thwarted in a scenario where each time a noxious smell interferes with the plaintiff’s enjoyment of land a series of separate nuisances ensues, where damages would be recoverable on each occasion. Nonetheless in reality the nuisances would merge as one continuing nuisance in perpetuity until for some reason the nuisance stopped or the defendant ran out of money to pay the damages.

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<sup>786</sup> It must be noted that until 1873, when Parliament abolished it, the Court of Common pleas dealt with common law cases whilst the Courts of Chancery dealt with cases in equity. Until this point there was a strict division between the two courts.

<sup>787</sup> JH Baker, *An Introduction to Legal History* (Butterworths 2002) 432.

<sup>788</sup> WD Lewis ‘Injunctions against Nuisances and the Rule Requiring the Plaintiff to Establish His Right at Law’ (1908) 56 *University of Pennsylvania Law Review and American Law Register* 289, 289.

This offers an historical slant on the Coase-Calabresi and Melamed debate that nevertheless has contemporary connotations.<sup>789</sup> Nuisance law, without injunctive relief, is a mere liability rule – it makes the defendant liable to the plaintiff to compensate them for injury. By contrast, where the plaintiff can secure the abatement of a nuisance by means of an injunction, nuisance becomes a ‘property rule’.<sup>790</sup> They have a right not simply to compensation, but to have their property restored to the condition to which they are entitled or, and this may be a different thing (returned to at the end of the chapter), have the nuisance prohibited and thus prevented.

It was the equitable injunction that was to become the answer for those affected plaintiffs who had to live without the use, comfort and/or amenity of land that nuisance law promised to protect. Injunctions visibly began to develop in the sixteenth-century in actions on the case for nuisance and were initially utilised by the Court of Chancery. According to Sir George Cary in his collected works ‘Reports or Causes in Chancery’<sup>791</sup> there is an incipient perception that: ‘Where an action upon the case for nusans [sic] and damages only are to be recovered, the party may have help here [in the Court of Chancery] to remove or restore the thing itself’.<sup>792</sup> In *Osborne v Barter* (1583),<sup>793</sup> Osborne pleaded ‘to be relieved’ of a nuisance created by the erection of a mill.<sup>794</sup> In *Swayne v Rogers* (1604)<sup>795</sup> again a mill was the subject of an action in the Court of Chancery. This time a law professor (Swayne) brought an action

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<sup>789</sup> Calabresi and Melamed, ‘Property Rules’ (4); and R Coase, ‘The Problem of Social Cost’, 3 (1960) JLE 1-44.

<sup>790</sup> *ibid.*

<sup>791</sup> Cary’s Reports, Chancery (English Reports vol. 21, collected between 1557 and 1604).

<sup>792</sup> Milton quotes: ‘Cary, 20’ (JRL Milton, *The Concept of Nuisance in English Law: A Study of the Origins and Historical Development of The Concept of Nuisance From its Earliest Beginnings To The End of the Nineteenth Century* (University of Natal 1978).

<sup>793</sup> Choyce Cases 176.

<sup>794</sup> This cause was later dismissed due to the plaintiff’s decision to resort to the assize of nuisance.

<sup>795</sup> (1604) Cary 26.

for an interference with his mill and the court took exception (*sed contrarium adjudicatum*<sup>796</sup>) to his plea.

Whilst these precedents are glimmers of the process that eventually took the injunction – the most effective remedy in nuisance - away from the exclusive domain of equity and into the common law courts, it was not until the middle to late nineteenth-century that law courts could adequately grant injunctive relief for disgruntled plaintiffs. Injunctions were unavailable to would be claimants in the law courts until the second Common Law Procedure Act<sup>797</sup> in 1854 (hereinafter the ‘SCLPA’) but it took time for its judges to become accustomed to their functionality; law court judges were simply unrehearsed in their operation.<sup>798</sup>

Arguably, we may presume that plaintiffs in two seminal nineteenth-century cases used the dual system to their advantage. In *Attorney-General v Birmingham*<sup>799</sup> Adderley brought his case in the Chancery Court, and when Tipping won his case in *St Helen's Smelting Co v Tipping*<sup>800</sup> he also brought separate proceedings there; the litigants were utilising the courts’ dual system to better their chances of success during these crucial decades of transformation. The majority of law court judges were only accustomed to awarding damages to which a claimant was entitled by right; using their discretion on the facts was imported from equity.<sup>801</sup>

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<sup>796</sup> But contrary to judgment.

<sup>797</sup> The Common Law Procedure Act, 1854 (2<sup>nd</sup> June) 17 Vict, Ch 125; see 19th Century House of Commons Sessional Papers vol. 1.473 in the House of Commons Parliamentary Papers (Bill 123 of 1854), particularly paras. LXXX-LXXXIII, pages 18-19. Now governed by the Supreme Court Act 1981, Ch. 54, section 37.

<sup>798</sup> To my knowledge only Bingham MR in *Jaggard v Sawyer* ([1995] 1 WLR 269, 276) has recognised the significance of this Act but, in the other judges’ defence, out of its 107 sections all but ss. 106 and 107 (which provide the Short Title; and that the Act does not extend to Ireland or Scotland) and 87 (actions on lost negotiable instruments) have been repealed.

<sup>799</sup> (1858) 4 K & J 528; 70 ER 220.

<sup>800</sup> (1865) 11 HL Cas 642.

<sup>801</sup> This was evident in the case of *Davies v Marshall* (1861) 10 Common Bench Reports (New Series) 697. Naturally as a consequence there was confusion when other equitable principles, in particular equitable defences such as acquiescence, would need to be applied in cases where injunctions were requested by claimants. Jolliffe observed (61) following an extract by David Bean that: ‘By analogy, the other equitable defences would be expected to apply’ (D Bean, *Injunctions*, (Sweet and Maxwell, 2007), 2.09).

Discussions in the House of Lords prior to the enactment of the 1854 Act following a Commissioners Report<sup>802</sup> illustrate that Lord Chancellor Cranworth<sup>803</sup> recognised that the common law had no power to stop defendants repeating injuries to plaintiffs; accordingly, the continuation of what he described as ‘preventative justice’, following on from the 1852 Act, was a central consideration of the Bill that established the second 1854 Act. The traditional stance that injunctions were a remedy only sought in the Chancery Courts in equity was unconscionable to the theory of nuisance. The problem was that plaintiffs who wanted damages for injuries already sustained to their property and justifiably wished to prevent reoccurrences were forced to bring two actions in two separate courts. Cranworth LC opined in such situations nothing could be: ‘More utterly at variance with the object of all jurisprudence than unnecessarily to hand over a party from one tribunal to another’.<sup>804</sup> He then questioned:

Why should they [parliament] not therefore give the court which had adjudicated upon the right, and given damages in respect of its infringement, the power of issuing an injunction to prevent its further infringement?<sup>805</sup>

Lord Cranworth<sup>806</sup> played a part in the majority of the leading cases - both in equity and common law - which became authority in nuisance law during this important stage of development.<sup>807</sup> Notwithstanding injunctions being unavailable in the law courts until SCLPA (1854) it must be reiterated that previously equity nevertheless certainly had an influence on the law. Professor Plunknett observed there was a ‘gradual introduction into the common law courts [in the eighteenth and nineteenth centuries] of procedures and doctrines which

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<sup>802</sup> N.B. The name of the Commissioners Report is not cited in the relevant Hansard session.

<sup>803</sup> Lord Cranworth, Robert Monsey Rolfe (Lord Chancellor 1852-1858 and 1865-66). Robert Monsey Rolfe was a Baron in the Exchequer from 1839 until 1850, became a Lord Justice in equity in 1850 and then started his first term as Lord Chancellor in 1852. See Second Common Law Bill (1854), Hansard, 27<sup>th</sup> February 1854, HL Deb 27/02/1854 vol. 130, ccl 1327-50, 1341.

<sup>804</sup> *ibid.*

<sup>805</sup> *ibid.*

<sup>806</sup> See (48).

<sup>807</sup> Lord Cranworth position’s between 1839 and 1858 means it is difficult to envision how a man could be better placed during this conversion period between equity and law thus understand how injunctions came to be applied and utilised in both (Milton (37) 243 n 55).

were originally a peculiar province of Chancery...This tendency was carried much further by the Common Law Procedure Act 1854’.<sup>808</sup>

Although the disadvantage to plaintiffs needing to first establish a nuisance at law before bringing a second action to obtain an injunction was alleviated by the SCLPA, a balance between law and equity was not struck until four years later when the Court of Chancery Amendment Act (1858), more commonly known as Lord Cairns’ Act, was passed allowing damages to be sought in the Chancery Courts.<sup>809</sup> Plunkett nevertheless describes the relationship between law and equity in the eighteenth century as harmonious and that both systems became ‘closely involved in the working of each other’.<sup>810</sup> He noted that Chancery would get opinions from common law judges on points of common law and send issues that required a jury trial to the common law courts. It is visible that doctrines and principles of equity were slowly merging into the law courts prior to the SCLPA, which was the formal recognition of equitable doctrines penetrating the common law. However, Milton observed: ‘The infiltration of the doctrines of equity was an almost imperceptible process [it was] more a matter of osmosis than formal recognition’.<sup>811</sup> This discourse maintains the ebb and flow of nuisance’s development with social mores and law rather than a linear history of balanced development. The complex interplay of political and juridical decisions that developed the injunction at law to tackle the lacuna of a potential continuum of cases for damages is a succinct illustration of that process in practice.

### **3. Injunctions in the Nineteenth Century**

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<sup>808</sup> See TFT Plunkett, *A Concise History of the Common Law* (5<sup>th</sup> edn Butterworth 1956) 211.

<sup>809</sup> Now governed by the Supreme Court Act 1981, Ch. 54, section 50.

<sup>810</sup> Plunkett (53) 210-11.

<sup>811</sup> Milton (37) 243.

In *Shelfer v City of London Electric Lighting Co*<sup>812</sup> the plaintiff brought an action in private nuisance against an electricity company following vibrations from equipment in a power station in London that caused structural damage to the house and discomfort to the occupier. An injunction was sought. The power stations were a frequent source of complaint, whether from vibrations, noise, or fumes, so much so that the industry lobbied Parliament for a modification of the common law. It was extremely difficult for these works to operate so as not to cause a nuisance thus the defendant asked the courts to exercise their discretion to grant damages in lieu of injunction; the trial judge (Kekewich J) awarded damages but refused an injunction.

The Court of Appeal overturned the decision and awarded the injunction. There was nothing in the Electric Lighting Act (1882) to exempt those governed by the Act, such as the defendant, from liability to an action at common law for nuisance to their neighbours caused by their activities. In Lord Cairns' Act the jurisdiction to award damages instead of an injunction conferred upon Courts of Equity did not alter the settled principles upon which those Courts would grant an injunction. What was important - according to Lord Cairns' Act – was in cases of continuing actionable nuisance the jurisdiction to award damages ought only to be exercised under *very exceptional circumstances*. The way the judges interpreted the Act in *Shelfer* was captured by Lindley LJ, he commented:

Ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalising wrongful acts; or in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a

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<sup>812</sup> n (3).

public benefactor (e.g. a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed.<sup>813</sup>

Later in the twentieth-century Millett LJ in *Jaggard v Sawyer*<sup>814</sup> referred to those judicial concerns reaffirming the need to assert the developments in the nineteenth-century that culminated in the cessation of the nuisance law lacuna. He stated:

It has always been recognised that the practical consequence of withholding injunctive relief is to authorise the continuance of an unlawful state of affairs...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 is willing and able to pay compensation.<sup>815</sup>

Smith LJ expressed in *Shelfer* a century prior to Millett LJ, that:

Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction.<sup>816</sup>

He then went on to set out 'a good working rule'<sup>817</sup> better known as the '*Shelfer* principles' which judges are now, following their constant reaffirmation (more recently in *Watson* and *Regan*) compelled to consider when contemplating denying an injunction and awarding

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<sup>813</sup> *Shelfer* (3) 315-6.

