RYONA WINWOOD

A PATH TO RECIPROCITY: REBALANCING THE TORT OF PRIVATE NUISANCE AFTER *FEARN V TATE GALLERY*

LLB (HONOURS)

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Abstract

The tort of private nuisance finds itself in an erratic state following the Supreme Court ruling in Fearn v Tate Gallery. This judgment has exposed a growing imbalance within private nuisance, jeopardising the principle of reciprocity that underpins the tort. Recent developments have witnessed the expansion of the scope of private nuisance, deeming more scenarios actionable nuisances with seemingly no constraint. When the doctrine becomes more favourable to plaintiffs without a corresponding adjustment to protect the interests of defendants, it raises concerns about the fairness of the tort and its loyalty to the principle of reciprocity.

This paper will investigate the various defendant adverse factors that the Fearn majority discuss. These include an overreliance on the "common and ordinary" use standard and a failure to consider the public interest, reasonable self-help measures, and planning permissions. Given the already extensive list of factors that weigh against defendants, the continued expansion of private nuisance without a re-evaluation of the side of the doctrine pertaining to defendants runs the risk of undermining the principle of reciprocity. Thus, in order to restore equilibrium to the tort, factors such as "coming to the nuisance" must be a relevant consideration when assessing liability. This is crucial to maintain an equitable balance between the interests of both claimants and defendants to a private nuisance claim. Only through such a reassessment can the tort of private nuisance remain grounded in the principle of reciprocity.

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Keywords

Private nuisance, reciprocity principle, coming to the nuisance, Fearn v Tate Gallery

Table of Contents

I Introduction

The tort of private nuisance is in a state of imbalance following the controversial judgment by the United Kingdom Supreme Court in *Fearn v Tate Gallery*.[1] This highly anticipated decision has sparked intense debate and cast a shadow of doubt over the very foundations of the tort. The principle of reciprocity – "give and take, live and let live" – once considered a cornerstone of private nuisance, now appears shaken by *Fearn*.[2] As made clear in *Sedleigh-Denflield v O'Callaghan*, "[a] balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with".[3] Despite this, the tort's unpredictability and lack of favourable considerations for defendants move the tort away from balancing neighbours' rights and towards inescapable liability for defendants. Hence, to rebalance the defendant's interests and honour the principle of reciprocity, the law must revisit factors pertaining to defendants. This entails a change in the current test for succeeding in a claim for private nuisance. One that, among other factors, considers the extent to which the claimant came to the nuisance.

The pivotal moment occurred on 1 February 2023, when the Supreme Court delivered its verdict on the *Fearn* appeal. The outcome has provoked concerns from lawyers and the general public regarding the blurring of the already ill-defined boundaries of private nuisance and the inevitable increase in liability for defendants.[4] However, from another perspective, *Fearn* reignites the old-age debate of "coming to the nuisance" as a defence and highlights the need to reformulate the tort altogether.

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[1] *Fearn and others v Board of the Trustees of the Tate Gallery* [2023] UKSC 4, [2023] 2 All ER 1.

[2] *Bamford v Turnley* (1862) 3 B & S 66, (1862) 122 ER 27 at 33.

[3] *Sedleigh-Denflield v O'Callaghan* [1940] UKHL 2, [1940] AC 880 at 903.

[4] See Oliver Wainwright "The Tate Modern privacy ruling could lead to a worrying future for cities" (1 Feb 2023) The Guardian <www.theguardian.com/artanddesign/2023/feb/01/london-tate-modern-privacy-ruling-cities-privacy-precedent>; Adam Osieke and Amanda Hanmore "Tate Modern and the law of nuisance: time to take a different point of view?" (3 Feb 2023) Kennedys Law <www.kennedyslaw.com/en/thought-leadership/case-review/tate-modern-and-the-law-of-nuisance-time-to-take-a-different-point-of-view/>; Kate Andrews "What a nuisance: the impact of Fearn v Tate Gallery of future nuisance claims" (22 Feb 2023) The Law Society <www.lawsociety.org.uk/topics/property/what-a-nuisance-the-impact-of-fearn-v-tate-gallery-on-future-nuisance-claims>.

This paper advocates for a reassessment of factors that disadvantage defendants, with a specific focus on "coming to the nuisance". This adjustment is a necessary response to the ever-expanding scope of the tort, which now captures a wider range of scenarios and protects more claimants. Failing to address these factors could undermine the very foundation of the tort – the principle of reciprocity. The central argument presented here is that if one aspect of the doctrine is expanded, it only makes sense that the other side be simultaneously altered to maintain an appropriate balance. In other words, defendant-favourable factors that courts have historically deemed irrelevant, such as "coming to the nuisance", must be reassessed to offset the enlargement of the tort's reach.

To begin with, a necessary overview of the tort of private nuisance will be provided. Subsequently, this paper explores the history and rationale behind the "coming to the nuisance" defence. The Supreme Court's judgment in *Fearn* will then serve as a guide, examining the various defendant-friendly factors deemed irrelevant to liability by the majority, causing a divergence from the reciprocity principle. These factors include the overreliance on "common and ordinary" land use and the inability to consider the public interest, reasonable self-help measures, and planning permissions. Finally, this paper will conclude that the law must re-evaluate these factors to restore equilibrium between competing landowners and, thus, uphold the principle of reciprocity. As we are yet to see what New Zealand courts will do should the situation arise, and being a New Zealand student myself, this paper occasionally considers *Fearn*'s potential impact on the New Zealand context.

A The Facts of Fearn

The case of *Fearn* concerned the Tate Gallery's (the Tate's) viewing platform on the top floor of the Blavatnik Building, which offered a 360-degree view of London.[5] Alongside enjoying a panoramic view of the capital, sightseers also observed the lives of the adjacent claimants residing in the Neo Bankside flats (the Flats).[6] The two buildings in question were separated by approximately only 34 meters.[7] This, along with the flats' floor-to-ceiling glass walls and several hundred thousand annual visitors to the viewing gallery, inevitably caused the Bankside residents privacy concerns and distress. An injunction was sought by the residents, based on a

[5] *Fearn v Tate Gallery*, above n 1, at [1].

[6] At [2].

