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HUNTER V CANARY WHARF
AN ANALYSIS OF THE HOUSE OF LORDS' DECISION ON THE RIGHT TO SUE IN PRIVATE NUISANCE

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CONTENTS

I INTRODUCTION

The case of *Hunter v Canary Wharf*[1] is an interesting development in the law of private nuisance. Approximately 600 plaintiffs claimed damages for loss of use and enjoyment of their homes due to disruption of television viewing and excessive dust. The plaintiffs argued that when it comes to interference with a neighbour's quiet enjoyment of his or her land, the right to bring an action in nuisance is not confined to those with a proprietary interest, but extends to all those who occupy the property as their home.

This claim opened the way for the Lords to explore the nature of the tort of nuisance, and its place in the common law. Their judgments exhibited two diverse styles of judicial law-making. The Majority offered a classic legal analysis based on the concept that the tort of nuisance protects property, while Lord Cooke's approach proposed the tort be moulded to reflect the modern expectations of ordinary citizens.

The law of torts is concerned with compensating an injured party, generally for something that party already had rather than for not getting something he or she might have expected to get.[2] We have a tort of nuisance, as opposed to merely a general policy aiming to do justice between the parties, so that guidelines are established and people can have a degree of certainty about their ability to obtain a remedy. In assessing whether the majority or Lord Cooke's method produced the better result it becomes clear that the latter approach ultimately makes more sense. The majority decision impacts heavily on people who do not have a proprietary interest in land, especially women and children.

This paper will proceed in six parts. Part II gives a brief history of the case. Part III looks closely at the majority decisions. Part IV assesses Lord Cooke's dissenting judgment. Following this, Part V considers the impact of the decision and canvasses some alternative approaches. Part VI looks

[1][1997] 1 WLR 684 (*Canary Wharf*).
[2]Todd, S. (ed.) *The Law of Torts in New Zealand* (2ed. Brookers, Wellington, 1997) 7.

at the impact of the decision on the law of private nuisance in New Zealand. Lastly, in Part VII, some conclusions are drawn as to the overall scope and impact of the decision in *Canary Wharf*.

II HISTORY OF THE CASE

The Canary Wharf Tower is a landmark on London's Docklands. The 250 metre high, 50 metre square, stainless steel-clad construction was erected in 1989. Its presence has been the source of considerable civil litigation arising from effects of the construction process and from the nature of the completed structure. In *Canary Wharf* the plaintiff and approximately 600 co-plaintiffs, many the spouses and children of those with a proprietary interest in properties in the vicinity of the tower, claimed damages for nuisance created by the presence of the tower which caused interference with television reception. The Tower cast a reception shadow over an area on the Isle of Dogs until a relay was built on top of the building in April 1991. The Lords considered two issues. First, whether the presence of a tall building which interferes with television can constitute an actionable nuisance. Second, the nature of the right to sue in private nuisance.

A separate action for interference due to dust caused by construction of the Limehouse Link Road was heard concurrently. This involved essentially the same group of plaintiffs and the sole issue considered was whether they had standing to sue.

At first instance Judge Havery Q.C. held that interference with television reception is capable of constituting an actionable nuisance but that a right of exclusive possession of land is necessary to entitle a person to sue in private nuisance. The Court of Appeal reversed the decision of Judge Havery on both issues. Pill LJ delivered the judgment of the court, holding that the creation or presence of a building in the line of sight between a television transmitter and other properties is not actionable as an interference with the use and enjoyment of land, but that occupation of property as a home provided a sufficiently substantial link to enable the

occupier to sue in private nuisance. The House of Lords unanimously upheld the Court of Appeal's decision on television signals. However, the majority reversed the findings on the right to sue. Lord Cooke dissented on this point.

III THE MAJORITY DECISION

This Part assesses the judgments of Lord Goff, Lord Hoffman, Lord Lloyd and Lord Hope in light of the traditional boundaries of the law of private nuisance.

A The Origins and Scope of Private Nuisance

The origins of the tort of nuisance are obscure but stem from three different sources.[3] These three essentially different forms are still recognisable today. From the Twelfth Century an action lay in the assize of nuisance, which was originally part of the assize of disseisin, but later became distinct from it. Disseisin is "a wrongful putting out of him that is seised of the freehold".[4] This was intended to protect a property right and could only be brought by a freeholder against a freeholder. In its modern form, an action for interference with an easement or profit has its origins here.[5] The second source was found within "the pleas of the Crown" remediable on indictment before the King's justices as a misdemeanour. Interference with the neighbourhood, particularly the highway, was known as common or public nuisance. This is the origin of public nuisance in the modern law of torts. An action on the case for interferences gradually came to be recognised. This developed into the tort of private nuisance where remedies are available for annoyance to the occupier of land resulting from some act or omission on the land of another. The historic focus in each of these forms has been on the problem caused to the *land.*

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[3]Vennell, M. A., "The essentials of nuisance: a discussion of recent New Zealand developments in the tort of nuisance" (1977) 4 Otago LR 56.
[4]as defined in *Black's Law Dictionary* (6ed, St Paul, Minnesota, 1995)
[5]*Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 902 (HL).

There are three types of private nuisances.[6] First, nuisance by encroachment on a neighbour's land. Second, nuisance by direct physical injury to a neighbour's land. Third, nuisance by interference with a neighbour's use and enjoyment of his or her land. In the first and second cases it is the owner, or the occupier with the right to exclusive possession, who is entitled to sue. Remedies by way of abatement, injunction or damages may be granted. The harm caused in these cases, for example diminution in the value of the land, is suffered solely by the owner or occupier with exclusive possession so it is logical that they alone should recover.