<sup>814</sup> *Jaggard* (43) 287.

<sup>815</sup> *ibid* 287. See also Buckley LJ who held: 'The court has affirmed over and over again that the jurisdiction to give damages where it exists is not so to be used as in fact to enable the defendant to purchase from the plaintiff against his will his legal right to the easement' (*Cowper v Laidler* [1903] 2 Ch 337, 341).

<sup>816</sup> *Shelfer* (3) [322].

<sup>817</sup> *ibid*, Sir Thomas Bingham MR also referred to the *Shelfer* test as a good working rule in *Jaggard* ((43) 278) but added at 283 that 'the test is one of oppression, and the court should not slide into application of a general balance of convenience test'. This is in the sense that 'it is not enough for the defendant to show that the balance of convenience went in favour of damages – the correct test is oppression, and should not be watered down' (J Jolliffe, 'The Irresistible Remedy Meets the Immovable Interest: Injunctions and the Public Interest after *Watson v Croft Promo-Sport Ltd*' [2009] 17(1) Environmental Liability 27, 31).

damages in lieu.<sup>818</sup> Assuming a case can be made out,<sup>819</sup> or that a claimant has not disentitled himself to equitable relief,<sup>820</sup> the appropriate remedy may be damages in lieu of an injunction when the injury to the plaintiff's legal rights is small; is capable of being estimated in money; can be adequately compensated by a small money payment; and that the granting of an injunction would be oppressive to the defendant. Awarding damages in addition to or substitution for an injunction is 'a delicate matter' of judicial discretion.<sup>821</sup> Of course it is not possible to specify all the circumstances relevant to the exercise of the discretion or to lay down exact rules for its exercise. In Smith LJ's words:

It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant.<sup>822</sup>

Outside specific intolerable conduct by the claimant it would appear that only undue oppression of the defendant will be considered a justified reason unless the injury is minimal. Regardless, the discretion is of course to be decided on the good sense of the tribunal.<sup>823</sup>

The principles are not required to be considered exhaustive; for instance, the fourth criterion regarding oppression was not discussed by Smith LJ when he decided to grant the injunction. Palpably the unending number of potential variables within individual cases dictates that it is only logical that judges' discretion may vary; after all who can tell what 'a very exceptional

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<sup>818</sup> *Regan* (6) 35-7 (Mummery LJ).

<sup>819</sup> On this issue Millett LJ stated in *Jaggard* ((43) 287) that: 'When the plaintiff claims an injunction and the defendant asks the court to award damages instead, the proper approach for the court to adopt cannot be in doubt. Clearly the plaintiff must first establish a case for equitable relief, not only by proving his legal right and an actual or threatened infringement by the defendant, but also by overcoming all equitable defences such as laches, acquiescence or estoppel. If he succeeds in doing this, he is prima facie entitled to an injunction'.

<sup>820</sup> *ibid*, 'There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction' (*Shelfer* (3) 323 (Smith LJ)). Conversely delay in mounting proceedings may also adversely affect a plaintiff (*Broadbent* (89) 611).

<sup>821</sup> [Colls v Home and Colonial Stores Ltd \[1904\] AC 179](#), 192-195 (Lord Macnaghten); also *Regan* (6) 142 (Mummery LJ).

<sup>822</sup> *ibid* 323 (Smith LJ).

<sup>823</sup> *ibid*.



circumstance' may involve in each individual case?<sup>824</sup> Certain conduct by the defendant that would amount to 'reckless disregard for the plaintiff's rights'<sup>825</sup> might influence judges not to award damages in lieu, regardless of whether all four conditions were satisfied.<sup>826</sup> Certainly Smith LJ's 'good working rule' is not entirely rigid, nevertheless it has continually been perceived as binding.<sup>827</sup>

Jenny Steele has posited that the *Shelfer* conditions focus more on the interest of the claimant rather than on superfluous grounds, for instance, public interest.<sup>828</sup> If that truly is the case then – today - those who allow harmful activities to emanate from their property should find it futile to argue that their activities perform a social utility, unless in 'a marginal case where the damage to the claimant is minimal'.<sup>829</sup> Social utility (or public interest) has often been the antithesis of private interests despite the fact that private interests often serve them.

Bramwell B in *Bamford v Turnley*<sup>830</sup> looked at the possibility of achieving 'a more productive compromise between private rights and public interests'. Outwardly, his judgment averred an element of economic efficiency: by allowing damages in lieu of an injunction more readily it would encourage 'productive activities' and enhance the economy. However his comments have nevertheless been perceived as an elaborate ruse to protect traditional property rights against profit seeking industrial development.<sup>831</sup> Of course, a degree of caution would be

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<sup>824</sup> *ibid* 323-4.

<sup>825</sup> *ibid* 323.

<sup>826</sup> J Steele, *Tort Law: Text, Cases and Materials* (OUP 2007) 651.

<sup>827</sup> Lawton LJ stated: The principles enunciated in *Shelfer's* case, which is binding on us, have been applied time and time again during the past 85 years (e.g. *Kennaway v Thompson* (7) 93). See *Regan* (6) 35 (Mummery LJ).

<sup>828</sup> Steele (71).

<sup>829</sup> As per the Chancellor of the High Court in *Watson* (2) 51.

<sup>830</sup> *Bamford v Turnley* (1862) 3 B & S 66; 122 ER 27). See Steele (71) 657.

<sup>831</sup> AWB Simpson, 'Victorian Judges and the Problem of Social Cost' in *Leading Cases in the Common Law* (OUP 1995) 175; also J Steele *ibid* 607 and 657.

required by judges when awarding damages in lieu of an injunction considering the concerns their contemporaries had following the enactment of the Lord Cairn's Act.<sup>832</sup>

*Watson*, until *Coventry*, clarified the confines in which judges may operate to grant the discretionary remedy and the decision certainly appeared to have decisively addressed the issue of public interest over private proprietary right in favour of private interest. Previously, since *Shelfer*,<sup>833</sup> according to R. A. Buckley, injunctions were awarded 'virtually as of right.'<sup>834</sup> That is to say, the social utility of the defendant's enterprise is not a ground for them 'paying to pollute'. They must stop pollution, in one way or another. Nevertheless, for a time, the issue of public interest had become an obstacle to litigants' clear and legitimate expectation that the equitable remedy would be granted.<sup>835</sup>

It can be argued that, in light of the preceding (and later) analysis, private interests in private nuisance should continue to override public benefit. Seemingly it is the status quo of modern private nuisance, enshrined in the seventeenth-century cases, for instance *Aldred's Case*<sup>836</sup> and *Jones v Powell*,<sup>837</sup> to be insusceptible to societal need.<sup>838</sup> This state of affairs is entirely logical in an action conceived to protect private proprietary rights: *private* nuisance should naturally seek to safeguard *private* interests above all else. However, the private/public nexus

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<sup>832</sup> Millet LJ in *Jaggard* referred to those judicial concerns, he stated: Bramwell B, who views were 'based on an ethical notion of fairness' (Simpson *ibid* 175) would have been perfectly aware of the same concerns that Millet LJ expressed more than a century later, making a strong case against a more flexible approach towards private rights and public interest (Simpson challenges any claims that Bramwell engaged in economic analysis. cf JG Fleming, *The Law of Torts* (LBC Information Services, 1998), 471-2).

<sup>833</sup> *Shelfer* (3).

<sup>834</sup> Today section 158 of the Planning Act 2008 provides a defence of statutory authority (in both civil and criminal proceedings). See for example *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66 where the defendant sewerage undertaker was protected under the Water industry Act 1991. The option of seeking statutory protection would not be quick or cheap for public bodies but we must recognise that corporations are capable of successfully lobbying for such a level of protection; they have the influence, time and finances to achieve it.

<sup>835</sup> RA Buckley, 'Injunctions and the Public Interest' (1981) 44 MLR 212, 214.

<sup>836</sup> *Aldred's Case* (1610) 9 Co Rep 58.

<sup>837</sup> *Jones v Powell* HLS MS 1083, fo 50v (KB); (1628) Palm 536; 81 ER 1208; CUL MS Dd 12. 48, fo 115v.

<sup>838</sup> Such an expectation was formed fairly early on in the development of Case, it can certainly be traced back to at least the sixteenth-century (*Hales' Case* (1569) KU MS D152(5)), but by the seventeenth-century seminal cases of *Aldred's Case* (80) and *Jones v Powell* (*ibid*) it was the prevalent stance of the judiciary (see JH Baker & SFC Milsom 'Sources of English Legal History: Private Law to 1750' (Butterworths 1986), 592-606).

is more complicated in this setting. In fact it was submitted in *Bamford* that: ‘It is for the public advantage that no nuisance be committed... [W]orks which are injurious to their neighbours will find means of avoiding the creation of nuisance’.<sup>839</sup> Considering that *Birmingham Corporation* was relatively fresh in mind, that statement supports that private nuisance forced industry to innovate cleaner industrial practices during the Industrial Revolution, as will be seen.

Private nuisance’s perceived resilience to public benefit has generated a phenomenon where statutory protection needs to be sought to prevent the courts from awarding an injunction against corporate undertakings by expressly excluding the nuisance actions in the statutory provisions; this legislative tactic nonetheless is not entirely reliable.<sup>840</sup> It is only occasionally that groups of polluters successfully organise a lobby of Parliament for curtailment of the common law of nuisance but,<sup>841</sup> mostly, statutory authority is something the courts imply into a statute that is silent on the position of the common law in relation to the statutory scheme.<sup>842</sup>

It is worth mentioning that an injunction rarely sets out to prohibit entirely an economic activity rather it is more likely to restrain a continuing nuisance; although, mandatory injunctions are equally subject to the *Shelfer* principles.<sup>843</sup> Defendant’s concerns regarding the potential austerity of injunctions are arguably exaggerated in most instances and the requirement for statutory provisions to prohibit common law nuisance is largely unfounded. That is the point made above (in connection with *Bamford*), but it is worth amplifying and it should be recognised that nuisance has a natural ability to seek the equitable outcome.

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<sup>839</sup> *Bamford* (75) 70.

<sup>840</sup> For instance, compare *Dobson v Thames Water* [2007] EWHC 2021 where the presence of negligence and nuisance was considered as providing jurisdiction to grant an injunction despite the provisions of the Water Industry Act 1991 that expressly attempted to prevent any jurisdiction to grant an injunction (*Marcic* (79) 66).

<sup>841</sup> An example being under the Rivers Pollution Prevention Act 1876 (39 & 40 Vict, Ch 75).

<sup>842</sup> *Hammersmith & City Railway Co v Brand* (1869-70) LR 4 HL 171.

<sup>843</sup> *Shelfer* (3) 322-3.

In *Broadbent*,<sup>844</sup> for example, the House of Lords laid the foundations for the decision in *Shelfer*. They addressed the concerns inherent in Lord Cairns' Act regarding the possibility of judges legalising activities which have been deemed a nuisance at law. Indeed Lord Chancellor Campbell consulted with Lord Cairns whilst deliberating on this case;<sup>845</sup> the careful but asserted emergence of the injunction, for the reasons discussed above, were clearly visible during this period. Tackling unwarranted concerns of defendant's were presumably crucial to the reasoning behind the *Shelfer* principles becoming rules of discretion; the equitable remedy would need to take defendant's rights to use their land seriously but not to the extent that the courts would be legalising a nuisance. Smith LJ perhaps saw commissioning a nuisance as pandering to the defendants' rights in favour of the plaintiffs. He commented:

Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *primâ facie* [sic] entitled to an injunction.<sup>846</sup>

The defendant's objection in *Broadbent* that they would have to cease providing gas under the terms of the injunction (or in other words cease trading) - because they knew of no way of not producing acid gas emissions - was dismissed by the Lord Chancellor. He stated that as they were able to adequately provide the district with gas prior to installing the new retort<sup>847</sup> that was the focus of the action; they could therefore adequately provide that district again

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<sup>844</sup> *The Imperial Gas Light and Coke Company v Broadbent* (1859) House of Lords Cases (Clark's) 600; 11 ER 239.

