



Liability in nuisance: *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4

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ABSTRACT

The author discusses the recent Supreme Court case of *Fearn v Tate Modern Galleries*. In *Fearn*, the court was required to determine whether the defendants' allowing visitors to the viewing gallery, which was situated at the top of the Tate Modern, to stare into domestic flats, which were situated close to the Tate, constituted a nuisance in law. The claimants' flats were of an unusual design, in that the external walls which faced the Tate, were constructed entirely of glass, thereby allowing visitors to the Tate to stare into the interior of the flats. By a bare majority, the court held that such a use of the defendants' premises ranked as a nuisance. Whereas the majority of the court upheld the traditional view that, for a claimant to succeed in a nuisance action, the use of the defendant's land required to be unreasonable, in order to determine whether that use was unreasonable, one was required to ascertain whether the defendant's use of land had caused substantial interference with the ordinary use of the claimants' land. However, in turn, the claimant could not complain if the use which was interfered with was not an ordinary use of that land. The court held that the use of the viewing gallery had caused a substantial interference with the ordinary use and enjoyment of the claimants' property.

The majority of the Supreme Court concluded that both lower courts had erred by laying store by the fact that the use of the viewing gallery was of public benefit. However, public interest was a factor which required to be addressed only when the court was ascertaining whether to grant an injunction or an award of damages.

The author argues that the dissenting judgment of the court is to be preferred over that of the majority, most importantly for the following reasons. It may be difficult first, to determine whether the defendant's use of land deviates from the norm, and therefore does not rank as a 'common and ordinary' use of land, and secondly it may prove difficult to weigh such use of land against that of the claimant. The author argues that the test of reasonableness as a test for liability in nuisance, as hitherto employed by the courts, is more conducive to clarity. The traditional test also allows the law to develop both coherently and incrementally, by considering the changing norms of society.

Keywords: nuisance; intrusive viewing; interference with common and ordinary use of land; viewing galleries; public interest; remedies.

BACKGROUND AND DECISION

At the top of the Tate Modern Gallery (the Tate) there was a public viewing gallery, which was opened to the public in 2016. Unfortunately, visitors to the viewing gallery could see straight into the living areas of the claimants' flats, which were situated in close proximity (about 34 metres) to the Tate. The walls of the flats which faced the Tate were constructed mainly of glass. The claimants sought an injunction, requiring the defendants, namely, the Board of Trustees of the Tate, to prevent members of the public from viewing their flats from the relevant part of the Tate or, alternately, an award of damages. The claim was based on the private law of nuisance.

The trial judge found that the intrusive viewing from a neighbouring property could give rise to a claim for nuisance. However, he held that the intrusion which the claimants experienced, did not amount to a nuisance, on the basis that the Tate's use of the viewing gallery was reasonable. The trial judge also found that the claimants were responsible for their own misfortune, firstly, because they had bought property with glass walls, and secondly because they could have taken remedial measures to protect their own privacy, such as lowering their blinds during the day, or installing net curtains.

The claimants appealed. The Court of Appeal dismissed the appeal. The claimants appealed to the Supreme Court which (by a majority of three to two) allowed the appeal. As the trial judge and the Court of Appeal both found no liability in nuisance, the remedy question, injunction or damages did not need to be addressed. Liability was the only issue in the Supreme Court, so the allowing of the appeal required the remedy question to be remitted to the trial court.

In the Supreme Court, Lord Leggatt (who gave the majority opinion) stated that the tort of private nuisance protected a claimant not from the physical invasion of the claimant's land itself, but rather, from the resulting interference with the utility, or amenity value, of the claimant's land.¹ Moreover, there was no requirement that the interference was caused by a physical invasion of the land. He went on to state that there was no reason why a state of affairs, which consisted of the defendant allowing his premises to be used as a base for members of the public to stare into neighbouring property, could not be actionable as a private nuisance.²

Lord Leggatt stated that, whereas it was sometimes said that, as a governing principle, to give rise to liability in nuisance any interference with the claimant's enjoyment of land had to be unreasonable, 'unreasonableness' was not itself a legal standard or test, which assisted

1 [2023] UKSC 4, [13].