[7] At [2].

claim of private nuisance, requiring the Board of Trustees of the Tate to prevent sightseers from peering into their flats.[8]

In a three to two majority, the Supreme Court overturned the Court of Appeal's judgment, which held that visual intrusion, no matter how oppressive, could not amount to a private nuisance. Instead, the Supreme Court held that the case before them was a "straightforward case of nuisance" and remitted it back to the High Court to grant appropriate remedies.[9]

B When Reading Fearn

The aspect of the *Fearn* judgment that predominantly caught my attention was para [139]. Lord Leggat briefly mentioned that two of the original claimants had either sold or leased their proprietary interests in the apartment buildings.[10] These subsequent flat residents decided to sign despite knowing the extent of the visual intrusion and the disturbance it had caused their predecessors. Since the Tate had not constructed its viewing gallery before the Neo Bankside development, *Fearn* did not deal with "coming to the nuisance" as a defence. Nonetheless, this made me consider the case for if the viewing gallery existed prior. Or alternatively, the case for the subsequent tenants who bought the flats despite knowing the circumstances.

The ruling in *Fearn* reminded me of a proposal in 2018 for an ultra-high-rise building neighbouring New Zealand's Sky Tower.[11] Given *Fearn*'s implications and the current landscape of private nuisance, this hypothetical high rise could technically force the closure of the Sky Tower's viewing platform – a cherished landmark operating since 1997. Presumably, most New Zealanders would consider this ruling unreasonable and ridiculous. It seems that only litigation of such magnitude would truly convey the disadvantages experienced by defendants due to the lack of "coming to the nuisance" considerations.

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[8] *Fearn v Tate Gallery*, above n 1, at [4].

[9] At [7].

[10] At [139].

[11] See Dileepa Foneska "Ideas for ultra-high rise next to Auckland's Sky Tower include a sky garden and a waterfall" (6 September 2018) StuffNZ <www.stuff.co.nz/auckland/106869236/ideas-for-ultrahigh-rise-next-to-aucklands-sky-tower-include-a-sky-garden-and-a-waterfall>.

C Why is the Fearn Ruling an Issue?

This is just another aspect of the tort that disfavours defendants. *Fearn* illustrated the inability to consider the public interest,[12] reasonable self-help measures,[13] and compliance with planning permissions in addressing questions of liability. [14] The majority also placed extensive weight on "common and ordinary" use considerations, holding that priority is given "to the common and ordinary use of land over special and unusual uses."[15] Only acts necessary for the "common and ordinary" occupation of land can be performed without any risk of liability in private nuisance.[16] This principle places those with special land use, like the Tate, at an immense disadvantage. Considering the lack of favourable factors for defendants, it is virtually impossible for unusual land users to succeed in a claim involving substantial harm. But why should the law discriminate against the extraordinary? Must "give and take, live and let live" only apply to mundane living?

A fundamental element of the rule of law is the need for laws to be certain, transparent, and predictable, enabling people to plan their lives without being subject to arbitrary actions.[17] The current state of private nuisance, characterised by its broadening scope and increase in potential liability, places defendants in a worrying position. As the tort continues to expand and grant more rights to claimants without adjusting the other side, it becomes difficult for people to confidently plan their livelihood and conduct their affairs. The potential consequence of the tort's enlargement and uncertainty, coupled with the lack of defences, is the thwarting of socially valuable activities. This is because exceptional land users, notwithstanding their prior existence, will face many challenges in winning a private nuisance case, ultimately discouraging certain future endeavours.[18]

In a judicial era where the tort's net is being cast further by the case, this calls for a reappraisal of the defendant's side of the equation. While this expansion benefits claimants, it leaves

[12] *Fearn v Tate Gallery*, above n 1, at [47].

[13] At [83].

[14] At [110].

[15] At [35].

[16] *Bamford v Turnley*, above n 2, at 83–84.

[17] Robert S Summers "Principles of the Rule of Law" (1998) 74 Notre Dame L. Rev. 1691 at 1693–1694.

[18] Ezra Friedman and Abraham L Wickelgren "Chilling, settlement, and the accuracy of the legal system" (2010) 26 JLEO 144 at 144–145.

potential defendants in a state of uncertainty with limited safeguards to rely upon. Although the *Fearn* majority acknowledged the need to balance conflicting interests, their approach lacked a true effort to achieve the appropriate equilibrium between the Tate and the Flats. This is because they discount many factors that would weigh favourably on defendants and with little logical justification. Yet, the *Fearn* majority seemed to encounter no difficulty when widening the tort's scope to protect more plaintiffs' interests. Essentially, the Court amplified the rights of claimants to "not be interfered with" and diminished the rights of defendants to "do what he likes with his own".[19]

This paper will investigate each factor unfavourable to defendants in more depth below to illustrate the disparities they experience. Considering private nuisance is rooted in the reciprocity principle, the absence of "coming to the nuisance" considerations exacerbates this disadvantage and further weakens the underlying principle.

II The Tort of Private Nuisance

Private nuisance constitutes an unlawful interference with the claimant's use and enjoyment of their rights in land.[20] It seeks to strike an appropriate balance between competing property interests.[21] In his book, *The Law of Private Nuisance*, Allan Beever describes the tort as a "method that the common law utilises for prioritising property rights so that conflicts between uses of property can be resolved."[22] In *Bamford v Turnley*, Bramwell B emphasises the need for compromise in the courts' approach, something which has been famously described as the golden rule of reciprocity, a rule of "give and take, live and let live".[23]

Fearn usefully recalled the relevant principles of private nuisance before analysing them against the facts. Whether they adhered to these principles or not is a matter for debate. The Court cites the initial inquiry determining "whether the defendant's use of land has caused a *substantial* interference with the *ordinary* use of the claimant's land."[24] Firstly, only a person with a legal interest in the land may sue for interferences that cause a diminution in utility and

[19] *Sedleigh-Denflield v O'Callaghan*, above n 3, at 903.

[20] Francis Newark "The Boundaries of Nuisance" (1949) 65 LQR 480 at 482.

[21] *Fearn v Tate Gallery*, above n 1, at [219].

[22] Allan Beever *The Law of Private Nuisance* (Bloomsbury Publishing, London, 2013) at 1.

[23] *Bamford v Turnley*, above n 16, at 712.