<sup>845</sup> *ibid* 611.

<sup>846</sup> *Shelfer* (3) 322.

<sup>847</sup> A furnace for carrying out the chemical process for producing the gas.

without it. Curtailing their activities would not be oppressive neither for the company nor for the public it served.<sup>848</sup>

The Lord Chancellor was not saying that the defendant company could not utilise the new retort they were solely required under the conditions of the injunction to cease injuring the plaintiff. If they were unable to operate it without causing injury then it was quite possible that they could invent new technology to do so. It would be inequitable to provide statutory authority to allow an undertaking to pollute indiscriminately and whilst the amalgamation of the injunction in the law and equity courts must have presented a real threat to many economic activities, a balance could always be struck in the courts using the doctrines of nuisance law without the need for parliamentary intervention.

Three important aspects can be taken from the nineteenth-century case law in the context of injunctive relief. First, the judges' equitable discretion to grant an injunction is such that it should be the norm rather than the exception to the rule; after all, damages are a remedy awarded as of right when a nuisance is proven at law. That means that private interests are – naturally – to take precedence over public interest when injunctive relief is considered. Second, a simple judicial test (the *Shelfer* principles), as 'a good working rule'<sup>849</sup>, determined whether judges might exercise their discretion not to grant an injunction and choose to limit redress to compensation in monetary terms. Third, judges did not have the right to commission a nuisance; they nonetheless balanced conditions contained within injunctions where possible so that only the injury caused to the plaintiff was curtailed and thus was not oppressive to the defendant.

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<sup>848</sup> Lord Campbell stated: 'The Appellants are at liberty, under the injunction, to carry on their works so that they do not injure the plaintiff, and they must either find out some mode by which they can carry on their works without that injury, or they must limit the quantity of gas to that which they made before this new retort was constructed. I do not believe that the public will at all suffer from this injunction being maintained' (*Broadbent* (89) 611). See (65) above.

<sup>849</sup> *Shelfer* 322 (Smith LJ); see also a century later in *Jaggard* (43) 287 (Millet LJ).

It has been argued that oppression was essentially the test,<sup>850</sup> or better expressed, after balancing the circumstances of the case an injunction would generally be awarded unless the injunction would be oppressive on the defendant. Conversely, if an activity continued to injure then that activity needed to cease otherwise, not only would judges be legalising a nuisance, the plaintiff's rights would in effect be for sale, purchasable by repeated awards for damages at a price dictated not by the market but at the discretion of judges. Subjugation of either defendant's or plaintiff's proprietary rights would be 'unduly oppressive'; and to borrow Mummery LJ's words, such an exploit would not be 'in accordance with the principles on which equitable relief has usually been granted'.<sup>851</sup>

An eventuality of the discretionary injunction on these terms was that judges of the nineteenth-century encouraged innovative technology, both impliedly and expressly. Seemingly, in many circumstances and as a consequence of injunctive relief, in order for publically or financially beneficial activities to continue, new technology needed to be developed.<sup>852</sup> This is a much disregarded reality of private nuisance actions during the period; instead the prevailing stance is that the tort was on the whole ineffective at tackling pollution from industrial activities.<sup>853</sup> There is much evidence to refute such claims.

#### **4. Technological Innovation Through Discretionary Judicial Intervention**

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<sup>850</sup> In *Jaggard* *ibid* 278 and 283 Sir Thomas Bingham MR stated that, 'the test is one of oppression, and the court should not slide into application of a general balance of convenience test'. This is in the sense that 'it is not enough for the defendant to show that the balance of convenience went in favour of damages – the correct test is oppression, and should not be watered down' (Joffiffe (62) 31). See also *Watson* (2) 45.

<sup>851</sup> *Regan v Paul* (6) 38 (Mummery LJ). Lawton LJ stated: The principles enunciated in *Shelfer's* case, which is binding on us, have been applied time and time again during the past 85 years (*Kennaway* (7) 93).

<sup>852</sup> See, for instance, *Attorney-General v Birmingham Corporation* (4) (discussed below in section 4).

<sup>853</sup> R Coase, 'The Problem of Social Cost', 3 (1960) JLE 1-44; JF Brenner, 'Nuisance Law and the Industrial Revolution' (1974) 3 JLS 403; JPS McLaren, 'Nuisance Law and the Industrial Revolution-Some Lessons from Social History' (1983) 3 OJLS 155; Ogus & Richardson, 'Economics and the Environment' (1977) 36 CLJ 284; see also D Campbell, 'Of Coase and Corn: a (Sort of) defence of private nuisance' (2000) MLR 197.

Past triumphs<sup>854</sup> in the courts have heralded environmental protection measures. Nuisance actions have prevented pollution by acid smuts<sup>855</sup> and oil,<sup>856</sup> protected against noxious fumes,<sup>857</sup> offensive smells from animals<sup>858</sup> and foul-smelling privies.<sup>859</sup> Nuisances regarding stinky privies intensified over the epochs as the problems of disposing of effluent transformed into nuisance of a much grander scale – sewage pollution. The story of sewage pollution in private nuisance illustrates private nuisance’s capabilities for environmental protection (and safeguarding human health). The problem of disposing of increasing amounts of sewage snowballed exponentially as population increased creating towns and cities with the onset of industrialisation. The unimaginable situation to the modern audience culminated in, arguably, private nuisance law’s finest hour and revealed its ability to function as a true environmental tort.

*Attorney-General v Birmingham Corporation*<sup>860</sup> secured investment and consequent advances in sewage treatment that protected public health on a national scale. Adderley’s action to thwart the entire city of Birmingham (approximately a quarter of a million people at the time) from damaging his land whilst it disposed of its sewage into the river Tame is a succinct example of private nuisance’s capability to prevent large public interests and corporations from polluting on an industrial scale; it also demonstrates the power of judges to force polluters to find alternate methods of operating. Over a period of thirty seven years of court

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<sup>854</sup> For example, *Tipping* (45) (see generally Simpson (75); and B Pontin, ‘*Tipping v St Helens Smelting Company* (1865): anti-development or sustainable development?’ (2007) 19 ELM 7); *Birmingham Corporation* (44) (see L Rosenthal, ‘Economic Efficiency, Nuisance, and Sewage: New Lessons from *Attorney-General v Council of the Borough of Birmingham*, 1858-95’ 36 JLS 27 (2007) for an evaluation of this seminal case). *Manchester Corp v Farnworth* [1930] AC 171; and *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145.

<sup>855</sup> *Halsey* *ibid*.

<sup>856</sup> *Smith v Great Western Railway Co.* (1926) 42 TLR 391 but cf *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218.

<sup>857</sup> *Walter v Selfe* (1851) 64 E.R. 849; (1851) 4 De G. & Sm. 315; *Bamford* (75); *Tipping* (45). See also *Poynton v Gill* (cited in *Bamford* and 1 Roll. Abr. 89, pl. 7).

<sup>858</sup> *Aldred’s Case* (80) (the smell of hogs from a pig-sty); and *Rapier v London Tramways Co* [1893] 2 Ch. 588 (the smell of stabling hundreds of horses for pulling trams).

<sup>859</sup> *Jones v Powell* (81). Cases regarding privies littered the early London Assizes of Nuisance (see HM Chew & W Kellaway, *London Assize of Nuisance 1301-1431* (London Record Society 1973).

<sup>860</sup> *Attorney-General v Birmingham Corporation* (44).

room drama concerning injunctions and a subsequent half a million pounds (equivalent to £20m today<sup>861</sup>) of clean infrastructure investment from the corporation<sup>862</sup> the plaintiff was finally satisfied that the defendant had achieved an adequate means of purifying urban effluent and ceased injunctive relief from the courts. According to Pontin, the key subtlety here lies in granting the wrongdoer a suspension to the injunction, to allow for the necessary technological innovation.<sup>863</sup>

Government archives provide irrefutable evidence that private nuisance restricted the effects of pollution in the Industrial Revolution:<sup>864</sup> sure enough, particularly during the nineteenth century, the archives show that *Birmingham* was just the beginning of a broader common law driven campaign to clean up sewage through the instigation of technological innovation (on a massive scale) to stamp out sewage pollution. Such findings refute Joel Brenner's contentions that private nuisance was ineffectual in dealing with industrialisation.<sup>865</sup> Brenner emasculated nuisance law as a potential curb on environmental pollution; however it is evident the tort played a crucial role in preventing unbridled environmental damage. Historical black letter and empirical analysis during the Industrial Revolution by Pontin has introduced a differing stance about case law during the course of industrialisation and his work is testament to the success of the tort in environmental protection. It is suggested here the key to that success rested in the injunction.

## **5. *Miller v Jackson*: anyone for cricket?**

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<sup>861</sup> [www.nationalarchives.gov.uk/currency/results.asp#mid](http://www.nationalarchives.gov.uk/currency/results.asp#mid).

<sup>862</sup> *Memorial to the Attorney General praying for the Dismissal of the Suit* (13 April 1894), Birmingham Library, Norton Archive 2645, p 2. See B Pontin, 'The Secrets of Nineteenth Century Nuisance Law: Attorney General v Birmingham Corporation (1858)' (2007) 19 ELM 6 271, 283.

<sup>863</sup> See most recently C Abbott, B Pontin, and J Razzaque, 'Nuisance Law in the Balance' (2015) 27(1) Journal of Environmental Law 165.

<sup>864</sup> See Pontin (107) (and Pontin (99)) for illustrations regarding how successful private nuisance can be in environmental protection.

<sup>865</sup> Brenner (98) 403, 413-4. See also McLaren (98) 155, 190 and 220 who somewhat qualifies Brenner's contentions.



In *Miller v Jackson*<sup>866</sup> Lord Denning found himself in - what was for him - the difficult position of potentially halting activities of a village cricket club (Lintz Cricket Club). Developers were granted planning permission to build houses adjoining a long-established cricket ground. Mrs Miller was one of the new residents that quickly became annoyed by the showering of cricket balls – despite the boundary fence - and complained to the club. She refused an offer by it to pay for any damage that might be caused. Following damage to the property and interference with her and her husband's use and enjoyment of their garden during cricket matches she sought an injunction that would prohibit cricket being played on the ground without first taking adequate steps to prevent balls being struck out of it on to their house or garden. The trial judge granted the injunction and Lintz Cricket Club appealed. On appeal it was held (Lord Denning dissenting) that every time a cricket ball went onto the Millers' property the cricket club was liable for both nuisance and negligence. However Lord Denning and Cumming-Bruce LJ refused the injunction (Lane LJ dissenting) on the premise that:

The special circumstances were such that the greater interest of the public should prevail over the hardship to the individual householders by being deprived of their enjoyment of their house and garden while cricket was being played; and for that reason the injunction should be discharged and damages...substituted for past and future inconvenience.<sup>867</sup>

Lord Denning's highly criticised judgment that fails to consider the *Shelfer* case or its principles has recently been described as 'a work of literature first and law a somewhat distant second'.<sup>868</sup> Wilson wrote, 'no summary or extract can properly do justice to Denning's literary craftsmanship'.<sup>869</sup> the judgment is indeed a literary work of art but that is out of place

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<sup>866</sup> *Miller* (5).

<sup>867</sup> *ibid* 967.

<sup>868</sup> J Wilson, 'The Delight of Everyone' (2011) 161 NLJ 1294, 1294.