2 *Ibid* [17].

one in concluding that a nuisance existed. There were principles, settled since the nineteenth century, which govern whether use of the claimant's land was unreasonable.

In applying these principles, the first question which one was required to ask was whether the defendant's use of land had caused a *substantial* interference with the *ordinary* use of the claimants' land.³ Lord Leggatt stated that the test for 'substantial' was objective.⁴ Furthermore, what amounted to material or substantial interference was to be judged by the standards of an ordinary or average person in the claimants' position. Lord Leggatt went on to state that the objective nature of the test reflected the fact that the interest protected by the law of private nuisance was the utility of land and not the bodily security or comfort of the particular individuals occupying it.

Lord Leggatt stated that an occupier could not complain if the use which was interfered with was not an ordinary use of land.⁵ The other aspect of the core principle was that, even where the defendant's activity substantially interfered with the ordinary use and enjoyment of the claimants' land, the activity would not give rise to liability if the activity itself was no more than the ordinary use of the defendant's own land.⁶

Lord Leggatt then stated, on the authority of the celebrated case of *Sturges v Bridgeman*,⁷ that what constituted a common and ordinary use of land was to be judged having regard to the character of the locality.⁸ A further rule illustrated by *Sturges* was that coming to a nuisance was no defence.⁹ Neither was it a defence that the defendant's activity did not amount to a nuisance until the claimants' land was built on or its use had changed. The rule that coming to a nuisance was not a defence was confirmed recently by the Supreme Court in *Lawrence v Fen Tigers Ltd*.¹⁰

Lord Leggatt then applied the law, which he had summarised, to the facts of the case. He was of the view that it was beyond doubt that the viewing and photography which took place from the Tate building caused a substantial interference with the ordinary use and enjoyment of the claimants' properties.¹¹ Furthermore, such use could not be said

3 Ibid [21].

4 Ibid [23].

5 Ibid [25].

6 Ibid [27].

7 (1879) 11 Ch D 852 (CA).

8 [2023] UKSC 4, [38].

9 Ibid [42].

10 [2014] UKSC 13.

11 [2023] UKSC 4, [48].

to be a necessary, or ordinary, incident of operating an art museum.¹² Hence, the Tate could not rely on the principle of give and take and argue that it sought no more toleration from its neighbours for its activities than they would expect the Tate to show for them.

Lord Leggatt then addressed the decisions of the trial judge and the Court of Appeal. Both courts had rejected the claimants' claim for entirely different reasons. Lord Leggatt stated that the lower courts had erred under three heads.¹³

THE DECISION AT FIRST INSTANCE

As far as the decision of the trial judge was concerned, Lord Leggatt stated that the former had erred by framing the question which he had to decide, as to whether the Tate was making an unreasonable use of its land by operating the viewing gallery as it did.¹⁴ Instead the trial judge should have ascertained whether it was a common and ordinary use. Lord Leggatt stated that having asked himself the wrong question, the answer, unsurprisingly, was that the operation of a viewing gallery was not an inherently unreasonable activity in the neighbourhood.¹⁵ Nowhere did the judge consider whether the operation of a viewing gallery was necessary for the common and ordinary use and occupation of the Tate's land. Lord Leggatt stated that, had the trial judge done so, he would have been bound to conclude that, as in *Bamford v Turnley*,¹⁶ the Tate was not using its land in a common and ordinary way, but in an exceptional manner.

Lord Leggatt then stated that the trial judge had applied the law incorrectly, in considering the impact of the Tate's activities on the ordinary use and enjoyment of the claimants' flats. Lord Leggatt addressed separately the judge's reasoning in relation to (a) the sensitivity of the flats and (b) the availability of protective measures.¹⁷

As far as (a) was concerned, Lord Leggatt agreed with the judge that the glassed design of the claimants' flats and their sensitivity to inward view was a relevant factor. It was relevant to the visual intrusion which the occupants could be expected to tolerate.¹⁸ However, the judge went wrong in how he analysed that question. Critically, the judge did not distinguish between two different types of argument, one of which was valid, and the other which was not.