[24] *Fearn v Tate Gallery*, above n 1, at [21].

amenity value rather than mere personal discomfort.[25] Interferences are usually caused by something emanating from the defendant's land (noise, fumes, dust etcetera), but many cases deviate from this pattern.[26] While legal academics and the Supreme Court itself have problems with the misconstructions of the "unreasonableness" requirement, the interference must be "unreasonable" in the sense of being "unlawful".[27] This implies that not every interference may amount to an actionable nuisance; all the relevant circumstances of the case must be considered.[28]

The Court also attached great significance to the "common and ordinary" use of land requirement, indicating that complaints are invalid if the interfered use is not ordinary or if the defendant's activity is nothing beyond ordinary use of their land.[29] This requirement is supposedly coloured by the "reasonable user", "reciprocity", and "freedom to build" rules.[30] Furthermore, it is well established that determining an ordinary use of land depends on the character of the locality, as "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey".[31]

The majority stated that the reciprocity principle explains the "common and ordinary" use requirement. If someone's land use is exceptional while their neighbours' is ordinary, they cannot claim they seek the same level of consideration.[32] However, while the premise of this argument is understandable, the "common and ordinary" use requirement seems to presuppose a singular definition of "living" confined to mundane activities. This approach overlooks the

[25] *Fearn v Tate Gallery*, above n 1, at [10]–[11]; referring to *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426.

[26] See *Guppys (Bridport) Ltd v Brookling* (1983) 14 HLR 1, [1984] 1 EGLR 029; *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, [2000] 2 All ER 705; *Jolly v Kine* [1907] AC 1, [1907] 76 LJ Ch **1**; *Bass v Gregory* (1890) 25 QBD 481, (1890) 55 JP 119; *Barratt Homes Ltd v Dŵr Cymru Cyfyngedig (No 2)* [2013] EWCA Civ 233, [2013] 1 WLR 3486.

[27] *Fearn v Tate Gallery*, above 1, at [18].

[28] At [18]–[20].

[29] At [24]–[27].

[30] At [29]–[37].

[31] *Sturges v Bridgman* (1879) 11 Ch D 852 (1 July 1879), [1879] UKLawRpCh 225 at 865.

[32] *Fearn v Tate Gallery*, above n 1, at [35].

diversity of lifestyles, disfavours those pursuing unique endeavours, and may ultimately stultify the vibrancy of modern life.[33]

Importantly, the Court reaffirmed that "coming to the nuisance",[34] the public interest,[35] reasonable self-help measures,[36] and planning permissions are not defences to liability.[37] *Fearn* also reiterated that the categories of nuisance are not exhaustive. Anything short of a direct trespass may constitute a nuisance if there is a material interference with the claimant's enjoyment of their land rights.[38]

The theory of private nuisance contains gaps, lacks a precisely defined scope, and features contradictory analyses of liability.[39] The extent of liability remains open and flexible, continuously growing from judicial developments. For instance, the case of *Thompson-Schwab v Costaki* distorted the culpability standard by holding that an activity on neighbouring land might be so offensive as to constitute a private nuisance, thereby adding confusion to the emanation debate.[40] Similarly, it was determined in the New Zealand case of *Wu v Body Corporate* that remotely changing locks to deny the plaintiff access to his apartment constituted a private nuisance.[41] Such legal developments indicate an unconstrained exposure to liability for defendants. *Fearn* itself supports this assertion, as the Supreme Court determined that, contrary to precedent, visual intrusion can qualify as a nuisance.[42]

Fearn can be taken to have "resolved" some of the debate on private nuisance's relationship with privacy law. Despite the Court of Appeal's stance, the Supreme Court concluded that "[t]he concepts of invasion of privacy and damage to interests in property are not mutually exclusive."[43] The Court of Appeal hesitated to extend private nuisance to capture these facts

[33] *Fearn v Tate Gallery*, above n 1, at [225].

[34] At [42].

[35] At [47].

[36] At [88].

[37] At [109].

[38] At [12].

[39] Allan Beever, above n 22, at 1.

[40] *Thompson-Schwab v Costaki* [1956] 1 WLR 335, at 339.

[41] *Wu v Body Corporate* 366611 (2014) 16 NZCPR 618 at 621.

[42] *Fearn v Tate Gallery*, above n 1.

[43] At [112].

and believed it was better for the legislature to decide if further privacy laws were required.[44] However, the Supreme Court were more audacious, essentially holding that matters seemingly in the realm of privacy law (like *Fearn*'s facts) can be framed to unlock the use of private nuisance.[45] This boldness appears one-sided since the majority took a much more conservative approach towards aspects helpful to defendants. While these debated points have found some resolution post-*Fearn*, their decision further swells the private nuisance boundaries.

While the tort is flexible in terms of claimant protection, with courts prepared to stretch its sphere to address new situations, the aspect that remains rigid is the lack of available defences. "Coming to the nuisance" is of particular importance. Given the expanding uncertainty of scope and the lack of defendant-favouring considerations, it will undoubtedly be hard for defendants to plan their livelihood or business on their land. Consequently, we might see a reduction in socially valuable activity due to the chilling effect.[46]

III "Coming to the Nuisance"

It has been a longstanding rule in the law of private nuisance, illustrated in *Sturges*, that "coming to the nuisance" is not a defence against liability.[47] This means that it is no defence to claim that the alleged nuisance existed before the claimant acquired their property, even if they were aware of its existence.[48]

However, this was not always the case. Early common law historically granted property rights to those who were there first.[49] In his book, *Commentaries on the Laws of England*, William Blackstone used an example of a tan-yard owner that inevitably created less healthy air for neighbouring properties. If the tan-yard owner was in first possession, and a complainant purchases the property next door, the nuisance is their seeking, and the tan-yard operations may

[44] *Fearn v Tate Gallery*, above n 1, at [111].

[45] At [112].

[46] Ezra Friedman and Abraham L Wickelgren, above n 18, at 144–145.

[47] *Sturges v Bridgman*, above n 30.

[48] *Fearn v Tate Gallery*, above n 1, at [42].

[49] Donald Wittman "First Come, First Served: An Economic Analysis of "Coming to the Nuisance" (1980) 9(3) Journal of Legal Studies 557 at 557.

continue.[50] This perspective was rooted in the ancient maxim of volenti non fit injuria: no legal wrong is done to he who consents.[51]

However, this changed in private nuisance law as society became more urbanised. Individuals struggled to avoid nuisances caused by their neighbours, making "implied consent" much more challenging to justify. Consider a slaughterhouse case as an illustration: as a city expands to accommodate its growing population, dwellings inevitably encroach upon what was once an isolated slaughterhouse location, leading to interferences with healthy living.[52] This transformation prompted a shift in legal thinking, with the traditional approach of courts now recognising that individuals should not sacrifice their wellbeing for residential choice. As a result, "coming to the nuisance" is no longer a defence, as per *Sturges* and reinforced in *Lawrence v Fen Tigers*.[53]

The reasons for abolishing the defence remain understandable even in the modern context. Some nuisances are not so obvious upon a minimal inspection by prospective purchasers. Consequently, the claimant may have not been aware of the defendant's nuisance-causing activity until after purchasing the nearby property.[54] In this scenario, it is hardly appropriate to hold these claimants have "consented" to the nuisance, and it would be unjust to deny remedies to buyers who were unfortunately blind to neighbouring activities.

