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THE VIEW OF PRIVATE NUISANCE FROM CANARY WHARF

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CONTENTS PAGE

In the past, private nuisance had been burdened with performing two functions: balancing property rights, and compensating physical injuries. The former was an important element in the protection of property. The latter crossed into the path of negligence.

This paper examines the House of Lords decision in the private nuisance case of Hunter v Canary Wharf Ltd. In this case, the speeches of Lord Goff and Lord Hoffmann ("the majority") reflected a vision of tort where liability for all physical damage to land and personal injury is governed by the law of negligence. This vision is supported in this paper.

Once liberated from its compensatory function, the primary role of private nuisance would be to balance the rights of people to use their land, against the rights of their neighbours not to suffer interference.

In Canary Wharf, the majority limited the right to bring this action, to owners, or people with exclusive possession. However, Lord Cooke saw merit in extending the right to bring this action, so as give effect to the expectations of the community with respect to the protection of people in their homes. It is submitted that the goals of systematising the law of tort and providing protection for people in their homes are not necessarily irreconcilable. Accordingly, the right to bring an action in private nuisance, ought to have extended to all people occupying land as a home.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 14,965 words.

THE VIEW OF PRIVATE NUISANCE FROM CANARY WHARF

I INTRODUCTION

The decision of the House of Lords in *Hunter v Canary Wharf*[1] should be read for two reasons. First, it is undoubtedly the most important private nuisance decision to be given in recent years. The House of Lords defined the interference limb of nuisance. An interference must emanate from the defendant's land onto the land of the plaintiff to be an actionable nuisance. Only then will the rights of the competing landowners be balanced. As a result it may be some years before another case involving this branch of nuisance reaches these judicial heights.

More importantly, the decision reveals a complex interplay between two competing visions of the future of the law of tort. The speeches of Lord Goff and Lord Hoffmann ("the majority") reflected a vision of tort law characterised by principled systematic coherence. On the other hand, the approach of Lord Cooke reflected a vision of a law of tort that recognised the values that ordinary people find important.

Traditionally, the action of private nuisance had been burdened with two functions. The first was to balance the rights of people to use land against the rights of their neighbours not to suffer interference. The second was to compensate for injury. It is because of this latter function that all efforts to define private nuisance against a background of the rapacious law of negligence have proved sisyphean. The vision of private nuisance contemplated by the majority in Canary Wharf, redefines the role private nuisance in the law of tort.

The model of private nuisance adopted by the majority was influenced by the goal of rationalising the law of tort so that all physical damage, whether it is to land or personal injury, is governed by a single principle: negligence. To accomplish this

[1] [1997] 1 All E.R. 426 ("*Canary Wharf* HL").

would constitute a major turning point in the law of tort. The actual case did not offer the opportunity to complete this goal because it only involved the determination of preliminary issues. However, there is merit in turning the law in this direction. Accordingly, the speeches of the majority indicated that this is the direction in which the law of nuisance is heading.

Of the three types of potential damage in Canary Wharf, two involve actual material physical damage. The first was material physical damage to land. The second was personal injury. These two types of damage will be examined together. The third type of damage was interference with the use and enjoyment of land. This will be considered separately.

In Part V, the approach of the Lords with respect to the recovery in private nuisance of material physical damage to land, will be examined. It will be demonstrated that, while the majority indicated that material physical damage to land would not feature in the future of private nuisance, Lord Cooke envisioned it otherwise. It will be shown that there are strong reasons to surrender this type of damage to negligence.

Part VI will examine the approach of the Law Lords with respect to the recovery of personal injury in private nuisance. Personal injury can arise in a case of private nuisance in one of two ways. The injury could have occurred as a consequence of an actionable nuisance, or it may have occurred directly. It will be demonstrated that the majority considered the recovery of direct personal injury in private nuisance an anachronism and accordingly such recovery has been extinguished. However, the Law Lords left the door ajar with respect to the recovery of personal injury that interferes with the ability of the injured person to use and enjoy land. On the other hand, Lord Cooke thought that both types of personal injury should be recoverable. It will be argued that the appropriate legal mechanism for the determination of liability for both types of personal injury is negligence.

It follows from the model of private nuisance adopted by the majority, and supported in Parts V and VI, that the only work extant for private nuisance is to determine how much interference users of land are permitted to inflict on their neighbours. Part VII will examine the approach of the Law Lords with respect to the question of the appropriate class of people eligible to bring this type of action. The model adopted by the majority restricted the right to bring an action to those possessing a proprietary interest. In doing so, they were influenced by the traditional conception of private nuisance as a property tort. Lord Cooke saw the value in extending standing to any person who occupies the land as a home. It will be argued that standing should have been extended. Part VIII will examine a Roman law model that rationalised physical injury in the law of *delict*, and also permitted people other than owners to bring an action against their neighbours for interference.

Before any of the above analysis can occur it will be necessary to present two preliminary sections. In Part II the background to the case will be presented. Part III will consist of a model of the institution of private property and a discussion of the fault principle.

II BACKGROUND

A Facts

1 The circumstances

In the late 1980's the defendants, Canary Wharf Ltd, commenced construction on the Canary Wharf tower in London. The tower is over 250 metres high and over fifty meters square. It has stainless steel cladding and metalised windows.[2] As a result of the construction of the tower, two actions were brought.

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[2] *Canary Wharf* HL above n1, 683 per Lord Goff.

2 *The claims*

a First action - television signals

The plaintiffs in the first action were various persons who lived in what is known as the shadow area. They claimed that the tower blocked their television reception. They claimed that the interference commenced in 1989 while the building was in construction. It continued until an alternative relay transmitter was erected, and the plaintiffs tuned their televisions to it, between July 1991 and April 1992.[3]

The plaintiffs sought damages for the interference with their television reception for this period against Canary Wharf Ltd. They claimed that the tower constituted a private nuisance. Initially the plaintiffs claimed negligence but this claim was abandoned.

b Second action - dust damage

The plaintiffs in the second action claimed damages for excessive amounts of dust created as a result of the construction of a road by the defendants. This road was known as the Limehouse Link Road. The plaintiffs were residents in the area. They claimed in nuisance and negligence against the London Docklands Development Corporation.[4]

3 *The issues*

The Judge at first instance made orders for the trial of a number of preliminary issues of law. Only two survived to be considered by the House of Lords. The first was

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[3] *Canary Wharf* HL above n1, 684 per Lord Goff.

[4] A claim in *Rylands v Fletcher* (1868) L.R. 3 HL 330. was originally advanced but was subsequently abandoned.

in relation to the first action only. The issue was whether interference with television reception was capable of constituting an actionable nuisance. The second issue related to both actions. The issue was whether it was necessary to have an interest in the property interfered with, or damaged, in order to sustain a claim in private nuisance. If so, what type of interest was sufficient.

The issue of whether damages lay in negligence for annoyance and discomfort caused by dust was heard in the Court of Appeal but not the House of Lords.

B The Law

1 Television signals

The question of whether an interference with television signals could constitute an actionable nuisance was considered in *Bridlington Relay Ltd v Yorkshire Electricity*.[5] In that case an interference with television signals was not an actionable nuisance. The electricity board caused the interference during an electrical operation undertaken in the course of erecting an overhead power line. Without laying down a rule with respect to television signals, the Court observed that there had been no cases where the interference with a purely recreational activity had been held to be a legal nuisance. Buckley J stated that the ability to receive television signals was not :

> so important a part of an ordinary householder's enjoyment of his property that such interference should be regarded as a legal nuisance.[6]

In *Bridlington* the interference was not caused by the mere physical presence of a building but by the undertaking of an electrical operation. However, interferences caused by the mere physical presence of buildings had been considered in cases concerning the blocking of prospects. Since 1610 in *Aldred's case*[7] it had been

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[5] [1965] Ch 436 ("*Bridlington*").
[6] *Bridlington* above n5, 447.
[7] (1610) 9 Co Rep 57: 77 ER 816.

accepted as settled law that the mere physical presence of a building does not create an actionable nuisance.

2 Standing

Since *Malone v Lasky,*[8] it had been accepted as settled law that only plaintiffs with a proprietary interest were entitled to bring an action in private nuisance. In that case a husband and wife were given licence to occupy a property by the husband's employer. The wife was injured when a bracket supporting a water tank was dislodged due to vibrations caused by machinery on the adjoining premises. The Court held that the wife could not claim in nuisance as she did not have an interest in the land.

C Pressure to Change

None of the authorities could be described as recent. In the meantime nuisance had come under pressure to change of considerable momentum. This pressure reflected the rapidly changing nature of modern society and the things that people collectively consider worthy of protection.

1 The importance of telecommunication

Many argued that nuisance failed to accord proper respect to the importance of new interests in modern society. The right to receive television signals was one of these new interests. As Rosalind English asked:

> [O]ver the course of the last 40 years, the 22-inch screen has become a ubiquitous feature in British homes. If it is no longer a trivial part of our lives, can it be excluded on the basis of being a luxury?[9]

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[8] [1907] 2 KB 141.

[9] Rosalind English "The Tenant, his Wife, the Lodger and their Telly: a Spot of Nuisance in Docklands" (1996) 59 Mod L Rev, 726, 728 ("English").

English further criticised the merits of analogising television reception to prospects. Undoubtedly views may be a source of delight. However, for many people, television is the only sources of communication with the outside world.[10]

The importance of the right to receive television signals had received judicial recognition in Canada. In *Nor-Video Services Ltd v Ontario Hydro*[11] the Court refused to follow *Bridlington*. In that case the High Court of Ontario observed that, nowadays, television viewing is:

> an important incident of ordinary enjoyment of property and should be protected as such.[12]

2 Extending the standing to sue

Pressure to alter private nuisance also arose in the arguments for extending standing to bring an action. It was argued that nuisance ought to be available to people who have an interest in land even where that interest is less than a proprietary right. There had been much academic commentary in favour of extending the standing to sue in nuisance.[13] Some going as far to describe the restriction of standing to sue as "senseless discrimination."[14]

In recent case law, arguments for extending standing to sue primarily arose where nuisance was required to provide protection to non property owners from interferences in the nature of harassment. In *Foster v Warblington Urban District Council*[15] the defendant had taken advantage of oyster ponds on a foreshore for many years. He had no legal title to the land. Despite this he succeeded in an action for nuisance.

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[10] English above n9, 728.
[11] (1978) 84 DLR (3d) 221.
[12] *Nor-Video* above n11, 231.
[13] See for example English above n9, 729; Elizabeth Cooke "A Development in the Tort of Private Nuisance" (1994) MLR, 289,293; Steven Todd (ed) *The Law of Torts in New Zealand* (2ed Brookers, Wellington, 1997) 537.
[14] Professor Fleming *The Law of Torts* (6th edn 1983) 393-394.
[15] [1906] 1 KB 648.

