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Hunter and Others v. Canary Wharf Ltd; Hunter and Others v. London Docklands Corporation [1997] UKHL 14; [1997] AC 655; [1997] 2 All ER 426; [1997] 2 WLR 684; [1997] 2 FLR 342; [1997] Fam Law 601 (24th April, 1997)

HOUSE OF LORDS

Lord Goff of Chieveley Lord Lloyd of Berwick Lord Hoffmann
Lord Cooke of Thorndon Lord Hope of Craighead

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

HUNTER AND OTHERS (A.P.)
(ORIGINAL APPELLANTS AND CROSS-RESPONDENTS)

v.

CANARY WHARF LIMITED
(ORIGINAL RESPONDENTS AND CROSS-APPELLANTS)

HUNTER AND OTHERS
(RESPONDENTS)

v.

LONDON DOCKLANDS DEVELOPMENT CORPORATION
(APPELLANTS)

ON 24 APRIL 1997

LORD GOFF OF CHIEVELEY

My Lords,

There are before your Lordships' House appeals in two actions, which raise fundamental questions relating to the law of private nuisance.

In the first action, *Patricia Hunter and others v. Canary Wharf Ltd.*, the appellants (who are the plaintiffs in the action) claim damages in respect of interference with the television reception at their homes. This, they claim, was caused by the construction of the Canary Wharf

Tower, which was built on land developed by the defendants. The tower is nearly 250 metres (about 800 feet) high and over 50 metres square. The source of television transmissions in the area is a BBC transmitter at Crystal Palace; and the appellants claim that, because of its size and the metal in its surface (it has stainless steel cladding and metallised windows), it has caused interference with the television signals from Crystal Palace. The appellants all lived at the material time in an area on the Isle of Dogs affected by the interference, which has been called the shadow area. They claim that the interference began in 1989, during the construction of the tower. A relay transmitter was then built to overcome the problem of interference in the shadow area. This came into operation in April 1991, and it is claimed that the aerials at the appellants' homes were adjusted or replaced between July 1991 and April 1992 to achieve satisfactory reception. The appellants claim damages in respect of the interference with their television reception during the intervening period. Their claim was framed in nuisance and in negligence, though their claim in negligence has since been abandoned.

In the second action, *Patricia Hunter and others v. London Docklands Development Corporation*, the respondents (the plaintiffs in the action) claim damages in respect of damage caused by what they claim to be excessive amounts of dust created by the construction by the appellants of a road 1,800 metres in length, known as the Limehouse Link Road, which was constructed by the appellants between November 1989 and May 1993. The respondents are residents in the affected area, and they advanced their claims in negligence and nuisance and under the Rule in *Rylands v. Fletcher*, though this last head of claim has been abandoned.

In both actions, Judge Fox-Andrews Q.C. made orders for the trial of a number of preliminary issues of law. Of the issues of law in the first action, two have survived to reach your Lordships' House, viz. (1) whether interference with television reception is capable of constituting an actionable nuisance, and (2) whether it is necessary to have an interest in property to claim in private nuisance and, if so, what interest in property will satisfy this requirement. In the second action, the only issue to reach your Lordships' House is the latter of these two issues.

The preliminary issues in the two actions were considered by Judge Havery Q.C. at separate hearings. In respect of the two issues in the first action, he held (1) that interference with television reception is capable of constituting an actionable nuisance, but (2) that a right of exclusive possession of land is necessary to entitle a person to sue in private nuisance. He later held that his answer on the second issue was applicable in the case of the same issue in the second action. The Court of Appeal reversed the decision of Judge Havery on both issues, holding (1) that the creation or presence of a building in the line of sight between a television transmitter and other properties is not actionable as an interference with the use and enjoyment of land, but (2) that occupation of property as a home provided a sufficiently substantial link to enable the occupier to sue in private nuisance. The plaintiffs in the first action now appeal to your Lordships' House against the first of these answers, and the defendants in both actions appeal or cross-appeal against the second.

Interference with Television Signals

I turn first to consider the question whether interference with television signals may give rise to an action in private nuisance. This question was first considered over thirty years ago by Buckley J. in *Bridlington Relay Ltd. v. Yorkshire Electricity Board* [1965] Ch. 436. That case was concerned not with interference caused by the presence of a building, but with electrical interference caused by the activities of the defendant Electricity Board. Buckley J. held that such interference did not constitute a legal nuisance, because it was interference with a purely recreational facility, as opposed to interference with the health or physical comfort or well-being of the plaintiffs. He did not however rule out the possibility that ability to receive television signals free from interference might one day be recognised as "so important a part of an ordinary householder's enjoyment of his property that such interference should be regarded as a legal nuisance" (see p. 447). Certainly the average weekly hours for television viewing in this country, which your Lordships were told were 24 hours per week, show that many people devote much of their leisure time to watching television, even allowing for the fact that it is not clear whether the relevant statistic is based more on the time when television sets are turned on, rather than being actually watched. Certainly it can be asserted with force that for many people television transcends the function of mere entertainment, and in particular that for the aged, the lonely and the bedridden it must provide a great distraction and relief from the circumscribed nature of their lives. That interference with such an amenity might in appropriate circumstances be protected by the law of nuisance has been recognised in Canada, in *Nor-Video Services Ltd. v. Ontario Hydro* (1978) 84 D.L.R. (3d) 221, 231.

However, as I see the present case, there is a more formidable obstacle to this claim. This is that the complaint rests simply upon the presence of the respondents' building on land in the neighbourhood as causing the relevant interference. The gravamen of the appellants' case is that the respondents, by building the Canary Wharf Tower, interfered with the television signals and so caused interference with the reception on the appellants' television sets; though it should not be overlooked that such interference might be caused by a smaller building and moreover that, since it is no defence that the plaintiff came to the nuisance, the same complaint could result from the simple fact of the presence of the building which caused the interference. In this respect the present case is to be distinguished from the *Bridlington Relay* case, in which the problem was caused not just by the presence of a neighbouring building but by electrical interference resulting from the defendant Electricity Board's activities.

As a general rule, a man is entitled to build on his own land, though nowadays this right is inevitably subject to our system of planning controls. Moreover, as a general rule, a man's right to build on his land is not restricted by the fact that the presence of the building may of itself interfere with his neighbour's enjoyment of his land. The building may spoil his neighbour's view (see *Attorney-General v. Doughty* (1752) 2 Ves. Sen. 453, and *Fishmongers' Co. v. East India Co.* (1752) 1 Dick 163); in the absence of an easement, it may restrict the flow of air onto his neighbour's land (*Bland v. Mosely* (1587) cited in *Aldred's Case* (1610) 9 Co.Rep. 57b, 58a, and *Chastey v. Ackland* [1895] 2 Ch. 389); and, again in the absence of an easement, it may take away light from his neighbour's windows (*Dalton v. Angus* (1881) 6 App.Cas. 740, 794-795 *per* Lord Selborne L.C., 823, *per* Lord Blackburn): nevertheless his neighbour generally cannot complain of the presence of the building, though this may seriously detract from the enjoyment of his land. As Lindley L.J. said in *Chastey v. Ackland* [1895] 2 Ch. 389 at p. 402 (a case concerned with interference with the flow of air):

> ". . . speaking generally, apart from long enjoyment, or some grant or agreement, no one has a right to prevent his neighbour from

> building on his own land, although the consequence may be to diminish or alter the flow of air over it on to land adjoining. So to diminish a flow of air is not actionable as a nuisance."

From this it follows that, in the absence of an easement, more is required than the mere presence of a neighbouring building to give rise to an actionable private nuisance. Indeed, for an action in private nuisance to lie in respect of interference with the plaintiff's enjoyment of his land, it will generally arise from something emanating from the defendant's land. Such an emanation may take many forms--noise, dirt, fumes, a noxious smell, vibrations, and suchlike. Occasionally activities on the defendant's land are in themselves so offensive to neighbours as to constitute an actionable nuisance, as in *Thompson-Schwab v. Costaki* [1956] 1 W.L.R. 335, where the sight of prostitutes and their clients entering and leaving neighbouring premises were held to fall into that category. Such cases must however be relatively rare. In one New Zealand case, *Bank of New Zealand v. Greenwood* [1984] 1 N.Z.L.R. 525, the glass roof of a verandah which deflected the sun's rays so that a dazzling glare was thrown on to neighbouring buildings was held, prima facie, to create a nuisance; but it seems that the effect was not merely to reflect the sunlight but to deflect it at such an angle and in such a manner as to cause the dazzling glare, too bright for the human eye to bear, to shine straight into the neighbouring building. One expert witness explained that the verandah glass diffused the light, as if from a multitude of mirrors, into what he described as a high intensity dazzle, which was extremely difficult to look at. On that basis, such a case can be distinguished from one concerned with the mere presence of a building on neighbouring land. At all events the mere fact that a building on the defendant's land gets in the way and so prevents something from reaching the plaintiff's land is generally speaking not enough for this purpose.

It is of some interest that the same conclusion has been reached in German law. I refer in particular to the decision of the Bundesgerichtshof in BGH 21.10.1983, BGHZ 88 p. 344 = NJW 1984 S. 729. The facts of the case were very similar to the present case. The plaintiffs were the owners of their family home. The local municipality erected a nine storey hospital on a neighbouring site, and as a result there was significant interference with television reception in the plaintiffs' house, making it impossible for them to receive certain programmes. The plaintiffs' claim for damages against the municipality failed. Nothing was emitted from the defendants' land, and the so-called "negative Immissionen" (negative effects) which resulted in interference with the plaintiffs' television reception gave rise to no cause of action. It was stated that the court, by the adoption of the settled jurisprudence of the Reichsgericht, had repeatedly affirmed that the so-called "negative adverse effects" caused by interference with access to natural amenities like light and air are not "impermissible" within the meaning of the relevant provisions of the Civil Code. Within the boundaries of his land the owner may in principle deal with his property as he wishes.

That decision demonstrates that English law is not alone in reaching this conclusion. The German principle appears to arise from the fact that the appropriate remedy falls within the law of property, in which competing property rights have to be reconciled with each other. In English law liability falls, for historical reasons, within the law of torts, though the underlying policy considerations appear to be similar.

In the result I find myself to be in agreement on this point with Pill L.J., who delivered the judgment of the Court of Appeal, when he expressed the opinion that no action lay in private nuisance for interference with television caused by the mere presence of a building. That a building may have such an effect has to be accepted. If a large building is proposed in a neighbouring area, it will usually be open to local people to raise the possibility of television interference with the local planning authority at the stage of the application for planning permission. It has, however, to be recognised that the problem may well not be appreciated until after the building is built, when it will be too late for any such representations to be made. Moreover in the present case, in which the Secretary of State had designated the relevant area as an Enterprise Zone with the effect that planning permission was deemed to have been granted for any form of development, no application for permission had to be made. But in any event, with the rapid spread of the availability of cable television in urban areas, interference of this kind is likely to become less and less important; and it should not be forgotten that satellite television is also available. In the present case, the problem was solved in the end by the introduction by the B.B.C. of a new relay station, though not until after a substantial lapse of time.

For these reasons I would dismiss the appeal of the plaintiffs in the first action on this issue.

Right to sue in Private Nuisance

I turn next to the question of the right to sue in private nuisance. In the two cases now under appeal before your Lordships' House, one of which relates to interference with television signals and the other to the generation of dust from the construction of a road, the plaintiffs consist in each case of a substantial group of local people. Moreover they are not restricted to householders who have the exclusive right to possess the places where they live, whether as freeholders or tenants, or even as licensees. They include people with whom householders share their homes, for example as wives or husbands or partners, or as children or other relatives. All of these people are claiming damages in private nuisance, by reason of interference with their television viewing or by reason of excessive dust.