<sup>869</sup> Wilson *ibid*.

for a law report.<sup>870</sup> Resolutely allowing the appeal, Denning blamed both the developer (for building the houses too close to the ground) and the local authority for granting planning permission for the developer to build the houses in such close proximity; he even rendered the Millers culpable for buying one of the houses. It would seem that anyone could be at fault except the cricketers for, as Denning viewed it, continuing to play as they had done for more than seventy years.<sup>871</sup> He decided the reasonable use of the ground did not suddenly become a nuisance because a neighbour chooses to come to a house in a position where it might occasionally be hit by a cricket ball.<sup>872</sup> It would seem his judgment was clouded in this case.

Whereas, as we have seen, Millett LJ ascertained in *Jaggard*<sup>873</sup> that it had always been recognised that withholding injunctive relief – where a nuisance has been found at law - is to authorise the continuance of an unlawful state of affairs, the appeal majority in *Miller* deviated from what was essentially a judicial safeguard to protect against the illegal commissioning of a tort. Accordingly the activity in *Miller* had for all intents and purposes been legalised owing to it being a social utility, despite already having been found to be unlawful in those circumstances. Be that as it may, Lord Denning's overzealous attempt to defend cricket and village life is seemingly the only case that emphatically states that - counter to and ignoring the *Shelfer* principles<sup>874</sup> - the public interest outweighed the private

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<sup>870</sup> We are left in no doubt from the outset which side of the boundary fence, as it were, Lord Denning was going to land. The facts begin: 'In summer time village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good clubhouse for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practise while the light lasts (*Miller* (5) 976). The judgment continues in the same literary tone.

<sup>871</sup> Cumming-Bruce LJ went as far as to ignore the long-established rule laid out in *Sturges v. Bridgman* (1879) 11 Ch 852 that coming to a nuisance is no defence.

<sup>872</sup> *Miller* (5) 980- 81.

<sup>873</sup> *Jaggard* (43) 286.

<sup>874</sup> *Kennaway* (7) 93 (Lawton LJ).

interest.<sup>875</sup> The decision in *Kennaway* quickly restored the status quo to a place before the temporary disruption caused by *Miller*.

## **6. *Kennaway v Thompson*: the *Shelfer* Principles Restored**

The cases of *Kennaway* and *Watson*<sup>876</sup> are related for a number of reasons thus it is judicious to examine them jointly to expound the erosion of the *Shelfer* principles in *Miller* concerning the standpoint on public interest. They both involved noise nuisance from motor sports and in both cases the Court of Appeal decided to reverse the trial judge's decisions and award an injunction. The conditions contained within the injunctions to restrain the defendants' activities were similar in composition.<sup>877</sup> Both cases reaffirmed the *Shelfer* principles as the proper test to assess whether damages should be awarded in lieu of an injunction;<sup>878</sup> that such damages should only be awarded under 'very exceptional circumstances';<sup>879</sup> and again both reaffirmed that, in accord with *Shelfer*, private interests should prevail over public interests when considering injunctive relief.<sup>880</sup>

There are some differences however and, while they do not affect the basis of Smith LJ's working rule, they do help build a more holistic account regarding guidance for granting injunctions today. One distinguishing fact that must be mentioned is that in *Watson* the claimants sought an injunction for noise that already existed when they purchased the property that was considered a public benefit. Mrs Kennaway on the other hand built her house (next to a lake she owned); she could not, and did not, complain of racing activity at the levels which were experienced when she built the house. It was the later intolerable noise

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<sup>875</sup> *ibid* 93. See Steele (70) 648.

<sup>876</sup> *Watson* (2); *Kennaway* (7).

<sup>877</sup> *Watson* *ibid* 54; *Kennaway* *ibid* 94.

<sup>878</sup> *Watson* *ibid* 44; *Kennaway* *ibid* 92-3.

<sup>879</sup> *Watson* *ibid* 44; *Kennaway* *ibid* 94.

<sup>880</sup> *Watson* *ibid* 51; *Kennaway* *ibid* 92-3 (where Lawton LJ cites Smith LJ in *Shelfer*).

after the club expanded, generated by large boats, commonly at national and international meets, which attracted the interest of the aggrieved parties who then brought proceedings.<sup>881</sup>

The significance of *Kennaway*, particularly in the twenty-first-century, has often been overlooked but it stands out as a seminal case regarding remedies in private nuisance; this was recognised by Coulson J in *Barr and others v Biffa Waste Services Ltd.*<sup>882</sup> He pointed out that Lawton LJ began his judgment by expressing the appeal focused on remedies. In that respect, and in the context of this chapter, *Kennaway* represents the ideal platform to work from on the issue of private rights prevailing over public benefit, particularly as it directly disputes the decision in *Miller* reaffirming the *Shelfer* principles.<sup>883</sup> In fact Lawton LJ went a little further stating that ‘we are of the opinion that there is nothing in *Miller* binding on us [the Court of Appeal], which qualifies what was decided in *Shelfer's* case’ despite being heard in the same court.<sup>884</sup>

In *Watson* the use of the Croft Motor Circuit by the defendants gave rise to excessive noise that constituted a nuisance. The Watsons sought an injunction to restrain the continuation of the nuisance (by restricting the number of days that exceeded the noise threshold established by a previous agreement<sup>885</sup>) and damages as compensation for its commission in the past. The trial judge, Simon J, awarded damages<sup>886</sup> but refused to grant an injunction on the grounds that there was considerable delay in bringing the proceedings and that the claimant could be adequately compensated by the award of damages. Although not considered by Simon J as

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<sup>881</sup> *Kennaway* *ibid* 94.

<sup>882</sup> [2012] EWCA Civ 312; [2012] 3 WLR 795, 826.

<sup>883</sup> *Kennaway* (7) 93.

<sup>884</sup> *ibid*.

<sup>885</sup> A Unilateral Undertaking made under [s.106 Town and Country Planning Act 1990](#) for the regulation of the circuit for motor and motor cycle events, for driving tuition and as a sports centre. The defendant agreed to ensure that no vehicle using the circuit should exceed certain maximum noise levels and that the use of the circuit for motor and motor cycle events should be limited by reference to noise levels measured at a defined point on the circuit (see *Watson* (2) 10). In summary the Agreement categorised events as N1 to N4 (N1 being the loudest), the relevant noise level for each event and the frequency of those events.

<sup>886</sup> The award was to the sum of £109,600 of which £40,000 was awarded for the diminution in value of their properties and loss of amenity.

part of his conclusion he mentioned the relevance of the beneficial public utility that the track provided as no other track of that sort existed in northern England.<sup>887</sup> The Court of Appeal<sup>888</sup> disagreed with Simon J and granted the injunction restricting events classified as N1 to N4 to forty days per annum.<sup>889</sup>

Mary Kennaway owned a house adjacent to a manmade lake in Gloucestershire called Mallam Water. She brought an action in nuisance against the Cotswold Motor Boat Racing Club owing to often intolerable noise from practice sessions and races at meets on most weekends during the months of April to October. Again, Mrs Kennaway sought an injunction to restrain further nuisances (by reducing the number of race meets<sup>890</sup>) and damages including special damages for diminution in the market value of her house by reason of the activities of the club. The trial judge, Mais J, awarded the plaintiff damages<sup>891</sup> but this time refused to grant an injunction on the ground that there was considerable public interest in the club thus an injunction would be oppressive.

In reversing the decision, for the reasons set out above, it was clear that the Court of Appeal in *Kennaway* were focused on refuting the decision in *Miller* regarding a public interest prevailing over private interests when seeking an injunction. Whereas the judges in *Watson* held that private interests prevailed over public utility Lawton LJ was emphatic and went a little further, he stated:

Any decisions before *Shelfer's* case...which give support for the proposition that the public interest should prevail over the private interest must be read subject to the decision in *Shelfer's* case.<sup>892</sup>

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<sup>887</sup> [2008] Env LR 43 87-8; see the Court of Appeal judgment, 42.

<sup>888</sup> The Chancellor of the High Court, Richards LJ and Lady Justice Hallett.

<sup>889</sup> See (130) above.

<sup>890</sup> *Kennaway* (7) 91-2.

<sup>891</sup> Totalling £16,000 (£1,000 general damages and £15,000 for diminution in the value of her premises).

<sup>892</sup> *Kennaway* (7) [93].

Lawton LJ is therefore suggesting that all cases where the balance had been struck in favour of the public interest should be reassessed and not used to support notions that the public interest should prevail. In a manner of speaking this matter was resolved in *Regan*. It would seem, in line with *Shelfer*, that while the public interests or any private individuals interests may be taken into account when the injury to the claimant is *minimal* the requirement for exceptional circumstances or oppression to the defendant (before the injunction can be denied) is not removed.<sup>893</sup> Of course, it is highly unlikely that any form of environmental pollution would be considered minimal, or a ‘small injury’ for the purposes of Smith LJ’s first principle.<sup>894</sup> It should be noted that *Regan* was concerned with mandatory injunctions that are traditionally far more onerous on a defendant forcing a positive act, for instance, to demolish a building for obstructing ancient light.<sup>895</sup>

To Lawton LJ intervention by injunction can only be justified when an activity ‘causes inconvenience beyond what other occupiers in the neighbourhood can be expected to bear’.<sup>896</sup> He clearly conveyed that the noise levels had become unbearable on occasions, particularly during national and international meets when they exceeded 100 decibels.<sup>897</sup> The point at issue in Lawton LJ’s mind concerning granting an injunction was that of reasonableness of user. He stated, ‘The question is whether the neighbour is using his property reasonably; having regard to the fact that he has a neighbour’.<sup>898</sup> He sought to find equilibrium where the claimant no longer had to put up with an inconvenience beyond what she should be expected to bear and the right for the plaintiffs to reasonably use the lake. The conditions laid out by the court in the injunction found that equilibrium by restraining the intensity of the continuing

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<sup>893</sup> Jolliffe (61) 31.

<sup>894</sup> *Shelfer* (3) [322].

<sup>895</sup> See Mummery LJ’s discussion (*Regan* (6) [142-6]) regarding the significance of Lord Macnaghten’s speech in *Colls* (65) not being binding thus *Shelfer* remaining the proper test. He refers to, inter alia, *Kine v Jolly* [1905] 1 Ch 480; *Slack v Leeds Industrial Co-operative Society Ltd* [1924] 2 Ch 475; and *Fishenden v Higgs & Hill Ltd* (1935) 153 LT 128.

<sup>896</sup> *Kennaway* (7) [94].

<sup>897</sup> *ibid* 91.

<sup>898</sup> *ibid* 94.

nuisance; the tradition of balancing of interests vital to actionability had become central to awarding an injunction and its conditions.

Lawton LJ's reasoning behind granting the injunction – and its conditions – somewhat echoes Lord Wright's judgment in *Sedleigh-Denfield* where he stated:

A balance has to be maintained between the right of the occupier to do what he likes with his own and that right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in a particular society.<sup>899</sup>

Lawton's handling of *Kennaway* suggests a link exists between the judicial reasoning behind the discretion for granting injunctions, the interests balancing exercise that is synonymous with private nuisance, and the reasonableness of user (see chapter 4).<sup>900</sup> He was not the first judge to think in those terms. Previously in *Sanders-Clark v Grosvenor Mansions Co Ltd* Buckley J stated that the court must question whether the defendant is using his or her property reasonably or not: 'If he is using it reasonably, there is nothing which at law can be considered a nuisance, but if he is not using it reasonably ... then the plaintiff is entitled to relief'.<sup>901</sup> Evidence of this link between reasonable user and injunctive relief was seen a little earlier in *Gaunt v Finney*, a case again concerning noise but on that occasion from the defendants' mill, Lord Selborne LC held:

A nuisance by noise ... is emphatically a question of degree... Such things to offend against the law must be done in a manner which, beyond fair controversy, ought to be regarded as excessive and unreasonable.<sup>902</sup>

In fact the ratio referred to in this chapter that span the nineteenth, twentieth and twenty-first-centuries only really affirmed the principles of the eighteenth-century judges, such as Lord

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<sup>899</sup> [1940] AC 880, 903.