In *Canary Wharf*, the plaintiffs argued that the position is quite different in the third category. They pointed to the fact that when use and enjoyment is interfered with, it is the individual who suffers. The land itself is not damaged. Cases where the plaintiff is caused actual personal injury are extreme examples of such interference. In the present case the plaintiffs could have developed bronchial conditions as a result of the excess dust. Disrupted television viewing also affects the individual rather than the land.

B The Majority Approach

The defendants, Canary Wharf Limited, argued that many of the plaintiffs, while residents in the affected areas, were not in exclusive possession and therefore not entitled to sue in nuisance. Pill LJ, giving the judgment of the Court of Appeal, held that:[7]

> There has been a trend in the law to give additional protection to occupiers in some circumstances. ... it is no longer tenable to limit the sufficiency of that link by reference to proprietary or possessory interests in land. I regard satisfying that test of occupation of property as a home provides sufficient link with the property to enable the occupier to sue in private nuisance.

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[6] Above n. 1, 698 per Lord Lloyd of Berwick.
[7] [1996] 1 WLR 348, 365.

The Court used precedent and open judicial creativity to reach its decision.[8] On appeal, the majority in the House of Lords reversed this finding, preferring instead to follow the more traditional line of authority which surrounds private nuisance.

The Lords assessed the underlying principles which distinguish the law of private nuisance. On the basis of those principles they identified those who have a right to sue for a remedy and those who do not. Lord Hope's comment is typical of the approach taken by the majority:[9]

> It is tempting to depart from principle out of sympathy for the plaintiffs or in search of a remedy for some objectionable activity, but in this area of the law it is important to resist the temptation and to rely instead on the guidance of principle.

In Lord Cooke's words, the Majority approach achieves 'a major advance in the symmetry of the law of nuisance'. However, too much emphasis can be placed on symmetry, to the detriment of decision-making which achieves positive and fair results for the parties. The Lords address policy issues to a certain extent but eschew the judicial activism shown by the Court of Appeal, seemingly for the sake of neat and tidy precedent in the law of private nuisance. The majority reach their conclusion by a process of deduction. This traditional mode of legal analysis ensures thorough contemplation of precedent. The facts and findings in earlier decisions lead the majority to the principle that the law of private nuisance is based on property alone.

C Interest in Land

The Lords' starting point was *Malone v Laskey*[10]. That case arose as a result of a serious physical injury caused to the plaintiff when a bracket supporting the water tank in the premises in which she lived was dislodged due to vibrations caused by machinery on adjoining premises. It was held

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[8] Cheer, U. 'Neighbours, Nuisance and Negligence' [1996] NZLJ 245, 247.
[9] Above n. 1, 724.
[10] [1907] 2 KB 141.

that she had no cause of action because she had no interest in the land on which the accident occurred. She only had a right to occupy the premises with her husband who was allowed to reside there by licence of his employer. Fletcher Moulton LJ added that the plaintiff 'was in the premises as a mere licensee, ... and a person who is merely present in the house cannot complain of a nuisance which has no element of a public nuisance.'[11]

Malone v Laskey is an unsatisfactory authority in that no attempt was made in the judgments to explain what was meant by a right of occupation in a legal sense, nor to distinguish between the various categories of licensee, of which some are entitled to possession of premises and some are not.[12] Subsequent cases have clarified this issue to a degree.[13]

The majority in *Canary* Wharf recognised that *Malone v Laskey* has since been followed in a number of cases.[14] The English courts have, in general, interpreted *Malone v Laskey* as deciding that the plaintiff must have an interest in land or, at least, a legal right of occupation, in order to sue in private nuisance. Lord Hoffman acknowledged that nothing has been said in the House of Lords to cast any doubt upon the decision as it relates to standing to sue in private nuisance.[15] (It has been recognised that Mrs Malone would nowadays have a cause of action in negligence in line with the expanded doctrine of duty of care developed in the wake of *Donoghue v Stevenson.*[16]) Attention was drawn to this point in *Read v J Lyons & Co Ltd*[17] by Lord Simmons with regard to the difference between nuisance and negligence. He stated that negligence was based on fault but protected interests of many kinds. Liability in nuisance was strict but protected only

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[11] Above n. 10, 153-154
[12] Kodilinye G. "Standing to Sue in Private Nuisance" (1989) 9 Legal Studies 284, 285.
[13] For a discussion of this see Buckley, P. *The Law of Nuisance* (2ed, Brookers, London, 1996) 86-90.
[14] Above n. 1, 693 per Lord Goff, for example.
[15] Above n. 1, 706.
[16] [1932] AC 562. *A.C. Billings & Sons Ltd. v Riden* [1958] AC 240 overruled the part of the decision in *Malone v Laskey* relating to negligence.
[17] [1947] AC 156, 183.

interests in land. However, this was obiter and not focussed on interference with amenities.