In *Motherwell v Motherwell*[16] it was held that *Foster v Warblington* established a distinction between 'one who is "merely present" and occupancy of a substantial nature.' In *Motherwell,* the defendant harassed her father, her brother and her brother's wife with persistent letters and telephone calls. The sister in law brought a claim in nuisance in her own right, despite having no proprietary interest in the family home. In a judgment delivered by Clement JA, the Appellant Division of the Alberta Supreme Court granted an injunction in nuisance. In doing so the Court relied upon the distinction gleaned from *Foster v Warblington.*

In *Khorasandjian v Bush*[17] an eighteen year old woman lived with her parents in the family home. For many months a former friend persistently harassed her with telephone calls. Miss Khorasandjian had no proprietary interest in the property. Despite this, she sought an injunction in nuisance. Relying on *Motherwell*, the English Court of Appeal granted the injunction. The decision was not uncontroversial. Many commentators were concerned that once the action was severed from a proprietary interest there seemed no logical reason to restrict it to the home. Indeed in *Khorasandjian* the injunction extended beyond the property.

D The Lower Courts

1 First instance

Judge Havery QC held that the interference with television reception was capable of constituting an actionable nuisance. He also held that a proprietary interest was required to entitle a person to sue in private nuisance. In doing so he relied on *Malone v Laskey*.

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[16] [1977] 73 DLR (3d) 62.
[17] [1993] 3 WLR 476.

2 *The English Court of Appeal*

a Television reception

The Court of Appeal reversed the decision of Judge Havery on the first issue.[18] Pill LJ distinguished *Nor-Video* in that, in that case, the interference was not caused by the mere physical presence of a building.[19] He then drew an analogy between television signals and prospects.[20] It followed that the mere physical presence of a building in the line of sight between a television transmitter and other properties was not actionable as an interference with the use and enjoyment of land.

b Standing to sue

The Court of Appeal also reversed the decision of Judge Havery on the second issue. Pill LJ relied on *Khorasandjian.* He went one step further and attempted to define the relevant test. He considered that there needed to be a "substantial link" between the persons enjoying the use of the land and that land. In his opinion occupation of property as a home conferred upon an occupant a sufficient link.[21] This was a significant departure from the traditional approach to standing in private nuisance as represented by *Malone v Laskey*.

c Dust

The dust issue was disposed of by Pill LJ who held that an action for dust lay in negligence where there is proof of actual damage.[22]

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[18] [1997] AC 655 ("*Canary Wharf* CA").
[19] *Canary Wharf* CA above n18, 664 per Pill LJ.
[20] *Canary Wharf* CA above n18, 665 per Pill LJ.
[21] *Canary Wharf* CA above n18, 675 per Pill LJ.
[22] *Canary Wharf* CA above n18, 676 per Pill LJ.

E The Speeches of the House of Lords

1 The majority

a Television signals

Like Pill LJ in the Court of Appeal, Lord Goff distinguished *Nor-Video* on the basis that it did not involve an interference resulting from the mere physical presence of a building.[23] He then considered whether the mere presence of a building could cause a nuisance. He observed that:

> [a]s a general rule, a man is entitled to build on his own land. ...Moreover, as a general rule, a man's right to build on his own land is not restricted by the fact that the presence of the building may of itself interfere with his neighbour's enjoyment of his land.[24]

He observed that a building may spoil the neighbour's view, restrict the flow of air onto a neighbour's land or take away light from a neighbour's windows.[25] Nevertheless, the neighbour could not complain of the presence of the building. Lord Goff observed that actionable nuisances generally arose from something emanating from the defendants land.

Lord Hoffmann agreed, adding that an owners right is limited by prescriptions. He added that the town planning regulations provided a mechanism for control of the unrestricted right to build. In his view this was a more appropriate form of control.[26]

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[23] *Canary Wharf* HL above n1, 685 per Lord Goff.
[24] *Canary Wharf* HL above n1, 685 per Lord Goff.
[25] *Canary Wharf* HL above n1, 685 per Lord Goff. Note the exception in the case of an easement.
[26] *Canary Wharf* HL above n1, 710 per Lord Hoffmann.

b Standing

The majority held that standing to sue in nuisance required a proprietary right in the property suffering the nuisance. They relied on *Malone v Laskey*. In doing so Lord Goff over ruled *Khorasandjian*. He did this by undermining the authority that *Khorasandjian* relied upon. He did not agree that *Foster v Warblington* stood for the proposition that a mere licencee was able to sue in nuisance.[27] He did not elaborate this point but presumably this was because the plaintiff in *Foster v Warblington* had adverse possession. It followed therefore that *Motherwell* was wrongly decided. It also followed that, so far as *Khorasandjian* relied on *Motherwell,* it was also wrongly decided.

Lord Hoffmann referred to a passage in *Sedleigh Denfield v O Callaghan*[28] where Lord Wright referred to possession or occupation as being necessary to acquire standing.[29] In Lord Hoffmann's opinion, Lord Wright was referring to possession based upon, or derived through, title or defacto occupation. In his view, *Foster v Warblington* was a case of defacto occupation. In his opinion, even when that possession is wrongful against the true owner, a plaintiff with exclusive possession is able to bring an action in nuisance against third parties.

Lord Hoffmann disputed that *St Helens Smelting Co v Tipping* [30] created two torts: one covering actual material damage and another covering sensible personal discomfort.[31] He agreed that, in the former cases, only a person with an actual interest in the land could sue. In his view, *Khorasandjian* demonstrated a tendency to extend standing in the latter. However, in his view they were two sides of the same tort:

> Once it is understood that nuisances productive of sensible personal discomfort do not constitute a separate tort of causing discomfort to people but are merely part of a single

[27] *Canary Wharf* HL above n1, 691 per Lord Goff.
[28] [1940] AC 880, 902-903.
[29] *Canary Wharf* HL above n1, 703 per Lord Hoffmann.
[30] (1865) 11 HL Cas 642.
[31] *Canary Wharf* HL above n1, 707 per Lord Hoffmann..

> tort of causing injury to land, the rule that the plaintiff must have an interest in the land falls into place as logical, and indeed, inevitable.[32]

2 *Lord Cooke*

a Television signals

Like the majority, Lord Cooke held, that in this case, the interference with television signals was not an actionable nuisance. In his opinion, this question was governed by the user principle, or give and take.[33] He agreed with the rule that planning permission authorising a building could not authorise a nuisance. However, it was an important factor in determining whether nuisances caused by the presence of a building were reasonable in the circumstances. In this case the planning permission indicated that the interference with television signals was reasonable. As such it did not constitute a nuisance.[34]

b Standing

Lord Cooke agreed with Pill LJ in the Court of Appeal that, in cases of interference with an amenity, occupancy of the home was sufficient to sue in nuisance.[35] He approved of the distinction between those nuisances that produce actual physical damage and those that cause sensible personal discomfort. He drew an analogy between the latter cases and cases in contract where plaintiffs were able to recover for the partial failure to produce a promised amenity.[36] Lord Cooke considered it logical that standing to sue in nuisance should be extended in cases involving the loss of amenity value.

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[32] *Canary Wharf* HL above n1, 707 per Lord Hoffmann.
[33] *Canary Wharf* HL above n1, 720 per Lord Cooke.
[34] *Canary Wharf* HL above n1, 722 per Lord Cooke.
[35] *Canary Wharf* HL above n1, 717 per Lord Cooke.
[36] *Canary Wharf* HL above n1, 712 per Lord Cooke.

In Lord Cooke's opinion *Foster v Warblington* was not misunderstood in *Motherwell*. In his opinion, Clement J in *Motherwell* based his reasons, not on *Foster v Warblington*, but on wider considerations relating to the family home.[37] In *Malone v Laskey* the wife was dismissed by the court as a person who had "no right of occupation in the proper sense of the term."[38] Fletcher Moulton LJ described her as "merely present."[39] In the opinion of Lord Cooke, the wife received "rather light treatment." Such treatment was no longer acceptable today. In this respect he approved of *Motherwell*.[40]

However, Lord Cooke was not content to limit nuisance to wives. He mentioned Article 16 of the Convention on the rights of the Child: Article 12 of the Universal Declaration of Human Rights and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[41] All of these are aimed, in part, at affording protection of the home. In his view they go beyond property rights. In this respect he approved of *Khorasandjian*.

III SIX PLAINTIFFS, TWO PARADIGMS, ONE ACTION

In Canary Wharf, six types of claim could, potentially, have been brought relying on private nuisance. There were two categories of plaintiff. The first group were people who possess a proprietary interest in the land. This group included owners, leasees, and licencees with exclusive possession. The second group were people who lived with property owners. Included in this group were people who lived on the land as a home, but who did not possess a proprietary interest. Since the case decided preliminary issues, the Court did not hear complete facts concerning the types of damage suffered. However, there were three potential types of damage. These were material physical damage to land, interference with the use and enjoyment of land and personal injury.

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[37] *Canary Wharf* HL above n1, 713 per Lord Cooke.
[38] *Malone v Laskey* above n8, 151
[39] *Canary Wharf* HL above n1, 713 per Lord Cooke.
[40] *Canary Wharf* HL above n1, 713 per Lord Cooke.
[41] (1953) (Cmd. 8969).

The lineaments of who were to recover and who were not, depended upon the boundaries of private nuisance. Traditionally private nuisance had been burdened with dual functions. The first was to balance the rights of people to use land, against the rights of their neighbours not to suffer interference. The second was to compensate for injury. The former provided an important element in the institution of private property. The latter crossed over into the law of negligence. These two paradigms influence the operation of private nuisance, and as a result, determined who could recover.

A A Model of Property

Property is not a relationship between a person and a thing in the legal sense. A thing cannot have rights or owe obligations.[42] Rather, it is a relationship between a person and others, whereby those others recognise that the person has certain rights against them in respect to a thing.[43] This relationship allows people to advance their will in the material world through an object. In the absence of such a relationship, owners could not advance their will by employing the object because they could not guarantee that the object, or its product, would not be taken, or interfered with, by another.[44] In a Hobbesian world, owners could maintain the rights by threat of physical violence if they are tough enough. But this strategy is uncertain given that potential takers could gang up on a possessor.[45] It is therefore a fundamental function of a legal system to support through its institutions the rights of the owner.[46] The certainty and predictability that this support provides permits people to advance their will.