<sup>900</sup> *Kennaway* (7) 94; see G Cross, 'Does Only The Careless Polluter Pay? A Fresh Examination of the Nature of Private Nuisance' (1995) LQR 445, 448.

<sup>901</sup> [1900] 2 Ch 373 375-6.

<sup>902</sup> (1872) 8 LR Ch App 8, 12.

Mansfield, which in turn were only a ‘restatement and stabilisation of principles forged earlier’ in Case during the seventeenth-century.<sup>903</sup>

Judges at the beginning of the Industrial Revolution approached nuisance cases with a rule of reasonableness to take into account the effects of snowballing urbanisation and industrialisation; although, of course, that was before the consolidation of the remedies in nuisance law in the mid-nineteenth-century seen above.<sup>904</sup> While Mansfield showed an increasing willingness to strike a balance in favour of commercial activity he nonetheless made attempts to actively persuade parties to arbitrate a resolution.<sup>905</sup> With the notion of equity ever more present in nuisance cases his other option, as nuisance could not be abated in Case, was to direct the plaintiff to bring an action to obtain an injunction in the Court of Chancery, where they had been available since the early 1700s.<sup>906</sup>

The *Shelfer* principles were forged in consideration of ‘preventative justice’. We have seen that preventative justice was central to Cranworth LC’s motivations surrounding the Bill that established the SCLPA 1854. It was geared at creating statutory authority to stop the lacuna effect created by the continuation of nuisances and repeated injuries to plaintiffs discussed earlier. Lord Cairns’ Act balanced the remedial power of the law and equity courts thus the *Shelfer* principles and much judicial reasoning thereafter were the indirect result of the perceived problems of rights being purchased if the over-awarding of damages in lieu of an injunction was not controlled. Despite this fundamental element of ‘justice’ the nature of injunctions must be recognised: they are inherently coercive – they force action and prevent persons from undertaking often lawful activities.

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<sup>903</sup> J Oldham, *English Common Law in the Age of Mansfield* (University of North Carolina Press 2004), vol. two 248; J Oldham, *The Mansfield Manuscripts and the Growth of the English Common Law in the Eighteenth Century* (University of North Carolina Press, 1992), vol. two, 882.

<sup>904</sup> J Oldham *ibid* 248 and 252; J Oldham *ibid* 882 and 892.

<sup>905</sup> J Oldham, *ibid*; *ECL* and *GECL*; and E Cockayne, *Hubbub: Filth, Noise & Stench in England 1600-1770* (Yale University Press 2007).

<sup>906</sup> *Bush v Western* (1720) Prec Ch 530.; and *Duke of Dorset v Girdler* (1720) Prec Ch 532. See Oldham, *GECLs*, *ibid*, 887-6.



The coercive element intrinsic to injunctions is probably inescapable as its origins following the Black Death suggest. Palpably a remedy that forces someone to act or not act in a particular manner or to do something undesirable – sometimes generating pecuniary loss - is anything but passive, despite its function to create a just state of affairs. The safeguard within *Shelfer's* principles that is aimed at preventing injunctive relief from being oppressive to defendants nevertheless is at the discretion of judges even with the added possibility of exceptional circumstances denying the injunction. Bingham MR and Millett LJ in *Jaggard* equated oppression of the defendant to the exceptional circumstances required by the *Shelfer* principles to justify withholding an injunction.<sup>907</sup> Regardless of these possible grounds to deny an injunction both are highly dependent on judicial discretion. That discretion was tested to the limit in *Dennis v Ministry of Defence*.<sup>908</sup>

## **7. National Security, the Ultimate Public Interest?**

The erosion of *Shelfer* concerning public interest (as seen in *Miller*) was revisited in *Dennis*. The public interest that was the point in issue was national security, arguably the extremity of all public interests. The Ministry of Defence infringed the Dennis' use and enjoyment of their home, Walcot Hall Estate. 'Extreme noise' was created during the training of Harrier pilots from neighbouring RAF Wittering which was construed to constitute a nuisance. Nevertheless, unusually, the court gave damages in lieu of an injunction. Buckley J made his decision in the belief that his conclusion was not prohibited by authority<sup>909</sup> in fact he does not choose to put forward that previous case law either compelled or justified that conclusion.<sup>910</sup> The facts of the case were 'exceptional', to say the least, and they were not analogous to the cases that were cited by Buckley - in actual fact they were not analogous to any other case of which I am aware. It can be argued that his unconventional, albeit careful, approach was

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<sup>907</sup> See *Watson* (2) 47 (as per the Chancellor of the High Court).

<sup>908</sup> *Dennis v Ministry of Defence* [2003] EWHC 793.

<sup>909</sup> *ibid* 49.

<sup>910</sup> *Steele* (71) 656.

consequential to questions regarding the defence of the realm demanding a solution. The fact that the circumstances of the case were burdened with the cumbersome element that national security is, perhaps, the greatest of public interests the long-established supremacy of private right over public interest also demanded resolution; it was nonetheless unresolved.

Importantly this case ultimately affirmed that public utility is incapable of removing the existence of a nuisance, or in other words, it does not make something that would otherwise be considered a nuisance cease to be one. Ostensibly, the defence of the realm is an exception to that rule. To date, barring cricket in *Miller* (which justifiably received negative judicial treatment), the defence of the realm seems to be the only deviation from the general perception that a public interest in a continuing activity ordinarily constitutes a nuisance. It would appear the matter will depend on all the circumstances, not least the strength of the public interest in question.<sup>911</sup> What must be taken from the decision in *Dennis* is that even national security does not entirely deny the granting of an injunction.

Using the guidelines of Smith LJ in *Shelfer* to award damages in lieu of an injunction<sup>912</sup> (including oppression of the defendant, the ability to financially compensate for the diminution in the market value of the Estate,<sup>913</sup> and considerable delay in bringing the proceedings<sup>914</sup>) Buckley J nonetheless, for all intents and purposes, merely suspended an injunction rather than denying one.<sup>915</sup> The possibility of granting the injunction, but suspending it ‘to give the MoD time to find an alternative site’, was in fact suggested by the

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<sup>911</sup> *Dennis* (153) 756.

<sup>912</sup> Although it has been established that an injunction should not be granted where damages are an ‘adequate’ remedy (*London & Blackwall Railway Co v Cross* (1886) 31 Ch D.) it is clear that the adequacy of the remedy rests in being ‘fully’ compensated by an award of damages for an injunction not to be granted (see Bean (46) 2.09 (1)).

<sup>913</sup> Damages were in fact assessed on past and future loss of amenity; past and future loss of use; and loss of capital value (*Dennis* (153) 767).

<sup>914</sup> *Dennis* ibid 758.

<sup>915</sup> Compare J Hartshorne, ‘Public Interest in Private Nuisance’ (2003) *Conveyancer and Property Lawyer* 526, 529.

claimant's representative, Mr Wood QC.<sup>916</sup> The difficulty in proving that a more suitable site existed was ubiquitous; in reality all that would be achieved was a relocation of the nuisance, which is an unfortunate consequence of injunctive relief, as was the case in *Esso v Halsey*.<sup>917</sup> The case revolved around whether this extraordinary use of land could be considered a public interest capable of withholding an injunction when the case law - and most commentators - concludes that public interest *in itself* cannot prevail over private rights and is not a defence in private nuisance.<sup>918</sup> Buckley J stated:

It seems to me that the nettle must be grasped. Either these Harriers constitute a nuisance or public interest, as represented by the MoD maintaining a state of the art air strike force and training pilots, provides immunity. *If there is immunity, it is obviously not unlimited.* The MoD must do all it reasonably can to avoid damaging the interests of others. In my view that would include choosing an appropriate location and operating it reasonably.<sup>919</sup>

The defence of the realm clearly gave rise to extraordinary circumstances that could arguably be justified as 'exceptional' for the purposes of deviating from the *Shelfer* principles, but this was not expressed by Buckley J. In effect, the defence of the realm as a public interest was treated as if it had been authorised by statute rather on long-established - seemingly binding - principles.<sup>920</sup>

But then again, Buckley J choose not to dismiss the possibility of an injunction in the future when he awarded damages in lieu. The Harrier was due to be replaced in 2012. Evidentially Mr Dennis was given the scope to bring a fresh claim at that time and Buckley J strongly advised the RAF to relocate by then.<sup>921</sup> The Harrier was retired in 2011 but the demise of Joint Force Harrier in December 2010 and the subsequent departure of Number 4 Squadron

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<sup>916</sup> *Dennis* (153) [757].

<sup>917</sup> For instance, *Halsey* (99).

<sup>918</sup> *Dennis* (152) [753-7]. See Steele (71) 648.

<sup>919</sup> *ibid* 756. Emphasis added.

<sup>920</sup> *ibid* 757.

<sup>921</sup> Mr Dennis would not have been prevented by the doctrine of *res judicata* (a matter [already] judged).

following its disbandment in January 2011 means we will never know if Mr Dennis would have sought another injunction, if the RAF had not taken Buckley J's advice to train its pilots elsewhere when the Harrier was replaced.<sup>922</sup>

If we imagine that the training of Typhoon pilots had replaced the role of Joint Force Harrier and Mr Dennis decided to bring an action in nuisance seeking an injunction to restrain activities, what could we expect to be the outcome? The decisions in *Regan* and *Watson* do suggest that Mr Dennis would have been successful in a subsequent claim if the proper test was used (in the absence of statutory authority or planning permission that was capable of changing the character of the neighbour<sup>923</sup>); Buckley J did not consider the *Shelfer* principles, in fact he only really referred to *Shelfer* itself to affirm the rule that the public benefit of a wrong doer 'has never been considered a sufficient reason to refuse an injunction.'<sup>924</sup> It can therefore be asserted that, according to the Chancellor of the High Court in *Watson*, Buckley J 'failed to apply the proper test' to award damages in lieu of an injunction.<sup>925</sup> Certainly the injury to the plaintiff's legal rights was not small and, although the injury may be viewed as capable of being estimated in money, the compensation was by no means small (£950,000). If the test was oppression to the defendant, in reality, the resources of the RAF and Her Majesty's government that funds it are – even in this time of austerity - arguably too substantial to suggest relocating the activities to another of the numerous RAF bases as oppressive to the defendant.

Owing to Mr Dennis' option to seek an injunction from the Ministry of Defence in future, the delay in proceedings that Buckley J referred to would be unlikely to be relevant in a further action to seek an injunction. If *Watson* and *Regan* are to be understood correctly then public

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<sup>922</sup> *Dennis* (152) 767.

<sup>923</sup> See *Hunter v Canary Wharf Ltd* [1997] 2 WLR 684; [1997] AC 655. It would be highly unlikely that planning permission would be capable of changing the character of the neighbourhood considering the extraordinary nature of Walcot Hall Estate and the surrounding environs.

<sup>924</sup> *Dennis* (152) 752.

<sup>925</sup> *Watson* (2) 43.

interests are only relevant in ‘marginal cases’. Essentially, as the noise levels would not be ‘minimal’ and thus the injury not small, the public interest would be by definition irrelevant.<sup>926</sup> Of course the facts in *Dennis* probably represent the most extreme circumstances in which the private right/public interest paradigm could be tested, thus the true question is would the circumstances be construed as exceptional for the purposes of withholding an injunction as per the *Shelfer* principles? Perhaps, but this was not examined by Buckley.

Bearing in mind the hierarchy of the courts, *Dennis* was decided at a relatively low level and there is room for its extraordinary facts to be reconsidered if any similar case was to reach the courtroom in the future. One further point requires reflection here regarding the potential real outcome of the decision to allow a further action to seek injunctive relief. Although the replacement for the Harrier is not due to around 2020<sup>927</sup> the RAF still need to train pilots; that had not continued at RAF Wittering. It cannot be readily dismissed that, considering the strong advice given to the Ministry of Defence to relocate, the threat of an injunction in 2012 was enough to reassess the situation and train pilot elsewhere. Whatever the case may be it appears that private interest remains the ‘irresistible force’ it has exemplified since the early seventeenth-century.<sup>928</sup>

## **8. *Coventry v Lawrence* – affirmation of a judge’s discretion to award or withhold an injunction**

Stephen Tromans comments in 1982 arguably pre-empt the Supreme Court’s decision in *Coventry*. If this is the case, the decision vindicates his criticism of *Shelfer* that it could produce ‘drastic’ results – Adderley’s sewage case is considered an example of that – and

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<sup>926</sup> See Jolliffe on this point (62), 30-2.