Malone v Laskey was specifically followed in *Metropolitan Properties Ltd v Jones.*[18] Goddard LJ considered that the case had 'laid down in terms that, unless the plaintiff in an action in nuisance has a legal interest in the land which is alleged to be affected by the nuisance, he has no cause of action.'[19] In *Canary Wharf* Lord Hoffman considered that Goddard LJ took *Malone v Laskey* too far.[20] The defendant was in de facto possession. That was enough to entitle him to sue. The fact that the missing assignee might have had a better claim to possession was no defence. This statement by Hoffman LJ is illustrative of the Lord's approach. They did not follow the most narrow view of the scope of private nuisance.

D Actual Occupation

It is logical that de facto possession has been recognised as sufficient for standing to sue. Even in conversion, which, unlike nuisance, necessarily involves a reflection on the plaintiff's title, actual possession is protected against all but the rightful owner.[21] The Lords recognised that in some circumstances, a plaintiff may have standing to sue notwithstanding they do not have absolute legal title in the affected land. For example, in *Foster v Warblington Urban Council*[22] the plaintiff sued for a nuisance affecting his oyster pond. There was much controversy over his legal right of occupancy. Vaughan Williams LJ said that:[23]

> Even if title could not be proved,...there has been such an occupation of these beds for such a length of time - not that length of time is really material for these purposes - as would entitle the plaintiff as against the defendants...to sustain their action.

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[18] [1939] 2 All ER 202.
[19] Above n. 18, 205.
[20] Above n. 1, 706.
[21] *Harris v Lombard NZ Ltd* [1974] 2 NZLR 161.
[22] [1906] 1 KB 648.
[23] Above n. 22, 659-660.

Actual occupation has been accepted as sufficient to maintain an action in other jurisdictions. In *Paxhaven Holdings Ltd v Attorney General,*[24] Mahon J. held that even if the plaintiff was only a licensee, it did have exclusive possession of land on which it grazed its stock and this 'possessory right' gave standing to sue in nuisance. In *Mcleod v Rub-A-Dub car Wash (Malvern)Pty Ltd,*[25]the judge of the Supreme Court of Victoria, Australia, held that a proprietary company, which was neither the owner nor the lessee of shop premises which were affected by a nuisance constituted by noise, was in actual occupation of those premises and so could sue.

This is essentially as far as the majority was prepared to go. They considered further developments which have been recognised by some courts, and rejected them as having moved away from the basic property model upon which private nuisance is based. This was in line with the majority's classic legal analysis.

E Extension of the Right to Sue.

Difficulties as to who can sue have arisen in a number of different cases. A common situation is where the land affected by the defendant's state of affairs is occupied by a married couple, but owned by only one of them. Can the non-owning spouse sue? Alternatively, the children of a householder may be affected. What recourse should they have? There may be other people living in the home - other relatives, an au pair or a lodger, for example. What standing is appropriate for these potential plaintiffs? The answer to these questions have important consequences. *Canary Wharf* was the House of Lords' first opportunity to address these issues with such a diverse range of potential plaintiffs. The majority looked at the approach taken by the Canadian courts and the English Court of Appeal.

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[24][1974] 2 NZLR 185.

[25]Unreported, Supreme Court of Victoria, 29 February 1972, summarised [1976] VR 657, quoted in Kodilinye, above n. 12, 286.

The Manitoba decision *Motherwell v Motherwell*[26] recognised the wider view of the right to sue. This case emphasised that a distinction must be drawn between being 'merely present' and being 'in substantial occupation'. It is the fact of occupation that supports the action. Clement JA said:[27]

> Here we have a wife harassed in the matrimonial home. She has a status, a right to live there with her husband and children. I find it absurd to say that her occupancy of the matrimonial home is insufficient to found an action in nuisance. In my opinion she is entitles to the same relief as her husband [the householder].

Foster was followed in *Motherwell.* In Lord Goff's opinion, *Foster* does not provide authority for the proposition that a person in the position of a mere licensee is entitled to sue.[28] He felt there had been a misunderstanding which undermines the authority of *Motherwell.* However, Lord Cooke noted that the decision in *Motherwell* was essentially based on policy reasons.[29] It is not likely that Foster was misunderstood. Rather, the judges chose to develop the point in the latter case. The decision in *Motherwell* is illustrative of the type of problem which arises when the right to sue is restricted solely to those with exclusive possession.

The English Court of Appeal in *Khorasandjian v Bush*[30] took a non-traditional view of the right to sue. In that case the daughter of the house was being pestered and threatened by unwanted telephone calls from an ex-friend. Dillon LJ gave the majority judgment and held that she had a cause of action in private nuisance. He regarded it as:[31]

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[26] (1976) 73 DLR (3d) 62.
[27] Above n. 26, 78.
[28] Above n. 1, 694-695.
[29] Above n. 1, 714.
[30] [1993]QB 727.
[31] Above n. 30, 735.

> [r]idiculous if in this present age the law is that the making of deliberately harassing and pestering telephone calls to a person is only actionable in the civil courts if the recipient of the calls happens to have the freehold or a leasehold proprietary interest in the premises in which he or she has received the calls.

The extension of the right to sue expounded in *Khorasandjian* was subsequently used by Pill LJ in the Court of Appeal ruling on *Canary Wharf*.[32] The Lords in *Canary Wharf* felt the Court in *Khorasandjian* failed to apply the general rule of law.[33] These two cases were in part based upon *Motherwell*, and to that extent the Lords held they were based on unsound reasoning.

By overruling the decisions the majority in *Canary Wharf* took away the possibility that the right to sue could be extended as proposed by the Court of Appeal in *Khorasandjian* and *Canary Wharf*. No one doubts that the House of Lords can overrule a Court of Appeal finding in some circumstances. However, this begs the question of whether it was the right decision.