Additionally, if a complete "coming to the nuisance" defence were permitted, there would hardly be a mechanism to control the activities of those who were there first, irrespective of the negative externalities they generate.[55] If a noxious business were established before others, they would essentially be able to set the character of the locality, and newcomers would have no choice but to endure it. This does not seem equitable as it appears to grant one landowner more rights over another. However, if private nuisance is going to extend, thereby providing claimants with more rights, then elements that were once considered obsolete due to excessive

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[50] William Blackstone *Commentaries on the Laws of England: In Four Books; with an Analysis of the Work* (Vol. 1, W.E. Dean, New York, 1847) at 324.

[51] Donald Wittman, above n 49, at 557.

[52] Thomas Baynes "Coming to a Nuisance – The Non Existent Defense, a Historical Perspective" (1972) 10 LJ 277 at 281–282.

[53] *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822.

[54] Keith N Hylton "Nuisance" (2015) Forthcoming in Encyclopedia of Law and Economics at 12.

[55] At 12.

favourability to defendants must now be revisited. This re-evaluation is necessary to restore the equilibrium of competing interests within the framework of the tort.

A Sturges v Bridgman

Sturges is recognised as the landmark case that established the inapplicability of the "coming to the nuisance" defence. In that case, the claimant doctor (Dr Sturges) built a consulting room in his garden, which shared a boundary with the defendant confectioner (Mr Bridgman), who had produced sweets for more than 60 years before the doctor's arrival.[56] Dr Sturges complained that the noise and vibrations of Mr Bridgman's pestles and mortars caused significant disruption to his practice and constituted an actionable nuisance.[57] Although Dr Sturges experienced no material interference until he built his consulting room, it was held that Mr Bridgman's longstanding property use and the fact that Dr Sturges came to it was no defence.[58]

B Lawrence v Fen Tigers

Fen Tigers, a more recent decision, also reaffirms this rule.[59] The case concerned a stadium authorised for speedway racing in 1975, causing substantial noise nearby.[60] However, the matter only became problematic in 2006 when the plaintiffs moved into a house approximately half a mile from the speedway.[61] Concerned about the noise, the claimants bought an action in private nuisance, seeking an injunction. Lord Neuberger considers "coming to the nuisance" and reiterates that the maxim that has stood for over 180 years must prevail.[62] His Lordship delved into an obiter discussion, suggesting that it may be a defence if the defendant's activity only became a nuisance due to a change in the use of the plaintiff's land.[63] However, this matter is yet to be explored further by future courts.

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[56] *Sturges v Bridgman*, above n 30, at 852–853.

[57] At 852–853.

[58] *Fearn v Tate Gallery*, above n 1, at [42].

[59] *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822.

[60] At [7].

[61] At [13].

[62] At [51].

[63] At [53] and [58].

C Miller v Jackson

There have been instances where judges seemingly desired to invoke a "coming to the nuisance" defence, particularly where there was incredible sympathy for a longstanding entity. *Miller v Jackson* serves as an example of a case constrained by the "coming to the nuisance" rule, leading the Court to deliver the judgment with regret.[64] Although "coming to the nuisance" considerations ultimately tailored the remedy in the case, it was reaffirmed that it was not a defence to liability.

In that case, a cricket club had engaged in cricket activities for approximately 70 years when an adjoining housing estate was built, and the claimants subsequently bought a house at the edge of the grounds.[65] The claimants complained of cricket balls landing in the garden or striking the house. Despite many attempts by the cricket club to mitigate risks and remedy damages, the claimants sought an injunction based on private nuisance.[66]

Because the plaintiffs were deemed newcomers, Lord Denning MR, the dissenting judge, held that "[t]he building of the house does not convert the playing of cricket into a nuisance when it was not so before."[67] Lord Denning MR's dissenting judgment deeply conveys his condolence for the cricket club as he expresses their legacy will be "rendered useless … by the thoughtless and selfish act of an estate developer in building right up to the edge of it."[68] Lord Denning MR continuously emphasises that the Court's task is to balance the rights of the neighbouring property owners, hammering home (if I may use the expression) the notion that the tort exists to enforce the principle of reciprocity.[69] His Lordship undeniably felt that constraining justice because of the *Sturges* rule would fail to balance the interests of the claimants and the cricket club. Thus, he would have concluded that because the claimants "came to the nuisance", they could not have succeeded.

However, Geoffrey Lane LJ (Cumming-LJ concurred) considered himself bound by the rule in *Sturges* that "coming to the nuisance" is no defence to liability. While acknowledging that the

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[64] *Miller v Jackson* [1977] EWCA Civ 6, [1977] 1 QB 966.

[65] at 338.

[66] At 338.

[67] At 334.

[68] At 342.

[69] At 344.

rule may result in injustice and that one might make a different decision in the absence of authority, His Lordship regrettably decided that the Court cannot "alter a rule which has stood for so long."[70]

It appears that the Court of Appeal (but predominantly Lord Denning MR) in *Miller* felt sympathy for the cricket club for many factors, including the 70 years it had operated, the remedial measures of the cricket club, the public interest, and most importantly, the fact that the complainants came to the nuisance. Parallels can be drawn between the predicament of the cricket club in *Miller* and the situation involving the Tate in *Fearn*.

Merely stating that the Court cannot alter a longstanding rule seems lazy. To assert this while simultaneously holding a strong belief that there might have been an injustice seems inequitable. While it is essential for judges to uphold principles and precedents to ensure consistency, predictability, and certainty, the law must also be flexible to adapt to the changing needs and dynamics of society.[71] This paper delves into the reasons why the current *Sturges* rule has reached a point where it must be revisited, especially in light of *Fearn*.

IV Factors Inconsistent with the Reciprocity Principle

Defendants who face a private nuisance claim appear to be receiving the short end of the stick with the current state of the tort. The scarcity of favourable factors they can point to makes it considerably challenging for them to succeed. As the boundaries of the tort continue to inflate, encompassing new instances that can be subject to legal action, how can individuals or businesses be expected to navigate their affairs in an environment widespread with uncertainty? While this holds true for all defendants to a private nuisance claim, some will be more unfortunate than others. In particular, defendants who may not necessarily conform to "common and ordinary" use requirements and those who were there first, or worse, a combination of both. These defendants will have little or nothing to point to if substantial harm is determined. Consequently, the equilibrium tilts disproportionality in favour of the plaintiffs.