Judge Havery held that the right to sue in private nuisance did not extend to include so wide a class of plaintiffs, but was limited to those with a right to exclusive possession of the relevant property. His decision on this point was however reversed by the Court of Appeal who, in the judgment delivered by Pill L.J., held (see [1996] 2 W.L.R. 348, 365):

> "A substantial link between the person enjoying the use and the land on which he or she is enjoying it is essential but, in my judgment, occupation of property, as a home, does confer upon the occupant a capacity to sue in private nuisance."

Against that decision, the defendants in both actions now appeal to your Lordships' House.

The basic position is, in my opinion, most clearly expressed in Professor Newark's classic article on *The Boundaries of Nuisance* in (1949) 65 L.Q.R. 480, when he stated (at p. 482) that the essence of nuisance was that "it was a tort to land. Or to be more accurate it was a tort directed against the plaintiff's enjoyment of rights over land. . . " The historical origin of the tort lay in the fact that (see p. 481):

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

Later, when distinguishing cases of personal injury, he stated (at pp. 488-489):

> "In true cases of nuisance the interest of the plaintiff which is invaded is not the interest of bodily security but the interest of liberty to exercise rights over land in the amplest manner. A sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them taking their ease in their gardens. It is for this reason that the plaintiff in an action for nuisance must show some title to realty."

Finally, he proclaimed four theses which should be nailed to the doors of the Law Courts and defended against all comers. The first was that:

> "The term 'nuisance' is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land."

There are many authoritative statements which bear out this thesis of Professor Newark. I refer in particular to *Sedleigh-Denfield v. O'Callaghan* [1940] AC 880, 902-903, *per* Lord Wright; *Read v. Lyons* [1947] AC 156, 183, *per* Lord Simonds; *Tate & Lyle Ltd. v. Greater London Council* [1983] 2 AC 509, 536-537, *per* Lord Templeman; *Fleming, The Law of Torts*, 8th ed. (1992), p. 416.

Since the tort of nuisance is a tort directed against the plaintiff's enjoyment of his rights over land, an action of private nuisance will usually be brought by the person in actual possession of the land affected, either as the freeholder or tenant of the land in question, or even as a licensee with exclusive possession of the land (see *Newcastle-under-Lyme Corporation v. Wolstanton Ltd.* [1947] Ch. 92, 106-108, *per* Evershed J.); though a reversioner may sue in respect of a nuisance of a sufficiently permanent character to damage his reversion. It was however established, in *Foster v. Warblington Urban District Council* [1906] 1 K.B. 648, that, since jus tertii is not a defence to an action of nuisance, a person who is in exclusive possession of land may sue even though he cannot prove title to it. That case was concerned with a nuisance caused by the discharge of sewage by the defendant council into certain oyster beds. The plaintiff was an oyster merchant who had for many years been in occupation of the oyster beds which had been artificially constructed on the foreshore, which belonged to the lord of the manor. The plaintiff excluded everybody from the oyster beds, and nobody interfered with his occupation of the oyster beds or his removal and sale of oysters from them. It was held by the Court of Appeal that he could sue the defendant Council in nuisance, notwithstanding that he could not prove his title. Stirling L.J. said (at pp. 673-674):

> "I think, therefore, that, as against a private individual, the plaintiff would have a right of action, and I do not think that this case can be governed by the decision in the case of *Corporation of Truro v. Rowe*. There the contest arose between the owners of the foreshore and a person who claimed simply to be availing himself of a public right of fishing. Here the contest arises, in my view, between the person who is in occupation of a portion of the foreshore and a wrongdoer. Whether the plaintiff would be able to resist the claims of the owner of the foreshore, whoever he may be, or the owner of a several fishery, if such fishery exists, or of a member of the public exercising a right of fishery, if there be such a right in the present case, seems to me immaterial for the purposes of this case. . . ."

This decision was followed and applied by Mahon J. in *Paxhaven Holdings Ltd. v. Attorney-General* [1974] 2 N.Z.L.R. 185. He said (at p. 189):

> "In my opinion, however, the matter is clear in principle. In an action for nuisance the defence of jus tertii is excluded, and it is no answer for the respondent to contend in the present case that the nuisance was committed on an area of land mistakenly included in the grant of lease to the appellant from its landlord. De facto possession is sufficient to give the appellant his remedy: *Foster v. Warblington Urban District Council* [1906] 1 K.B. 648."

I have referred to this point at some length because I will have to return to it at a later stage.

Subject to this exception, however, it has for many years been regarded as settled law that a person who has no right in the land cannot sue in private nuisance. For this proposition, it is usual to cite the decision of the Court of Appeal in *Malone v. Laskey* [1907] 2 K.B. 141. In that case, the manager of a company resided in a house as a licensee of the company which employed him. The plaintiff was the manager's wife who lived with her husband in the house. She was injured when a bracket fell from a wall in the house. She claimed damages from the defendants in nuisance and negligence, her claim in nuisance being founded upon an allegation, accepted by the jury, that the fall of the bracket had been caused by vibrations from an engine operating on the defendants' adjoining premises. The Court of Appeal held that she was unable to succeed in her claim in nuisance. Sir Gorell Barnes P. said, at p. 151:

> "Many cases were cited in the course of the argument in which it had been held that actions for nuisance could be maintained where a person's rights of property had been affected by the nuisance, but no authority was cited, nor in my opinion can any principle of law be formulated, to the effect that a person who has no interest in property, no right of occupation in the proper sense of the term, can maintain an action for a nuisance arising from the vibration caused by the working of an engine in an adjoining house. On that point, therefore, I think that the plaintiff fails, and that she has no cause of action in respect of the alleged nuisance."

Fletcher Moulton L.J. said (at pp. 153-154):

> "So far as the plaintiff's case is based upon nuisance, the contention on her behalf appears to me to be supported by no authority. Witherby & Co. were the tenants and occupiers of these premises, and if the premises had been injured or the enjoyment of them interfered with by the vibration it was open to them to take any one of three courses--they might come to the courts for an injunction to stop the vibration, or they might simply have tolerated it, or they might have authorised its continuance either gratuitously or for a valuable consideration. A person in the position of the plaintiff, who was in the premises as a mere licensee, had no right to dictate to Witherby & Co. which course they should take, and they seem to have voluntarily permitted the vibration to continue. Indeed, if it is permissible to conjecture, I have very little doubt that the proximity of the engine was by no means an unmixed evil to them, for it may well have affected the amount of rent paid by them for the premises. But, whether that be so or not, it was a matter entirely for the tenant, and a person who is merely present in the house cannot complain of a nuisance which has in it no element of a public nuisance."

I should add that an alternative claim by the plaintiff in negligence also failed, though that claim would have succeeded today: (see *A.C. Billings & Sons Ltd. v. Riden* [1958] AC 240).

The decision in *Malone v. Laskey* on nuisance has since been followed in many cases, of which notable examples are *Cunard v. Antifyre Ltd.* [1933] 1 K.B. 551 and *Oldham v. Lawson (No. 1)* [1976] V.R. 654. Recently, however, the Court of Appeal departed from this line of authority in *Khorasandjian v. Bush* [1993] QB 727, a case which I must examine with some care.

The plaintiff, a young girl who at the time of the appeal was 18, had formed a friendship with the defendant, then a man of 28. After a time the friendship broke down and the plaintiff decided that she would have no more to do with the defendant, but the defendant found this impossible to accept. There followed a catalogue of complaints against the defendant, including assaults, threats of violence, and pestering the plaintiff at her parents' home where she lived. As a result of the defendant's threats and abusive behaviour he spent some time in prison. An injunction was granted restraining the defendant from various forms of activity directed at the plaintiff, and this included an order restraining him from "harassing, pestering or communicating with" the plaintiff. The question before the Court of Appeal was whether the judge had jurisdiction to grant such an injunction, in relation to telephone calls made to the plaintiff at her parents' home. The home was the property of the plaintiff's mother, and it was recognised that her mother could complain of persistent and unwanted telephone calls made to her; but it was submitted that the plaintiff, as a mere licensee in her mother's house, could not invoke the tort of private nuisance to complain of unwanted and harassing telephone calls made to her in her mother's home. The majority of the Court of Appeal (Peter Gibson J. dissenting) rejected this submission, relying on the decision of the Appellate Division of the Alberta Supreme Court in *Motherwell v. Motherwell* (1976) 73 D.L.R. (3d) 62. In that case, the Appellate Division not only recognised that the legal owner of property could obtain an injunction, on the ground of private nuisance, to restrain persistent harassment by unwanted telephone calls to his home, but also that the same remedy was open to his wife who had no interest in the property. In the Court of Appeal Peter Gibson J. dissented on the ground that it was wrong in principle that a mere licensee or someone without any interest in, or right to occupy, the relevant land should be able to sue in private nuisance.

It is necessary therefore to consider the basis of the decision in *Motherwell v. Motherwell* that a wife, who has no interest in the matrimonial home where she lives, is nevertheless able to sue in private nuisance in respect of interference with her enjoyment of that home. The case was concerned with a claim for an injunction against the defendant, who was the daughter of one of the plaintiffs, the other two plaintiffs being her brother and sister-in-law. The main ground of the complaint against the defendant was that, as a result of a paranoid condition from which she suffered which produced in her the conviction that her sister-in-law and her father's housekeeper were inflaming her brother and her father against her, she persistently made a very large number of telephone calls to her brother's and her father's homes, in which she abused her sister-in-law and the housekeeper. The Appellate Division of the Alberta Supreme Court, in a judgment delivered by Clement J.A., held that not only could her father and brother, as householders, obtain an injunction against the defendant to restrain this activity as a private nuisance, but so also could her sister-in-law although she had no interest in her husband's property. Clement J.A. said, at p. 78:

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

This conclusion was very largely based on the decision of the Court of Appeal in *Foster v. Warblington U.D.C.* [1906] 1 K.B. 648, which Clement J.A. understood to establish a distinction between "one who is 'merely present'" and "occupancy of a substantial nature", and that in the latter case the occupier was entitled to sue in private nuisance. However *Foster* does not in my opinion provide authority for the proposition that a person in the position of a mere licensee, such as a wife or husband in her or his spouse's house, is entitled to sue in that action. This misunderstanding must, I fear, undermine the authority of *Motherwell* on this point; and in so far as the decision of the Court of Appeal in *Khorasandjian v. Bush* is founded upon *Motherwell* it is likewise undermined.

But I must go further. If a plaintiff, such as the daughter of the householder in *Khorasandjian v. Bush*, is harassed by abusive telephone calls, the gravamen of the complaint lies in the harassment which is just as much an abuse, or indeed an invasion of her privacy, whether she is pestered in this way in her mother's or her husband's house, or she is staying with a friend, or is at her place of work, or even in her car with a mobile phone. In truth, what the Court of Appeal appears to have been doing was to exploit the law of private nuisance in order to create by the back door a tort of harassment which was only partially effective in that it was artificially limited to harassment which takes place in her home. I myself do not consider that this is a satisfactory manner in which to develop the law, especially when, as in the case in question, the step so taken was inconsistent with another decision of the Court of Appeal, viz. *Malone v. Laskey*, by which the court was bound. In any event, a tort of harassment has now received statutory recognition: see the Protection from Harassment Act 1997. We are therefore no longer troubled with the question whether the common law should be developed to provide such a remedy. For these reasons, I do not consider that any assistance can be derived from *Khorasandjian v. Bush* by the plaintiffs in the present appeals.

It follows that, on the authorities as they stand, an action in private nuisance will only lie at the suit of a person who has a right to the land affected. Ordinarily, such a person can only sue if he has the right to exclusive possession of the land, such as a freeholder or tenant in possession, or even a licensee with exclusive possession. Exceptionally however, as *Foster* shows, this category may include a person in actual possession who has no right to be there; and in any event a reversioner can sue in so far his reversionary interest is affected. But a mere licensee on the land has no right to sue.