But what is the institution labeled property and how is it protected? According to Professor Harris, the essentials of a property institution are the twin notions of

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[42] Felix Cohen "Dialogue on Private Property" (1954) 9 Rutgers L. Rev 357, 361 ("Cohen").
[43] JW Harris *Property and Justice* (Clarendon Press, Oxford, 1996)("Harris").
[44] For example, from person A's point of view, there would be no point in researching an essay on a piece of paper (her will), if she could not be sure that she could use the piece of paper at a subsequent time.
[45] Cohen above n42, 371.
[46] Cohen above n42, 371.

trespassory rules and the ownership spectrum.[47] The ownership spectrum describes various interests a person may have in a thing. According to Professor Harris, an ownership interest may fall anywhere on a spectrum between mere property, and full blooded ownership. Mere property comprises:

> some open ended set of use privileges and some open ended set of powers of control over uses made by others.[48]

Full blooded ownership assumes that people are entirely free to do what they will with the object, whether by way of use, abuse, or transfer.[49] Blackstone labeled it absolute ownership and described it as:

> that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[50]

Trespassory rules are rules which purport to impose obligations on all members of society, other than an owner, not to make use of, or interfere with, the owned thing without the consent of the owner.[51] Legal trespassory rules may be criminal or civil. It is here that the law of tort plays an important role in supporting the institution of property. All of the property torts, including private nuisance, are claims devised to support ownership interests.[52] They are all trespassory rules. As Englard observed:

> [T]ort liability has a dual task: compensation for damage and enforcement of the right itself. Against this background one can understand the torts of strict liability even where no real damage is incurred ie torts actionable per se.[53]

Englard was referring to the torts that vindicate possession, or ownership, where property has been taken. The right these torts protect is the right not to be dispossessed

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[47] Harris above n43, 5.
[48] Harris above n43, 29.
[49] Harris above n43, 29.
[50] Sir William Blackstone, *Commentaries on the Laws of England* (16th Edn., J Butterworth and Son, 1825), Book 2, 1.
[51] Harris above n43, 25. These may be legal or social.
[52] Harris above n43, 34.
[53] Englard "The Law of Torts in Israel" (1974) 22 Am J Comp L 302, 311.

or deprived of ownership.[54] However, the right to be free of damage is an important element of an owner's property right. It is this right that private nuisance protects. Where property is severely damaged, the effect may, in principle, be the same as dispossession.

But nuisance also has another function in the institution of private property. Contrary to Blackstone, even the fullest ownership powers and privileges are not completely open ended. Harris noted that ownership interests are restricted by two types of limitation. The first are property independent prohibitions.[55] Certain actions are prohibited irrespective of property. As Harris observed, it is not a defense to murder to say "I owned the knife."[56] The second are property limitation rules.[57] These are rules that limit an ownership interest only. Private nuisance would be a property limitation if it applied to land owners only. For example, if private nuisance imposes strict liability on Canary Wharf Ltd because it is a land owner, when other people who are not asserting a property right are only liable if they are negligent, then nuisance is a property limitation. It is so because nuisance is specifically directed at limiting the use of land owners. On the other hand, if everyone faced strict liability, whether a land owner or not, then nuisance would be a non property prohibition. The prohibition would apply irrespective of property.

B The Fault Principle

The fault principle pronounces that there shall be no liability without fault. In personal torts, fault has been the recognised liability criterion.[58] The traditional

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[54] Where Roman law had separate and distinct actions in the law of property to vindicate these rights, the common law uses tort.
[55] Harris above n43, 32.
[56] Harris above n43, 32.
[57] Harris above n43, 33. These are not essential to a minimalist conceptualisation of the property institution. It is possible to imagine a system where owners were free to do anything they liked with their property so long as their actions did not breach a property independent prohibition.
[58] Peter Crane *Atiyah's Accidents, Compensation and the Law* (Butterworths, London, 1993) 27, see also 152.

rationale is that fault provides the moral justification for attaching liability to the delinquent party. As Salmond observed:

> Reason demands that a loss should lie where it falls, unless some good purpose is to be served by changing its incidence; in general the only purpose so served is that of punishment for wrongful intent or negligence.[59]

Salmond's quote highlights two important elements of tort. First, tort determines who should bear losses. Secondly, tort punishes morally wrong actions. These two aims were evident at the birth of modern negligence where in *Donoghue v Stevenson*, Lord Atkins noted that liability for negligence:

> is no doubt based upon a general public sentiment of moral wrong doing for which the defendant must pay.[60]

But what theories lie behind negligence? Two pairs of concepts feature large in tort theory, particularly with reference to the liability criterion for physical damage and personal injury. The first pair are corrective and distributive justice. The second pair are moral responsibility and social utility.

1 Corrective and distributive justice

Corrective justice focuses on undoing the wrong suffered by the plaintiff by compelling the defendant to pay damages.[61] What constitutes wrong is determined independently. Most tort scholars believe that the concept of wrong in the framework of corrective justice cannot be based on utilitarian grounds.[62] On the other hand, distributive justice requires that the innocent sufferer of loss receive compensation.

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[59] Salmond (6th Edn), 12-13.
[60] [1932] AC 562, 580.
[61] Izhak Englard *The Philosophy of Tort Law* (University Press, Cambridge, 1993) 12 ("The philosophy of Tort Law").
[62] The philosophy of Tort Law above n61, 12.

When viewed independently of corrective justice, it becomes obvious that the compensation need not originate with the defendant.[63]

Negligence cannot claim to deliver unequivocally either corrective or distributive justice.[64] By using fault as the criterion for liability, negligence theoretically focuses on corrective justice.[65] But this point is overstated. Negligence may provide more than corrective justice alone. In practice the moral rationale is contradicted by the objectivity of the reasonably forseeability test.[66] Further, vicarious liability casts liability on an employer even when the employer is blameless. Negligence is more distributive than it appears at first blush.

2 Social utility and moral responsibility

The moral analysis of tort focuses on the suffering and doing of wrongs. Defendants are liable if they commit a wrong against a plaintiff, causing that plaintiff loss.[67] Moral responsibility is generally equated with blameworthiness. The moral analysis focuses exclusively upon the plaintiff and the defendant.[68] On the other hand, arguments in favour of social utility seek to determine liability on external grounds. These grounds are inevitably utilitarian. The utilitarian perspective argues that liability criterion should advance overall social utility. Accordingly, this perspective views tort law as an instrument for the delivery of external goals, such as compensation, deterrence, loss spreading, cheapest cost avoidance and wealth maximisation.[69] Tort law matters only to the extent that it advances or frustrates these social goals.

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[63] AI Ogus " Limits of liability for Compensation" in I. Furmston (ed) *The Law of Tort* (Duckworth & Co Ltd, London 1986) 211, 213.
[64] The Philosophy of Tort Law above n62, 24.
[65] The Philosophy of Tort Law above n62, 24.
[66] The Philosophy of Tort Law above n62, 21.
[67] E Weinrib "The Special Morality of Tort Law" (1989) 34 MCGill L Jnl 403,408 ("Weinrib").
[68] Weinrib above n67, 412.
[69] The Philosophy of Tort Law above n62, 8.

There is a divergence of opinion concerning the extent to which negligence deviates from a strict moral criteria.[70] Clearly negligence sits somewhere on a spectrum between moral responsibility and social utility. Weinrib argues that negligence perfectly matches the structural requirements of corrective justice and as such advances moral responsibility.[71] However, it is clear that in employing objective reasonableness, negligence diverges, if only slightly, towards considerations of social utility.

IV DIFFERING MODELS OF PRIVATE NUISANCE OFFERRED BY THE MAJORITY AND LORD COOKE

As a general rule, a person is able to recover in negligence for any type of material physical damage or personal injury that is reasonably forseeable.[72] In the past, nuisance had preferred certain categories of people by affording them extra protection. There are two aspects to this preference. The first is the class of people who were preferred. The second is the way in which they were preferred. In the past, private nuisance had provided extra protection in two ways. First, it had provided stricter liability for material physical damage to land and personal injury. Land owners who suffered these types of damage received distributive justice. Secondly, the interference limb had permitted recovery for harm less than personal injury.

Whether or not the six types of plaintiff were able to recover depended upon the approach the Lords took to who was to be preferred, and how.

A The Model Adopted by the Majority

There were, primarily, two influences on the shape of the model of nuisance adopted by the majority. The first was the traditional shape of private nuisance. This

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[70] Compare G Fletcher "Fairness and Utility in Tort Theory" (1972) 85 Harv L Rev 537 with Weinrib above n67.
[71] The Philosophy of Tort Law above n62, 24.
[72] See *Donoghue v Stevenson* above n60.

influenced the class of people who were permitted extra protection. The majority restricted the class of people preferred, to those with proprietary interests ("owners").

The second was the goal of rationalising the law of tort so that all physical damage is controlled by negligence. This affected the scope of that protection. By indicating that material physical damage to land and personal injury should be severed from private nuisance, the majority advocated reducing the extra protection nuisance could offer owners. The only extra protection extant, would be from interferences with use and enjoyment.

In their decision to prefer only owners, both Lord Goff and Lord Hoffmann were influenced by "The Boundaries of Nuisance" by Professor Newark.[73] Newark observed that the essence of nuisance was that it was a tort directed against the plaintiff's enjoyment of rights over land.[74] Professor Newark noticed that the historical origin of the tort lay in the fact that:

> Disseisina, transgressio and nocumentum [nuisance] covered the three ways in which a man might be interfered with in his rights over land. Wholly to deprive a man of the opportunity of exercising his rights over land was to disseise him, for which he might have recourse to the assize of novel disseisin. But to trouble a man in the exercise of his rights over land without going so far as to dispossess him was a trespass or a nuisance according to whether the act was done on or off the plaintiff's land.[75]

It followed from the analysis provided by Professor Newark, that an action in private nuisance would only lie at the suit of a person who had a right to the land affected. But what was the nature of this right?

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[73] F.H. Newark "The Boundaries of Nuisance" (1949) 65 L.Q.R. 480 ("Newark").
[74] Newark above n73, 481.
[75] Note, the three actions mentioned are all examples of trespassory rules.

Lord Goff held that it included any person who had a right of exclusive possession. This included freeholder, tenant in possession or even a licencee with exclusive possession.[76] Lord Hoffmann cited Lord Wright in *Sedleigh Denfield* who observed:

> The assizes became early superceded by the less formal procedure of an action which lay for damages. This action was less limited in its scope, because whereas the assize was by a freeholder against a freeholder, the action lay also between possessors or occupiers of land. …[P]ossession or occupation is still the test.[77]

Lord Hoffmann interpreted possession to refer to a right to possession based on title or defacto occupation.[78] Either way, they amounted to exclusive possession.