The majority discussed many factors that weighed unfavourably on the defendants. This included an overreliance on "common and ordinary" use and a lack of regard for the public

[70] *Miller v Jackson*, above n 64, at 349.

[71] Mohammed B Hemraj "Judges as Law Makers" (2002) 4 Eur. JL Reform 447 at 449.

interest, self-help measures, and planning permissions. These factors and their inconsistencies with the reciprocity principle will be examined below.

A "Common and Ordinary" Use

Firstly, it was held that the Tate was not a "common and ordinary" use of land as "[i]nviting members of the public to look out from a viewing platform is manifestly a very particular and exceptional use of land."[72] This assertion is undeniably valid, and very few people would conclude that this was ordinary land use in the conventional sense.

The main problem with the majority's conclusion that the Tate's use of land was not "common and ordinary" is that they perceived it as the ultimate element in the case's resolution. This is evident when they criticised the trial judge, Mann J, for applying the wrong test. Essentially, Mann J had "incorrectly" questioned whether the Tate's use of its land was "reasonable" rather than "common and ordinary".[73] This appears to be the majority's attempt to neaten the problem of the "reasonableness" test, as described by Allan Beever.[74] In his book, Beever stresses that "reasonableness" is too vague to provide adequate answers and is, thus, redundant.[75] This observation is grounded as there is no clear-cut definition of what acting "reasonably" means. The majority in *Fearn* seem to be trying to address this ambiguity by employing the "common and ordinary" use requirement to provide a more practical approach to interpreting "reasonableness".[76]

However, while this direction arguably provides more meaning and structure to the "reasonableness" inquiry, it almost guarantees that defendants like the Tate will fail in any nuisance claim due to its unique land use. Once it is established that the defendant's use of their land was not "common and ordinary", a mere demonstration of substantial interference with the claimant's land use is sufficient to hold the defendant liable.[77]

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[72] *Fearn v Tate Gallery*, above n 1, at [50].

[73] At [54].

[74] Allan Beever, above n 22.

[75] At 10.

[76] *Fearn v Tate Gallery*, above n 1, at [54].

[77] At [227].

The majority discussed cases where land use was found not to be "common and ordinary". *Ball v Ra*y and *Border v Saillard* were two cases cited by the majority in which the defendant's land use was held not to be "common and ordinary" as they operated stables in residential streets.[78] Notably, these cases date back to the 1870s, an era when cars had not yet been invented and horses were a prevalent mode of transportation. This observation reveals the considerable threshold for defining "common and ordinary" land use, which seems to unfairly impact land users deviating from the norm within their locality.

The majority held that the "common and ordinary" use requirement aligned with the principle of reciprocity – ensuring equal justice through "give and take, live and let live" becomes more challenging when one land use is exceptional while the other is common.[79] Nevertheless, this perspective assumes a singular lifestyle, fostering an imbalanced dynamic of mutual exchange and preference for ordinary living. This can hinder the development of urban society by discouraging creative projects that contribute to a vibrant community, all due to the fear of legal repercussions.[80]

Without recourse like the "coming to the nuisance" defence, the stringent nature of this "common and ordinary" use requirement is bound to disproportionately harm businesses that often involve exceptional land usage. To illustrate, consider the facts of *Costaki* (cited in *Fearn*). There, it was held that the sight of prostitutes entering neighbouring premises constituted a nuisance, suggesting a land use that fell outside the norm.[81] Setting aside questions of illegality or immorality and focusing solely on the commercial aspect, anyone could situate themselves beside a distinct establishment, essentially "coming to the nuisance", and bring a complaint. This would have a very high likelihood of succeeding if substantial harm was proven and land use was found not to be "common and ordinary".

In situations that hinge on a finding that the defendant's land use was not "common or ordinary", the result is an expansion of rights for those who engage in mundane living. To make this possible, the rights of exceptional land users are interfered with and diminished –

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[78] *Fearn v Tate Gallery*, above n 1, at [24] referring to; *Ball v Ray* (1873) LR 8 Ch App 467 at 471 and *Broder v Saillard* (1876) 2 Ch D 692.

[79] *Fearn v Tate Gallery*, above n 1, at [35].

[80] Ezra Friedman and Abraham L Wickelgren, above n 18, at 144–145.

[81] *Thompson-Schwab v Costaki*, above n 40.

promoting more "take" and less "give". Thus, the extent to which this "common an ordinary" use requirement aligns with the principle of reciprocity, as asserted by the *Fearn* majority, might be subject to reconsideration. Additionally, if the law will expand claimants' rights in this way, factors such as "coming to the nuisance" might need to be implemented to reintroduce balance to the tort.

The dissenting judge, Lord Sales (Lord Kitchin concurring), held a similar critical view, claiming that the strict "common and ordinary" use requirement would severely misshape the tort.[82] His Lordship expressed that the "reasonable" use question should not be reduced to whether it was "common and ordinary".[83] To do so would "place excessive weight on one side of what is an inextricably two-sided relationship" of competing interests and prevent the Court from analysing the other side.[84] For instance, questions of whether they had knowingly come to or exacerbated the nuisance or whether there were any reasonable self-help measures are excluded from the equation.[85] While confining the question of "reasonable" use to a "common and ordinary" use may facilitate in interpreting "reasonableness", it consequently prevents judges from looking at situations in the round and catering to the many defendants like the Tate who fall outside this definition. Thus, Lord Sales ultimately found that the strict nature of the "common an ordinary" use requirement relied upon by the majority contradicts rather than complements the principle of reciprocity.[86]

In an evolving world and considering the general right of a landowner to use their land in the way they wish, the "common and ordinary" use determinant seems archaic and unjust. As Lord Sales nicely put it, the principle of reciprocity must "include give and take … in relation to the desires of neighbouring landowners to use their land in new ways."[87] The existing contrary stance may inevitably stultify the vibrancy of modern life.[88] Why should the law create a problem for tall poppies like the Tate? Why should we discriminate between the remarkable and the mundane? The consequence of a strict "common and ordinary" use requirement taken

[82] *Fearn v Tate Gallery*, above n 1, at [227].

[83] At [226].

[84] At [227].

[85] At [227].

[86] At [252].

[87] At [229].

[88] At [225].

by the *Fearn* majority may inevitably "chill" activity and impede the preservation and future development of an exciting world.[89] The magnitude of this chilling risk is aggravated when recognising the tort's unpredictable scope and the increasing human population, making it harder for people to avoid the effects of their neighbour.