Khorasandjian is in shreds as a result of the majority's comments. It seems Lords Goff, Lloyd and Hope were unduly hard in their criticism of the case. Goff was concerned a tort of harassment was being created by the back door. In light of the classic legal analysis of private nuisance this indeed seems to be the case. But the facts of *Canary Wharf* were so different that it is difficult to see why the majority did not at least follow Lord Hoffman's comments[34] and limit the decision to cases involving intentional harassment, or reserve judgement, rather than overruling it entirely.

The majority was partly swayed against interpreting the right to sue in the more liberal way proposed by the court below by the fear of uncertainty as

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[32] Above n. 7.
[33] Above n. 1, 726 per Lord Hope.
[34] Above n. 1, 709.

to who would be eligible. Lord Goff felt that the 'substantial link' test adopted by the Court of Appeal was an insufficiently identifiable category.[35] He was concerned as to how the 'au pair girl or the lodger upstairs' would fit in to this new framework. This does not seem enough reason to deny redress in the clear cut cases which would likely form the greatest number in future actions. Lord Goff concluded that[36]

> [o]n the authorities as they stand, an action in private nuisance will only lie at the suit of a person who has a right to the land affected. Ordinarily such a person can only sue if he has the right to exclusive possession of the land , such as a freeholder or tenant in possession, or even a licensee with exclusive possession. Exceptionally however, as Foster shows, this category may include a person in actual possession who has no right to be there... But a mere licensee on the land has no right to sue.

Canary Wharf thus held that those whose presence on a property is merely transitory should not be able to sue.

F Nuisance as a Species of Property Law

Lord Goff argued that the extension of the tort in the way proposed by the Court of Appeal would transform it from a tort to land into a tort to the person.[37] The decisions confuse a tort designed to protect property with the desire to protect people. In the majority view, extending the tort in the way proposed by the plaintiffs would be going too far. In the words of Lord Lloyd:[38]

> [i]t is one thing to modernise the law by ridding it of unnecessary technicalities; it is another thing to bring about a fundamental change in the nature and scope of a cause of action.

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[35] Above n. 1, 696.
[36] Above n. 1, 695.
[37] Above n. 1, 696.
[38] Above n. 1, 698-699.

The common law has always given a special place to property rights. It must be asked whether this is the most appropriate approach to take in modern times. It is not readily apparent why someone who happens to have exclusive possession of a home is prima facie entitled to protection under the tort of private nuisance while someone who does not have a legal interest but who nevertheless has a similarly strong attachment to their home cannot. Historically the notion that 'an Englishman's house is his castle' has prevailed. This conception should in today's world be held to include individual rights in the home, regardless of whether that home is in their exclusive possession.

Neither of the Court of Appeal decisions of *Canary Wharf* or *Khorasandjian* revolutionise, or at the extreme abolish, the tort of private nuisance. In both of them the emphasis was upon the concept of a person's *home*. The decisions merely left the court free to protect, in a realistic way and without undue regard for the technicalities of land law, a plaintiff's enjoyment of the premises where he or she lives.

Take for example the situation where the family company owns the family home.[39] In such arrangements the family members are often no more than mere licensees. Presumably the company suffers no damage if its land is invaded by smell. The family has de facto possession and it seems unrealistic to deny them a remedy. However, under the Lords' approach such a remedy would not necessarily be granted. Of course, the problem could be avoided by the company formally letting the property to the family.

Some of the majority offered a potential concession in their otherwise hard line by suggesting that as wives often have some kind of beneficial interest in property they do not own, they might still be able to sue.[40] The inchoate nature of a spouse's interest in a partner's property is a very difficult area.

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[39] Above n. 2, 538.
[40] Above n. 1, 696 per Lord Goff, for example.

There is limited certainty where the couple is married and virtually no certainty in determining such rights where the couple are living in a de facto relationship. It is not reasonable to have to cross the hurdle of inchoate rights to have standing to sue. A more coherent test, offering greater likelihood of success, would have been helpful. The unfairness inherent in this 'allowance' made by the majority will be explored further below in the discussion of the impact of the decision on women.

The Lords offered some alternatives to expanding the right to sue in private nuisance. Lord Goff suggested Parliament should be responsible for making such changes.[41] An example of the legislature making such changes can be seen in the recently enacted Protection from Harassment Act 1997 (UK). Lord Hoffman felt harassment cases would be better dealt with under the tort of intentional infliction of emotional distress.[42] It is also possible that negligence will expand to cover nuisance 'use and enjoyment' cases for those without 'exclusive possession' of their home. These alternatives may allow redress to the individual, but they do not allow the development of a coherent law of private nuisance which would satisfy the expectations of the community.