The question therefore arises whether your Lordships should be persuaded to depart from established principle, and recognise such a right in others who are no more than mere licensees on the land. At the heart of this question lies a more fundamental question, which relates to the scope of the law of private nuisance. Here I wish to draw attention to the fact that although, in the past, damages for personal injury have been recovered at least in actions of public nuisance, there is now developing a school of thought that the appropriate remedy for such claims as these should lie in our now fully developed law of negligence, and that personal injury claims should be altogether excluded from the domain of nuisance. The most forthright proponent of this approach has been Professor Newark, in his article in (1949) 65 L.Q.R. 480 from which I have already quoted. Furthermore, it is now being suggested that claims in respect of physical damage to the land should also be excluded from private nuisance: see, e.g., the article by Mr. Conor Gearty on *The Place of Private Nuisance in a Modern Law of Torts* in [1989] C.L.J. 214. In any event, it is right for present purposes to regard the typical cases of private nuisance as being those concerned with interference with the enjoyment of land and, as such, generally actionable only by a person with a right in the land. Characteristic examples of cases of this kind are those concerned with noise, vibrations, noxious smells and the like. The two appeals with which your Lordships are here concerned arise from actions of this character.

For private nuisances of this kind, the primary remedy is in most cases an injunction, which is sought to bring the nuisance to an end, and in most cases should swiftly achieve that objective. The right to bring such proceedings is, as the law stands, ordinarily vested in the person who has exclusive possession of the land. He or she is the person who will sue, if it is necessary to do so. Moreover he or she can, if thought appropriate, reach an agreement with the person creating the nuisance, either that it may continue for a certain period of time, possibly on the payment of a sum of money, or that it shall cease, again perhaps on certain terms including the time within which the cessation will take place. The former may well occur when an agreement is reached between neighbours about the circumstances in which one of them may carry out major repairs to his house which may affect the other's enjoyment of his property. An agreement of this kind was expressly contemplated by Fletcher Moulton L.J. in his judgment in *Malone v. Laskey* [1907] 2 K.B. 141, 153. But the efficacy of arrangements such as these depends upon the existence of an identifiable person with whom the creator of the nuisance can deal for this purpose. If anybody who lived in the relevant property as a home had the right to sue, sensible arrangements such as these might in some cases no longer be practicable.

Moreover, any such departure from the established law on this subject, such as that adopted by the Court of Appeal in the present case, faces the problem of defining the category of persons who would have the right to sue. The Court of Appeal adopted the not easily identifiable category of those who have a "substantial link" with the land, regarding a person who occupied the premises "as a home" as having a sufficient link for this purpose. But who is to be included in this category? It was plainly intended to include husbands and wives, or partners, and their children, and even other relatives living with them. But is the category also to include the lodger upstairs, or the au pair girl or resident nurse caring for an invalid who makes her home in the house while she works there? If the latter, it seems strange that the category should not extend to include places where people work as well as places where they live, where nuisances such as noise can be just as unpleasant or distracting. In any event, the extension of the tort in this way would transform it from a tort to land into a tort to the person, in which damages could be recovered in respect of something less serious than personal injury and the criteria for liability were founded not upon negligence but upon striking a balance between the interests of neighbours in the use of their land. This is, in my opinion, not an acceptable way in which to develop the law.

It was suggested in the course of argument that at least the spouse of a husband or wife who, for example as freeholder or tenant, had exclusive possession of the matrimonial home should be entitled to sue in private nuisance. For the purposes of this submission, your Lordships were referred to the relevant legislation, notably the Matrimonial Homes Act 1983 and the Family Law Act 1996. I do not however consider it necessary to go through the statutory provisions. As I understand the position, it is as follows. If under the relevant legislation a spouse becomes entitled to possession of the matrimonial home or part of it, there is no reason why he or she should not be able to sue in private nuisance in the ordinary way. But I do not see how a spouse who has no interest in the matrimonial home has, simply by virtue of his or her cohabiting in the matrimonial home with his or her wife or husband whose freehold or leasehold property it is, a right to sue. No distinction can sensibly be drawn between such spouses and other co-habitees in the home, such as children, or grandparents. Nor do I see any great disadvantage flowing from this state of affairs. If a nuisance should occur, then the spouse who has an interest in the property can bring the necessary proceedings to bring the nuisance to an end, and can recover any damages in respect of the discomfort or inconvenience caused by the nuisance. Even if he or she is away from home, nowadays the necessary authority to commence proceedings for an injunction can usually be obtained by telephone. Moreover, if the other spouse suffers personal injury, including injury to health, he or she may, like anybody else, be able to recover damages in negligence. The only disadvantage is that the other spouse cannot bring an independent action in private nuisance for damages for discomfort or inconvenience. It follows that, with all respect, I do not feel able to follow the decision on this point by the majority of the Court of Appeal of New Brunswick in *Devon Lumber Co. Ltd. v. MacNeill* (1987) 45 D.L.R. (4th) 300, preferring as I do the dissenting judgment of Rice J.A. in that case.

I should record that your Lordships' attention was drawn to certain American cases cited in the supplement (1988) to the 5th ed. (1984) of *Prosser and Keeton on Torts*, at pp. 621-622, which reveal a division of opinion on this point. I intend no disrespect if I say that I did not derive any assistance from this slender and inconclusive line of authority.

Since preparing this opinion, I have had the opportunity of reading in draft the speech of my noble and learned friend Lord Cooke of Thorndon, and I have noticed his citation of academic authority which supports the view that the right to sue in private nuisance in respect of interference with amenities should no longer be restricted to those who have an interest in the affected land. I would not wish it to be thought that I myself have not consulted the relevant academic writings. I have, of course, done so, as is my usual practice; and it is my practice to refer to those which I have found to be of assistance, but not to refer, critically or otherwise, to those which are not. In the present circumstances, however, I feel driven to say that I found in the academic works which I consulted little more than an assertion of the desirability of extending the right of recovery in the manner favoured by the Court of Appeal in the present case. I have to say (though I say it in no spirit of criticism, because I know full well the limits within which writers of textbooks on major subjects must work) that I have found no analysis of the problem; and, in circumstances such as this, a crumb of analysis is worth a loaf of opinion. Some writers have uncritically commended the decision of the Court of Appeal in *Khorasandjian v. Bush* [1993] QB 727, without reference to the misunderstanding in *Motherwell v. Motherwell* 73 D.L.R. (3d) 62, on which the Court of Appeal relied, or consideration of the undesirability of making a fundamental change to the tort of private nuisance to provide a partial remedy in cases of individual harassment. For these and other reasons, I did not, with all respect, find the stream of academic authority referred to by my noble and learned friend to be of assistance in the present case.

For all these reasons, I can see no good reason to depart from the law on this topic as established in the authorities. I would therefore hold that *Khorasandjian v. Bush* must be overruled in so far as it holds that a mere licensee can sue in private nuisance, and I would allow the appeal or cross-appeal of the defendants in both actions and restore the order of Judge Havery on this issue.

LORD LLOYD OF BERWICK

My Lords,

Since your Lordships are differing from the unanimous decision of the Court of Appeal on one of the two important points for decision in this case, I add a short speech of my own. I find it convenient to begin with the question of locus standi, on which I agree with the valuable judgment of his Honour Judge Richard Havery Q.C.

Private nuisances are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land. In cases (1) and (2) it is the owner, or the occupier with the right to exclusive possession, who is entitled to sue. It has never, so far as I know, been suggested that anyone else can sue, for example, a visitor or a lodger; and the reason is not far to seek. For the basis of the cause of action in cases (1) and (2) is damage to the land itself, whether by encroachment or by direct physical injury.

In the case of encroachment the plaintiff may have a remedy by way of abatement. In other cases he may be entitled to an injunction. But where he claims damages, the measure of damages in cases (1) and (2) will be the diminution in the value of the land. This will usually (though not always) be equal to the cost of reinstatement. The loss resulting from diminution in the value of the land is a loss suffered by the owner or occupier with the exclusive right to possession (as the case may be) or both, since it is they alone who have a proprietary interest, or stake, in the land. So it is they alone who can bring an action to recover the loss.

Mr. Brennan argues that the position is quite different when one comes to the third category of private nuisance, namely, interference with a neighbour's quiet enjoyment of his land. He submits that here the right to bring an action for nuisance is not confined to those with a proprietary interest, but extends to all those who occupy the property as their home. This would include not only the wife and children of the owner, as has been held by the Court of Appeal, but also, as Mr. Brennan argues, a lodger with a contractual right to remain in the house as licensee, or a living-in servant or an au pair girl.

One can see the attraction in this approach. The wife at least, if not the children, should surely be regarded nowadays as sharing the exclusive possession of the home which she occupies, so as to give her an independent right of action. There is also a superficial logic in the approach. Suppose there are two adjoining properties, affected by smoke from a neighbouring factory. One of the properties is occupied by a bachelor, the other is occupied by a married man with two children. If they are all equally affected by the smoke, it would seem to follow that the damages recoverable by the married man and his family should be four times the damages recovered by the bachelor. Many of the textbooks favour this approach. In the current edition of *Clerk & Lindsell On Torts*, para. 18.39, it is said that such a conclusion would affect "a degree of modernisation" in the law, "while freeing it from undue reliance upon the technicalities of land law."

Like, I imagine, all your Lordships, I would be in favour of modernising the law wherever this can be done. But it is one thing to modernise the law by ridding it of unnecessary technicalities; it is another thing to bring about a fundamental change in the nature and scope of a cause of action. It has been said that an actionable nuisance is incapable of exact definition. But the essence of private nuisance is easy enough to identify, and it is the same in all three classes of private nuisance, namely, interference with land or the enjoyment of land. In the case of nuisances within class (1) or (2) the measure of damages is, as I have said, the diminution in the value of the land. Exactly the same should be true of nuisances within class (3). There is no difference of principle. The effect of smoke from a neighbouring factory is to reduce the value of the land. There may be no diminution in the market value. But there will certainly be loss of amenity value so long as the nuisance lasts. If that be the right approach, then the reduction in amenity value is the same whether the land is occupied by the family man or the bachelor.

If the occupier of land suffers personal injury as a result of inhaling the smoke, he may have a cause of action in negligence. But he does not have a cause of action in nuisance for his *personal* injury, nor for interference with his *personal* enjoyment. It follows that the quantum of damages in private nuisance does not depend on the number of those enjoying the land in question. It also follows that the only persons entitled to sue for loss in amenity value of the land are the owner or the occupier with the right to exclusive possession.

Damages for loss of amenity value cannot be assessed mathematically. But this does not mean that such damages cannot be awarded: see *Ruxley Electronics Ltd. v. Forsyth* [1996] AC 344 *per* Lord Mustill at 360-361 and Lord Lloyd of Berwick at 374.

It was said that confining the right to sue would cause inconvenience. There might be a case, for example, where the owner was unwilling to bring proceedings because he was less sensitive to smoke than other members of his family. I find it difficult to visualise such a case in practice. In any event the inconvenience, such as it would be, does not justify a departure from principle.

As for authority, one need look no further than the dictum of Lord Simonds in *Read v. J. Lyons & Co. Ltd.* [1947] AC 156 at 183:

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

No doubt Lord Simonds will have had in mind the decision of the Court of Appeal in *Malone v. Laskey* [1907] 2 K.B. 141. There the plaintiff was injured by a falling bracket in the lavatory, caused by vibrations from the defendants' engine next door. The plaintiff occupied the house as her home, but neither she nor her husband had any proprietary interest in the house. They were mere licensees. The plaintiff sued in nuisance and negligence. As to nuisance, Sir Gorell Barnes P. said, at p. 151:

> "The main question, however, on this part of the case is whether the plaintiff can maintain this action on the ground of vibration causing the damage complained of, and in my opinion the plaintiff has no cause of action upon that ground. Many cases were cited in the course of the argument in which it had been held that actions for nuisance could be maintained where a person's rights of property had been affected by the nuisance, but no authority was cited, nor in my opinion can any principle of law be formulated, to the effect that a person who has no interest in property, no right of occupation in the proper sense of the term, can maintain an action for a nuisance arising from the vibration caused by the working of an engine in an adjoining house."