Hence, while the Tate's use of land deviates from the "common and ordinary", the be-all and end-all nature of this requirement, as emphasised by the majority, places defendants like the Tate in an extremely unfavourable position. Although the majority hold differently, the Court seems to defy the key principle of "give and take, live and let live" by holding one way of living paramount to others. Thus, to reinstate balance to private nuisance, factors such as "coming to the nuisance" might need to be revisited when determining liability.

B Public Interest

Secondly, the Supreme Court majority noted that both the trial judge and the Court of Appeal erred in relying extensively on the public interest associated with the Tate's viewing platform when assessing liability.[90] They argued that private nuisance involves the "violation of real property rights" and aims to "protect equality of rights between neighbouring occupiers to use and enjoy their own land when those rights conflict".[91] Thus, the public interest is irrelevant to liability.[92]

According to Lord Leggat, the correct approach is to incorporate the public interest when considering damages in lieu of an injunction.[93] His Lordship cited *Fen Tigers* as the principal authority for this proposition.[94] In that case, Lord Neuberger advocated for a flexible and entirely discretional approach to damages in lieu, where the public interest is always relevant.[95]

However, the degree to which this rule is binding on future decisions is debatable. This is because Lord Leggat overlooked the fact that Lord Neuberger's discussion was entirely obiter,

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[89] Ezra Friedman and Abraham L Wickelgren, above n 18, at 144–145.

[90] *Fearn v Tate Gallery*, above n 1, at [114].

[91] At [121].

[92] At [121].

[93] At [120].

[94] *Lawrence v Fen Tigers*, above n 53.

[95] At [119] and [124].

meaning it is not binding. This is evident when Lord Neuberger stated, "it would be inappropriate to go further than I have gone at this stage, in light of the arguments which were raised on this appeal"[96] and "[damages in lieu] is not an issue which an appellate court should determine when the trial judge was not asked to do so".[97] Thus, while highly persuasive, the true leading authority for damages in lieu is *Shelfer v City of London Electric Lighting Company*,[98] albeit criticised in Lord Neuberger's obiter discussion.[99]

Furthermore, granting damages in lieu is a matter of complete discretion.[100] While this aspect could arguably support Lord Neuberger's stance in *Fen Tigers*, it also signifies that a defendant's socially valuable activity may not hold any weight regardless of whether *Fen Tigers* or *Shelfer* is the correct test. Given the current ambiguity surrounding the requirements for damages in lieu and the emphasis on discretion, it cannot confidently be said that the public interest will be considered in a case like *Fearn*. Unless and until there is a non-obiter Supreme Court decision supporting Lord Neuberger's position in *Fen Tigers*, it is probable that courts may prefer the *Shelfer* test.

A L Smith LJ's frequently cited four-step test for damages in lieu in *Shelfer* requires that 1) the injury to the plaintiff's legal rights is small, 2) it is capable of being estimated in money, 3) it must be adequately compensated by a small monetary payment, and 4) an injunction would be oppressive to the defendant.[101] The more recent ruling in *Watson v Croft Promo-Sport Ltd* also endorsed the *Shelfer* test, highlighting that the public interest may only be considered where the claimant's harm is minimal.[102] With this test and the current line of authorities, it is improbable that the Tate would be afforded a public interest consideration when assessing remedies. Given the substantial harm to the claimants, as determined by the *Fearn* majority, and the likelihood of unsatisfactory monetary compensation, the Tate is unlikely to secure damages in lieu.

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[96] *Lawrence v Fen Tigers*, above n 53, at [127].

[97] At [149].

[98] *Shelfer v City of London Electric Lighting Company* (1895) 1 Ch 287 (18 December 1894).

[99] *Lawrence v Fen Tigers*, above n 53, at [100]–[132].

[100] At [120].

[101] *Shelfer v City of London Electric Lighting Company*, above n 98, At 322–323.

[102] *Watson v Croft Promo-Sport Ltd* [2009] EWCA Civ 15, [2009] 3 All ER 249 at [44] and [51].

Stepping beyond the confines of the English context, it is worth noting that *Shelfer* remains the law in New Zealand. The principle established in *Shelfer* and upheld in *Kennaway*, that being a public benefactor is never a sufficient justification to deny the claimants an injunction, is highlighted by Hardie Boys J in *Bank of New Zealand v Greenwood*.[103] This case concerned sunlight reflecting off Greenwood's veranda, which caused considerable disturbance to the opposite Bank of New Zealand building.[104] The judge concluded that the *Shelfer* test was not met and emphasised that once an actionable nuisance is established, "the plaintiff is entitled to have the nuisance stopped, and not to be paid off in damages, for that would result in the Court licensing his wrongdoing."[105] As a result, while a future court may adopt an approach more in line with *Fen Tigers*, as the law currently stands, the New Zealand hypothetical outlined at the beginning of this paper would find the Sky Tower in an incredibly unfavourable position. One where a court would be unable to factor in the public interest of a landmark that has stood for so long despite the high-rise apartment building "coming to the nuisance".

It is crucial to acknowledge that the general point made by the courts regarding the public interest holds merit – the law should not let private property rights be curtailed to favour the public interest.[106] Given the entire purpose of a property right is to "bind all the world", this principle is crucial.[107] The well-known maxim "a man's home is his castle" encapsulates the importance and power of property rights, emphasising the notion that landowners should have the freedom to use their property in the way they wish. It is difficult to imagine what would remain in property rights if the law permitted the interference of those rights in favour of the public interest.[108] However, with the current expansion of private nuisance, the law essentially creates additional private property rights, affording greater privileges to landowners and strengthening the concept of property rights altogether. To counteract the enhanced rights of landowners like the Flats in *Fearn*, the law may need to be more sensitive to the public interest. Is this not what the reciprocity principle would require? If adjustments are made to one side, it is critical to do the same on the other to strike a balance between conflicting landowners. This paper suggests that given the current state of private nuisance, the reciprocity principle is being

[103] *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525 at 535.

[104] At 525.

[105] At 533.

[106] Allan Beever, above n 22, at 30.

[107] Elizabeth Cook *Land Law* (3rd ed, Oxford Academic, Oxford, 2010) at 26.

[108] Allan Beever, above n 22, at 30.

contravened by failing to consider the public interest when determining liability and, perhaps, even when determining appropriate remedies.

C Reasonable Self-Help Measures

Thirdly, the majority in *Fearn* held that the claimant's ability to undertake reasonable self-help measures to avoid the adverse consequences of the defendant's actions is not a good defence to a nuisance claim.[109] They reasoned that this approach is far from involving "give and take" and instead places all responsibility on the victim alone.[110] The validity of this argument is apparent. It should not be as simple as stating, "the claimants can close their blinds during the day, so the appeal is dismissed". Such an approach would entirely shift the burden on the claimant and violate the principle of reciprocity.