B The Model Advanced by Lord Cooke

Lord Cooke acknowledged that the speeches of the majority "achieve a major advance in the symmetry of the law of nuisance."[79]

But he added:

> Being less persuaded that they strengthen the utility or the justice of this branch of the common law, I am constrained to offer an approach which, although derived from concepts to be found in those opinions, would lead to principles different in some respects. [80]

Lord Cooke envisioned a law of tort that was capable of providing legal recognition of the values of the community. He doubted the capability of nuisance, as restricted by the majority, to recognise the values people find important. He observed:

> What has made the law of nuisance a potent instrument of justice throughout the common law world has been largely its flexibility and versatility.[81]

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[76] *Canary Wharf* HL above n1, 692 per Lord Goff.
[77] *Sedleigh-Denfield v O'Callaghan* [1940] A.C. 880, 902-903.
[78] *Canary Wharf* HL above n1, 703 per Lord Hoffmann.
[79] *Canary Wharf* HL above n1, 711 per Lord Cooke.
[80] *Canary Wharf* HL above n1, 711 per Lord Cooke.
[81] *Canary Wharf* HL above n1, 711 per Lord Cooke.

Lord Cooke was concerned to develop private nuisance into a tort directed at protecting people in their homes. He extended the class of people to be preferred to those who occupy the land as a home. In a sense, he began to construct a bundle of rights around the home. His model preferred this of class people by providing extra protection in two ways. First, they were able to rely on the 'interference with use and enjoyment' limb of nuisance to recover for harm less than personal injury. Secondly, they were potentially able to rely on a different liability criterion to recover personal injury in private nuisance.[82]

He proceeded to outline a nuisance that was considerably different in many respects from that of the majority. He did not respect the traditional boundaries of nuisance. As a consequence, plaintiffs suffering certain types of damage, who had fallen between the boundaries of nuisance and negligence in the majorities model, were able to recover.

V MATERIAL PHYSICAL DAMAGE TO LAND

The majority judgment indicated that material physical damage ought to be exclusively controlled by negligence. However, Lord Cooke appreciated a difference between strict liability for reasonably forseeable material physical damage in private nuisance, and liability in negligence. It is submitted that material physical damage to land ought not be recoverable in private nuisance.

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[82] Lord Cooke's model of private nuisance preferred the owner of land for material physical damage to land. For this damage, only the owner was able to recover in nuisance.

A Recovery by An Owner for Material Physical Damage to Land

1 The model adopted by the majority - reasonable foresight as an element of private nuisance

The recovery of damages in nuisance for material physical damage to land was not expressly considered in the speeches of the House of Lords. Unfortunately, this meant that their Lordships were not called upon to venture an opinion on two current issues. The first was the role that negligence plays in nuisance as it applies to cases of material physical damage to land. The second was whether the material physical damage limb of nuisance still exists .at all, or whether actual damage is now exclusively the province of negligence. However, it can be shown that, in the model favoured by the majority, there is very little difference between liability in the claim of negligence and liability for reasonably forseeable damage in private nuisance.

Through an action of nuisance, plaintiffs are able to access the most powerful remedies the common law possesses: damages and injunction. Yet the common law has struggled in its attempts to determine a balance between the right of property owners to obtain compensation for actual damage to their land, and the principle that a defendant shall not be liable without fault. Actual damage as a result of a one off occurrence resembles the types of cases normally controlled by negligence. This has lead to much confusion with respect to the elements of nuisance as it applies to actual damage. In *The Wagon Mound (No.2)* [83] Lord Reid, delivering a speech in the Privy Council, observed that "[a]lthough negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves forseeability." [84]

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[83] *Overseas Tankship (UK) Ltd v Miller Steamship Pty Ltd (The Wagon Mound (no.2))*[1967] 1 AC 617 ("*The Wagon Mound*").
[84] *The Wagon Mound* above n83, 639.

Lord Reid went on to say:

> It is not sufficient that the injury suffered by the respondents' vessel was the direct result of the nuisance if that injury was in the relevant sense unforseeable.[85]

Although this was *obiter dictem*, it has been widely accepted as the settled law on the point.[86] In *Cambridge Water*[87] Lord Goff expressed the view that Lord Reid was referring to remoteness. As Lord Goff observed:

> It is still the law that the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user. But it by no means follows that the defendant should be held liable for damages of a type which he could not reasonably forsee.[88]

It appears that, defendants are only liable for reasonably forseeable circumstances in private nuisance: but they are liable even when they take care.

In cases of material physical damage to land, liability in negligence and nuisance will rarely differ. When defendants do not bother to take care to avoid reasonably forseeable damage they will be liable in both negligence and nuisance. But will there be a difference when the defendants take care? Imagine Canary Wharf Ltd had taken care not to create dust. Despite this, dust is created causing damage to the cladding of a plaintiff's house. This was reasonably forseeable. As a result of the dust, a drain blocked. The ensuing flood, damaged the plaintiff's prize roses. This could not have been reasonably forseen. Assume causation is clearly established. Canary Wharf Ltd will not be liable for the roses in negligence since that damage was not reasonably forseeable. The *Wagon Mound* establishes that Canary Wharf Ltd will not be liable for the roses in nuisance for the same reason. Moreover, Canary Wharf Ltd will not be liable for the cladding damage in negligence if in taking care, they reached a certain standard of conduct. They will also escape liability in nuisance, if they can show that

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[85] *The Wagon Mound* Above n83, 640.
[86] *Cambridge Water Co. Ltd v Eastern Counties Leather Plc* [1994] 2 WLR 537, 538 ("*Cambridge Water*") per Lord Goff.
[87] *Cambridge Water* above n86, 537.
[88] *Cambridge Water* above n86, [1994] 2 A.C. 264, 300.

they took precautions to the point that dust damage was no longer reasonably forseeable. It follows that there will be little practical difference between the two actions in this context.

The introduction of negligence as a liability element in nuisance has caused many to question whether the actual damage limb of nuisance ought to exist at all. In *Canary Wharf*, Lord Goff referred to "The Place of Private Nuisance in the Modern Law of Torts" by Conor Gearty.[89] Gearty argued that physical damage should be left to negligence. He argued that this:

> will enable nuisance to turn its undivided attention to what it does best, protecting occupier against non physical interference with the enjoyment of their land.[90]

Gearty claimed that in many of the cases involving actual damage for a one off event, nuisance had been the theoretical basis of liability, but negligence had been the driving force. He argued that the occasional categorisation of physical harm as nuisance is anomalous:

> The breadth of negligence was not fully understood in the nineteenth century or even in the first half of the twentieth, and nuisance provided a superficially attractive receptacle for cases that were otherwise hard to classify.[91]

Lord Goff did not express an opinion on this thesis directly. But the position of the majority on this point is not entirely unclear. In *Smith v Littlewoods Organisation Ltd*[92] Lord Goff found it "difficult to believe" that there could "be any material distinction between liability in nuisance and liability in negligence." Moreover, in *Canary Wharf* he observed:

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[89] Conor Gearty "The Place of Private Nuisance in the Modern Law of Torts" [1989] CLJ 214 ("Gearty").
[90] Gearty above n89, 218.
[91] Gearty above n89, 218.
[92] [1987] AC 241, 274.

> In any event it is right for present purposes to regard the typical cases of private nuisance as being those concerned with interference with the enjoyment of land... . Characteristic examples of cases of this kind are those concerned with noise, vibrations, noxious smells and the like. [93]

As Professor Newark demonstrated, material physical damage to land had always been recoverable in nuisance. The Law Lords were unable to expressly alter this rule because the facts did not involve material physical damage. As a result this principle is extant. However, *Canary Wharf* indicates that the model of tort adopted by the majority may not retain material physical damage to land in nuisance for much longer.

2 *The model advanced by Lord Cooke - nuisance and negligence concurrently available*

Whether or not the liability criterion for material physical damage to land in the model advanced by Lord Cooke was reasonable foresight is unclear. In one part if his speech, Lord Cooke approved of a statement made by Lord Wilberforce in *Goldman v Hargreave* to the effect that:

> 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.[94]

In another part of his speech he refers to the:

> identification in *Cambridge Water*... of reasonable foresight of damage as an essential ingredient of liability.[95]

Lord Cooke found Conor Gearty's view that material physical damage should be exclusively governed by negligence "striking."[96] Clearly, he appreciated a material difference between strict liability for reasonably forseeable harm in nuisance, and

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[93] *Canary Wharf* HL above n1, 692 per Lord Goff.
[94] [1967] 1 AC 645, 657.
[95] *Canary Wharf* HL above n1, 719 per lord Cooke.
[96] *Canary Wharf* HL above n1, 712 per Lord Cooke.

liability in negligence. Plaintiffs who are unable to rely on negligence may rely on private nuisance to recover damages for material physical damage to land.

Lord Cooke once quoted with approval the following statement of Lord Goff:

> If I was asked what is the most potent influence upon a court in formulating a statement of legal principle, I would answer that in the generality of instances it is the desired result in the particular case before the court.[97]

This could not be true of the speech of Lord Cooke in Canary Wharf because he agreed with the result reached by the majority. However, given his references to justice and utility, it is clear that he appreciated that a protean nuisance action is more capable of assisting courts to reach desired results.

3 *Professor Harris' Model as it applies to material physical damage to land in nuisance*

Material physical damage to land should be exclusively governed by negligence. Reasonable foresight is the appropriate liability criterion for material physical damage to land for a number of reasons. First, it is simpler and easier to justify when liability for all material physical damage is determined according to one criterion. It has a principled coherence that does not favour one type of damage over another.

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[97] The Rt Hon. Lord Cooke of Thorndon KBE *The Hamlyn Lectures-Turning Points of the Common Law* (Sweet & Maxwell, London, 1997).

As professor Atiyah observed:

> [P]rinciples... give some overall structure or rational shape to the law, not just in the interests of elegance, but in the interests of consistency, of the desire to ensure that like is treated alike.[98]

Secondly, the introduction of reasonable foresight into nuisance aligns property rights with personal rights. Professor Harris' model of the property institution can be used to demonstrate this point.

Negligence already controls liability in most fact situations that do not involve competing property rights. According to Professor Harris' model of the property institution, negligence is a property independent prohibition.[99] People are not permitted to cause reasonably forseeable damage of any type, whether it emanates from their land or not. For example, imagine the facts of *Canary Wharf* but add an extra defendant. A truck driver drives past emitting hazardous smoke, causing material damage to the plaintiff's land and personal injury to the plaintiff. The truck driver is unrelated to Canary Wharf Ltd. The truck driver is liable in negligence for the damage and injury, only when he intended the damage or was negligent. There is a general property independent prohibition against intentionally or negligently damaging the property of others, or injuring others. It is the tort of negligence.

Conversely, the plaintiffs are liable for any damage inflicted on the truck driver only when they intended the damage or they are negligent. The same property independent prohibition applies. It applies whether the plaintiffs inflicted the damage directly, or it merely came from their land. Therefore, it cannot be said that the policy of the law prefers the property owner.