12 Ibid [50].

13 Ibid [53].

14 Ibid [54].

15 Ibid [55].

16 (1862) 3 B & S 66, 122 ER 27.

17 [2023] UKSC 4, [56].

18 Ibid [61].

As far as the valid argument was concerned, the trial judge was plainly right to say that floor to ceiling windows were an advantage which came at a price, in terms of privacy.¹⁹ The fact that the property had been designed in such a way that made the occupants particularly vulnerable to inward view could not increase the liability of neighbours. Lord Leggatt gave the hypothetical example of another block of buildings, of similar height, being erected on the site of the Blavatnik Building (where the viewing gallery was currently situated) in such circumstances that the occupants of these flats could see straight into the claimants' living accommodation, causing annoyance to the claimants.²⁰ In these circumstances, if the occupants of the new flats were doing no more than making a normal use of their own homes, and showing as much consideration for their neighbours as they could reasonably expect their neighbours to show for them, the claimants could not have complained of nuisance. Such a situation would be analogous to the facts of *Southwark LBC v Mills*,²¹ where the claimants had to put up with the noise, which was incidental to the ordinary use and occupation of neighbouring flats, despite the considerable annoyance, resulting from the fact that flats had been constructed without adequate sound insulation. Lord Leggatt added that, in the same way, in accordance with the principle of reciprocity, each flat owner (in the example given) would have to put up with being visible to their neighbour. That would be required by the rule of 'give and take, live and let live'.

Lord Leggatt went on to state that it did not follow that where a person was using land, 'not in a common and ordinary way, but in an exceptional manner', it was a defence to argue that a neighbour would not have a material inconvenience, were it not for the fact that the neighbour occupied an 'abnormally sensitive' property.²² He stated that the nature and the extent of the viewing of the claimants' flats went beyond anything which could reasonably be regarded as a necessary or natural consequence of the common and ordinary use and occupation of the Tate's land.²³ That could not be regarded as a common or ordinary use of land.²⁴

Lord Leggatt then addressed issue (b): that is, whether the claimants could have adopted relevant measures to protect themselves from being overlooked from people on the viewing gallery. The trial judge had stated that, as far as the visual intrusion of the claimants' homes

19 Ibid [62].

20 Ibid [63].

21 [2001] 1 AC 1 (HL).

22 [2023] UKSC 4, [65].

23 Ibid [74].

24 Ibid [75].

was concerned, if the interior of a person's home could be seen from the windows of houses across the street, and the occupants wished to avoid being seen, it was for them to draw their blinds, or take other remedial measures.²⁵ However, Lord Leggatt stated that in circumstances where the claimants were doing nothing other than occupying and using their flats in a common and ordinary way, and in accordance with the ordinary habits of a reasonable person, it was no answer for someone who interfered with that use by making an exceptional use of their own land to say that the claimants could protect themselves in their own homes by taking remedial measures.

THE DECISION OF THE COURT OF APPEAL

Lord Leggatt then addressed the decision of the Court of Appeal. He stated that the sole reason why the Court of Appeal did not find the Tate liable in nuisance was that liability in nuisance did not extend to overlooking.²⁶ Lord Leggatt agreed with that proposition but disagreed with the Court of Appeal's view that the claimants' claim concerned 'overlooking'. Lord Leggatt then emphasised that the claimants' complaint was not the fact that their flats were overlooked from the Blavatnik Building.²⁷ Rather, they complained about the use which had been made of the top floor by the Tate. The Tate had actively invited members of the public to visit and look out from the viewing gallery in every direction, including the claimants' flats situated about 30 metres away, without interruption, for the best part of the day. That constituted a nuisance. Lord Leggatt added that the notion that visual intrusion could not constitute a nuisance was not supported by precedent.²⁸

Lord Leggatt then addressed three policy reasons which the Court of Appeal advanced for rejecting the claimants' appeal.