Nonetheless, the undermining of the reciprocity principle persists when self-help measures are wholly disregarded. This becomes particularly evident when considering the evolving and uncertain parameters of the tort, along with the increase in urban density, which heightens the challenge of evading the impacts of neighbours. Thus, reasonable self-help measures should be factored into the liability equation to offset this dilemma.

The *Fearn* minority took a similar view. Lord Sales expressed that:[111]

> …the principle of reciprocity and compromise which the law has adopted as the mechanism to balance the competing interests of neighbouring landowners has to take account of reasonable measures of self-protection which may be available.

Considering the tort hinges on the foundational principle of reciprocity, the minority perspective appears more legally grounded. In fact, it seems to be the most basic application of "give and take". This holds particularly true when a neighbour has exacerbated the effects of the alleged nuisance, as the claimants seemingly did in *Fearn.* This is because the claimants repurposed their originally designed indoor balconies – the only area of the flats with full, undisturbed floor-to-ceiling windows – into components of their living spaces.[112] It should be

[109] *Fearn v Tate Gallery*, above n 1, at [83].

[110] At [83].

[111] At [194].

[112] At [151].

a necessary part of applying the "give and take" principle to assess the *reasonable* means of diminishing the alleged nuisance of the defendant, especially when those defendants have submitted themselves to greater sensitivity than initially intended.[113] Is this not just basic neighbourliness?

As the scope of private nuisance widens to encompass more scenarios, more landowners will be required to stop their activities through injunctions issued to plaintiffs. While this paper does not intend to delve into the enormous amount of scholarship within the field of law and economics concerning injunctive relief, it remains beneficial to consider the basic cost-benefit analysis often employed by economists when studying injunctions.[114] This perspective helps shed light on the potential disparities that defendants could face if the scope of private nuisance expands, potentially granting more injunctions without accounting for reasonable self-help measures in the liability assessment. The "give and take" principle is comparable to a cost-benefit analysis as both concepts involve reaching a balanced outcome of competing interests. If a defendant is forced to stop their activities despite a significant skew after a cost-benefit analysis, the balance between competing landowner interests is not evenly struck. In other words, the principle of "give and take" is not being adhered to.

This might be the scenario in *Fearn*. The Tate had implemented measures to minimise the nuisance and reduce the harm experienced by the claimants. They shortened the opening time for the viewing gallery by considerable hours, displayed notices and instructed security guards to monitor the south and west sides.[115] Deeming these protective measures inadequate and making a ruling that puts the Tate in jeopardy of an injunction, without considering the reasonable self-help measures available to the complainant, appears to extremely disfavour the defendant. This is certainly not honouring the reciprocity principle. Instead, it prioritises one landowner (the Flats) over the other (the Tate).

This outcome likely results from the majority's over-reliance on the "common and ordinary" use requirement, tainting the impression that expecting the Flat residents to close their blinds

[113] *Fearn v Tate Gallery*, above n 1, at [57].

[114] See Ronald Coase "The Problem of Social Cost" (1960) 3 J Law Econ at 27 and the reply of AW Brian Simpson "'Coase v. Pigou' Reexamined'" (1996) 25 CJLS 54 at 58–63.

[115] *Fearn v Tate Gallery*, above n 1, at [142].

is unreasonable. This is unusual, considering it is normal to expect any apartment resident in a congested city to close their blinds when they desire privacy.[116]

This point emphasises the drawbacks of the majority's narrow approach to "common and ordinary" use, preventing them from investigating the other side. Simply because the Tate is using its land as a viewing platform rather than, say, an office block should not render it entirely irrelevant. Although the degree of visual intrusion between the two undoubtedly varies, the reality remains that reasonable self-help measures should be factored into the equation to truly honour the reciprocity principle in *Fearn*.

Granting the claimants an injunction will likely lead to significant financial losses for the Tate. Simultaneously, the Flats will enjoy all the advantages of having floor-to-ceiling windows without worrying about visual disturbance or needing to close blinds for privacy. This outcome clearly favours the plaintiffs, leaving the defendants with nothing to gain.

Dismissing self-help measures from the liability equation is certainly not the most balanced approach in handling *Fearn*. The Tate is already incurring additional costs for their existing remedial measures (security guard wages, extended hours closed etcetera). Such costs are expected, given they are the source of the nuisance. However, how is it justifiable, let alone fair, to overlook the possibility of residents closing their blinds as needed? Incorporating reasonable self-help measures into the analysis appears to be the utmost basic application of the "give and take " principle, which seems to be undermined by the *Fearn* majority.

D Planning Permission

Fourthly, the *Fearn* majority endorsed the view held in *Fen Tigers* that the existence of planning permissions cannot refute a private nuisance claim.[117] The rationale behind this stance being that "planning laws and the common law of nuisance have different functions."[118] While the former focuses on regulating land use with a public interest perspective, the latter is exclusively constructed to safeguard private interests.[119] This represents the classic case of private law

[116] *Fearn v Tate Gallery*, above n 1, at [214].

[117] At [110].

[118] At [109].

[119] At [109].

versus public law. However, it seems impractical and inefficient to have two avenues in play that do not at least complement one another.

Moreover, this divergence seems to overlook an opportunity to reinstate a sense of security for new developers as the tort of private nuisance expands, especially after cases like *Fearn*. In *Fen Tigers*, Lord Neuberger held that the existence of planning permission that supports the contested activity holds no weight in aiding a defendant to a private nuisance claim.[120] This raises questions about the rationale of this stance. Why have planning permissions at all if they can be rendered insignificant by a private nuisance claim, with little or no consideration from the courts?

The House of Lords in *Hunter v Canary Wharf* discussed the connection between nuisance and planning laws.[121] When deciding whether interference with television signals could be deemed an actionable nuisance, Lord Hoffmann was influenced by existing planning permissions. His Lordship found that planning permission for new buildings effectively obviated the need for expanding nuisance to control the placement of new developments.[122] His Lordship thought the planning system was a much more appropriate means of control than expanding the right to bring an action for private nuisance at common law.[123] Although he ultimately holds that planning permission should not always be a defence, as it would undermine third parties' private rights, he emphasises the need to consider other means of protecting interests when the Court is being asked to create new rights of action.[124] Failing to consider these aspects could expose developers to excessive unforeseen legal action and additional costs, impacting their projects unfairly.[125] Moreover, claimants typically have the opportunity to file concerns during the planning stage of the development and acquire the necessary conditions.[126]

Lord Hoffmann's view is in alignment with the premise of this paper. If the scope of private nuisance continues expanding, encompassing more situations, planning permissions should be

[120] *Lawrence v Fen Tigers*, above n 53, at [94].