<sup>927</sup> A Chuter, ‘It’s Official: U.K. To Switch Back to STOVL F-35’ Defence News, 10 May 2012.

<sup>928</sup> Jolliffe (62) 32.

that the courts ought to be more willing to remedy nuisance through compensation to avoid this eventuality; this is the prevention/payment dichotomy.<sup>929</sup> Pontin, however, has argued that there is nothing per se drastic about the award of an injunction. Everything hinges on the terms on which it is awarded. Adderley's injunction in *Birmingham* was suspended so as to enable the essential public utility to continue to operate (on pain of compensation for the wrong) while it worked out what to do about the nuisance, in the sense of mitigating it.

Pontin has also questioned the extent to which *Coventry* has indeed departed from *Shelfer*. There appear to be two broad aspects to this argument. The first is that there are too many differences of opinion in the speeches of the Justices of the Supreme Court to conclude that the law has changed. These comprise the extreme opinion of Lord Sumption, that injunctions should not be awarded where third parties rely on the wrongdoers activity; the opinion of Lord Neuberger that the court ought not to fetter its discretion to consider all factors, including the needs of the wrongdoer's workforce and the defendant having planning permission, which will usually be relevant as evidence of the public interest in the wrongdoer's land use; Lord Carnwath's agreement with Lord Neuberger with the caveat that planning permission was to be understood as a relevant factor, but not necessarily a weighty one; and Lord Mance's concern that victims of a nuisance affecting their home ought not be required to accept payment for the wrong rather than prevention of it.

Pontin's second argument is that the Supreme Court has not mentioned leading authority to the effect that the proper way of 'factoring in' the public interest is in the terms on which the injunction is granted. Pontin cites *Pride of Derby v British Celanese*<sup>930</sup> as the most recent authority in that respect. There it was stated by Lord Romer that public interest arguments

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<sup>929</sup> S Tromans, 'Nuisance – Prevention or Payment' (1982) 41 Cambridge Law Journal 87.

<sup>930</sup> [1953] Ch 149.

‘are strong reason for suspending the injunction, but *no reason* for not granting it’.<sup>931</sup> As noted above, that approach dates back to the mid-nineteenth century, in cases such as *Broadbent* (House of Lords) and *Adderley’s Case* (Birmingham).

One possible response to Pontin’s first argument is that the Supreme Court appears to have united – the reasons for the reconciliation are not explicit - around Lord Neuberger’s approach.<sup>932</sup> ‘We are changing the practice of the courts’, opined Lord Neuberger in *Coventry*.<sup>933</sup> The effect of Lord Neuberger’s contribution, as approved by Court as a whole, is that a trial judge cannot decline damages in lieu of an injunction on the basis that the public interest etc is irrelevant. There is no disguising that this is a change. However, it is not clear whether this will make much if any difference in practice, partly because the change involves affirming a court’s discretion (and that each case will turn on the facts), but mainly because of the likelihood that the public interest concerns that exerted influence on the Supreme Court are pre-empted by the case law on injunctions being awarded on terms that are suspended. If the injunction can be granted on terms which safeguard the public interest, why should it be withheld on public interest grounds?

A possible criticism of Pontin’s ‘suspension’ argument is that it is better, in the sense of more certain, to address the public interest in the grant or withholding of an injunction rather than through some finely tailored, case specific terms. For example, thirty seven years is a long time for an injunction to be ‘overhanging’ through a suspension, as in *Adderley’s Case*. Something which Pontin does not mention is Buckley J in *Dennis* (see previous section), whose approach was to decline an injunction and award damages in lieu, but with an invitation for the victim to return to court should the defendant continue to cause a nuisance. However, as I have already commented, Buckley J’s approach is tantamount to a suspended

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<sup>931</sup> *ibid* 192 (Emphasis added).

<sup>932</sup> *Coventry* (1) [5].

<sup>933</sup> *Coventry* 132.

injunction. This would support the argument that the court in *Coventry* has not fundamentally shifted the onus from prevention to payment.

At the time of writing, it is unclear whether or how the wrongdoer in *Coventry* will respond to the invitation to apply for damages instead of an injunction, or indeed whether the victims will continue to seek an injunction. ‘Fenland’, the victims’ home, remains unoccupied because of a fire rendering it uninhabitable. One theoretical option is that the parties agree on compensation for the future devaluation of Fenland as a residence, as a result of noise from the weekend racing, and that the wrongdoer acquires an easement to emit weekend noise which protects them against future nuisance proceedings on this point.

Whether the parties agree on this, or bargain leading to a settlement of another way forward (concerning the permissible amount of weekend noise, for example), it is important to reiterate that negotiation of compliance with the common law of nuisance is a well-established facet of the practice and, crucially, the courts often play a quite conscious and deliberate part in framing negotiation. The court’s traditional role is that of laying down a broad goal of being a ‘good neighbour’ which can be fleshed out in a *ex post* negotiated settlement of behavioural change rather than ‘impose’ the details of a remedy.<sup>934</sup> This is illustrated by *Coventry* itself, where after judgment on liability at first instance the parties had agreed on the injunction and its terms. Thus it was a surprise that the defendant’s sought to depart from this at the Supreme Court stage. It would be deeply regrettable were this role of the courts to change to that of putting a price on nuisance, as Lord Sumption advocates (or rather advocated).

## **9. Beyond Prohibitory Injunctions – Preventing Nuisance Risks**

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<sup>934</sup> E.g. *Hunter* (168) 692 (Lord Goff).



In a mirror to the case law, the focus of this chapter has been on the award or withholding of injunctions prohibiting a proven nuisance; that is the form of injunction most claimants in reported nuisance actions seek. The argument so far is that the courts, with some exceptions, have closely followed nineteenth century jurisprudence regarding injunctions and that the injunction as a consequence is the victim's primary remedy. A further argument is that this remedy reflects the concern of Lord Cranworth with 'preventative justice',<sup>935</sup> which is of interest from the perspective of the concern in this thesis with the environmental dimension to nuisance law. Prevention of harm is highly valued as a 'principle' of environmental law.

However, the courts exercise greater caution when it comes to managing the risk of an unproved and potential nuisance from occurring in future. This is apparent from the case law on the subject of the *quia timet* injunction. An injunction of this nature can be obtained in the face of impending harm, though no actual damage has as yet occurred. According to Pearson J in order to maintain a *quia timet* action to restrain an apprehended injury two ingredients are required, first 'there must, if no actual damage is proved, be *proof of imminent danger* and, second, 'there must also be proof that the apprehended damage will, if it comes, be very substantial'.<sup>936</sup>

Hence if the potential damage is not imminent or at least very likely to occur in the near future, the court will not usually exercise its discretion in the issue of this type of injunction.<sup>937</sup> But what is interesting in ecocide theory terms about this two tier test to grant a *quia timet* injunction is the nature of the apprehended damage. Pearson J continued:

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<sup>935</sup> n (48).

<sup>936</sup> *Fletcher v Bealey* (1885) 28 Ch D 688, 698.

<sup>937</sup> 'If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitude', *per* James LJ in *Salvin v North Brancepeth Coal Coat* (1874) 9 Ch App 705, 709-10.

I should *almost* say it must be proved that [the damage] will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn [sic] that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the Plaintiff to protect himself against it if relief is denied to him in a *quia timet* action'.<sup>938</sup>

It is difficult to truly determine what Pearson J meant by 'almost irreparable' even in light of the rest of his judgment but we can be confident that he was attempting to assert the difficulties of ascertaining what represents an imminent threat in nuisance law terms. Thus we may argue that he intended to communicate the difficulty of establishing proof that a threat was imminent; in such a position setting a high benchmark would be logical. We can apprehend a threat although it may never materialise.

However if the nuisance in question is capable of inflicting irreversible damage then the plaintiff's rights will be diluted by the courts if the injunction is denied then the injury occurs; it would be too late. The judges would be culpable of severe misjudgement for not appreciating the severity of the environmental threat. This may explain Pearson J's caution and the express use of the word 'almost' in his ratio. Considering his choice of words it would be difficult to argue he was proposing that a potential injury would *need* to be irreversible in order for a *quia timet* injunction to be granted. There are various environmental threats today that would cause irreparable environmental damage if a threat became a reality. The potential for this category of injunction is thought-provoking as arguably there are numerous examples of persons with the sufficient interest in private nuisance where an action can be brought today; it is a question of whether the ingredients for a *quia timet* injunction can be found for judges to grant them at their discretion.

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<sup>938</sup> *Fletcher v Bealey* (181) 698. Emphasis added.

The *quia timet* injunction is perhaps the best illustration of the coercive nature of injunctive relief. In environmental protection terms it is in all probability the option that needs exploring the most; if substantial environmental harm can be prevented before it happens then the environment and human health could be rigorously safeguarded. Another aspect of the judgment in *Fletcher v Bealey*<sup>939</sup> which is important for the environment rests in the fact that, despite the action being denied, the dismissal was expressly declared to be without prejudice thus the plaintiff had the right to bring another action in case of actual injury or any future apprehended imminent danger. It would seem the courts are unable to justify preventing would be litigants from exercising their private rights. Accordingly private litigants – through private nuisance – can take a participatory role in the environmental debate.<sup>940</sup>

## 10. Conclusions

In comparison with the foregoing chapters, the current law on injunctions is based on the nineteenth-century position; this is explicable in terms of the chronology of injunction's late development, even though they have far more ancient origins than is commonly understood. This chapter also varies from the others as there has been a clear shift in inclination that leans in favour of the plaintiff and away from the defendant or polluter. The case law confirms that if a nuisance at law has been established then *prima facie* an injunction will be granted. It has been clearly established by the decisions of the Court of Appeal in *Shelfer*, *Regan* and *Watson* – and even to probably to a lesser extent *Coventry* - that damages in lieu of an injunction should only be awarded under 'very exceptional circumstances'.

Whilst the decision in *Dennis* is exceptional the decision in *Miller* is clearly viewed as an isolated blip in an otherwise constant judicial fiat that public interests must acquiesce to

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<sup>939</sup> *Fletcher* (178).

<sup>940</sup> cf J Steele, 'Private Law and the Environment: Nuisance in Context' (1995) 15(2) LS 236.

private proprietary rights: consideration of public benefit is of no (or very little) significance in nuisance law.<sup>941</sup> In light of the preceding analysis, suggesting as it does, the injunction is a powerful tool in the armoury of environmental protection. It has the potential to stop nuisances, to restore desired environmental conditions (allowing, for example, scorched vegetation to regenerate in a favourable environment) and to prevent substantial environmental damage from happening in the first place.

It is perhaps often overlooked that judicious litigants may use nuisance law to effect environmental protection by attaining an injunction from the outset of their action. As such, it is suggested that nuisance law's nature imparts a pedigree for environmental protection. Further, there is something much more fundamental than a fortunate externality of the action when nuisance provides that protection, especially when – if only in part – that is the claimant's objective. It goes without saying that claims can be maintained regarding injunctions having an *indirect effect* on environmental protection when litigants assert their rights in nuisance. However that is irrelevant if any degree of intent to effect environmental protection was a factor when a claimant decides to begin litigation. The direct or indirect effect concerning environmental protection in nuisance law is, on the whole, merely academic. Regardless of the resultant influence of an injunction, the outcome is desirable, in environmental terms, if an action is successful and the injunction stops the environmental harm. The injunction – when seen in terms of the concluding comments in this chapter – strongly supports the notion that nuisance is an environmental tort.