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[98] P.S. Atiyah *The Hamlyn Lectures-Pragmatism and Theory in English Law* (Stevens & Sons, London, 1987).
[99] Harris above n43, 25.

Private nuisance is different because it balances competing property rights.[100] As a result, it provides a trespassory rule for plaintiffs, as well as a property limitation rule imposed on defendants. As Harris observes:

> In common law systems, a land owners use privileges are limited by the tort of nuisance. He is prima facie entitled to do what he likes on and with his own land, but not if that would cause unacceptable harm to his neighbours.[101]

Private nuisance, therefore, does two things. First, it defines the uses owners may make of their land by defining the property limitations provided by tort. In this case, it determines whether or not Canary Wharf Ltd may undertake activities that cause dust. Secondly, it vindicates the plaintiffs property right. As Englard observed:

> The existence of a right is to be inferred indirectly from the protection it is given from invasion. Thus the right is a function of and co-extensive with the remedy and is not to be defined other than through its scope of protection (*ubi remedium, ibi ius*).[102]

Applying Englard's notion to *Canary Wharf*, the extent of the right of owners not to suffer material physical damage to their land, will depend on the trespassory protection available to them. From the perspective of vindicating the right to be free of land damage, there can be no argument against negligence. The other property torts are strict because they protect the right of possession or ownership.[103] Private nuisance merely protects against damage. In cases involving personal injury or chattel damage, the policy of the law has been to protect the plaintiff only to the extent that the tortfeasor was at fault. In other words, people who suffer personal injury on a public street resulting from the dust from Limehouse Link Road, only have the right to be free of personal injury to the extent that the defendant was negligent. Why should the right not to suffer material physical damage to land be better protected than the right not to suffer personal injury? To retain strict liability on the basis of vindicating the right to

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[100] It is generally accepted that nuisance operates when the damage complained of originates on the land of the defendant. For example see *Miller v Jackson* [1977] QB 966, 980 per Lord Denning MR "it is the very essence of a private nuisance that it is the unreasonable use by a man of his land to the detriment of his neighbour."

[101] Harris above n43, 34.

[102] Englard "The Law of Torts in Israel" above n53, 311.

[103] Englard "The Law of Torts in Israel" above n53, 311.

be free of property damage, would be to prefer property rights to personal rights. This is an indefensible proposition. From this perspective, introducing negligence as the liability criterion, aligns material physical damage to land with personal injury and chattel damage.

On the other hand, from the perspective of property limitations, there may be reasons to retain strict liability.[104] Nuisance and negligence are concurrently available. Theoretically, strict liability could make Canary Wharf Ltd liable even when they take reasonable precautions in the use of their property. Arguably, Canary Wharf Ltd would undertake fewer risky ventures if they knew that liability for material physical damage to land was strict. The question is whether there are any reasons to retain strict liability on the grounds that it reduces use privileges?

As Lord Cooke observed in *Canary Wharf*:

> the lineaments 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 consciousness of the need to protect the environment.[105]

These are examples of many factors that may contribute to the argument for limiting the use rights of property owners such as Canary Wharf Ltd. To these may be added, the increasing ways in which uses of land may effect large numbers of other people, the pressures of increased population on land which is a finite resource, the trend toward urbanisation and a greater number of people owning land in smaller parcels. If the policy of the law was to limit the things that people can do with their land, then strict liability would be retained for material physical damage to land. However, it has, generally not been the policy of the common law to restrict the right of land owners to use their land. In so far as the approach adopted by the majority introduces reasonable forseeability, it increases the set of use privileges available to Canary Wharf Ltd.

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[104] Refer Harris above n57.
[105] *Canary Wharf* HL above n1, 711 per Lord Cooke.

B Recovery by a Person Living with an Owner for Material Physical Damage to Land

1 The model adopted by the majority - no recovery

In accordance with the analysis provided by Professor Newark, the majority denied recovery for material physical damage to land in private nuisance to people living with the owner. The majority preferred to endorse *Malone v Laskey*.

It was argued in *Canary Wharf* that spouses of the property owner ought to be able to recover in nuisance.[106] The Matrimonial Homes Act 1983 (UK) and Family Law Act 1996 (UK) were cited in support of this submission. However, neither Lord Goff or Lord Hoffmann approved of this submission. As Lord Hoffmann observed:

> The effect of these provisions is that a spouse may ...become entitled to exclusive possession of the home. If so she will become entitled to sue for nuisance. Until then her interest is analogous to a contingent reversion.[107]

2 The model advanced by Lord Cooke - no recovery

Like the majority model, the approach advanced by Lord Cooke did not permit a person living with the owner to recover for material physical damage to land in nuisance. This is an expression of the distinction between the land as property and the land as a home. Material physical damage to land is damage to property and as such is recoverable by the owner.

In summary, neither an owner or a person living with an owner, ought to be able to recover material physical damage to land in private nuisance. Professor Harris' property model demonstrates that reasonable foresight in private nuisance aligns property rights with personal rights. By the approach adopted by the majority, there is

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[106] *Canary Wharf* HL above n1, 708 per Lord Hoffmann.
[107] *Canary Wharf* HL above n1, 708 per Lord Hoffmann.

no material difference between liability for reasonably forseeable damage in nuisance and liability in negligence. As a result, material physical damage to land should be controlled by negligence.

VI PERSONAL INJURY

Personal injury can arise in a case of private nuisance in one of two ways. The injury can occur in connection with an actionable nuisance, or it may occur directly. The model of private nuisance adopted by the majority did not permit recovery for direct personal injury. However, personal injury was recoverable where it interfered with the injured party's ability to use and enjoy their land. It is submitted that personal injury ought not be recoverable in private nuisance by either an owner or a person living with an owner.

A Recovery by An Owner for Personal Injury

1 The model adopted by the majority - no recovery for direct personal injury

The majority confirmed that there can be no recovery in private nuisance for direct personal injury. In deciding this they were influenced by Professor Newark. Newark remarked that the idea that personal injury could be recovered in private nuisance would never have occurred to lawyers of Bracton's day or long after.[108] The idea only insinuated itself as the result of some incautious *obiter dictum* on the part of Fitzherbert J in 1535.[109]

Right from its conception, one of the property rights that nuisance protected was an easement. In early law the easement most effected was the right of way. To interfere with a right of way was a nuisance. Interference with a public right of way was an encroachment upon the King. This form of public nuisance was a crime. As such no

[108] Newark above n73, 482.
[109] Newark above n73, 482.

common person could recover for it.[110] Unfortunately, in an action for blocking the public highway, Baldwin J advanced the reasoning that if recovery for damage was allowed to one, it would have to be allowed to all.[111] Agreeing with this proposition, Fitzherbert J went on to create an exception where one person suffered special injury. He held, that if someone created a trench across the road so that both he and his horse were to fall into it, he could recover in nuisance:

> I shall have an action against him who made the trench across the road because I am more damaged than any other man.[112]

According to Newark:

> At this point we have moved into the realm of personal injuries and away from the original conception of nuisance as a tort to land.[113]

This case came to be used as authority for the proposition that it was possible to recover in nuisance for personal injury. A line of cases developed from this proposition. As Newark complained:

> They were all actions on the case, and an examination of the manner of the plaintiffs declaring makes it plain that the lawyers of that time conceived of them as actions for negligence . Furthermore, the cases were fought in court on the footing of negligence and juries were instructed in terms of negligence. [114]

However, from the mid eighteenth century these cases became increasingly pleaded as nuisances. Plaintiffs were able to rely on strict liability in nuisance to recover damages for personal injury. Newark described this as a:

> heresy which is equally offensive to the legal historian and the jurisprudent. ...A sulphurous chimney in a residential area is not a nuisance because it makes householder cough and splutter, but because it prevents them taking their ease in their gardens. [115]

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[110] Newark above n73, 482.
[111] Y.B. 27 Hen. 8, Mich. Pl.10.
[112] Y.B. 27 Hen. 8, Mich. P1 10.
[113] Newark above n73, 483.
[114] Newark above n73, 484-485.
[115] Newark above n73, 488.

For these reasons Newark argues that personal injury ought not be recoverable in nuisance.

Lord Goff did little more than draw attention to this conclusion in his speech. However, he did mention that the typical cases of private nuisance were characteristically those concerned with noise, vibrations noxious smells and the like.[116] Personal injury was not one of the typical nuisances he suggested. It is consistent with the majority's goal of rationalising all material physical damage, that personal injury be excluded from private nuisance.

2 The model advanced by Lord Cooke - personal injury in private nuisance

In a significant departure from the majority, the approach advanced by Lord Cooke permitted recovery for personal injury.[117] This undoubtedly increased the protean nature of private nuisance. However, it ought not be adopted for a number of reasons. Lord Cooke's first argument related to the history of nuisance. He observed that it was clearly established that personal injury is recoverable in public nuisance. He then states "as to the kind of harm actionable it would be hard to see any sensible difference between public and private nuisance."[118]

In his view, it was too late to rue the incautious *dicta* of Fitzherbert J that was mentioned by Professor Newark.[119] However, Lord Cooke's argument is fallacious. It assumes that it is appropriate to recover for personal injury in public nuisance. Like private nuisance, public nuisance permitted recovery for personal injury before the modern action of negligence existed. As Conor Gearty would argue, personal injury in public nuisance should also be returned to negligence.[120]

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[116] *Canary Wharf* HL above n1, 692 per Lord Goff.
[117] *Canary Wharf* HL above n1, 719 per Lord Cooke.
[118] *Canary Wharf* HL above n1, 719 per Lord Cooke.
[119] *Canary Wharf* HL above n1, 718 per Lord Cooke.
[120] Refer Gearty above n89.

Secondly, Lord Cooke saw no reason to exclude personal injury from nuisance now that reasonable forseeability is an essential element.[121] As the majority conceives it, liability for reasonably forseeable damage in private nuisance is the same as negligence. Where this is so, private nuisance provides no extra protection and so this damage should be subsumed into negligence. On the other hand, Lord Cooke perceived a difference between strict liability for forseeable harm in nuisance and liability in negligence. As such private nuisance would provide extra protection.

However, this offends the fault principle. In support of personal injury in nuisance, Lord Cooke referred to an article by Martin Davies entitled "Private Nuisance Fault and Personal Injuries."[122] Despite a lack of English authority, Davies asserted that it was possible to recover personal injury in nuisance. He based this assertion on a dearth of academic opinion. He then presented authority for the proposition that defendants can be liable in nuisance without fault. This lead Davies to the conclusion that personal injuries could be recovered in nuisance without proof of fault.[123]

Corrective justice is the dominant theory in the general policy of the law of tort with respect to personal injury.[124] Liability without fault in private nuisance for personal injury would provide owners with the benefit of distributive justice. But it remains to be seen why this should be so. According to Professor Harris' property model, the right not to suffer personal injury is not a right attached to property. When a person acquires property, they do not acquire a right to be free of personal injury while on it. This right exists independent of the land, and as such, is governed by property independent prohibitions such as negligence.