The first was that the Court of Appeal was of the opinion that it would be difficult to apply an objective test for deciding if there had been a material interference with the amenity value of the land.²⁹ In rejecting that ground, Lord Leggatt stated that intrusive viewing was no more subjective, or harder to judge, than any other forms of nuisance.³⁰ There was nothing peculiar about assessing whether visual intrusion amounted to a nuisance.

25 Ibid [84].

26 Ibid [89].

27 Ibid [92].

28 Ibid [104].

29 Ibid [106].

30 Ibid [108].

The second matter of policy raised by the Court of Appeal was that planning laws would be a better medium for controlling ‘inappropriate looking’ than the common law of nuisance. However, Lord Leggatt endorsed Lord Neuberger’s *dictum* in *Lawrence v Fen Tigers* to the effect that there was no basis, in principle, for the proposition that the planning regime ‘cut down’ private rights.³¹

The third policy reason advanced by the Court of Appeal concerned the issue of privacy. The Court of Appeal stated that there were other laws which bore on privacy. An extension of the law could only be made by Parliament rather than by the courts. However, Lord Leggatt stated that that view assumed that applying the law of nuisance to the facts of the instant case would require an extension of the law.³² That was a wrong assumption. No new privacy laws were required to deal with that complaint.

Lord Leggatt then addressed the relevance of public interest in the decisions of the lower courts. Both lower courts were influenced by what they perceived to be the public interest in the use made of the viewing gallery.³³ However, public interest was not a factor that fell to be addressed when the court was deciding whether the use which was being made of the viewing gallery amounted to a nuisance. It was a factor one should apply when deciding whether to grant an injunction or an award of damages after it had been decided that a nuisance existed.³⁴ Lord Leggatt added that the point of private nuisance was to protect equality of rights between neighbouring occupiers to the use and enjoyment of their own land when those rights conflicted. In deciding whether one party’s use had infringed the other’s rights, the public utility of the conflicting uses was not relevant.³⁵

Lord Leggatt concluded that the use of the Tate’s viewing gallery constituted a nuisance in law.³⁶

THE DISSENTING JUDGMENT

Lord Sales (with whom Lord Kitchen agreed) gave a dissenting judgment. He stated that the instant case raised two questions.

The first was, in principle, whether it was possible to conclude that a private nuisance existed, in the case of residential property, by reason

31 Ibid [110].

32 Ibid [111]–[112].

33 Ibid [114].

34 Ibid [120].

35 Ibid [121].

36 Ibid [133].

of visual intrusion consisting of people looking into the living areas of the claimants' property?³⁷

The second question was that, if that was possible, had the claimants established that there was an actionable private nuisance by reason of the visual intrusion which they had experienced?

Lord Sales stated that visual intrusion into someone's domestic property was capable of amounting to a nuisance.³⁸ There was no good reason to rule out the claimants' claim as a matter of principle.³⁹

In relation to the second question, as to whether a nuisance existed in the instant case, Lord Sales stated that the application of the 'give and take' principle, as a way of modulating and reconciling property rights of neighbouring landowners, was particularly important where the issue was visual intrusion, or overlooking.⁴⁰ He stated that he saw no good reason why one should leave out of account reasonable self-help measures (such as the provision of blinds and curtains) which might be available to the person complaining about visual intrusion.⁴¹ In turn, it was possible for the Tate to reduce the impact from the viewing platform on the claimants' property by closing it at certain times, putting up notices, and taking similar steps.⁴²

Lord Sales acknowledged that 'coming to a nuisance' was no defence, and that the 'give and take' principle was an objective one, which was to be applied in the light of the nature of the neighbourhood in which the relevant properties were located. He stated that there were sound reasons why the law adopted an objective approach in the context of the relevant locale.

The first of these reasons was that elevating the question of whether the defendant had acted in accordance with the existing common and ordinary use of land in the locality into the ultimate test for nuisance would seriously distort the law of nuisance.⁴³ Such an exclusive focus placed excessive weight on one side of what was an inextricably two-sided relationship. This would mean that, if a defendant's use of land was outside such use, the claimant would simply require to prove that the defendant's use of land had an unwelcome impact on the claimant's use of their own land.