If *Malone v. Laskey* was correctly decided, the decision below cannot stand.

But the Court of Appeal evidently felt free to depart from *Malone v. Laskey* in the light of the intervening decision of the Court of Appeal in *Khorasandjian v. Bush* [1993] QB 727. In the latter case, the daughter of the house was being pestered and threatened by unwanted telephone calls. Dillon L.J., giving the majority judgment, held that she had a cause of action in private nuisance. He regarded it as:

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

As for *Malone v. Laskey*, Dillon L.J. added:

> "The court has at times to reconsider earlier decisions in the light of changed social conditions . . ."

Dillon L.J. was influenced by a decision of the Appellate Division of the Supreme Court of Alberta in *Motherwell v. Motherwell* (1976) 73 D.L.R. (3d) 62. In that case it was the wife who was being harassed by unwanted telephone calls. Clement J.A., at p. 78, said:

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

Clement J.A. distinguished *Malone v. Laskey* on the ground that the plaintiff in that case and her husband were mere licensees. He relied on *Foster v. Warblington Urban District Council* [1906] 1 K.B. 648 for the proposition that "substantial occupation" is enough to found an action in private nuisance.

I regret that I cannot agree with Clement J.A.'s reasoning. *Foster v. Warblington Urban District Council* was decided on the basis that the plaintiff's occupation was such that he had exclusive right to possession. As Judge Havery observed, there is no half-way house between *Foster v. Warblington Urban District Council* and *Malone v. Laskey*. Indeed, it would have been surprising if there were, since both cases were decided within a year of each other, and Fletcher Moulton L.J. was party to both decisions. It may be that *Motherwell v. Motherwell* could have been supported on the grounds that in Canadian law there is a cause of action for invasion of privacy. But in so far as the case was decided in private nuisance it does not represent the law of England.

Judge Havery found himself in the awkward position of having to reconcile two irreconcilable decisions of the Court of Appeal in *Malone v. Laskey* and *Khorasandjian v. Bush*. He did so by suggesting that *Khorasandjian v. Bush* had extended the law of private nuisance to cover cases of harassment. Your Lordships are free to express a preference.

I can well understand Dillon L.J.'s concern to find a remedy for the wife or daughter who suffers from harassment on the telephone,

whether at home or elsewhere. But to allow them a remedy in private nuisance would not just be to extend the existing law. It would not just be to get rid of an unnecessary technicality. It would be to change the whole basis of the cause of action. For the reasons given by Peter Gibson L.J. in his dissenting judgment in *Khorasandjian v. Bush*, with which I agree, I would hold that that case was wrongly decided, and should be overruled. This removes an essential plank on which the reasoning of the Court of Appeal in the present case is based.

The only other authority I would mention is *Bone v. Seale* [1975] 1 W.L.R. 797. I refer to it because it illustrates and confirms that the right to sue in private nuisance is linked to the correct measure of damages. The facts of *Bone v. Seale* were that the defendant was a pig farmer. The plaintiffs were the owners and occupiers of two adjoining properties. They claimed damages for nuisance by smell. The judge awarded over £6,000. to each of the plaintiffs. The Court of Appeal reduced the sum to £1,000. The case is interesting because damages were awarded on a lump sum basis for loss of amenity over twelve years, there being no evidence of any diminution in market value of either of the two adjoining properties. Stephenson and Scarman L.JJ. suggested, very tentatively, that there might be an analogy with loss of amenity in personal injuries cases. But this was only for the purpose of showing that the sum awarded by the judge was much too high. There was no hint that the damages should vary with the number of those occupying the houses as their home. The damages were assessed, so to speak, per stirpes and not per capita.

At the end of his judgment on this part of the present case Pill L.J. at p. 365, said:

> "I regard satisfying the test of occupation of property as a home provides a sufficient link with the property to enable the occupier to sue in private nuisance. It is an application in present-day conditions of the essential character of the test as contemplated by Lord Wright. It appears to me, as it did to Dillon L.J., to be right in principle and to avoid inconsistencies, for example between members of a family, which in this context cannot now be justified."

For the reasons given above, I do not agree with this conclusion. Each member of a family does not have a separate cause of action. There is no more than one potential cause of action for each home. Over a hundred years ago Cotton L.J. said in *Rust v. Victoria Graving Dock Co. and London and St. Katharine Dock Co.* (1887) 36 Ch. D. 113, that at pp. 129-130, damages in nuisance are not to be increased by any subdivision of interests. By the same token damages are not to be increased by any multiplication of plaintiffs. It follows that the proceedings in the instant case were never properly constituted. Instead of the 690 plaintiffs named in the Schedule to the Statement of Claim, there should have been only one plaintiff for each address.

On the first point I would allow the appeal, and answer the question in the same manner as Judge Havery.

I need add very little on the second point, since I agree with the unanimous decision of the Court of Appeal that interference with television reception is not capable of constituting an actionable private nuisance. I lay stress on the word "actionable." For I would not want it to be thought for one moment that I regard television reception as being of little or no moment. The annoyance caused by the erection of Canary Wharf and the consequential interference with television reception must have been very considerable. But unfortunately the law does not always afford a remedy for every annoyance, however great. The house-owner who has a fine view of the South Downs may find that his neighbour has built so as to obscure his view. But there is no redress, unless, perchance, the neighbour's land was subject to a restrictive covenant in the house-owner's favour. It would be a good example of what in law is called "damnum absque injuria": a loss which the house-owner has undoubtedly suffered, but which gives rise to no infringement of his legal rights. In the absence of a restrictive covenant, there is no legal right to a view. The analogy between a building which interferes with a view and a building which interferes with television reception seems to me, as it did to the Court of Appeal, to be very close.

If one asks the more fundamental question as to why there should be no legal remedy in either case, one is taken back to the observation of Lord Hardwicke L.C. in *Attorney-General v. Doughty* (1752) 2 Ves. Sen. 453:

> "I know no general rule of common law, which warrants that, or says, that building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns; and I must grant injunctions to all the new buildings in this town . . ."

In *Dalton v. Angus* (1881) 6 App.Cas. 740 at 824, Lord Blackburn put it fairly and squarely on grounds of policy:

> "I think this decision, that a right of prospect is not acquired by prescription, shows that, whilst on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burthen upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement."

Another argument which Lord Irvine put forward, but did not press, is that the interference with television reception was not due to any activity on the part of the defendants on their land. It was due solely to the existence of the building itself. However, as Hardie Boys J. pointed out in *Bank of New Zealand v. Greenwood* [1984] 1 N.Z.L.R. 525, nuisance does not depend in every case on an activity, although it usually does. It may arise from a mere state of affairs on a man's land which he allows to continue. *Leakey v. National Trust* [1980] QB 485 is a good example. So I would not decide the case on the ground that interference with the plaintiffs' television reception did not involve any activity on the defendants' part.

If further precision is needed in answering the question why the plaintiffs have no legal redress in nuisance, it could be, as my noble and learned friend Lord Goff has suggested, because there is nothing emanating from the defendants' land in the present case. The eminently sensible conclusion reached in *Bank of New Zealand v. Greenwood* might not be easy to reconcile with this approach. So that case may go to the limit of the law of nuisance. But the facts were most unusual, as Hardie Boys J. pointed out at p. 535, and every case depends on its own particular facts. This is especially true in the field of nuisance.

LORD HOFFMANN

My Lords,

1. Canary Wharf

Canary Wharf is part of the old West India Docks which straddle the neck of land formed where the Thames doubles back on itself between Limehouse Reach and Blackwall Reach. That part of the river used to be a thriving port. Thousands of people who worked in the docks or on the ships lived nearby in Limehouse and Poplar to the north and the Isle of Dogs to the south. But container transport and motorways made the London docks obsolete. By the mid-seventies they had largely been abandoned. The land along the river lay derelict.

The Local Government, Planning and Land Act 1980 contained provisions designed to encourage the regeneration of such areas. It provided that if the Secretary of State was of opinion that it was "expedient in the national interest," he could designate an area as an "urban development area" and establish an "urban development corporation" for the purposes of regenerating the area: sections 134(1) and 135(1). The Act listed the ways in which the regeneration of the area was to be achieved:

> "bringing land and buildings into effective use, encouraging the development of existing and new industry and commerce, creating an attractive environment and ensuring that housing and social facilities are available to encourage people to live and work in the area": (section 136(2)).

In 1981 the Secretary of State designated the London docklands an urban development area and established the London Docklands Development Corporation ("LDDC").

In order to encourage development by the private sector, the Act (by section 149) enabled the Secretary of State to override the normal requirements for planning permission contained in the Town and Country Planning Act 1971. Under those powers, he approved a scheme adopted by the LDDC for designating the Isle of Dogs, including Canary Wharf, as an Enterprise Zone. The scheme provided that (subject to certain exceptions) all land in the zone was deemed to have been granted planning permission for any kind of development. Anyone could build what they liked. The only relevant exception was that a building over 120 feet high could be erected only by agreement with the LDDC.

In July 1986 the LDDC concluded an agreement with a company called Olympia and York Canary Wharf Ltd. (now called Canary Wharf Ltd.) under which it would construct a group of very large office buildings at Canary Wharf and the LDDC would provide some of the necessary infrastructure. The building in the centre of the group was built first. It is over 800 feet tall and clad in stainless steel. The LDDC, for its part, employed contractors to construct a new road giving access from central London called the Limehouse Link. Nearly a mile of it is underground. A great deal of excavation and earth moving was necessary and it took nearly four years to build.

2. The Local Residents

Before the 1980 Act it was most unlikely that planning permission would have been granted for a development on the scale of Canary Wharf without a public inquiry under the Town and Country Planning Act 1971. Local residents would have had the opportunity to go before an inspector and put forward their objections. In an Enterprise Zone, the procedure for the protection of neighbouring interests was very limited. Before adopting the scheme, the LDDC was obliged to consider representations: (Sched. 32, para. 2(3).) If their representations were rejected, the residents could lobby their Members of Parliament to try to have the scheme annulled by negative resolution (Schedule 32, paragraph 5(3).) In all other respects, their interests were liable to be overridden by the Secretary of State's view of the national interest and the LDDC's view of the best way to achieve its statutory objectives.

The local residents complain that the construction of the Canary Wharf Tower and the Limehouse Link Road caused them serious disturbance and inconvenience. Firstly, the construction of the road caused a great deal of dust in the air which settled upon their homes and gardens. If they opened their windows, everything in the room was soon covered in a layer of dust. If they hung out the washing in the garden it became dirty again. Secondly, the Canary Wharf Tower interfered with television reception. The great metal-clad tower stood between the BBC transmitter at Crystal Palace in south London and a swathe of houses, mainly in Poplar to the north of Canary Wharf, which lay in the building's electromagnetic shadow. The effect was that many houses could not receive television at all. In others the quality of the signal was impaired. This state of affairs continued until April 1991, when the BBC brought a relay transmitter into service. Between July 1991 and August 1992 the residents had their aerials aligned to the new transmitter and the problem was thereby solved.

3. The Actions

On 16 December 1993 a large number of residents in the vicinity of Canary Wharf commenced two separate actions; one against Canary Wharf Ltd., the owner of the office tower, and the other against the LDDC. The first action, which I shall call the television action, complained of interference with television reception and was based on negligence and nuisance. The second action, which I shall call the dust action,

complained of damage and annoyance caused by dust and was based on negligence, nuisance and the rule in *Rylands v. Fletcher*.