G Damages

The decision in *Canary Wharf* has potential consequences so far as damages are concerned, because, prima facie if people other than those with the proprietary interest can sue, the damages awarded for loss of enjoyment will be greater than if only one can sue. Lord Lloyd said that the right to sue in private nuisance is linked to the correct measure of damages.[43] He noted the case of *Bone v Seale*[44] in which the plaintiffs were the owners of two adjoining properties and the defendant was a pig farmer. They were awarded damages for loss of amenity due to smell. There was no hint that damages should vary with the number of those occupying the houses as their home. The damages were assessed 'per stirpes and not per

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[41] Above n. 1, 696-697.
[42] Above n. 1, 709.
[43] Above n. 1, 701.
[44] [1975] 1 WLR 797.

capita'. Lord Hope stated that the measure of damages must in principle be the same.[45]

In *Devon Lumber Co Ltd v MacNeill*[46] dust from the defendants property aggravated bronchial conditions of neighbouring children. It was held that these individuals could receive damages. Such cases involving illness resulting from the nuisance illustrate the desirability of allowing standing to sue based on the effect on the person rather than the property interest. The majority analysis clearly avoids the problem of indeterminacy of damages as regards the numbers of possible claimants. However, this could be said to go against the nature of private nuisance as essentially a strict liability tort (in the sense that it is no defence to say that the defendant took all reasonable care to prevent it). Inherent in this is the concept that once the proximity and requisite type of harm are established, the defendant is responsible for foreseeable harm caused. It is surely foreseeable that a number of people may be equally affected by a loss of the right to quiet enjoyment, irrespective of whether they are owners of that property or merely occupants.

H Conclusion on the Majority Approach

The law of private nuisance stems from interests in property and the majority justify restricting the right to sue in the tort to those exercising 'exclusive possession'. In particular Lord Goff's decision shows great elegance. It is classic legal analysis at its finest.

However, the approach now confirmed by the Lords is capable of generating profoundly unsatisfactory results turning on the nature of interests in land rather than on the substance of the interference suffered by the plaintiff. Lord Cooke continues his reputation as an activist member of the judiciary in his dissenting judgment. He was more open to developing the tort. The next part of this paper considers his approach.

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[45] Above n. 1, 725.
[46] (1987) 45 DLR (4th) 300.

IV LORD COOKE'S DISSENT

A Lord Cooke's Approach to Law-making

Lord Cooke began his dissenting judgment with an explanation:[47]

> [i]f the common law of England is to be directed into the restricted path which in this instance the majority prefer, there may be some advantage in bringing out that the choice is in the end a policy one between competing principles.

This approach is to be commended. Issues do not tend to reach the highest courts if they have one simple answer. The Court of Appeal unanimously reached a quite different result. It seems improbable that they are, in the true sense of the word, "wrong". Rather, they hold a different opinion of the law of private nuisance and, quite possibly, of the role of the law in society. Lord Cooke based his reasoning on policy - the arbitrariness of the law and the need to adapt the law to changing social conditions. He concluded that it was appropriate to allow at least those in the position of spouses or children to be able to sue when their use or enjoyment of their home is interfered with.

Unlike the majority, Lord Cooke was prepared to develop the law in line with community expectations. In his view, the law is no longer solely about the protection of property. Three of his statements made in recent years are indicative of his approach to law-making.[48] The first, made in his Lordship's judicial capacity is this: "The whole of the common law is judicial legislation."[49] The second, made extra-judicially expands the first:[50]

> [t]he great majority of New Zealand judges, perhaps all, now openly recognise (albeit no doubt in varying degrees) that the

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[47] Above n. 1, 713.
[48] Sutton, R. "Lord Cooke and the Academy: the View from the Law Schools" *The Struggle for Simplicity* (Legal Research Foundation, Auckland, 4 April 1997) 3.
[49] *South Pacific Manufacturing Co Ltd v NZ Security Consultants and Investigations Inc* [1992] 2 NZLR 282, 295.

> inevitable duty of the Courts is to make law and that is what all of us do every day...a guiding principle in many recent New Zealand developments, however expressed, has been the need to give effect to reasonable expectations.

The third statement, also extra-judicial, related to whether Parliament could legally declare New Zealand a republic. Lord Cooke said: [51]

> It is indeed an issue that would fall to be decided by ...the judges, but perforce they would have to decide it, not by defined legal criteria, but by vaguer considerations - largely their own sense of reality and of the public will.

Of course the realm of private nuisance is much more tangible than is the notion of major constitutional change. But the concept behind this statement is witnessed in his approach in *Canary Wharf.* Lord Cooke believes the general framework of legal principle needs to be broadly constructed so that it does not necessarily disqualify a new set of facts from consideration, just because earlier judges may not have foreseen them.[52] Within that broad framework judges must check each new result to see whether the law "works". A set of rules is shown to be adequate, not by the wisdom of the court which initially propounded the rules, but by the fact that it has been tested over a period of time and not been found wanting. One of the difficulties with the common law is that once a set of rules has established itself over time, it can be difficult to change.

B Recognition of Community Interests

Lord Cooke advocates moving the law of private nuisance beyond its beginnings as a species of property law to focus on the interference suffered, rather than on the interest in the land. It is his belief that the community has found the rules to be wanting in this case.

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[50]"Dynamics of the Common Law" *Papers of the 9th Commonwealth Law Conference* (1990), 4.
[51]"The Suggested Revolution Against the Crown" in P. Joseph(ed.) *Essays on the Constitution* (Brookers, Wellington, 1995) 28, 36.
[52]Above n. 48, 19.

The boundaries of the law of nuisance were established before the age of television and radio, motor transport and aviation, town and country planning, a "crowded island" and a heightened public awareness of the need to protect the environment. It is possible for the courts to cater for such developments because the forms which nuisance may take are protean and nuisance is a term used to cover a wide variety of tortious acts or omissions. This was recognised by Lord Wright in *Sedleigh-Denfield*.[53] This has made the law of nuisance a potent instrument of justice throughout the common law world.