The second reason was that a claimant landowner and a defendant landowner might each wish to use their property in ways which were not in themselves common, according to the standards of the locale,

37 Ibid [134].

38 Ibid [179].

39 Ibid [204].

40 Ibid [212].

41 Ibid [214].

42 Ibid [216].

43 Ibid [227].

and the test to govern any conflict between these two uses had to be capable of accommodating such situations, in a just manner.⁴⁴

Thirdly, to make the exposure of the defendant depend on common and ordinary usage of its land was too conservative as regards the development of land and conflicted with the general policy of the law that a landowner should be free to use their land as they wished.⁴⁵

Fourthly, whereas questions of common and ordinary usage of land by a defendant might be central in working out the application of an objective standard of reasonableness in a locale, they were not, in themselves, capable of providing a solution across the whole range of cases with which the law of nuisance was required to deal.⁴⁶ It was necessary to have regard to a more general principle of objective reasonableness. Lord Sales added that the Tate's use of its land by operation of the viewing gallery was not a common and ordinary use of the land in the locale.⁴⁷ However, that factor was not sufficient to render the Tate liable to a claim in nuisance by any neighbouring landowner who could say that the resulting interference with their interests was significant or substantial. The claimants' use of their land, by adopting an unusually open form of design for residential living in the relevant urban locale and using the winter gardens as they did, was not a common and ordinary use of land in that locale.⁴⁸ Therefore, the claimants were not in a position, for their part, simply to claim that the Tate was obliged to moderate the use of its land, according to the objective standards of reasonableness, applicable in that locale.

Lord Sales went on to state that, fifthly, an objective test of reasonable reciprocity and compromise was clear and workable.⁴⁹

The sixth point which Lord Sales made was that a test which was based on the common and ordinary use by the defendant, was contrary to the way the test was formulated in the modern authorities.⁵⁰ The rule of 'give and take, live and let live' was a general test of objective reasonableness and had been approved in recent cases of the highest level.

Lord Sales then addressed the decision of *Mann J*. The latter had found that the law of nuisance could apply in cases of invasion of privacy by visual intrusion in relation to residential property.⁵¹ He also had

44 Ibid [229].

45 Ibid [231].

46 Ibid [232].

47 Ibid [237].

48 Ibid [238].

49 Ibid [240].

50 Ibid [243].

51 Ibid [256].

found that the Tate was making reasonable use of its land.⁵² Lord Sales stated that Mann J had assessed the standards of privacy which were to be expected in the locale at Neo Bankside and had concluded that owner/developers of dwellings designed with heightened vulnerability to external gaze in that locale could not complain. Lord Sales went on to state that Mann J had found that the atypical design of the flats, in the context of the standards of privacy which were reasonably to be expected in that locale, was a relevant factor in determining the overall reasonableness, as between parties, according to an objective assessment.⁵³ The latter had concluded that it would be wrong for the self-induced incentive to gaze into the flats, associated with their exceptionally open design, to create liability in nuisance.⁵⁴ Mann J had also concluded that, as far as the protection of the claimants' privacy was concerned, it was reasonable to expect the claimants to 'protect their own interests' to some degree.⁵⁵

Lord Sales then addressed the decision of the Court of Appeal. That court had criticised Mann J's judgment on two grounds.⁵⁶ First, the latter had been wrong to conclude that the claimants were required to take self-help measures to prevent the visual intrusion of their flats. Secondly, the court had held that the claimants were using their flats in a perfectly normal fashion, as homes. The trial judge's approach in balancing these interests against those of the Tate was contrary to the principles of private nuisance.