The plaintiffs in the television action numbered 690 and those in the dust action 513 [though some have since discontinued]. Some were the owners or tenants of houses. In some cases, husbands and wives were joint owners or joint tenants. But many of the plaintiffs had no proprietary interests in land at all. They were wives living in houses owned by or let to their husbands, or children living with their parents, or relations or lodgers having the use of a room.

On 27 June 1994 His Honour Judge Fox-Andrews Q.C. made orders in both actions for the trial of certain preliminary issues. Two of these are the subject of appeals before your Lordships. The first, which arises in both actions, is whether a plaintiff in an action for private nuisance need have an interest (and if so, what interest) in property. The second is whether the alleged interference with television was capable of constituting an actionable nuisance. His Honour Judge Richard Havery Q.C. decided, first, that a plaintiff in an action for private nuisance must have a right to exclusive possession of the property to which the nuisance is alleged to have been caused and secondly, that the interference with television was capable of constituting an actionable nuisance. The Court of Appeal disagreed on both points. It allowed an appeal by the plaintiffs in the dust action and declared that a plaintiff need not have an interest in property. He could sue in nuisance if he occupied the property in question as a home. It allowed an appeal by the defendant in the television action and declared that the interference with television alleged in this case was not capable of constituting an actionable nuisance

4. The Right to Sue

In the dust action it is not disputed that, in principle, activities which cause dust to be deposited on the plaintiff's property can constitute an actionable nuisance. The question raised by the preliminary issue is: who can sue? In order to answer this question, it is necessary to decide what exactly he is suing for. Since these questions are fundamental to the scope of the tort of nuisance, I shall deal with them first.

Up to about twenty years ago, no one would have had the slightest doubt about who could sue. Nuisance is a tort against land, including interests in land such as easements and profits. A plaintiff must therefore have an interest in the land affected by the nuisance. In *Sedleigh-Denfield v. O'Callaghan* [1940] AC 880, Lord Wright said:

> "I do not attempt any exhaustive definition of that cause of action. But it has never lost its essential character which was derived from its prototype, the assize of nuisance, and was maintained under the form of action on the case for nuisance. The assize of nuisance was a real action supplementary to the assize of novel disseisin. The latter was devised to protect the plaintiff's seisin of his land, and the former aimed at vindicating the plaintiff's right to the use and enjoyment of his land. The assize became early superseded by the less formal procedure of an action on the case for nuisance, which lay for damages. This action was less limited in its scope, because whereas the assize was by a freeholder against a freeholder, the action lay also between possessors or occupiers of land. With possibly certain anomalous exceptions, not here material, possession or occupation is still the test."

In speaking of "possession or occupation" Lord Wright was in my view intending to refer both to a right to possession based upon (or derived through) title and to de facto occupation. In each case the person in possession is entitled to sue in trespass and in nuisance. An example of an action for nuisance by a de facto possessor is *Foster v. Warblington Urban District Council* [1906] 1 K.B. 648 in which the plaintiff sued the council for discharging sewage so as to pollute his oyster ponds on the foreshore. He had some difficulty in proving any title to the soil but Vaughan Williams L.J. said:

> "But, even if title could not be proved, in my judgment there has been such an occupation of these beds for such a length of time--not that the length of time is really material for this purpose--as would entitle the plaintiff as against the defendants, who have no interest in the foreshore, to sustain this action for the injury which is alleged has been done by the sewage to his oysters so kept in those beds."

Thus even a possession which is wrongful against the true owner can found an action for trespass or nuisance against someone else: *Asher v. Whitlock* (1865) L.R. 1 Q.B. 1. In each case, however, the plaintiff (or joint plaintiffs) must be enjoying or asserting exclusive possession of the land: see *per* Blackburn J. in *Allan v. The Overseers of Liverpool* (1874) L.R. 9 Q.B. 180. Exclusive possession distinguishes an occupier who may in due course acquire title under the Limitation Act 1980 from a mere trespasser. It distinguishes a tenant holding a leasehold estate from a mere licensee. Exclusive possession de jure or de facto, now or in the future, is the bedrock of English land law. As it is said in *Cheshire and Burn's Modern Law of Real Property* 15th ed., (1994) at p. 26:

> "All titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title, and it may be said without undue exaggeration that so far as land is concerned there is in England no law of ownership, but only a law of possession."

The leading case on the need for exclusive possession to found an action in nuisance is *Malone v. Laskey* [1907] 2 K.B. 141. Mrs Malone lived in a house belonging to her husband's employer. He was probably a service occupier. She was injured by the falling of a bracket supporting a water tank which had been dislodged by vibrations caused by an engine worked by the defendants on the adjoining premises. She sued in negligence and nuisance and lost on both counts. Today she would have had a cause of action in negligence. The Court of Appeal applied the restricted doctrine of the duty of care which prevailed before *Donoghue v. Stevenson* [1932] AC 562. In *A. C. Billings & Sons Ltd. v. Riden* [1958] AC 240 the decision on this point was overruled. On nuisance, however, her claim was rejected because she had no interest in the property. She was the licensee of her husband or his employer.

Nothing has since been said in your Lordships' House to cast any doubt upon this part of the decision. On the contrary, in *Read v. J. Lyons & Co. Ltd.* [1947] AC 156, 183, Lord Simonds made the same point in drawing attention to the distinction between negligence and nuisance. Negligence was based on fault but protected interests of many kinds. Liability in nuisance was strict but protected only interests in land:

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

In *Metropolitan Properties v. Jones* [1939] 2 All E.R. 202 Goddard L.J., sitting at first instance, purported to follow *Malone v. Laskey* [1907] 2 K.B. 141. The defendant had been tenant of one of the plaintiffs' flats but had assigned his lease. The assignee disappeared and the tenant, who as original lessee remained liable for the rent, went back into possession. In response to an action for rent, he counterclaimed for nuisance constituted by the noise from a motor on the plaintiffs' premises which operated the central heating system. Goddard L.J. said that he would have awarded the defendant £21 damages but dismissed the counterclaim because he had no title. I think that this was wrong. The judge took *Malone v. Laskey* [1907] 2 K.B. 141 too far. The defendant was de facto in exclusive possession. That was enough to entitle him to sue. The fact that the missing assignee might have had a better claim to possession was no defence.

But the concept of nuisance as a tort against land has recently been questioned by the decision of the Court of Appeal in *Khorasandjian v. Bush* [1993] QB 727. The plaintiff was a young woman aged 18 living with her mother. The defendant was a former friend who pestered her with telephone calls. In the ordinary sense of the word, he was making a nuisance of himself. The problem was to find a cause of action which could justify the grant of an injunction to stop him. A majority of the Court of Appeal (Peter Gibson J. dissenting) held that she was entitled to sue in nuisance. Dillon L.J. brushed *Malone v. Laskey* [1907] 2 K.B. 141 aside. He said:

> "To my mind, it is ridiculous if in this present age the law is that the making of deliberately harassing and pestering telephone calls to a person is only actionable in the civil courts if the recipient of the calls happens to have the freehold or a leasehold proprietary interest in the premises in which he or she has received the calls."

This reasoning, which is echoed in some academic writing and the Canadian case of *Motherwell v. Motherwell* (1976) 73 D.L.R. (3rd) 62 which the Court of Appeal followed, is based upon a fundamental mistake about the remedy which the tort of nuisance provides. It arises, I think, out of a misapplication of an important distinction drawn by Lord Westbury L.C. in *St. Helen's Smelting Co. v. Tipping* 11 H.L.C. 642, 650. In that case, the plaintiff bought a 1300 acre estate in Lancashire. He complained that his hedges, trees and shrubs were being damaged by pollution from the defendants' copper smelting works a mile and a half away. The defendants said that the area was full of factories and chemical works and that if the plaintiff was entitled to complain, industry would be brought to a halt. Lord Westbury said:

> "My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply in circumstances the immediate result of which is sensible injury to the value of the property."

St. Helen's Smelting Co. v. Tipping was a landmark case. It drew the line beyond which rural and landed England did not have to accept external costs imposed upon it by industrial pollution. But there has been, I think, some inclination to treat it as having divided nuisance into two torts, one of causing "material injury to the property," such as flooding or depositing poisonous substances on crops, and the other of causing "sensible personal discomfort" such as excessive noise or smells. In cases in the first category, there has never been any doubt that the remedy, whether by way of injunction or damages, is for causing damage to the land. It is plain that in such a case only a person with an interest in the land can sue. But there has been a tendency to regard cases in the second category as actions in respect of the discomfort or even personal injury which the plaintiff has suffered or is likely to suffer. On this view, the plaintiff's interest in the land becomes no more than a qualifying condition or springboard which entitles him to sue for injury to himself.

If this were the case, the need for the plaintiff to have an interest in land would indeed be hard to justify. The passage I have quoted from Dillon L.J. is an eloquent statement of the reasons. But the premise is quite mistaken. In the case of nuisances "productive of sensible personal discomfort," the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered "sensible" injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to compensation.

I cannot therefore agree with Stephenson L.J. in *Bone v. Seale* [1976] 1 W.L.R. 797 when he said that damages in an action for nuisance caused by smells from a pigsty should be fixed by analogy with damages for loss of amenity in an action for personal injury. In that case it was

said that "efforts to prove diminution in the value of the property as a result of this persistent smell over the years failed." I take this to mean that it had not been shown that the property would sell for less. But diminution in capital value is not the only measure of loss. It seems to me that the value of the right to occupy a house which smells of pigs must be less than the value of the occupation of an equivalent house which does not. In the case of a transitory nuisance, the capital value of the property will seldom be reduced. But the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted. To some extent this involves placing a value upon intangibles. But estates agents do this all the time. The law of damages is sufficiently flexible to be able to do justice in such a case: compare *Ruxley Electronics and Construction Ltd. v. Forsyth* [1996] AC 344.

There may of course be cases in which, in addition to damages for injury to his land, the owner or occupier is able to recover damages for consequential loss. He will, for example, be entitled to loss of profits which are the result of inability to use the land for the purposes of his business. Or if the land is flooded, he may also be able to recover damages for chattels or livestock lost as a result. But inconvenience, annoyance or even illness suffered by persons on land as a result of smells or dust are not damage consequential upon the injury to the land. It is rather the other way about: the injury to the amenity of the land consists in the fact that the persons upon it are liable to suffer inconvenience, annoyance or illness.

It follows that damages for nuisance recoverable by the possessor or occupier may be affected by the size, commodiousness and value of his property but cannot be increased merely because more people are in occupation and therefore suffer greater collective discomfort. If more than one person has an interest in the property, the damages will have to be divided among them. If there are joint owners, they will be jointly entitled to the damages. If there is a reversioner and the nuisance has caused damage of a permanent character which affects the reversion, he will be entitled to damages according to his interest. But the damages cannot be increased by the fact that the interests in the land are divided; still less according to the number of persons residing on the premises. As Cotton L.J. said in *Rust v. Victoria Graving Dock Co.* (1887) 36 Ch. D.113, 130:

> ". . . where there are divided interests in land the amount of damages to be paid by the defendants must not be increased in consequence of that subdivision of interests."

Once it is understood that nuisances "productive of sensible personal discomfort" do not constitute a separate tort of causing discomfort to people but are merely part of a single tort of causing injury to land, the rule that the plaintiff must have an interest in the land falls into place as logical and, indeed, inevitable.