Lord Cooke considered a number of English, Canadian and United States cases in drawing his conclusion that spouses could sue in private nuisance. He agreed with Clement JA who said in *Motherwell* that the descriptions of the wife's position in *Malone v Laskey*, whatever their acceptability early this century, were 'rather light treatment of a wife, at least in today's society where she is no longer considered subservient to her husband'.[54]

The issue as to whether children could sue was directly addressed by Lord Cooke. In *Khorasandjian* Dillon and Rose LJJ thought that if the wife of the owner is entitled to sue in respect of harassing telephone calls, the same should apply to a child living at home with her parents. He said:[55]

> The persistent ringing of the telephone may be a nuisance in fact to all occupants of the home, not any primary target only, and all members of the family living there should be entitled to redress in law for substantial disturbance of their amenity.

Lord Cooke was persuaded by this reasoning, as well as by the weight of North American jurisprudence and international standards.

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[53] [1940] AC 880, 903.
[54] Above n. 26, 77.
[55] Above n. 1, 716.

Lord Cooke also considered the issue of other resident members of the family, including de facto partners and lodgers.[56] He held that these people may on the particular facts fairly be considered as having a home in the premises and could therefore be allowed standing to complain of 'truly serious interference with the domestic amenities lawfully enjoyed by them. However, he felt the issue of eligibility for standing could be extended in this way without going so far as to give a remedy in nuisance to non-resident employees in commercial premises. The employer is responsible for their welfare. In this way his Lordship more clearly delineates the vagueness of the Court of Appeal's requirement that a person claiming in nuisance have a "substantial link" to the land which is affected.

The use of community expectations as a standard against which to make decisions can be problematic. Determining what those community expectations are inevitably leads to the fear that not all sections of the community will be represented. Who will decide what people want from the law? These issues need not be overwhelming. As Lord Cooke shows, international norms and academic opinion can be used to discover what society requires of its law-makers.

C Use of International Norms

In reaching his conclusion on the right to sue in private nuisance Lord Cooke referred to international conventions which deal with the right to family life and the importance of the home.[57] In particular, provisions of the Convention on the Rights of the Child, the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Lord Cooke notes that these provisions aimed, in part, at protecting the home were construed to give protection against nuisances in *Arrondelle v United Kingdom*[58] (aircraft noise) and *Lopez Ostra v Spain*[59] (fumes and smells from a waste treatment plant).

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[56]Above n. 1, 719.
[57]Above n. 1, 715-716.
[58]Application No. 7889/77 (1982) 26 D.R.5 F.Sett.
[59](1994) 20 EHRR 277.

Lord Cooke previously used international law as an aid in shaping domestic law during his time as President of the New Zealand Court of Appeal. In *Baigent's case* he applied international conventions to an emerging public law regime.[60] His judgment in *Canary Wharf* goes further than this by suggesting that international norms should be used in developing traditional tort norms. In Lord Cooke's view the community has come to expect that international standards will be reflected in domestic law-making. Lord Cooke is not alone in advocating this approach. For example, in the United States international law is being used as federal common law to prosecute perpetrators of genocide.[61]

Lord Cooke's use of international standards was not commented on by the majority.[62] It remains to be seen whether such an approach will be adopted in future House of Lords decisions. But one suspects there will need to be a significant shift in focus among the majority before this occurs.

D Academic Opinion

Lord Cooke refers to academic authority in his judgment. Such work can help judges both on the theory of law, and on the practical effect of particular rules. Well researched and reasoned academic study can document changing social conditions and advocate reform. In the absence of recent judgments in an area of law, academic writing should be noted to the extent that it enhances a greater understanding of the broad framework in which the law is ideally made.

Academic opinion seems generally to be against confining the right to sue in nuisance for interference with amenities to plaintiffs with proprietary interests in land. For example, Fleming[63] wrote that the wife and family residing with a tenant should be protected by the law of nuisance against

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[60][1994] 3 NZLR 667.
[61]Bradley, C.A. and Goldsmith, J.L., "Customary International Law as Federal Common Law: A Critique of the Modern Position" (1997) 110 Harvard LR 816.
[62]Lord Goff read Lord Cooke's draft judgment and commented on some aspects of it in his judgment, above n. 1, 697.
[63]*The Law of Torts* (8ed, Law Book Co Ltd., Sydney, 1992) 426.

forms of discomfort and also personal injuries by recognising that they have a 'right of occupation' just like the official tenant. However, there is generally scant attention paid to the point by the textbooks. This is likely evidence of the paucity of authorities in this area. In his chapter on the law of private nuisance Fleming devoted barely a page to title to sue. Todd[64] devoted several pages and Buckley, in his book entitled *The Law of Nuisance*[65] offered only half a dozen pages.

The writers of torts textbooks generally reach their conclusions on the law of nuisance by a process of deduction.[66] A lot of cases, consisting of a lot of facts are pulled together to arrive at a principle. This leads to the situation where unless the issues are dealt with in the cases, they tend not to be addressed in the texts. This reflects the way the law of nuisance has developed as compared with the law of negligence, in which a process of induction is used. Rather than looking for the ratios of particular cases, subsequent negligence cases look for a general principle that lies behind imposing liability in earlier cases. This method allows more flexibility and ensures cases are considered on their general merit, rather than imposing liability only if their facts slot in to certain pre-defined limits. Lord Cooke's approach was more a process of induction than was the majority's.