However, Lord Sales stated that the Court of Appeal's criticisms of Mann J's judgment were wrong.⁵⁷ Lord Sales stated that the Court of Appeal had given insufficient weight to the reasonable interest of the Tate in making use of its own property as it wished by operating a viewing gallery, which Mann J had found to be reasonable, when assessed by reference to the locality.⁵⁸ The Court of Appeal had found that the viewing gallery was not necessary for the common and ordinary use of the Tate's property. However, Lord Sales stated that there was no good reason why the give-and-take test should be weighed against one of the competing property owners in such a way. The Court of Appeal had distorted the give-and-take principle by setting the interests of the claimants to use their property as was *reasonable* against a test which would require the Tate's use of its property to satisfy the higher standard of being *necessary*. Lord Sales held that Mann J's approach

52 Ibid [257].

53 Ibid [261].

54 Ibid [262].

55 Ibid [263].

56 Ibid [265].

57 Ibid [269].

58 Ibid [270].

to the give-and-take principle was correct.⁵⁹ Property owners in that part of London expected to be overlooked, and it was normal to expect people to use curtains and the like to limit the annoyance that might be caused. Mann J had found that the viewing gallery would not have caused a nuisance if the claimants' property had been used in such a way that did not involve heightened sensitivity to visual intrusion. Lord Sales stated that the owners of the land at Neo Bankside chose to develop it by building striking buildings of architectural distinction, which was likely to attract attention and the gaze of strangers.⁶⁰ In assessing what was the reasonable balance to strike between the competing interests and property rights of the claimants and the Tate, in the context of the particular neighbourhood and in the light of the particular nuisance alleged (ie visual intrusion), the trial judge had been entitled, in the circumstances, to have regard to the availability of self-help measures, which it was not unreasonable to expect the claimants to take.⁶¹ Lord Sales added that the Tate could not turn the operation of the viewing gallery into a nuisance, by reason of the development of their own property, according to a design which was out of line with the norm for that area.⁶²

In conclusion Lord Sales stated that he would have dismissed the appeal.⁶³

COMMENT

The Supreme Court was required to address two main substantive issues.

The first was whether the act of being overlooked by individuals standing on the defendant's viewing gallery, which adjoined the claimants' flats, could rank as a nuisance in law.

The second was whether the fact that the claimants occupied flats, the external walls of which were constructed entirely of glass thereby allowing visitors standing on the viewing gallery to stare into the flats, rendered the claimants' flats 'oversensitive', thus depriving the claimants a remedy by way of the law of nuisance.

As far as the first issue was concerned, there was, indeed, scanty authority to the effect that visual intrusion could form the basis of a nuisance action. The vast majority of nuisance cases have involved unreasonable interference with the claimant's land by smoke, fumes, odours, flooding, noise, vibrations and so on. However, as Newark

59 Ibid [271].

60 Ibid [272].

61 Ibid [273].

62 Ibid [278].

63 Ibid [280].

observed in his seminal article on nuisance,⁶⁴ the boundaries of the tort of nuisance are blurred. Indeed, neither judge nor academic has been able to offer a comprehensive and clear definition of what constitutes a nuisance. Furthermore, in the Court of Appeal case of *Thompson-Schwab v Costaki*,⁶⁵ where the court held that the sight of prostitutes and their clients entering and leaving premises in the vicinity of the claimant's house could constitute a nuisance, Lord Evershed MR stated that 'the forms which activities constituting actionable nuisance may take are exceedingly varied'. He added that they were not capable of precise or close definition. In short, the list of the various ways in which the claimant's enjoyment of their land can be adversely affected is not closed. Indeed, Lord Leggatt stated that anything short of direct physical invasion of the claimant's land could constitute a nuisance. Therefore, there was no doctrinal reason to preclude the court from deciding that unreasonable visual intrusion of the claimants' flats could rank as a nuisance. Indeed, in *Watt v Jamieson*⁶⁶ Lord Cooper stated that *any* type of use of the defendant's property which subjected adjoining proprietors to substantial annoyance was *prima facie* not a reasonable use and, therefore, capable of being a nuisance. Therefore, Lord Leggatt's deciding that visual intrusion could rank as a nuisance did not fall foul of any principle either in English or Scots law. However, the decision does take the law further forward.