Is there any reason of policy why the rule should be abandoned? Once nuisance has escaped the bounds of being a tort against land, there seems no logic in compromise limitations, such as that proposed by the Court of Appeal in this case, requiring the plaintiff to have been residing on land as his or her home. This was recognised by the Court of Appeal in *Khorasandjian v. Bush* [1993] QB 727 where the injunction applied whether the plaintiff was at home or not. There is a good deal in this case and other writings about the need for the law to adapt to modern social conditions. But the development of the common law should be rational and coherent. It should not distort its principles and create anomalies merely as an expedient to fill a gap.

The perceived gap in *Khorasandjian v. Bush* [1993] QB 727 was the absence of a tort of intentional harassment causing distress without actual bodily or psychiatric illness. This limitation is thought to arise out of cases like *Wilkinson v. Downton* [1897] 2 QB 57 and *Janvier v. Sweeney* [1919] 2 K.B. 316. The law of harassment has now been put on a statutory basis (see the Protection from Harassment Act 1997) and it is unnecessary to consider how the common law might have developed. But as at present advised, I see no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence: see *Hicks v. Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65. The policy considerations are quite different. I do not therefore say that *Khorasandjian v. Bush* [1993] QB 727 was wrongly decided. But it must be seen as a case on intentional harassment, not nuisance.

So far as the claim is for personal injury, it seems to me that the only appropriate cause of action is negligence. It would be anomalous if the rules for recovery of damages under this head were different according as to whether, for example, the plaintiff was at home or at work. It is true, as I have said, that the law of negligence gives no remedy for discomfort or distress which does not result in bodily or psychiatric illness. But this is a matter of general policy and I can see no logic in making an exception for cases in which the discomfort or distress was suffered at home rather than somewhere else.

Finally there is the position of spouses. It is said to be contrary to modern ways of thinking that a wife should not be able to sue for interference with the enjoyment of the matrimonial home merely because she has no proprietary right in the property. To some extent, this argument is based upon the fallacy which I have already discussed, namely that the action in nuisance lies for inconvenience or annoyance caused to people who happen to be in possession or occupation of land. But so far as it is thought desirable that the wife should be able to sue for injury to a proprietary or possessory interest in the home, the answer in my view lies in the law of property, not the law of tort. The courts today will readily assume that a wife has acquired a beneficial interest in the matrimonial home. If so, she will be entitled to sue for damage to that interest. On the other hand, if she has no such interest, I think it would be wrong to create a quasi-proprietary interest only for the purposes of giving her locus standi to sue for nuisance. What would she be suing for? Mr. Brennan Q.C., who appeared for the plaintiffs, drew our attention to the rights conferred upon a wife with no proprietary interest by the Matrimonial Homes Act 1983. The effect of these provisions is that a spouse may, by virtue of an order of the court upon a break-up of the marriage, become entitled to exclusive possession of the home. If so, she will become entitled to sue for nuisance. Until then, her interest is analogous to a contingent reversion. It cannot be affected

by a nuisance which merely damages the amenity of the property while she has no right to possession.

I would therefore allow the appeal of the defendants in the dust case and their cross-appeal in the television case and restore the declaration made on this point by the judge.

5. Interference with television

In the television action, the plaintiffs complain that Canary Wharf Tower has diminished the amenity of their houses by interfering with television reception. In *Bridlington Relay Ltd. v. Yorkshire Electricity Board* [1965] Ch. 436 Buckley J. said, tentatively and obiter:

> "For myself, however, I do not think that it can at present be said that the ability to receive television free from occasional, even if recurrent and severe, electrical interference is so important a part of an ordinary house holder's enjoyment of his property that such interference should be regarded as a legal nuisance, particularly, perhaps, if such interference affects only one of the available alternative programmes."

The learned judge was plainly not laying down a general rule that interference with television can never be an actionable nuisance. In principle I do not see why in an appropriate case it should not. *Bridlington Relay* was a case of alleged interference by electro-magnetic radiation from high tension electric cables. The Court of Appeal left open the question of whether interference of such a kind could be actionable and so would I.

In this case, however, the defendants say that the type of interference alleged, namely by the erection of a building between the plaintiffs' homes and the Crystal Palace transmitter, cannot as a matter of law constitute an actionable nuisance. This is not by virtue of anything peculiar to television. It applies equally to interference with the passage of light or air or radio signals or to the obstruction of a view. The general principle is that at common law anyone may build whatever he likes upon his land. If the effect is to interfere with the light, air or view of his neighbour, that is his misfortune. The owner's right to build can be restrained only by covenant or the acquisition (by grant or prescription) of an easement of light or air for the benefit of windows or apertures on adjoining land.

That such has until now been the law of England seems to me indisputable. A right to an uninterrupted prospect cannot be acquired even by prescription: *Aldred's Case* (1610) 9 Co.Rep 57b. The same is true of a right to the uninterrupted flow of undefined air to a chimney: *Bryant v. Lefever* (1879) 4 C.P.D. 172. In the absence of an easement, there is no right to light. In *Bury v. Pope* (1587) Cro.Eliz. 118 the owner of land was held entitled to erect a house against his neighbour's windows even though they had enjoyed light for over 30 years. Reporting the case, Sir George Croke succinctly noted the ratio decidendi in terms which might have had in mind Canary Wharf: "Nota. Cujus est solum, ejus est summitas usque ad coelum. Temp. Ed. 1."

The circumstances in which this principle should be subject to limitations in favour of neighbours was considered by the House of Lords in *Dalton v. Angus* (1881) 6 App.Cas. 740. By that time it was well-established that a neighbour could prescribe for a right of light which would restrict his neighbour's freedom to build. The Prescription Act 1832 had fixed the period for the acquisition of such an easement at 20 years. As Willes J. pointed out in *Webb v. Bird* (1861) 10 C.B.(N.S.) 268, 285, prescription for an easement of light was anomalous. In the normal case of prescription, the dominant owner will have been doing something for the period of prescription (such as using a footpath) which the servient owner could have stopped. But one cannot stop a neighbour from erecting a building with windows. Nevertheless, they will after 20 years acquire an easement of light. In *Dalton v. Angus* (1881) 6 App.Cas. 740 the House of Lords decided that, in like fashion, the owner of a building could prescribe for an easement of support from neighbouring land. On the other hand, it was well settled that one could not prescribe for a right to an uninterrupted view or to a flow of air otherwise through a defined aperture or channel. Lord Blackburn considered how these cases were to be distinguished. He said that allowing the prescription of a right to a view would impose a burden "on a very large and indefinite area." Rights of light, air and support were strictly a matter between immediate neighbours. The building entitled to support, the windows entitled to light and the apertures entitled to air would be plain and obvious. The restrictions on the freedom of the person erecting the building would be limited and precise.

In the absence of agreement, therefore, the English common law allows the rights of a landowner to build as he pleases to be restricted only in carefully limited cases and then only after the period of prescription has elapsed. In this case there is no claim to an easement of television by prescription. And in any event, on the reasoning in *Dalton v. Angus* (1881) 6 App.Cas. 740 I do not think that such an easement can exist. The extent to which a building may interfere with television reception is far from obvious. Nor is its potential effect limited to immediate neighbours. The number of plaintiffs in the television action is itself enough to demonstrate how large a burden would be imposed on anyone wishing to erect a tall building.

Once again we must consider whether modern conditions require these well established principles to be modified. The common law freedom of an owner to build upon his land has been drastically curtailed by the Town and Country Planning Act 1947 and its successors. It is now in normal cases necessary to obtain planning permission. The power of the planning authority to grant or refuse permission, subject to such conditions as it thinks fit, provides a mechanism for control of the unrestricted right to build which can be used for the protection of people living in the vicinity of a development. In a case such as this, where the development is likely to have an impact upon many people over a large area, the planning system is, I think, is a far more appropriate form of control, from the point of view of both the developer and the public, than enlarging the right to bring actions for nuisance at common law. It enables the issues to be debated before an expert forum at a planning inquiry and gives the developer the advantage of certainty as to what he is entitled to build.

In saying this, I am not suggesting that a grant of planning permission should be a defence to anything which is an actionable nuisance under the existing law. It would, I think, be wrong to allow the private rights of third parties to be taken away by a permission granted by the planning authority to the developer. The Court of Appeal rejected such an argument in this case and the point has not been pursued in your Lordships'

House. But when your Lordships are invited to develop the common law by creating a new right of action against an owner who erects a building upon his land, it is relevant to take into account the existence of other methods by which the interests of the locality can be protected.

In this case, as I mentioned at the beginning of this speech, the normal protection offered to the community by the Town and Country Planning Act was largely removed. Parliament authorised this to be done on the grounds that the national interest required the rapid regeneration of the Docklands urban development area. The plaintiffs may well feel that their personal convenience was temporarily sacrificed to the national interest. But this is not a good enough reason for changing the principles of the law of nuisance which apply throughout the country.

On the one hand, therefore, we have a rule of common law which, absent easements, entitles an owner of land to build what he likes upon his land. It has stood for many centuries. If an exception were to be created for large buildings which interfere with television reception, the developers would be exposed to legal action by an indeterminate number of plaintiffs, each claiming compensation in a relatively modest amount. Defending such actions, whatever their merits or demerits, would hardly be cost-effective. The compensation and legal fees would form an unpredictable additional cost of the building. On the other hand, the plaintiffs will ordinarily have been able to make their complaints at the planning stage of the development and, if necessary, secure whatever conditions were necessary to provide them with an alternative source of television signals. The interference in such a case is not likely to last very long because there is no technical difficulty about the solution. In my view the case for a change in the law is not made out.

I would therefore agree with the Court of Appeal on this point and dismiss the plaintiffs' appeal in the television action.

LORD COOKE OF THORNDON

My Lords,

Having had the privilege of reading in draft the opinions of the other four members of your Lordships' Committee in these cases, I begin my own contribution by respectfully acknowledging that they achieve a major advance in the symmetry of the law of nuisance. Being less persuaded that they strengthen the utility or the justice of this branch of the common law, I am constrained to offer an approach which, although derived from concepts to be found in those opinions, would lead to principles different in some respects. Naturally I am diffident about disagreeing in any respect with the majority of your Lordships, but such assistance as I may be able to give in your deliberations could not consist in mere conformity and deference; and, if the common law of England is to be directed into the restricted path which in this instance the majority prefer, there may be some advantage in bringing out that the choice is in the end a policy one between competing principles.

My Lords, the lineaments of the law of nuisance were established before the age of television and radio, motor transport and aviation, town and country planning, a "crowded island", and a heightened public consciousness of the need to protect the environment. All these are now among the factors falling to be taken into account in evolving the law. It is possible for the courts to cater for such developments because the forms which nuisance may take are protean (*Sedleigh-Denfield v. O'Callaghan* [1940] AC 880, 903, *per* Lord Wright) and nuisance is a term used to cover a wide variety of tortious acts or omissions, and in many negligence in the narrow sense is not essential (*The Wagon Mound (No. 2)* [1967] 1 AC 617, 639, *per* Lord Reid delivering the judgment of the Privy Council). In similar vein Lord Wilberforce delivering the judgment of the Privy Council in *Goldman v. Hargrave* [1967] 1 AC 645, 657, said that "the tort of nuisance, uncertain in its boundary, may comprise a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive."

Further, as to impairment of the enjoyment of land, the governing principle is that of reasonable user--the principle of give and take as between neighbouring occupiers of land (*Cambridge Water Co. Ltd v. Eastern Counties Leather plc.* [1994] 2 AC 264, 299, *per* Lord Goff of Chieveley). The principle may not always conduce to tidiness, but tidiness has not had a high priority in the history of the common law. What has made the law of nuisance a potent instrument of justice throughout the common law world has been largely its flexibility and versatility. The judgment of Hardie Boys J. in the glare case, *Bank of New Zealand v. Greenwood* [1984] 1 N.Z.L.R. 525, appeals to me as an admirable example and I do not share the view that it may overlook that nuisance and negligence are different torts.