Lastly, it may be argued that nothing can be more disturbing to a land owner's enjoyment of his or her property than 'a broken head.' However, the same broken head

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[121] *Canary Wharf* HL above n1, 719 per Lord Cooke. Refer *Cambridge Water* above n86.
[122] M Davies "Private Nuisance, Fault and Personal Injuries" (1990) 20 UWALR 129("Davies").
[123] Davies above n122, 140.
[124] See The Philosophy of Tort Law above n61, 12.

caused by a fist is no less disturbing. Yet it is not possible to bring an assault and battery action under nuisance.[125]

3 *Personal injury interfering with the use of land*

Both the majority and Lord Cooke approved of the recovery in private nuisance of personal injury occurring in connection with an actionable interference with the use and enjoyment of land. It is submitted that this injury ought not be recoverable in private nuisance.

Devon Lumber Co ltd v MacNeil[126] was mentioned in *Canary Wharf* because it was a case in which the wife and children of a property owner were able to recover in nuisance. However, this case is also significant because the children recovered for asthma aggravated as a result of dust. In deciding the case, Stratton CJNB took it for granted that personal injuries were able to be recovered in nuisance. This was in full accord with the academic authority he cites, including Linden J who observed:

> although members of the possessor's family were once denied compensation, it now appears that they may recover for personal injury resulting from private nuisance. [127]

Neither was Stratton CJNB concerned that plaintiffs are able to rely on stricter liability for personal injury in nuisance. He quoted Professor Fleming who noticed that denying wives and family access to nuisance, was:

> denying them protection against many forms of discomfort and, in case of personal injury, the benefit of potentially stricter liability for nuisance compared with negligence.[128]

Despite this, the plaintiffs were unable to recover for personal injury because the children had an abnormal sensitivity to the dust. The objective reasonableness test did

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[125] Newark above n73, 488.
[126] (1987) 45 DLR (4th) 300 ("Devon").
[127] Linden *Canadian Tort Law* (3rd ed., Butterworths, Toronto, 1982) 549.
[128] Fleming *The Law of Torts* above n14, 393-394.

not make a defendant liable for personal injury to a plaintiff with an extraordinary sensitivity.[129]

The plaintiffs did, however, recover on the grounds that the dust interfered with their ability to enjoy their home. As Stratton CJNB observed:

> compensation in nuisance is not dependent upon proof of physical injury. It may consist of the annoyance and discomfort caused to the occupiers premises. [130]

Since the dust seriously disturbed the plaintiffs enjoyment of their land, the defendant was required to pay damages. In this way the personal injury suffered by the plaintiffs whenever they tried to use their land, interfered with their use and enjoyment of that land. This is an approach approved by Lord Hoffmann. In his view, direct personal injury could not be recovered in nuisance that:

> So far as the claim is for personal injury, it seems to me that the only appropriate cause of action is negligence. [131]

However, in deciding whether personal injuries that interfere with the use and enjoyment of rights over land were recoverable, Lord Hoffmann stated that:

> [I]nconvenience, annoyance or even illness suffered by persons on land as a result of smells or dust are not damage consequential upon the injury to the land. It is rather the other way about: the injury to the amenity of the land consists in the fact that the persons upon it are liable to suffer inconvenience annoyance or illness.[132]

It is submitted that personal injury occurring in connection with an interference with the use and enjoyment of land ought not be recoverable in private nuisance. Traditionally, private nuisance provided recovery only where the interference with the use and enjoyment of property was unreasonable.[133] In this context, reasonableness has two facets. The reasonableness of the activity, and the reasonableness of the harm

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[129] Devon above n126, 303-304.
[130] Devon above n126, 304
[131] *Canary Wharf* HL above n1, 707 per Lord Hoffmann.
[132] *Canary Wharf* HL above n1, 706 per Lord Hoffmann.
[133] See *St Helens Smelting Co v Tipping* above n30.

suffered.[134] Presumably, the same criterion would apply when the defendant's activities cause personal injury that interferes with the injured parties ability to use and enjoy the home. By this logic, liability for personal injury would be determined by the reasonable user principle instead of negligence. But this begs the question: by what criterion is reasonableness determined and how would it differ from negligence.

If the reasonable user principle was directed at obtaining corrective justice, reasonableness would be determined in accordance with a moral criteria. Morality is generally equated with reasonable foresight. The test would employ reasonable forseeability to determine whether the actions of the tortfeasor were reasonable. Imagine that the trucks using Limehouse Link Rd, cause dust that gives the neighbours asthma. If the asthma was forseeable, then using the road would be unreasonable. There is very little practical difference between this and negligence.

On the other hand, it was asserted in *St Helens Smelting*,[135] that physical damage was never reasonable. If this rule was applied in personal injury cases, then private nuisance would provide recovery whenever plaintiffs suffer physical injury. Canary Wharf Ltd would be liable in private nuisance for dust that caused asthma on proof of causation. As such nuisance would provide distributive justice. The moral blameworthiness of the defendant would be irrelevant. This offends the fault principle.

Moreover, in cases involving competing property rights, external factors of social utility may determine what is reasonable in the reasonable user principle. In *Canary Wharf* the benefit of having the tower may be weighed against the loss of television reception. However, when the harm suffered was personal injury, it is unlikely that reasonableness would be determined without some reference to fault. It is difficult to imagine a test that weighs the reasonableness of driving fast down Limehouse Link Rd, against a broken limb, without reference to a moral criteria. Since fault is reasonable

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[134] See G Cross "Does only the Careless Polluter Pay? A Fresh Examination of the Nature of Private Nuisance" (1985) 111 LQR 445, 450.
[135] *St Helens Smelting v Tipping* above n30.

foresight, it is unlikely that a personal tort of nuisance would advance social utility goals further than already given by negligence.

B Recovery by a Person Living with an Owner for Personal Injury

1 The model adopted by the majority - no recovery

In accordance with the majority's goal of rationalising the law of tort, the majority model prohibited a person living with the owner from recovering damages for personal injury in private nuisance. Lord Goff stated:

> [I]f the other spouse suffers personal injury, including injury to health, he or she may, like anybody else, be able to recover damages in negligence. The only disadvantage is that the other spouse cannot bring an independent action in private nuisance for damages or discomfort or inconvenience. [136]

2 The model advanced by Lord Cooke - recovery

The approach of Lord Cooke would permit recovery in private nuisance for personal injury to people living with an owner. Lord Cooke did not expressly address the point. But he did expressly permit recovery for chattel damage in private nuisance. As he opined:

> If a husband's car and his wife's are both damaged by spray from an adjacent property, they should alike be entitled to sue in nuisance even if he alone has a proprietary interest in the land.[137]

It would be consistent with his goal of preferring people in their homes by providing them with extra protection, to extend recovery to people living with an owner who suffer personal injury.

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[136] *Canary Wharf* HL above n1, 694 per Lord Goff.
[137] *Canary Wharf* HL above n1, 719 per Lord Cooke.

People who live with owners ought not be able to recover for personal injury in private nuisance. Lord Cooke diverged from the majority on this point in two ways. First, he thought that direct personal injury should be available in nuisance. It has been shown that liability for this injury will either be the same as negligence, or it will offend the fault principle.[138] Professor Harris' property model cannot be relied upon to provide the justification for affording distributive justice to land owners. As a result, personal injury should only be recoverable in negligence.

Secondly, Lord Cooke thought that the class of people able to recover should include all people that occupy the land as a home. However, if the owner is unable to recover personal injury in private nuisance, there can be no reason to permit people living with that owner to recover. The arguments against personal injury in private nuisance apply equally to owners and people who live with them.

VII PHYSICAL DAMAGE TO LAND AND PERSONAL INJURY BELONG IN NEGLIGENCE

Traditionally, private nuisance had been burdened with two functions. The first was to compensate for injury. Such injuries included material physical damage to land and personal injury. The second was to determine how much interference the law will permit a land owner to inflict on others.

A Rationalising Material Physical Damage to Land and Personal Injury

Private nuisance should no longer deal with material physical damage to land. This damage should be dealt with in negligence. As Professor Harris' model of private property demonstrated, the introduction of reasonable foresight into nuisance aligns the right not to suffer property damage to land, with the general right not to be personally injured. The majority's model of nuisance indicated that the introduction of reasonable

[138] See part VI *A 2*.

foresight into private nuisance, means that there is very little practical difference between liability in negligence, and liability in nuisance in cases involving material physical damage to land. For the sake of systematic coherence, this type of damage ought to be subsumed into negligence.

Further, private nuisance should no longer deal with personal injury. Personal injury is more appropriately dealt with in negligence. Its inclusion in private nuisance has been an anachronism. Permitting recovery for personal injury in private nuisance provides a pocket of distributive justice that cannot be justified by referring to the model of the institution of private property. Accordingly, all personal injury should be governed by negligence..

B Rationalising Interference with Use and Enjoyment

If private nuisance is no longer constrained by the need to compensate material physical damage to land and personal injury, it can direct itself at the second function it is required to perform. This is, balancing the rights of people to use land against the rights of others not to suffer interference. Being less than material physical damage or personal injury, such interferences are likely to be in the nature of noxious smells, vibrations, dust and noise. It is mostly the case that defendants causing these types of interferences will not intend, but will be aware, that they are bothering their neighbours. The question asked of nuisance, will not be a question of determining liability for a wrong, but rather of determining what is a reasonable amount of discomfort. The reasonable user principle is ideally suited to deciding these issues.

However, the majority took two wrong turns in *Canary Wharf*. The first, was in finding that an interference had to emanate from the land of the defendant before it could be an actionable nuisance ("the emanation rule"). The second was that standing to bring an action in nuisance should be limited to owners.

VIII INTERFERENCE WITH USE AND ENJOYMENT OF LAND

A Recovery by an Owner for Interference with Use and Enjoyment of Land

1 The model adopted by the majority - the emanation rule

It was never in doubt in *Canary Wharf* that owners could recover for interference with use and enjoyment of their rights over land. The speeches in *Canary Wharf* do nothing more than affirm what has always been the case.

However, the majority took a wrong turn in adopting the emanation rule. Both Lord Goff and Lord Hoffmann began with the Blackstonian proposition that owners may build whatever they like on their land.[139] The Law Lords did, however, recognise that this principle was not unlimited. The right of land owners to build is limited by the law of tort.[140] In *St Helens Smelting*, the plaintiff bought an estate in Lancashire.[141] His hedges, shrubs and trees were being damaged by pollution from the defendants copper smelter. He brought an action in nuisance. The defendant argued that industry in the area would be brought to a standstill if the plaintiff was permitted to succeed. The House of Lords held that land owners may not use their land so as to cause material physical damage to the land of another. However, in cases of nuisances productive of sensible personal discomfort, liability will depend upon the circumstances of the place in which the nuisance occurs. A defendant may prevail where both the activity and harm were reasonable ("reasonable user principle").