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<sup>941</sup> *Barr and others v Biffa Waste Services Ltd* [2009] EWHC 1033 [804].

## Chapter 6

### Conclusion

At the outset of this research, I chose to follow Lord Goff's lead in *Hunter* by looking to incipient nuisance law to research the 'essence' of private nuisance and to determine whether there was a linear explanation for the tort's development over the centuries, with the main broad research objective to contribute to a deeper understanding of *common law* private nuisance and its potential to protect the natural environment. Palpably any linear explanation would be problematic without a comprehensive historical analysis of its evolution. In searching for the true 'essence' of private nuisance and evidence of a linear evolution I started (as Lords Goff did) in the medieval epoch. A fairly quick realisation was that, fundamentally, what I was searching for was there, but in a different form than was expected. Lord Goff's interpretation of the 'essence' of private nuisance being 'a tort directed against the plaintiff's enjoyment of rights over land'<sup>942</sup> is seemingly not an accurate depiction of the *true* essence. In fact, as was explained in Chapter 2, considering that the plea rolls leave little evidence of 'what created a nuisance...or even what rights a landholder had in his own tenement',<sup>943</sup> that nuisance law did not protect rights in land until the assize of nuisance, in name, existed; and that '[p]roperty was antithetical to twelfth-century feudal relationships',<sup>944</sup> we are placed in little doubt that the essence, in line with Lord Goff's proprietary interpretation, is not the true essence of nuisance, at least originally.

However, it was established, arguably, that an alternative 'essence' than that offered by Lord Goff, did emanate from its medieval form. Whilst that meant that the foundations for determining a linear explanation for the tort's evolution existed, it also meant that there was a

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<sup>942</sup> *Hunter* 688 (Lord Goff).

<sup>943</sup> Loengard (7) 271 (see page 40, Chapter 2).

<sup>944</sup> Palmer, *Origins* (10) 4. See page 42, Chapter 2.

flaw in his Lordship's hypothesis regarding the 'essence' of nuisance. If that is indeed the case his reasoning about his interpretation of the *strict* proprietary element to modern private nuisance needed revision – after all his judgment in *Hunter* has received much criticism. Palpably, if a revision is needed, Lord Goff's interpretation of the essence of nuisance is problematic because, almost certainly, as evidenced in the preceding chapters, it has influenced other decisions, which are essential to the continuing evolution of modern nuisance, particularly in its traditional role of effecting environmental protection.

It was during the process of researching the proprietary element of private nuisance, in regards to standing (discussed in Chapter 2), that the torts 'true essence' came to the fore. The 'simple form' argument put forward in this thesis (from which a linear explanation derives), that developed as the research advanced, showed that an essential aspect of nuisance over the centuries is an inherent evolutionary character of the law. It is argued in preceding chapters that the 'true essence' of private nuisance lies in the notion that it has evolved according to the varying contemporary societal needs across the epochs to protect various interests in land. The question throughout was whether that evolutionary character, in light of recent developments, is continuing in a manner consistent with its ancestry in effecting environmental protection? Which begs another question: do recent developments in the tort reflect environmental protection as a societal need?

As it is contended in the introduction, formative junctures across the epochs have been often overlooked by commentators and the judiciary, arguably generating confusion about the law's purpose and scope in a modern setting. It has been demonstrated that, the doctrinal issues, like remedies, have all evolved according to societal needs but it has been argued that modern developments in nuisance have broadly weakened the capacity of the law to adequately remedy pollution of the natural environment, as it affects individuals in occupation of land. Of course, despite a measure of historical claims pervading adjudication

and scholarly commentary in this field, they rarely venture beyond the nineteenth-century, and therefore many jurists have based their observations without the benefit of its ancestry. Much modern commentary, one could say, lacks a holistic historical overview of the issues (despite the ancient origins of the law), thus, arguably, the evolutionary character, in light of recent developments, is failing to continue in a manner consistent with its ancestry and does not reflect today's societal needs to effect adequate environmental protection (as it affects individuals in occupation of land) through common law private rights.

The objective throughout this thesis has been to contribute to a deeper historical understanding of common law private nuisance in order to assess its potential to protect the natural environment. The reality is, owing to the vast increase in population over time and ever increasing environmental threats, that private nuisance is needed, today, more than ever, to protect private interests in land. The traditional (historical) protection afforded by nuisance (and its remedies) has been demonstrably adulterated through non-traditional (unhistorical) doctrinal changes that, perhaps, ignore environmental protection as a contemporary societal need. Because environmental protection remains a societal need today, palpably, it makes sense to expound its environmental credentials as they developed; this thesis has sought to do that.

Indeed, it has been demonstrated here, that a number of the developmental steps taken during the evolution of nuisance have reacted to environmental challenges arising from societal developments across the ages (for instance the Black Death and the Industrial Revolution) and, accordingly, have consistently remedied environmental harms during that evolution. It is not trite to say that private nuisance has become decidedly underutilised in its logical (and historical) role in protecting individual environmental rights (and public health) in more recent times. Whilst it has been argued that common law nuisance is the precursor to the

emergence of what is termed today as ‘environmental law’,<sup>945</sup> the modern developments in the law, discussed in Chapters 2, 3 and 4, have challenged its very existence.<sup>946</sup> This has had a profound effect on its doctrines and proven derisive to nuisance’s ‘green’ credentials in a modern setting.

The simple form of private nuisance that afforded nuisance law the tools to effect environmental protection can be identified within the substantive chapters of the thesis. The topics discussed in those chapters have been the concern of nuisance actions across the epochs: today they remain the core architecture of the tort. The issues for any would be litigant over the last eight centuries have been whether they have the right to sue (Chapter 2), which harms are actionable (Chapter 3), the nature of liability incurred in the circumstances (Chapter 4), and what remedy they may expect, if successful (Chapter 5). The simplicity represented by the continuing core architecture of the tort ties in neatly with the essence that the law develops in response to societal needs.

Fundamentally, the doctrines that are required by each litigant to be successful in remedying environmental harm have largely remained constant. In truth, considering the vast ancestry of the tort, any doctrinal changes over its evolution have been incremental variations that have reacted to social, economic and political nuances of the time. Whilst judges, lawyers and litigants turned their backs on the nascent nuisance mechanisms as nuisance law evolved, particularly with the advent of Case, regardless of any variations across the epochs, each litigant has been faced with the same doctrinal issues discussed within the substantive chapters above. Indeed the heart of the core doctrinal issues and the enduring role and importance of the injunction, historically, fits the simplicity hypothesis.

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<sup>945</sup> J Steele, *Tort Law: Text, Cases and Materials* (OUP 2007), 670.

<sup>946</sup> C Gearty, ‘The Place of Private Nuisance in a Modern Law of Torts’ (1989) 48(2) CLJ 214, 216.



As time passed, the concept of property (that only appeared around 1200) evolved and the feudal relationship concerned with ‘profound mutual obligations’ based on a seigniorial relationship relinquished. During that period, proprietary rights developed and the notion of ‘use and enjoyment of that land’ developed alongside them. The modern descriptions of private nuisance reflect that socio-political change that influenced the law. It is apparent that there must have been a juncture in the tort’s history that represents the beginnings modern nuisance law. It has been argued in this thesis that Case represents the ‘point zero’ of the modern tort.

Similar to the discussion in chapter 4 which expresses that the proper conditions were needed to exist in order for negligence to become a separate tort, the correct conditions were needed before what we consider to be modern private nuisance could begin. The medieval constraints of feudal England did not allow this and it can thus be contended that the advent of modern nuisance law was unable to come to the fore until the case law functioned in a manner that was detached from manorial limitations. Indeed, it is probable that it is only after the decision of *Cantrell v Church* (which enabled litigants to abandon the assize of nuisance and *quod permittat prosternere*) that it is possible to speak of early modern nuisance law. The ancient writs prior to that point bear almost no resemblance to the ‘modern’ action with which the thesis is concerned. That was a reality that needed to be developed but it was methodologically unsound without first explaining the unsatisfactory nature of looking to the medieval law – as a model to structure the modern law - as Lord Goff had done in *Hunter*.

Developments and nuances of the legal system over the epochs driven, in part, by fluctuations of a societal evolution have almost certainly altered most aspects of incipient nuisance law, including the issues addressed in this thesis. The law of private nuisance has been notoriously - but nonetheless deservedly - labelled as being immersed in legal uncertainty. It is indeed convoluted and arguably even unfit for purpose. Nevertheless an overabundance of negativity

has overwhelmed the tort owing to various elaborate reinterpretations of the law of nuisance which, over the years, have accordingly confused the issues making the tort more complex at each passing attempt. In truth, the ‘unruly’ use of historic material by judges has caused added difficulties to those issues identified by the academic community, particularly in the recent past. The problem is twofold in that the past is neither used nor understood in any consistent way and the judiciary have manipulated snippets of historical material to suit the ‘policy’ of today’s courts, rather than contemporary or impending societal needs. It is entirely conceivable that that policy aspires to limit private nuisance and to leave space for established regulatory laws and further establish the hegemonic tort of negligence, both of which are arguably unsatisfactory as a means of effecting environmental protection.

Palpably there is a need for a private law mechanism which can initiate private (thus unofficial) challenges to official decisions made in what can be termed the ‘public interest’. Traditional regulation does indeed leave gaps for private law to fill and the inadequacy of much environmental regulation, that sometimes exacerbates environmental harms, highlights there are situations where public bodies must be kept in check by private responses to either unjust or unacceptable decisions. The natural modern function conflicts with the present prevailing judicial policy. For centuries now private nuisance has been a potential avenue for private individuals to challenge decisions authorised in some manner by a public body. That potential, however, is at the behest of the judiciary. Donald McGillivray and John Wightman were in a fortunate position in 1996 to comment upon the state of private nuisance following the Court of Appeal decision in *Hunter*. It was a unique moment when academics could pause, anticipate, and even speculate about the implications of private nuisance law in the face of modern environmental challenges and modern environmentalism, when standing, for a brief time, reflected contemporary societal needs.

The Court of Appeal was continuing the popular recognition (which developed in the twentieth-century across the courts of the Commonwealth) that a substantial link to property - such as occupation as a home – was the proper test for standing in private nuisance. But, the research in this thesis reveals that the Court of Appeal essentially emulated their medieval counterparts after an error at law had sent the issue of standing on the wrong course following the much maligned decision of *Malone v Laskey*. By relaxing the nexus between person and land to something other than a proprietary interest they had inadvertently repeated the same process as the late sixteenth and early seventeenth-century judges. The feudal requirement for a connection with land that denoted a recognised acceptance (by their lord<sup>947</sup>) - that was good against the world - had been long transcended by the turn of the seventeenth-century. The significance of the seigniorial relationship that offered security under the law, protecting the physical and economic survival of a tenant in return for a service was obsolete, and the decision in *Cantrell v Church* ensured that was recognised by the common law.

An interesting effect (direct or indirect) of individuals being able to adequately safeguard their proprietary rights, using private nuisance, is that litigation can often influence adequate environmental protection for the entire local environs concerned within each case, not merely the land in question. McGillivray and Wightman were faced with the reality of the true potential of private nuisance as a modern environmental tort. They envisioned a role that was neither ‘dominated by regulation’ nor ‘as a means of implementing a market based approach of environmental decision making’.<sup>948</sup> In that sense they envisioned that private nuisance would be in a position to promote public participation in environmental decisions after the event, when environmental harmful activities had been recognised in actuality rather than anticipated in theory. Accordingly, increased accountability would be imposed on those in the

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<sup>947</sup> That ‘lord’ could also be the king himself who was ultimately the highest lord on the feudal ladder.

<sup>948</sup> D McGillivray and J Wightman, ‘Private Rights, Public Interest and the Environment’ in T Hayward and J O’Neill ed., *Justice, Property and the Environment* (Ashgate, 1997), 156.

decision making process – this would certainly be desirable in light of the UK's obligations of the Århus Convention, which today it is outwardly flouting.