Lord Goff was quite scathing of the academic work in this area, summarising the situation with this gem: 'A crumb of analysis is worth a loaf of opinion.' The irony here is that Lord Goff in fact does respect academics. This was shown by his comment in the case of *The Spiliada*:[67]

> [j]urists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding.

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[64] Above n. 2.
[65] (2ed, Brookers, London, 1996).
[66] Linden, *Canadian Tort Law* (5ed, Butterworths, Toronto, 1993) does not use this approach.
[67] [1987] AC 460, 488.

It is disappointing that in this case Lord Goff merely dismissed academic work in the field of private nuisance instead of challenging academics to further explore the area. He could have requested further evidence which may have made him change his mind. For example, evidence of community expectations could have been submitted.

E The United States Approach

Lord Cooke's use of United States precedent is also a fairly novel approach for a member of the House of Lords. Such material has tended not to be considered mainly because of the difficulty in gleaning helpful precedent from what are effectively 51 different jurisdictions. Cooke quotes extensively from *Hosmer v Republic Iron & Steel Co*[68] in recognition of the fact the authority is not readily available.[69] The advances in technology which are allowing the creation of more and more comprehensive legal databases, mean United States material is likely to be seen more often in the Commonwealth jurisdictions. However, it is difficult to evaluate the quality of United States judgments. The fear of course, is of information overload and subsequent confusion. In this sense, the majority's blinkered approach is more readily understood. But it would not be a positive move for the courts to dismiss new developments on the premise that they may prove 'too hard'.

V IMPACT OF THE DECISION AND ALTERNATIVE OPTIONS

The majority in *Canary Wharf* set down a firm decision on the extent of the right to sue in private nuisance. But there are other ways to address the issue. For example, Lord Cooke's community expectation model or a feminist model. These options may be explored in the future.

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[68] 60 South. 801 (Al. 1913).
[69] Above n. 1, 717-718.

A Impact on Women and Children

If the majority's classic legal analysis is followed in future cases addressing the issue, it seems likely their findings will be maintained and the right to sue will remain limited to those who can establish a proprietary interest in property. However, it is hoped that judges will look beyond this classic form and ask the harder questions relating to who the tort aims to protect. The majority failed to ask the right questions when analysing this issue. They focussed predominantly on the nature of the interest in land required, rather than looking to see who this would affect in reality. For the people who have a proprietary interest in land the majority decision will have no effect. But many others are not in such a position. The decision will impact most heavily on women and children.

The decision is not overtly discriminatory against women or children. As it stands, the right to sue in private nuisance is available to those with a proprietary interest, be they male or female. This is an example of the law giving equal rights to all, providing the initial barrier of an interest in land is crossed. However, if the issue is examined more closely, it becomes apparent that the majority's approach is wanting. In *Andrews v Law Society of British Columbia*[70] it was acknowledged that sameness of treatment does not necessarily mean equality, and that it was the impact of the law which should be considered, not just its intent.

Many homes are still solely in the male spouse's name, and it is rare for children to be included in titles to land. The Lords expected that any action for interference with use and enjoyment would be taken by the householder. It was argued for the plaintiffs that this would cause inconvenience, for example, where the owner was unwilling to bring an action because he was less sensitive to the interference than other members of his family. This was dismissed by the Lords. Lord Lloyd stated:[71]

[70] [1989] 1 SCR 143.
[71] Above n. 1, 699.

> I find it difficult to visualise such a case in practice. In any event the inconvenience, such as it would be, does not justify a departure from principle.

Such cases may in fact be more common than the majority anticipates. For example the couple may be separated with the non-property owning spouse residing in the home by agreement for the children's sake. In such situations, the property owning spouse would have to be convinced to take action. If the relationship is less than amicable this may prove quite a battle. Alternatively, the non-property owning partner would need to cross the hurdle of inchoate rights before gaining standing.

On the majority approach, decisions such as that made in *Devon Lumber Co Ltd v MacNeill*[72] would not be possible. Children would not be eligible for individual recognition of the harm caused to them by the interference of a neighbour.

B Alternative Approaches

The Lords could have addressed the issue of the effect on women and children more thoroughly. No effort was made to assess just how great the impact of their decision would be. Instead of dismissing inconvenience to women as unlikely, the Lords could have challenged counsel to present figures on the numbers of family homes in single or joint names. In New Zealand these statistics are not specifically collated, but it would be possible to get an idea by looking at a sample from the council rates list and seeing whether payments are requested from individuals or couples. This would likely have been possible in England as well.

Lord Cooke considered international conventions. Further to this approach, the United Nations Convention to Eliminate all Forms of Discrimination Against Women could have been mentioned. This is a non-discrimination treaty in which the overall model is one of substantive equality. The convention imposes a positive obligation on signatories to

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[72] Above n. 46.

guarantee women's rights and protect women from disadvantage or discrimination on the basis of gender.[73]The use of this convention would help show the community expectation that women should not be excluded from a remedy because they lack a proprietary interest.

As discussed above, some of the Lords suggested alternative means of gaining redress in such situations if a person lacks the requisite proprietary interest to make private nuisance available. The tort of intentional infliction of emotional harm or statutory provisions may well be appropriate for some harassment cases. Negligence may expand to cover interference with use and enjoyment cases. But these alternatives are not of themselves sufficient justification for denying redress in private nuisance. The interests of justice would be better served by developing the tort in line with community expectations.