In so far as a nuisance consists in material damage to property, it is no doubt generally true, as stated by Cotton L.J. in *Rust v. Graving Dock Co.* (1887) 36 Ch.D. 113, 130, that damages must not be increased by any subdivision of interests. That was a case of flood damage where as to some of the land affected the plaintiff was only a reversioner. But, at least since the speech of Lord Westbury L.C. in *St. Helen's Smelting Co. v. Tipping* (1865) 11 HLCas 642, 650, it has been seen that a different category of nuisance is in issue when, as the Lord Chancellor put it, the action is brought on the ground of sensible personal discomfort, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that injuriously affects the senses or the nerves. Lord Westbury was emphasising that in that category much must depend on the circumstances of the place, as has become familiar doctrine. But just as a distinction has been drawn, as to the conditions of liability, between material physical damage on the one hand and personal discomfort and the like on the other, so a distinction could perfectly logically be drawn between them as to the right to sue. It is striking in this context that, as my noble and learned friend Lord Goff of Chieveley has noted, among the various views put forward about private nuisance is one that it should not apply at all to physical damage to land.

In *Ruxley Electronics and Construction Ltd v. Forsyth* [1996] AC 344 this House approved the award of damages in contract for partial failure to provide a promised amenity. In some of the speeches now being delivered the same concept is rendered as the amenity value

of the land or other property. I venture to appreciate this way of looking at the matter as a valuable insight. In contract the lost benefit is normally recoverable by the promisee; the subject of the rights of third party beneficiaries in contract may arise but is outside the scope of the present discussion. In tort the question "Who may recover for disturbance of enjoyment of the amenity?" is, as I see it, a question to which no one answer, wide or narrow, is inevitably compelled.

Private nuisance is commonly said to be an interference with the enjoyment of land and to be actionable by an occupier. But "occupier" is an expression of varying meanings, as a perusal of legal dictionaries shows. Compare, for instance, *Paterson v. Gas Light and Coke Co.* [1896] 2 Ch. 476, 482; *Regina v. Tao* [1977] Q.B. 141; *Street v. Mountford* [1985] AC 809. In the latter case the expression was used as a neutral one covering either a tenancy or a licence but it was held that, generally speaking, exclusive possession for a fixed or periodic term at a stated rent carries a tenancy. Your Lordships' House does not appear to have been called on hitherto to lay down precisely the meaning to be given to the expression in relation to interference with the amenities of land. There is a dictum by Lord Simonds in *Read v. J. Lyons & Co. Ltd* [1947] AC 156, 183, restricting a lawful claim in nuisance to he who has suffered an invasion of some proprietary or other interest in land; but it was obiter and not focused on interference with amenities. Where interference with an amenity of a home is in issue there is no a priori reason why the expression should not include, and it appears natural that it should include, anyone living there who has been exercising a continuing right to enjoyment of that amenity. Even this would not be exhaustive, as a defendant may not be able to set up the jus tertii against a de facto possessor: see two passages to that effect in *Foster v. Warblington Urban Council* [1906] 1 K.B. 648 quoted respectively by Clement J.A. in *Motherwell v. Motherwell* (1976) 73 D.L.R. (3d) 62, 77-78, and by Lord Goff of Chieveley in the present case. A temporary visitor, however, someone who is "merely present in the house" (a phrase used by Fletcher Moulton L.J. in *Malone v. Laskey* [1907] 2 K.B. 141, 154), would not enjoy occupancy of sufficiently substantial nature.

I cannot avoid adding that it seems to me less than probable that Clement J.A. misunderstood the plain meaning of the passage which he quoted from *Foster*. As I read his judgment, he mentioned *Foster* only as authority for the proposition that substantial de facto occupation may be enough--and the case is indeed authority for that--but his reason for holding that a resident wife had standing was not based on *Foster* but on altogether different and wider considerations relating to the family home.

Malone v. Laskey, a case of personal injury from a falling bracket rather than an interference with amenities, is not directly in point, but it is to be noted that the wife of the subtenant's manager, who had been permitted by the subtenant to live in the premises with her husband, was dismissed by Sir Gorell Barnes P. as a person who had "no right of occupation in the proper sense of the term" and by Fletcher Moulton L.J. as being "merely present." My Lords, whatever the acceptability of those descriptions ninety years ago, I can only agree with the Appellate Division of the Alberta Supreme Court in *Motherwell* at p. 77 that they are "rather light treatment of a wife, at least in today's society where she is no longer considered subservient to her husband." Current statutes give effect to current perceptions by according spouses a special status in respect of the matrimonial home, as by enabling the court to make orders regarding occupation (see in England the Family Law Act 1996, sections 30 and 31). Although such provisions and orders thereunder do not of themselves confer proprietary rights, they support in relation to amenities the force and common sense of the words of Clement J.A. in *Motherwell* at p. 78:

> "Here we have a wife harassed in the matrimonial home. She has a status, a right to live there with her husband and children. I find it absurd to say that her occupancy of the matrimonial home is insufficient to found an action in nuisance."

As between spouses and de facto partners the question whether contributions in money or services give a proprietary equitable interest in a matrimonial home is a notoriously difficult one today, wrestled with throughout the common law world. Nuisance actions would seem better left free of the complication of this side issue.

The status of children living at home is different and perhaps more problematical but, on consideration, I am persuaded by the majority of the Court of Appeal in *Khorasandjian v. Bush* [1993] QB 727 and the weight of North American jurisprudence to the view that they, too, should be entitled to relief for substantial and unlawful interference with the amenities of their home. Internationally the distinct interests of children are increasingly recognised. The United Nations Convention on the Rights of the Child, ratified by the United Kingdom in 1991 and the most widely ratified human rights treaty in history, acknowledges children as fully-fledged beneficiaries of human rights. Article 16 declares inter alia that no child shall be subjected to unlawful interference with his or her home and that the child has the right to the protection of law against such interference. International standards such as this may be taken into account in shaping the common law.

The point just mentioned can be taken further. Article 16 of the Convention on the Rights of the Child adopts some of the language of Article 12 of the Universal Declaration of Human Rights and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). These provisions are aimed, in part, at protecting the home and are construed to give protection against nuisances: see *Arrondelle v. United Kingdom,* Application No. 7889/77 (1982) 26 D.R.5 F. Sett. (aircraft noise) and *Lopez Ostra v. Spain* (1994) 20 E.H.R.R. 277 (fumes and smells from a waste treatment plant). The protection is regarded as going beyond possession or property rights: see *Harris, O'Boyle and Warbrick*, *Law of the European Convention on Human Rights* (1995), p. 319. Again I think that this is a legitimate consideration in support of treating residence as an acceptable basis of standing at common law in the present class of case.

In *Khorasandjian* Dillon and Rose L.JJ. thought that, if the wife of the owner is entitled to sue in respect of harassing telephone calls, the same should apply to a child living at home with her parents. I agree. The persistent ringing of the telephone may be a nuisance in fact to all occupants of the home, not any primary target only, and all members of the family living there should be entitled to redress in law for substantial disturbance of their amenity. It has been recognised in jurisdictions other than England and Canada that continual telephoning to a house may be a nuisance: see for instance *Stoakes v. Brydges* [1958] Q.W.N. 9; *Wiggins v. Moskins Credit Clothing Store* 137 F.Supp. 764 (Car. 1956). I share the disposition to think that harassment by telephone calls or otherwise should also be actionable when it occurs outside the home; but that is surely no reason for denying relief in nuisance when it or any other form of serious disturbance of amenity occurs within the home.

As to the North American cases, in *Motherwell* the relief granted to the plaintiffs, among them the wife of the owner of one of the houses telephoned, who was held entitled to sue in her own right, was nominal damages and an injunction. In *Devon Lumber Co. Ltd v. MacNeill* (1987) 45 D.L.R. (4th) 300 a majority of the New Brunswick Court of Appeal upheld awards of damages for annoyance and discomfort from dust to the infant children of the joint owners of the house, while reducing the amounts awarded in the court below--on the ground that abnormal sensitivity because of allergies was outside the scope of liability. Earlier Canadian provincial decisions, including *Motherwell*, were cited in support, as well as the textbooks of Dean Prosser, Mr Justice Linden and Professor Fleming. Stratton C.J.N.B. said at p. 303:

> "In the present case, it was established at trial that Mrs. MacNeill was a joint owner of the property with her husband and that they and their children lived together in the family home when the nuisance complained of occurred. Thus, at all relevant times, the MacNeills were sharing possession of the family home with their children and at the same time the children had a right to occupy the home with their parents. In these circumstances I would respectfully agree with Professor Fleming (*The Law of Torts,* 6th ed., pp. 393-394) that it would be 'senseless discrimination' against the MacNeill children to deprive them of a right of action in nuisance. I would accordingly conclude and hold that even though the children lacked any legal title to the property they had a right of occupation sufficient to support an action on their behalf for damages for any unreasonable and substantial interference with their lawful use or enjoyment of the family residence."

As is only to be expected in the light of the practical importance of nuisance liability in developed society, there is a vast sea of United States case law into which a judgment cannot conveniently do more than dip. It will have to be enough to rely on the summary in the American Law Institute's Restatement which echoes *Prosser and Keeton on Torts*, 5th ed. (1984) 621-622, and to give two illustrative cases. The *Restatement, Second, of Torts*, section 821E, includes:

> "d. Members of the family.
>
> 'Possession' is not limited to occupancy under a claim of some other interest in the land, but occupancy is a sufficient interest in itself to permit recovery for invasions of the interest in the use and enjoyment of the land. Thus members of the family of the possessor of a dwelling who occupy it along with him may properly be regarded as sharing occupancy with intent to control the land and hence as possessors, as defined in section 328E. When there is interference with their use and enjoyment of the dwelling they can therefore maintain an action for private nuisance. Although there are decisions to the contrary, the considerable majority of the cases dealing with the question have so held."

An illustrative case often cited is *Hosmer v. Republic Iron & Steel Co.* 60 South. 801 (Al. 1913), where it was alleged that a child had died from the foul, unwholesome and noxious air issuing from a pond constructed by the defendant in the neighbourhood of the child's home. Sayre J. delivered a learned judgment from which, as the report is not readily available in England, it may be useful to quote quite a long passage:

> "The only factor of the case presented which it is conceived may possibly be effective in denial of the cause of action asserted is that plaintiff's intestate owned no legal interest or estate in the land upon which he lived. To sustain his contention that the complaint is defective in this respect, appellee quotes Blackstone's definition of nuisance as 'anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another' (*Commentaries*, 4th ed. *(1876)*, vol. III, ch. *XIII*, p. 190). We have made approving use of that definition in several cases. On this occasion it is necessary to note that the hurt or annoyance of the definition is not necessarily a physical injury to the lands, tenements, or hereditaments, but may be an injury to the owner or possessor thereof in respect of his dealing with, possessing, or enjoying them. *Cooley on Torts*, 3**rd** ed., p. 1174. At the old common law, a declaration in a suit brought for the physical abatement of a nuisance by the writ of nuisance was required to allege a freehold estate in the premises affected, but that was because the action was a real action. One modern way of abating a nuisance is by an action on the case for damages merely, in which case the declaration need only show that the plaintiff was rightfully in possession of the premises affected. 14 Ency. Pl. & Pr. 1113. This remedy, however, is not permitted to those who suffer only in common with the public; for otherwise, in the language of Chief Justice Shaw in *Quincy Canal Proprietors v. Newcomb* (1843) 48 Mass. 276; 39 Am.Dec. 778, where he was speaking of a public nuisance which had not become a private nuisance by reason of special damage to the plaintiff, that 'would lead to such a multiplication of suits as to be itself an intolerable evil.' But that is as far as the best considered cases have gone in the policy of repressing litigation on account of wrongs done and suffered through nuisances, and, we apprehend, it is as far as the courts ought to go or will. This court, in common with all others, has held that the fact that a nuisance may have deleteriously affected the property or personal well-being of others in the neighbourhood does not alleviate any material and special injury done to the plaintiff, nor merge it in the public wrong for which the public may have a remedy in one way or another. *Richards v. Daugherty* (1902) 133 Ala. 569; 31 South. 934. It is obvious that to maintain an action for an injury affecting the value of the freehold the plaintiff must have a legal estate. But if noxious vapors and the like cause sickness and death to one who has a lawful habitation in the neighbourhood, no sufficient reason is to be found in the accepted definitions of nuisance, nor in that policy of the courts which would discourage vexatious litigation, nor in the inherent justice of the situation, as we see it, why the person injured, or his personal representative in case of death, should not have reparation in damages for any special injury he may have suffered, although he has no legal estate in the soil. Certainly a child has the right to live under his father's roof--is a lawful occupant of his father's home--and in our opinion he should be accorded the same measure of protection against the construction of nuisances in the neighbourhood which are so noxious and long-continued as to materially affect his physical well-being."