Rather than being a defense to a claim of nuisance available to the defendant, the reasonable user principle sets the threshold that determines whether the harm suffered was actionable as a nuisance at all. The merit of this lies in its flexibility. Sometimes it will refer to the quality and extent of the harm suffered, other times it will refer to the

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[139] *Canary Wharf* HL above n1, 685 per Lord Goff: 709 per Lord Hoffmann.
[140] *Canary Wharf* HL above n1, 709 per Lord Hoffmann. The right to build is also limited by covenant or by the acquisition, by grant or prescription, of an easement. It is also limited by town planning laws.
[141] *St Helen Smelting Co v Tipping* above n30.

activity undertaken by the defendant.[142] For example the reasonableness principle in *Canary Wharf* permits the court to balance the interference with television signals against the benefits of having the tower.

Where the majority went wrong was in setting a bright line. Nuisances that emanate, are permitted where they are reasonable. This policy is sound. It would be too restrictive to permit recovery for every effect emanating from activities undertaken on land. If it were not so, reasonable nuisances, such as the emanating sound of playing children, would be actionable. However, unreasonable nuisances that do not emanate, are not actionable. This policy is not sound. Gillespie argues that this rule arose because "the common. law evolved... to encourage and protect commercial enterprise."[143]

Be that as it may, as the facts of *Canary Wharf* demonstrate, the rule is no longer appropriate. The emanation rule prevented the House of Lords from granting recovery without overtly considering whether the interference was reasonable. The bright line emanation rule favours the party using the property and causing harm. But unreasonable interferences should be actionable even where they do not emanate.

2 The model advanced by Lord Cooke - reasonable user without the emanation rule

However, Lord Cooke recognised the danger in turning the law in this direction. He expressed his resounding approval for the reasonable user principle observing that:

> The principle may not always conduce to tidiness, but tidiness has not had a high priority in the history of the common law.[144]

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[142] G Cross "Does Only the Careless Polluter Pay" above n134, 450.
[143] J Gillepie "Private Nuisance as a Means of Protecting Views from Obstruction" (1989) Envtl. and Plan. L.J. 94.
[144] *Canary Wharf* HL above n1, 711 per Lord Cooke.

He did not countenance the emanation rule, preferring to rely on the reasonable user principle alone. In his view the emanation rule did not reflect the modern importance of television. As he observed, the public:

> might react with incredulity, and justifiably so, to the suggestion that the amenity of television and radio reception is fairly comparable to a view of the surroundings of their homes. It may be suspected that only a lawyer would think of such a suggestion.[145]

In choosing not to apply the emanation rule, Lord Cooke chose not to structurally implement a preference for the user of land. Under Lord Cooke's approach land users can not unreasonably interfere with the amenity of a persons home, whether or not the activity they undertake emanates from their own. This is a more sound approach. In a rapidly advancing technological age the right of access to the airwaves is becoming increasingly important.

B Recovery by a Person Living with an Owner for Interference with the Use and Enjoyment of Land

1 The model adopted by the majority - no recovery

The model adopted by the majority prevents people who live with an owner from claiming in nuisance for interference with use and enjoyment of the land. According to Professor Newark's postulation, nuisance is a tort exclusively directed at protecting rights over land.[146] The majority in *Canary Wharf* confirmed those protected rights as those of ownership or exclusive possession.[147] People who live with the owner, therefore, cannot rely on nuisance.

However, their arguments for this position were not strong. Lord Goff was concerned that sensible arrangements involving the trade of money for the right to

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[145] *Canary Wharf* HL above n1, 719 per Lord Cooke.
[146] Newark above n73.
[147] See part IV *A*.

continue the nuisance would become impractical where more than one person was able to bring an action.[148] However, this argument cannot be more than sophistry. By this logic co-ownership would have the same effect, and as such also ought to be excluded. Lord Goff was also concerned about the problem of defining the category of people who could bring a claim. His concern centered on the au pair girl, the lodger and the resident nurse.[149] However, as Lord Cooke observed:

> It would seem weak to refrain from laying down a just rule for spouses and children on the ground that it is not easy to know where to draw the lines regarding other persons.[150]

The majority were also concerned not to twist nuisance so as to turn it into a personal tort:

> In any event, the extension of the tort in this way would transform it from a tort to land into a tort to the person, in which damages could be recovered in respect of something less serious than personal injury and the criteria for liability were founded not upon negligence but upon striking a balance between the interests of neighbours in the use of their land. This is in my opinion not an acceptable way in which to develop the law.[151]

However, in so far as nuisance allows recovery for sensible personal discomfort, it already is a personal tort. That person is the owner.

As Lord Hoffmann observed, the policy of the law is that there can be no recovery for personal harm less than physical injury or nervous shock.[152] This was recognised in *Hicks v Chief Constable of the South Yorkshire Police*.[153] Lord Cooke sought to provide this recovery only to people in their homes.

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[148] *Canary Wharf* HL above n1, 692-693 per Lord Goff.
[149] *Canary Wharf* HL above n1, 693 per Lord Goff.
[150] *Canary Wharf* HL above n1, 718 per Lord Cooke.
[151] *Canary Wharf* HL above n1, 693 per Lord Goff.
[152] *Canary Wharf* HL above n1, 707 per Lord Hoffmann.
[153] [1992] 2 All E.R. 65.

However, Lord Hoffmann expressed doubts as to whether it was possible to limit the action in this way:

> Once nuisance has escaped the bounds of being a tort against land, there seems no logic in compromise limitations, such as that proposed by the Court of Appeal in this case, requiring the plaintiff to have been residing on land as his or her home.[154]

Lord Hoffmann, then went on to observe that the injunction granted in *Khorasandjian* applied whether the plaintiff was at home or not.

2 *The model advanced by Lord Cooke - a stick in the bundle of rights around the home*

It is with respect to the standing of people living with owners to sue in nuisance for interference with amenities, that the model advanced by Lord Cooke is most significantly different to that of the majority. The difference is that, where the majority saw the interference limb of nuisance as a further legal mechanism for protecting property rights, Lord Cooke saw its merit in protecting people in their homes. As he observed:

> Logically it is possible to say that the right to sue for interference with the amenities of a home should be confined to those with proprietary interests and licensees with exclusive possession. No less logically the right can be accorded to all who live in the home. Which test should be adopted, that is to say which should be the governing principle, is a question of the policy of the law.[155]

In the opinion of Lord Cooke, a policy that extends standing to sue in nuisance for interference with amenities gives better effect to widespread conceptions concerning the home and family.[156] There is merit in this proposition for a number of reasons.

First, the decision in *Canary Wharf* on this point was not a question of either or. It was not a case of whether nuisance protects property or protects the home. If standing

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[154] *Canary Wharf* HL above n1, 707-708 per Lord *Hoffmann.*
[155] *Canary Wharf* HL above n1, 717 per Lord Cooke.
[156] *Canary Wharf* HL above n1, 717 per Lord Cooke.

was extended to people who live on the premises, it could still be available to the owner. Therefore, the action would be available to anyone who owns the property or uses the property as a home. It would not diminish in any way the trespassory protection available the owner.

Secondly, the more people who have standing, the greater the liability exposure of land owners who are not careful in the use of their land. The greater the liability exposure, the more care owners will take in the use of their property.

Lastly, the home and family are deserving of protection. There are good reasons to construct a bundle of rights around the home. People are more offended when they suffer intrusions in their own homes, than they are when they suffer the same intrusions elsewhere. People expect to be able to rely on an independent realm of autonomous freedom inside their homes. As Lord Cooke rightly observed, these expectations are expressly recognised in international conventions such as The United Nations Convention on the Rights of the Child.[157] In Lord Cooke's view the policy of the law should be to reflect this expectation. The model advanced by Lord Cooke would permit people living with an owner to bring an action for interference with the use and enjoyment of the home.

3 Professor Harris' model of the institution of property

Professor Harris' model of the property institution provides a framework for the recognition of rights in the home. As Professor Harris observed, property is not a hunk of land, but rather a set of rules that recognise and protect the multifarious types of interests in land.[158] The use interests of people occupying land as a home can be recognised as an ownership interest for the purposes of the trespassory protection provided by the tort of private nuisance. Just as a neighbour's right to an easement co-exists with the right of an owner to use and enjoy the land, so may the right to use the

[157] *Canary Wharf* HL above n1, 713-714 per Lord Cooke.
[158] Harris above n43.

land as a home. Just as the right of an easement derives from the owner, so does the right to live on the land as a home. A person's right to be free of interference with the use and enjoyment of their home will gain recognition as a proprietary right when it is prescribed trespassory protection.

IX ROMAN LAW MODEL

The system envisioned by the majority, and supported in this paper, places all physical damage under one coherent principle: negligence. The goal of Lord Cooke was to give effect to the expectations of the community with respect to protection from interference with the peaceful enjoyment of the home. These are not irreconcilable goals. Arguably, the reason that the majority were unwilling to extend standing to bring an action in private nuisance beyond owners, was that they lacked a blueprint. It is possible to have a system that provides both. The Roman law was such a system.

If a claim for interference with prospect was substituted for the television signals claim, the facts of *Canary Wharf* could just as easily have been heard in ancient Rome. Buildings and dust were the subject matter of ancient Roman actions, just as they are in modern England today. In this respect, Roman law had to deal with the six types of plaintiff that have been discussed above.

A The Roman Law

Roman law has lived two lives.[159] In its first life it was the law of the city of Rome and eventually the whole Roman Empire. During this period the Roman lawyers developed "an elaborately articulated system of principles abstracted from the detailed rules which constitute the raw material of law."[160]

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[159] Barry Nicholas *Roman Law* (Oxford University Press, London, 1962) 1 ("Nicholas").
[160] Nicholas above n159, 1.

This first life of the Roman law lasted until Emperor Justinian in the sixth century AD. Five and a half centuries later, the second life of Roman law began. Justinian's law books came to be studied in northern Italy. From his works sprang a 'common stock' of legal ideas and a 'common grammar of legal thought' that influenced nearly all of Europe. From this influence, particularly in respect of Roman private law, Civil Law evolved.[161]

1 General Roman law

Early Roman private law was characterised by two broad categories. The first category was the law of persons. It governed matters of status. The second category was the law of thing-or *res*.[162]

Res were essentially economic assets. Roman law recognised two types of economic asset. The first was property. The second were obligations owed. The latter made up the law of obligations. The law of property included all *rem* actions.[163] The law of obligations included all *personam* actions. The law of obligations was further subdivided into *contractus* and *delict*.[164]

The Roman law did not have a claim like nuisance. The Romans kept the two functions performed by private nuisance separate. Wrongs were the subject of the law of *delict*. Use privileges were the subject of the law of property. The latter were governed by a complex body of rules involving usufructs, servitudes and a set of interdicts.