[121] *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426.

[122] Patrick Bishop and Victoria Jenkins "Planning and nuisance: revisiting the balance of public and private interests in land-use development" (2011) JEL 23 285 at 291; referring to *Hunter v Canary Wharf*, above n 121.

[123] *Hunter v Canary Wharf*, above n 121, at 710.

[124] At 710.

[125] At 710.

[126] At 710.

a relevant factor when determining liability. This would give developers a better sense of security, enabling them to point to prior planning consent and helping offset the unpredictability of the tort. This is not to say that obtaining planning permission will bar any neighbour from pursuing and potentially succeeding in a private nuisance case. The general principle remains true – "planning permission is not a licence to commit a nuisance".[127] However, for the sake of reciprocity amid the tort's erratic nature, courts should factor in the existence of planning permission and the process taken to obtain consent into their consideration of liability. This becomes especially relevant in scenarios like *Fearn,* where the Court is invited to expand the scope of private nuisance by deeming something that was once prohibited from ever qualifying as a nuisance to now be one. As the population increases and our infrastructure evolves, people will increasingly find it challenging to evade the impacts of their neighbours. Developers should have some sort of preliminary security to encourage urban prosperity rather than hinder it. Otherwise, how can we expect individuals or businesses to plan their affairs confidently and free from liability?

It does not seem equitable to dismiss the possibility that a claimant was fully informed of a development's essence, had the chance to object and negotiate during the planning phase, but only resorted to a common law action after its completion. Planning regulations generally control the location of land use activities and set standards regarding building height, spatial proximity, noise emissions, etc.[128] In the United Kingdom, local planning authorities assess factors such as size, external appearance, and, importantly, the impact on surroundings.[129] Members of the public are also allowed to comment and object to planning applications during this process.[130] Given the comprehensive laws and processes surrounding resource consent and planning permissions, it does not seem practical or fair to discount all of this in subsequent private nuisance claims.[131] Particularly when a local authority, as the majority acknowledges,

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[127] *Lawrence v Fen Tigers*, above n 53, at 84; referring to *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343, [1992] 3 All ER 923 at 359.

[128] See London.gov.uk (2023) "Planning applications and decisions" <https://www.london.gov.uk/programmes-strategies/planning/planning-applications-and-decisions>.

[129] GOV.UK (2019) "Use of planning condition" <https://www.gov.uk/guidance/use-of-planning-conditions#Government-policy-on-use-of-conditions>.

[130] GOV.UK (2022) "Consultation and pre-decision matters" <https://www.gov.uk/guidance/consultation-and-pre-decision- matters#:~:text=Anyone%20can%20respond%20to%20a,provide%20representations%20on%20planning%20applications>.

[131] See Town and Country Planning Act 1990 (UK) and Resource Management Act 1991 (NZ).

is "likely to consider the potential effect of a new building or use of land on the amenity value of neighbouring properties".[132]

Although it is firmly established that, in most situations, private nuisance remains a means of protecting private interests, notwithstanding planning permission, it should not follow that planning permissions are completely irrelevant. In *Fen Tigers*, Lord Neuberger explains how the existence of, or compliance with, planning permissions may sometimes be relevant to a private nuisance claim in that it can give rise to a change in the character of the locality.[133] However, His Lordship emphasises that planning permissions authorising an activity that would otherwise be a nuisance only change the locality's character if it relates to a large area, not a small one.[134] Thus, while planning permissions may arguably assist a small proportion of defendants in changing the character of the locality, there is a substantial risk that they will be of no use to a defendant like the Tate, whose area may not meet the size criteria.

Furthermore, the majority in *Fearn* criticised the trial judge's analysis of alternative protective measures, one of which was installing privacy film.[135] They note that "seeking to install it might have planning implications."[136] It does not seem fair that the Court can consider planning consequences to discredit an argument that benefits the defendant yet finds it irrelevant to questions of liability. This does not appear to be doing justice to the principle of reciprocity.

V Conclusion

The tort of private nuisance is characterised by unnecessary confusion. The Supreme Court judgment in *Fearn* has undoubtedly cast a darker shadow of uncertainty regarding future liability for defendants. The judgment has broadened the ambit of the tort even further than ever before by ruling that visual intrusion can now amount to a private nuisance. This begs the question: At what point is the common law bending the rules and established precedent of private nuisance too much as to distort it and move away from the principle of reciprocity – "give and take, live and let live"?

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[132] *Fearn v Tate Gallery*, above n 1, at [109].

[133] *Lawrence v Fen Tigers*, above n 53, at [82].

[134] At [86].

[135] At [81].

[136] At [81].

Furthermore, *Fearn* places an incredible and somewhat arbitrary reliance on "common and ordinary use" requirements. While this has added more certainty concerning what is required in questions of "reasonable" use, it adds a further hurdle for defendants in a private nuisance claim to overcome. Other hurdles include an inability to consider the public benefit, reasonable self-help measures, planning permissions, and, importantly, "coming to the nuisance". This leaves the contest of a private nuisance case incredibly hard for a defendant to succeed – especially one who was there first.

By enlarging the scope of the tort on the plaintiff-friendly side without adequately compensating on the defendant-friendly side, the common law deviates from the principle of reciprocity. This causes immense disparities for defendants as they are left with little factors to save them from being caught in the tort's widening net. The tort's uncertainty, coupled with the inadequate defences to match, raises concerns about the predictability and fairness of outcomes in future cases. Parties may struggle to gauge the boundaries of their rights and obligations as neighbours, especially those similar to the Tate.

Additionally, the current skewed favourability of the tort undermines legal principles and risks creating a chilling effect on vibrant activities, potentially stifling the realisation of modern life's fullest potential. Without well-defined parameters and a lack of defences, defendants may find themselves grappling with ambiguity, unsure of the potential consequences of their actions.

Fearn has left many unanswered questions regarding liability for future defendants in a private nuisance case. The increased departure from the reciprocity principle, the backbone of the tort, and the subsequent lack of available defences have raised important queries about the fairness of the tort. Thus, until future legal developments bring back the necessary clarity and restore a balance between the rights of both parties by revisiting defendant-favourable factors, the crucial guiding principle of reciprocity is dishonoured.

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