Since the House of Lords decisions in *Cambridge Water* and *Hunter* private nuisance has been placed into an indeterminate state. The so called 'conventional wisdom' sees environmental protection as a public matter and contends that only through the diminution of private rights by 'regulation in the public interest' can the environment be adequately protected.<sup>949</sup> The more 'collective rights' in property are accepted as qualifying private rights, the more the law is willing to dilute the traditional 'individualistic' comprehension of property rights. This, of course, is problematic for private nuisance and raises further questions regarding their Lordships' decisions in these cases. The attempt to take private nuisance back to its origins, albeit a misapprehended version, forces individual proprietary interests in land dominated by economic considerations to the heart of the tort. As such it is vulnerable to being further diluted by unsatisfactory 'environmental' regulations and planning decisions that will have an impact on varying localities as the monetary value of land becomes the overriding interest.

Arguably, if standing is based on the nexus between human beings and land as a home, rather than a proprietary interest, the economic impetus behind landholding will be attenuated in favour of deeper environmental concerns. Human health and the willingness to live in a healthy environment overshadow economic considerations. Private nuisance would be in the unique position to bypass the inherent limitations of much environmental law which is implemented with clear provisions to safeguard the growth-economy. By 'safeguarding the growth economy' has meant legislation geared to prevent pollution only insofar as it does not curtail the economic viability of polluters, and this will only serve to exacerbate environmental damage by way of those activities being given legislative consent.

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<sup>949</sup> *ibid*, 144; see also J Steele, *Tort Law: Text, Cases and Materials* (OUP 2007), 670.

If a polluter is strictly liable for causing physical environmental damage to protected property interests – as ratio in *Tipping* still requires – then those with standing have the right to seek an injunction to force the polluter to cease that activity. The research in this thesis maintains that – owing to the ratio in *Shelfer* and the Supreme Court decision in *Coventry* – only in exceptional circumstances (subject to strict, unambiguous criteria) will damages be awarded in lieu of an injunction. The reality of such common law rights being available to everyone with a substantial link to a property would certainly have been recognised by their Lordships when they were deliberating about their decisions in *Hunter*. Arguably, Lord Cooke’s intimation that *Hunter* was decided on policy grounds should not be limited to the desire of crafting symmetry and tidiness in the tort: we should consider wider policy implications, such as the controversial policy of promoting economic growth. Lord Mansfield’s decisions and his trial notes from the eighteenth-century are indicative that the higher House of the courts has in the past been prejudicial towards promoting economic interests in favour of private common law (environmental) rights. It is somewhat sardonic that the decision in *Tipping* was to ‘draw the line’ under the damaging effect of industrialisation on rural and landed England and Wales. Is it telling that Lord Goff, in essence, ignored the binding authority of *Tipping* in *Cambridge* before – just a few years later in *Hunter* - seeking justification to support the position of excluding the vast proportion of the population from having standing in private nuisance using extremely weak historical evidence?

Private nuisance is truly on the edge; it has never been in such a poor state than it finds itself today. The concept of nuisance grew around controlling the manner in which people used and exploited their land and environmental regulation is arguably a direct result of legislative attempts to control pollution as industrialisation became too widespread for the common law to cope with; nuisance was not unfit for the purposes of environmental protection, it was simply overwhelmed by the unprecedented rate of industrial growth, despite the Lords

attempts to stop the effects of pollution on the environment in decisions such as *Tipping*. As environmental regulations and planning decisions continue to increase whilst private nuisance becomes increasingly dormant waiting for the occasional case where it acts as an unofficial process when regulation is ineffective, where amenity nuisances have a prolonged financial effect or where an authority is unwilling to bring an action in statutory nuisance, the tort is fading deeper into oblivion.

The modern 'description' of private nuisance is vague and academics are far from unanimous on the subject of actionability. The difficulties associated with the assimilation of negligence principles are ubiquitous across, practically, the entire law of nuisance. Palpably that assimilation process was aided outside its original remit - created by Lord Wright (in *Sedleigh-Denfield*) as an exception to give added protection to those defendants that had an action thrust upon them - by the decision in *Cambridge Water*. Lord Goff's judgment in *Cambridge* is clearly at odds with Lord Westbury's judgment in *Tipping* and is clear evidence that the indoctrination of historically unfamiliar concepts (such as reasonable foreseeability based on the conduct of the hypothetical reasonable man) have damaged private nuisance's identity and integrity allowing the influences to spread deeper into the tort and effect other issues such as actionability.

Lord Goff's decisions in *Hunter* and *Cambridge* are visibly prejudicial against using private nuisance to protect interests in land, especially those that may be construed as environmental rights. His bias is evidenced fully in *Cambridge* by his expressed preference for Legislature generated regulation to ensure environmental protection (essentially preventing any further modern developments in the tort of private nuisance)<sup>950</sup> and his clear attempts to allow negligence principles to subjugate nuisance doctrine by blatantly ignoring the effects of the

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<sup>950</sup> Lord Goff stated in *Cambridge*: 'So much well-informed and carefully structured legislation is now put in place to effect environmental protection...there is less need for the courts to develop common law principle to achieve the same end, and indeed it may be undesirable that they should do so' ((6) 305).

binding precedent laid down in *Tipping*. It is difficult to dispute that by denying modern private nuisance the room to develop further Lord Goff felt it justifiable to sacrifice long-established private common law methods of environmental protection – the type his contemporary (Lord Hoffmann) recognised in *Hunter* was the purpose of the decision in *Tipping*.<sup>951</sup> Lord Goff's bias is further evidenced by his previous decision in *Smith*<sup>952</sup> in which he treated physical damage to property (caused by fire owing to the acts of a third party – similar to facts in *Goldman*<sup>953</sup>) as a case of negligence. We must question why one set of facts were treated as nuisance whilst the other as negligence, other than in manner that it was just a matter of different pleadings?

The examples discussed in Chapters 3 and 4 concerning specific matters of actionability and liability are clearly evocative that the merging of nuisance and negligence principles only serve unsatisfactory outcomes. Akin to oil and water they cannot properly mix – we may try but a natural separation will always be observable. Arguably the most individual characteristic of nuisance law from its medieval origins until the assimilation of negligence has been the evolution of the reasonable user test. From its genesis to deal with what Bracton coined as natural rights of landholding through the rule of reasonableness; the rule of reciprocity; and finally the reasonable user test itself, the manner in which human's use and exploit land by balancing their interests as between neighbours has been consistent. But, as Chapters 3 and 4 testify, the reasonable user test has been distorted by the language of nuisance which has grown ever more virile since the decision in *Cambridge* despite, it is argued here, questions regarding its status as good law considering the House of Lords decision in *Tipping*.

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<sup>951</sup> *Hunter* (1) 705.

<sup>952</sup> *Smith v Littlewoods* [1987] AC 241.

<sup>953</sup> *Goldman v Hargrave* [1967] 1 AC 645.

The language of negligence distorted an eight-hundred year evolutionary process which created more doctrinal and definitional problems than any sense of principled symmetry or policy could justify. Further to nuisance's conceptual independence is the lack of scholarly and judicial consensus on a number of issues from its disputed historical origins to current day dilemmas that extend far beyond the contents of this thesis. The explanation for why it is hard to find consensus is nonetheless surprisingly straightforward: the protracted existence of nuisance law, from its accepted origins in the assize of novel disseisin to its modern form, is ultimately too long a period for profound deviations not to have occurred at a number of different points in history. Developments and nuances of the legal system driven by the inevitable fluctuations during societal evolution were bound to have moved the goal posts for all aspects of nuisance law; including particularly (but not restricted to) the issues of standing; 'actionability'; liability and remedies that have been addressed here. We should not be surprised that we cannot find certainty in many aspects of private nuisance when essentially we are looking at an eight hundred and fifty piece jigsaw puzzle - each piece representing a year - where pieces have been both lost and malformed, by both academic conjecture and judicial reasoning.<sup>954</sup>

It is marked that whilst this research began to discover a linear evolutionary path to provide the basis for welcome doctrinal clarity and legal certainty within the realms of private nuisance, in reality that is a difficult task. A number of uncomfortable truths have been unravelled in this thesis, for instance, the merging of the entire law of nuisance during the development of actions on the case for nuisance (which essentially means there is an inexorable formative link between private and public nuisance that has often been disputed). Notwithstanding that, the research has shown that nuisance law, seen from a deeper historical perspective, is probably more intricate than could have been envisioned at the outset of this

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<sup>954</sup> PH Winfield, 'Nuisance as a Tort' (1931) CLJ 189.



project. It is for that reason, and that reason alone, that my conclusion is private nuisance will work best when kept in its simple form.

It is possible to provide a simple form of the tort which can be emulate today. Its interactions with the other members of the nuisance law family are ubiquitous, but, what is interesting about that, is that those interactions have transpired in a manner where they have gone practically unnoticed. That cannot be said about the modern assimilation process of the language of negligence. There is something insightful about that observation: in order to maintain private nuisance in its simple form only nuisance doctrine should be considered. A plethora of academic commentary and actual case law exists to vouch for private nuisance's environmental credentials. One could say, in light of such commentary and this research, that the law is inherently environmental. The thesis thus offers some support, of a historical character, for those who treat nuisance law as 'environmental law'.<sup>955</sup> The question regarding its future in that role depends largely on the resolution of various issues discussed in this thesis. Owing to the longevity of nuisance law it is unthinkable that it will be abandoned by the courts. The criminal and statutory variations make that as unlikely as past predictions that the tort was going to be fully assimilated by negligence.

It is essential in a tort driven by precedent that there is a repeat of the type of judicial reasoning that existed during the latter half of the nineteenth-century. The decisions in *Bamford*, *Tipping* and *Shelfer* are examples of how the judiciary can encourage environmental protection through robust private proprietary common law rights. There is certainly scope for the issues raised by this research to be resolved. As Maria Lee and Conor Gearty have recognised, the tort of negligence can change and produce some surprising results without controversy; after all, its assimilation into private nuisance has gone largely

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<sup>955</sup> See most recently, Lynda Collins, 'Evergreen. The Environmental Law of Tort' (2014) 22 Tort Law Review 107'

unchallenged, despite blurring the historical nature of liability. The history of private nuisance is testament to its ability to change; its protean nature is practically legendary. It is realistic that private nuisance can take a step back and look at its doctrines in terms of the simple form advocated in this thesis. The issues isolated in this research were of course by design. If those issues are addressed in the simplest terms possible with a well-grounded historical understanding, and with an added acceptance that the protean nature of the tort represents its true essence (as a derivative of societal responses to peoples' demands on and for the environment) then private nuisance can best safeguard the nexus between humans and land as it is understood in any given period.

Whichever 'description' the academic or judge professes to be the most accurate exemplification of modern private nuisance there is a common theme between them. The two descriptions that are under the most scrutiny in this thesis, Percy Winfield's, 'an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it';<sup>956</sup> and John Murphy's, 'any on-going or recurrent activity or state of affairs that causes substantial and unreasonable interference with a claimant's land with his use and enjoyment of that land',<sup>957</sup> both refer to interferences (with varying degrees) to the use and enjoyment of land. Whether environmental interferences physically damage land or adversely affect its amenity value, each description affords those who are capable of bringing an action the right to protect against environmental injury.

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<sup>956</sup> PH Winfield 'Nuisance as a Tort' (1931) CLJ 189, 190).

<sup>957</sup> Murphy (56) 5.

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*concerning the commodity, and use of houses, and their appurtenances. Whereunto is added, the iustices of assise their opinion, concerning statute law for parishes, and the power of iustices of peace, churchwardens, and constables: and to know what they are to do concerning bastards borne in their parishes, reliefe of the poore, and providing for poore children, what remedy for the same* (Tho. Cotes, for William Cooke 1639).

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