V IMPLICATIONS FOR NEW ZEALAND

A Canary Wharf*'s Weight in New Zealand*

De facto possession is clearly recognised as supporting an action in nuisance in New Zealand and at least two cases support the proposition that exclusive possession or occupation will suffice here: *Paxhaven Holdings Ltd v Attorney-General*[74]and *Delta Projects Ltd v North Shore City Council.*[75] The majority judgment will be seen as authoritative as regards the extent of the right to sue for plaintiffs with less than exclusive possession.

The status of the House of Lords within New Zealand's jurisdiction is somewhat uncertain at the present time.[76] Traditionally it was very unusual for a New Zealand court not to follow a House of Lords decision. By

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[73]As described by the Chief Justice of Alberta Catherine Fraser at the May 1997 Judicial Working Group's Seminar on Gender Equity. Reported in "The application of substantive equality in Canada and New Zealand" *Lawtalk* 4 August 1997, 14.
[74]Above n. 24.
[75][1996] 3 NZLR 446.
[76]For a discussion of this see Eichelbaum, T. "Brooding Inhibition or guiding hand? Reflections on the Privy Council Appeal" in P. Joseph, (ed.), *Essays on the Constitution* (Brookers, Wellington, 1996), 112.

comparison, there has never been the same sort of compulsion to follow the highest courts in other Commonwealth jurisdictions, primarily the High Court of Australia and the Supreme Court of Canada. But New Zealand courts will not necessarily follow the House of Lords. This was recognised by the Court of Appeal in *Bognuda v Upton & Shearer*.[77] The Privy Council in *Invercargill City Council v Hamlin*[78] recognised that in some situations New Zealand's individual characteristics justify departure from the law as stated by the House of Lords. It remains to be seen how far reaching this finding will be. An analysis of this is beyond the scope of this paper.

As Lord Cooke is past President of New Zealand's Court of Appeal, his judgment may be given considerable weight. However, the New Zealand court is generally more conservative since Cooke's departure for the House of Lords.

B Legislation

The nuisance action itself is now often the course of last resort. This is because in many instances the legislature has provided a better and more efficient remedy by statute, particularly the Resource Management Act 1991. The advantage of the statutory route is that the cost of obtaining the appropriate remedy may be greatly reduced when compared to the cost of litigation. But the disadvantage of relying on statutory bodies and local authorities to eliminate activities interfering with the enjoyment of one's property is that those bodies and authorities are often in practice reluctant or very slow to act. Restraining the right to sue will have the effect of limiting the options of some potential plaintiffs.

There are some areas in which the legislature does not provide a remedy. In these instances a potential plaintiff will have to cross the barrier of 'exclusive possession' before they can use the private nuisance remedy. An example of such a situation would be where a person is being harassed by a

[77] [1972] NZLR 741.
[78] [1996] 1 All ER 756; [1996] 1 NZLR 513.

stranger. New Zealand's Domestic Violence Act 1995 does not extend to such problems. If New Zealand courts follow the majority line, and in the absence of a significant interest in the land, such a victim would possibly not have a remedy. There is a possibility the tort of intentional infliction of emotional harm may breach the gap as suggested by Lord Hoffman.[79]

The Accident Rehabilitation and Compensation Insurance Act 1992 will prevent any action in New Zealand for basic damages in respect of personal injury suffered as a result of a private nuisance. However in some limited circumstance exemplary damages may be awarded. But the ACC bar on civil action does not really affect private nuisance. Most people use nuisance as a tort to eliminate a possible danger to their physical well-being before the injury occurs. If there is an actual physical injury, negligence acts retrospectively to compensate this.

The majority recognised the possibility of a spouse having inchoate rights in a property. New Zealand is considering amending its Matrimonial Property Legislation to include property rights for couples in de facto relationships. If this goes ahead, it may be that the majority's approach could be extended to include potential plaintiffs in de facto relationships. However, this would not overcome the uncertainty surrounding the nature of such inchoate rights.

VII CONCLUSION

The House of Lords decision in *Canary Wharf* is an important development in the tort of private nuisance. The wide range of plaintiffs enabled the court to focus on the question of who has a right to sue for interference with the use and enjoyment of land.

The majority judgments are compelling in their elegance, yet conservative in their approach. The Lords offered a classic legal analysis of the issue and restrained the extent of the right to those with a proprietary interest in the

[79] Above n. 1, 709.

land interfered with. There are problems with this approach. In standing by long held beliefs about the primacy of property, the majority risk continuing the exclusion of the interests of women and of children from the mainstream of the common law.

In his dissenting judgment, Lord Cooke offered an alternative approach which enables the expectations of the community to be considered. This method inevitably involved widening the traditional grounds for eligibility to sue in the tort. In particular, his use of international standards was a novel way of determining domestic law.

There are risks in changing the focus of the law. Confusion can result as subsequent courts struggle to interpret new facts in light of developments. It must be ensured that new approaches are workable and retain the degree of certainty the common law strives for. However, conservatism for conservatism's sake is not desirable. The different analyses made by the Lord Cooke on the one hand and the majority on the other are perhaps best summarised in the famous words of Denning LJ as the difference between 'bold spirits and timorous souls.'[80]Both approaches are tenable. It is hoped that in the future more emphasis will be placed on the impact a decision will make, rather than striving for symmetry in the law to the exclusion of society's needs.

[80] *Candler v Crane, Christmas & Co* [1951] 2 KB 164.

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