As far as the second issue is concerned, it is well established that the defendant is liable in nuisance only if the use of their land is unreasonable.⁶⁷ For Lord Leggatt the principles of reciprocity and equal justice underpinned the concept of unreasonableness. These principles were articulated, in terms of the law of nuisance, by the rule that an occupier of land could not complain if the use of the land which was being interfered with was not an *ordinary* use. Conversely, even if the defendant's conduct substantially interfered with the ordinary use of the claimant's land, no action in nuisance would lie if the defendant's activity was no more than the ordinary use of the land. In the instant case, Lord Leggatt held that, whereas the Tate could have been using the viewing gallery reasonably, the existence of the gallery was not a common and ordinary use of land and, therefore, *prima facie* capable of constituting a nuisance. However, having established that the viewing gallery was not a common and ordinary use of land, one was then required to determine the nature of the claimants' use of land and juxtapose that use with that of the defendant. For Lord Leggatt the fact that the external walls of the claimants' flats were constructed of glass

64 F H Newark, 'The boundaries of nuisance' (1949) 65 *Law Quarterly Review* 480.

65 [1956] 1 *WLR* 335 (CA), 338.

66 1954 *SC* 56, 58.

67 *Baxter v Camden LBC* (No 2) [2001] *QB* 1 (CA).

did not take that use out of that which was common and ordinary. In short, such use was not oversensitive, thereby depriving the claimants a remedy by way of the law of nuisance.

Traditionally, however, the courts have addressed the question of whether the claimant's use of land is oversensitive and thereby unable to be protected by an action in nuisance, without comparing the defendant's use or user of land with that of the claimant.⁶⁸ Lord Leggatt's approach in *Fearn* takes the law further forward, by requiring a comparison to be made of use made of the claimants' property and the use made of the land of the defendant, in terms of that which ranks as common and ordinary. According to Lord Leggatt, if the defendant's use of land deviates to a greater extent from the norm than that of the claimant, in that respect, the latter can succeed in a nuisance action. In *Fearn* the defendant's use of land deviated from the norm (ie that which ranked as common and ordinary) to a greater extent than did that of the claimants. Therefore, it automatically followed that the defendant's use of the gallery constituted a nuisance. However, the author would argue that it may often be difficult, first, to determine whether any use of the defendant's land deviates from the norm, in terms of a given locality, and, secondly, to weigh, as it were, such a use against that of the claimant, in terms of the law of nuisance. The author would, therefore, readily endorse the dissenting view of Lord Sales, to the effect that elevating the question of whether the defendant had acted in accordance with the existing common and ordinary use of land in the locality, as to be the ultimate test for nuisance, would seriously distort the law of nuisance, in that, if the defendant's use of land lay outside the norm of that which was common and ordinary, a claimant would only be required to show that the defendant's use had an unwelcome impact on the claimants' land. Furthermore, Lord Sales' endorsement of the general test of reasonableness, as the test for liability in nuisance, conforms to the traditional approach which has been adopted by the courts, is more conducive to clarity and also allows the law to develop both coherently and incrementally, by considering the changing requirements and expectations of society.

Finally, the social utility of the defendant's activities has traditionally been considered as going to the question of whether a nuisance exists.⁶⁹ However, in *Fearn* Lord Leggatt was of the view that the fact that the

68 *Robinson v Kilvert* (1888) 41 Ch D 88 (CA); *Heath v Brighton Corporation* (1908) 24 TLR 414; *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch 436 Ch D); *Network Rail Infrastructure Ltd (formerly Railtrack) v Morris* [2004] EWCA Civ 172.

69 *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409 (Ch D); *AG v Hastings Corp* (1950) 94 Sol J 225 (CA); *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [185] (Lord Carnwath).

Tate had public utility was an irrelevant factor in the court determining whether the viewing gallery was a nuisance. Rather, public utility had relevance solely in relation to the remedy, if any, which fell to be awarded against the defendant. In this respect, Lord Leggatt followed the decision of Buckley J in *Dennis v MoD*.⁷⁰ However, Lord Pentland refrained from expressing a view as to whether *Dennis* represented the law of Scotland in *King v Lord Advocate*.⁷¹ The author would suggest, however, that *Dennis* does not, and that public interest should be considered by the court when it decides whether a nuisance exists.

70 [2003] EWHC 793 (QB), [2003] Env LR 34.

71 [2009] CSOH 169, [17].