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[161] Nicholas above n159, 2.
[162] Nicholas above n159, 98.
[163] Nicholas above n159, 98.
[164] Nicholas above n159, 158.

B Material Physical Damage to Land

If land damage had occurred, a Roman land owner used *delict*. Where damage was yet to occur, the land owner used a property interdict.

1 Damages in Delict

Physical damage to property could be recovered by invoking *Damnum iniuria datum* or 'loss wrongfully caused.'[165] This action consisted of four elements. The first was the application of force. Initially force had to be direct but indirect force and omissions were later sufficient. The second element was *iniuria* or lack of justification. This amounted to fault. It included both intent and negligence. The third element was *damnum* or 'loss.' Lastly the plaintiff had to be able to show title. As a result, land owners who suffered material physical damage to land as a result of dust in *Canary Wharf* could have recovered under this *delict*.[166] People living with land owners would not have been able to recover.

C Recovery For Personal Injury

Personal injury was governed by *delict*. The Roman law of *delict* permitted plaintiffs to recover for personal injury by invoking *iniuria*, whether or not the injury occurred on the owners land.[167] It was a property independent prohibition. This *delict* was available only where the injury was inflicted intentionally.

D Recovery for Interference with Use and Enjoyment of Land

Roman land users were able to bring actions for interferences with the use and enjoyment of land in both the law of *delict* and the law of property.

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[165] Nicholas above n159, 218.
[166] Nicholas above n159, 215.
[167] Nicholas above n159, 215.

1 Delict

Owners who suffered interference with the use and enjoyment of their land may also have been able to rely on the *delict* of *iniuria. Iniuria* translates to 'insult' or 'outrage.' However, the scope of this tort was more akin to actions that disregard another's rights or personality. As Nicholas observed "it was… *Iniuria* to interfere with his [the owners] use of his property or to enter unauthorised into his house or onto his land."[168]

Therefore, this action was only available to property owners. The act had to be intentional.

2 Property interdicts

In general the property interdicts were directed at preventing actual damage from being done. Occasionally one provided compensation for actual damage that had been done. As Romy observed:

> All these proceedings rest chiefly on the natural claim of an owner or other interested person, that his neighbours or others shall not interfere injuriously with his land, nor work their own land, or so omit to repair their buildings, as to put the former to unnecessary loss or peril.[169]

On the facts of *Canary Wharf*, three are relevant.

The first was, *Interdictem Quod Vi Aut Clam.* This was an action to secure a remedy, or compensation, for injury done by the building or works of neighbours in defiance of an objection.[170] An objector did not need to possess a right in the land

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[168] Nicholas above n159, 216.
[169] Henry John Roby *Roman Private Law in the times of Cicero and of the Antonines* (V1, University Press, Cambridge, 1902) 509 ("Roby").
[170] Roby above n169, 520.

being protected to object. An objection could be given orally, formally in front of witnesses, or by a symbolic act. Once notice was given, work had to cease until the parties were heard by a praetor (judge). Any work on or connected with land came within the interdict. The action was available whether the work was in still in progress or had been completed. Once notice was given, the party undertaking the building had to prove that he or she had a right to interfere with the property in question.[171] Damages were given if the notice was ignored. They were determined in accordance with the interest of the plaintiff. The aim was to put plaintiffs in the position they would have been in if the work had not been done.

The second proceeding, *Operis Novi Nuntiatio*, was only available to an owner. This proceeding was available to owners who anticipated interference with their rights as a result of new work undertaken by the defendant.[172] The work had to be the construction or demolition of a building. Notice had to be given to the defendant or their agent while at the location of the disputed work. Once defendants were given notice, they could either suspend work while they prove their right, or give security and let the objector prove a right of their own.

The third action was *Uti Possideti*. This proceeding was available to plaintiffs whose activities on their own ground are interfered with by a neighbour.[173] The action provided protection from an encroachment upon the plaintiffs possession. Once invoked the party encroaching had to prove a right.

Anyone interested in stopping work undertaken by a neighbour, was able to rely on the interdict of *Quod vi aut clam*. The objector was not required to give reasons. The interdict focused on whether the builder had a right. An objection could be made because the building interfered with the use and enjoyment of the home. Land users

[171] Roby above n169, 521.
[172] Roby above n169, 517-518.
[173] Roby above n169, 524.

could also rely on *uti possiditis* for encroachment upon possession as this covered encroachments less than material physical damage.

D General Comment

In the Roman law, *Delict* dealt with compensating wrongs. The balancing and protecting of property rights in land were dealt with in the law of property. With respect to damage to land, the *delict* of *Damnum iniuria datum* could be relied on if the damage was intentional or negligent. In the case of personal injury, the same liability criterion applied whether the wrong was committed on the plaintiff's land or on the public highway. The *delict* of *iniuria* provided recovery only where the damage was intentional.

With respect to balancing property rights, the Romans developed a complex body of property rules involving usufructs, prescription, servitudes and a collection of interdicts to support them. A few interdicts have been mentioned. Mostly these rules where concerned with determining, and vindicating rights over land. Occasionally, one of the interdicts provided a compensatory remedy for harm to the land, but this was the exception.

However, the number of uses land could be put to, and the consequences on neighbours were limited in Roman times. Such a system lacks practicality in the fast moving, industrialised, society of today where any number of uses could potentially annoy a neighbour. The reasonable user principle in nuisance is a clearly superior legal mechanism. The one principle permits the court to balance the right of plaintiffs to be free of interference with the right of defendant to use their land as they see fit. People using land may reasonably interfere with their neighbours without the necessity of proving a servitude.

The value of the Roman Law model is that it included actions directed at the rights of people to use their land that were available to anybody. In modern times, it would be going too far to permit all and sundry interested in a building to bring an action in private nuisance. Moreover, town planning regulations provide appropriate mechanisms for objections. In addition, extending the right to object to everyone would not give effect to the expectations of the community that Lord Cooke is concerned about. The private nuisance action does not have to exclude people occupying the land as a home. Standing to bring an action in private nuisance against interferences with use and enjoyment should have been extended to all who occupy the home. As Lord Cooke appreciated, the expectation of the community of protection from interference of the home ought to influence the policy of the law.

X CONCLUSION

In the past, private nuisance had been burdened with performing two functions: balancing property rights and compensating physical injuries. The former was an important element in the protection of property. The latter crossed into the path of negligence. Oceans of ink have been spilt trying to reconcile the two functions.

The speeches of the majority in *Canary Wharf* have indicated that the two functions should be separated. This proposition has been supported in this paper. Professor Harris' property model has been used to demonstrate that liability for material physical damage to land is appropriately governed by reasonable foresight. It follows that this damage ought to be subsumed into negligence. Further, personal injury should no longer be recoverable in private nuisance. Stricter liability for personal injury in private nuisance prefers land owners by affording them distributive justice. This cannot be justified by referring to the protection of property rights. Reasonable foresight is the most appropriate liability criterion. Accordingly, personal injury ought to subsumed into negligence.

Once liberated from compensating injury, private nuisance can concentrate on balancing the rights of people to user their land against the rights of their neighbours not to be disturbed. It has been shown that the majority ought not have adopted the emanation rule. The demands of modern society require that even non emanating nuisances should be actionable if they are unreasonable. Further, the majority ought to have extended standing to all people who occupy the land as a home. This gives effect to the expectations of the community of protection for people in their homes. Professor Harris' property models demonstrates that the right of a person to use and enjoy his or her home, can be recognised as a proprietary right.

In *Canary Wharf*, the majority speeches indicated a concern to provide the law of tort with a measure of systematic coherence. Lord Cooke sought to develop the law of tort so as to make it more reflective of the values of the community. As the Roman law model demonstrates, these two goals are not necessarily irreconcilable. Unfortunately, by not extending standing all people who occupy land as a home, the majority missed the opportunity to recognise and protect a right of undoubted importance.

BIBLIOGRAPHY

Journal Articles

Felix Cohen "Dialogue on Private Property" (1954) 9 Rutgers L. Rev 357.

Elizabeth Cooke "A Development in the Tort of Private Nuisance" (1994) MLR, 289.

G Cross "Does only the Careless Polluter Pay? A Fresh Examination of the Nature of Private Nuisance" (1985) 111 LQR 445.

M Davies "Private Nuisance, Fault and Personal Injuries" (1990) 20 UWALR 129.

Izhark Englard "The Law of Torts in Israel" (1974) 22 Am J Comp L 302.

Rosalind English "The .Tenant, his Wife, the Lodger and their Telly: a Spot of Nuisance in Docklands" (1996) 59 Mod L Rev, 726.

G Fletcher "Fairness and Utility in Tort Theory" (1972) 85 Harv L Rev 537.

Conor Gearty "The Place of Private Nuisance in the Modern Law of Torts" [1989] CLJ.

J Gillepie "Private Nuisance as a Means of Protecting Views from Obstruction" (1989) Env & Plan LJ 94.

F.H. Newark "The Boundaries of Nuisance" (1949) 65 L.Q.R. 480.

E Weinrib "The Special Morality of Tort Law" (1989) 34 MCGill L Jnl 403.

Text

P.S. Atiyah *The Hamlyn Lectures-Pragmatism and Theory in English Law* (Stevens & Sons, London, 1987).

Sir William Blackstone, *Commentaries on the Laws of England* (16th Edn., J Butterworth and Son, 1825), Book 2.

The Rt Hon. Lord Cooke of Thorndon KBE *The Hamlyn Lectures-Turning Points of the Common Law* (Sweet & Maxwell, London, 1997).

Peter Crane *Atiyah's Accidents, Compensation and the Law* (Butterworths, London, 1993).

Izhak Englard *The Philosophy of Tort Law* (University Press, Cambridge, 1993).

Fleming *The Law of Torts* (6th edn 1983).

JW Harris *Property and Justice* (Clarendon Press, Oxford, 1996).

Linden *Canadian Tort Law* (3rd ed.,1982).

Barry Nicholas *Roman Law* (Oxford, 1962).

AI Ogus "Limits of Liability for Compensation" in I. Furmston (ed) *The Law of Tort* (Duckworth & Co Ltd, London 1986).

Henry John Roby *Roman Private Law in the times of Cicero and of the Antonines* (V1, University Press, Cambridge, 1902).

Salmond (6th Edn).

Steven Todd (ed) *The Law of Torts in New Zealand* (2ed Brookers, Wellington, 1997).