Coming to more recent times, in *Bowers v. Westvaco Corporation* (1992) 419 S.E. 2d. 661 (Va. 1992) family members, including minors living at home, were awarded damages for dust and vibration nuisance caused by truck-staging operations on adjacent property.

Hassell J., delivering a judgment of a court of seven of the Supreme Court of Virginia, emphasised that the court had "repeatedly held that an owner or occupant of land had a right to recover against the operator of a private nuisance." He spoke of liability to "occupants of neighbouring dwellings," holding that the children were entitled to recover as lawful occupants. The Restatement was among the supporting materials cited.

The preponderance of academic opinion seems also to be against confining the right to sue in nuisance for interference with amenities to plaintiffs with proprietary interests in land. Professor John G. Fleming's condemnation of a "senseless discrimination"--see now his 8th ed. (1992) 426 - has already been mentioned. His view is that the wife and family residing with a tenant should be protected by the law of nuisance against forms of discomfort and also personal injuries, "by recognising that they have a 'right of occupation' just like the official tenant." *Clerk and Lindsell*, 17th ed. (1995) para. 18-39, is to the same effect, as is *Linden* 5th ed. (1993) 521-22; while *Winfield and Jolowicz*, 14th ed. (1994) 419-20, and *Markesinis and Deakin*, 3rd ed. (1994) 434-35 would extend the right to long-term lodgers. *Salmond and Heuston on the Laws of Torts*, 21st ed. (1996) 63, n.96, and the New Zealand work *Todd on Torts*, 2nd ed. (1997) p. 537 suggest that the status of spouses under modern legislation should at least be enough; and the preface to the same edition of *Salmond and Heuston* goes further, by welcoming the decision in *Khorasandjian v. Bush* as relieving plaintiffs in private nuisance cases of the need to show that they enjoyed a legal interest in the land affected.

My Lords, there is a maxim communis error facit jus. I have collected the foregoing references not to invoke it, however, but to suggest respectfully that on this hitherto unsettled issue the general trend of leading scholarly opinion need not be condemned as erroneous. Although hitherto the law of England on the point has not been settled by your Lordships' House, it is agreed on all hands that some link with the land is necessary for standing to sue in private nuisance. The precise nature of that link remains to be defined, partly because of the ambiguity of "occupy" and its derivatives. In ordinary usage the verb can certainly include "reside in", which is indeed the first meaning given in the Concise Oxford Dictionary.

In logic more than one answer can be given. Logically it is possible to say that the right to sue for interference with the amenities of a home should be confined to those with proprietary interests and licensees with exclusive possession. No less logically the right can be accorded to all who live in the home. Which test should be adopted, that is to say which should be the governing principle, is a question of the policy of the law. It is a question not capable of being answered by analysis alone. All that analysis can do is expose the alternatives. Decisions such as *Malone v. Laskey* do not attempt that kind of analysis, and in refraining from recognising that value judgments are involved they compare less than favourably with the approach of the present-day Court of Appeal in *Khorasandjian* and this case. The reason why I prefer the alternative advocated with unwonted vigour of expression by the doyen of living tort writers is that it gives better effect to widespread conceptions concerning the home and family.

Of course in this field as in most others there will be borderline cases and anomalies wherever the lines are drawn. Thus there are, for instance, the lodger and, as some of your Lordships note, the au pair girl (although she may not figure among the present plaintiffs). It would seem weak, though, to refrain from laying down a just rule for spouses and children on the ground that it is not easy to know where to draw the lines regarding other persons. Without being wedded to this solution, I am not persuaded that there is sufficient justification for disturbing the conclusion adopted by Pill L.J. with the concurrence of Neill and Waite L.JJ. Occupation of the property as a home is, to me, an acceptable criterion, consistent with the traditional concern for the sanctity of family life and the Englishman's home--which need not in this context include his workplace. As already mentioned, it is consistent also with international standards.

Other resident members of the family, including such de facto partners and lodgers as may on the particular facts fairly be considered as having a home in the premises, could therefore be allowed standing to complain of truly serious interference with the domestic amenities lawfully enjoyed by them. By contrast, the policy of the law need not extend to giving a remedy in nuisance to non-resident employees in commercial premises. The employer is responsible for their welfare. On this part of the case I have only to add that normally there should not be any difficulty about sensible compromises with the author of the nuisance. Members of a household impliedly authorise the householder to represent them in such matters.

As interferences with the amenities of land and personal injuries arising during the use of land are cognate subjects, it may be appropriate to add a few words about personal injuries from private nuisance. *Malone v. Laskey* appears to assume that these will be actionable at the suit of a qualified plaintiff. A recent writer has concluded after a survey of the field that, although there is not much authority on the point, an occupant of property affected there by a nuisance can probably recover for personal injuries (Martin Davies in (1990) 20 W.A.L.R. 129). In his 1949 article in 65 L.Q.R. 480, Professor Newark partly denied this, but made a major qualification of his thesis by conceding (n.55) that it might well be that where an actionable nuisance is committed which in addition to interfering with the plaintiff's enjoyment of rights in land also damages his person or chattels, he can recover in respect of the damage to his person or chattels as consequential damages. He deplored "an incautious obiter dictum which was let fall in the Common Pleas in 1535" and "sent subsequent generations wrong in their law." Professor Newark was referring to a statement by Fitzherbert J. that a rider injured by falling at night into a trench across the highway would have an action against the maker of the trench. If this was indeed an indiscretion on Fitzherbert's part, to rue it now might seem a little late. In truth it has become solidly established that an action lies for personal injuries from a public nuisance: see for one of many illustrations *Mint v. Good* [1951] 1 K.B. 517, C.A., and so much was implicitly accepted by this House in *Jacobs v. London County Council* [1950] A.C. 361, 374-377, where Lord Simonds said that the law of nuisance had travelled far beyond its original limits.

My Lords, as to the kind of harm actionable it would be hard to see any sensible difference between public and private nuisance. So, too, between nuisance and *Rylands v. Fletcher* liability, at least since the identification in the *Cambridge Water* case, [1994] 2 AC 264 of

reasonable foresight of damage as an essential ingredient of liability under either head. It is true that there is a dictum to the contrary by Lord Macmillan in *Read v. J. Lyons & Co. Ltd* at p. 173, but the other members of the House in that case left the point open and there are sundry cases in the reports of liability under *Rylands v. Fletcher* for personal injuries. To the examples given by Lord Porter in *Read v. J. Lyons & Co. Ltd* at p. 178 may be added another Court of Appeal decision, *Hale v. Jennings Bros.* [1938] 1 All E.R. 179. Moreover, opinions contrary to that of Lord Macmillan have been powerfully expressed by Barwick C.J. and Windeyer J. in *Benning v. Wong* (1969) 122 C.L.R. 249, 274-275, 318-319.

Similarly, a plaintiff with standing to sue, including on my approach a member of the household, should be entitled to recover in nuisance for damage to chattels: *Midwood & Co. Ltd v. Manchester Corporation* [1905] 2 K.B. 597; *Moss v. Christchurch Rural District Council* [1925] 2 K.B. 750; *Halsey v. Esso Petroleum Co. Ltd.* [1961] 1 W.L.R. 683; *British Celanese Ltd. v. A.H. Hunt (Capacitors) Ltd.* [1969] 1 W.L.R. 159; *Howard Electric Ltd. v. A.J. Mooney Ltd.* [1974] 2 N.Z.L.R. 762. If a husband's car and his wife's are both damaged by spray from an adjacent property, they should alike be entitled to sue in nuisance even if he alone has a proprietary interest in the land.

The principles which I prefer might perhaps help the plaintiffs in the dust action, but nothing further can be said on that matter as the nature of the complaints in that action were not the subject of any of the agreed issues submitted to your Lordships. If the adoption of such principles might add marginally to building or operating costs in some cases, that could hardly be a more significant argument against them than is the cost of reasonable safeguards in any other field of the law.

Turning to the television action, I am in the happier position of being able to agree with all your Lordships and the Court of Appeal that this cannot succeed. Television has become a significant and, to many, almost an indispensable amenity of domestic life. For the reasons given more fully by Robins J. in *Nor-Video Services Ltd v. Ontario Hydro* (1978) 84 D.L.R. (3d) 221 and my noble and learned friend Lord Goff, I agree that, in appropriate cases, television and radio reception can and should be protected by the law of nuisance, although no doubt rights to reception cannot be acquired by prescription. Inhabitants of the Isle of Dogs and many another concentrated urban area might react with incredulity, and justifiably so, to the suggestion that the amenity of television and radio reception is fairly comparable to a view of the surroundings of their homes. Neither in nature nor in value is that so. It may be suspected that only a lawyer would think of such a suggestion.

What in my opinion must defeat an action for interference with television reception by the construction of a building, not only in this but in most cases, is the principle of reasonable user, of give and take. The 1983 decision in Germany of the Federal Supreme Court to which Lord Goff refers rejected a claim by neighbours, whose television reception of certain programmes had been spoilt by the erection of a nine-storey hospital, to connect their aerial to the system in the defendants' building. In the translation available to your Lordships the essential ground of the decision appears thus:

> "In respect of the so-called negative adverse effects there is no gap in the [Civil] Code; on the contrary it deliberately leaves it to the freedom of the owner to use his property as he wishes within the framework of the Code, as long as he does not cross the boundary of neighbouring land by the emission of imponderables."

Although turning on the Code, that is of interest as a matter of comparative law and some help. The common law case most closely in point that I have been able to find is the decision of the Supreme Court of Illinois, delivered by Kluczynski J., in *People ex rel. Hoogasian v. Sears, Roebuck & Co.* 58 A.L.R. 3d. 1136 (1972). These were appeals in proceedings to stop the further construction of a building in Chicago which would reach 110 storeys or 1350ft. (Compare the 50 storeys and 800ft. of the Canary Wharf tower; the Chicago building had reached 50 storeys when the proceedings were commenced.) Distortions on television screens were expected because the broadcasting antennae of Chicago stations were lower than the designed structure. The Supreme Court identified the principal issue as being whether

> "defendant has a legal right to use the air space above its property subject only to legislative limitation, or, stated conversely, whether an individual or class of individuals has the right to limit the use of such property on the basis that interference with television reception constitutes an actionable nuisance."

The court saw the case as one of competing legitimate "commercial" interests, both of concern to the public. It said that responsibility for inadequate television reception in certain areas rested more with the broadcaster's choice of location than with the height of the defendant's building. "Therefore disruption of television signals initiated by totally independent third parties over which the defendant has no control cannot be the basis for enjoining the full legal use and enjoyment of defendant's property."

As will be seen, this proposition was qualified later in the judgment, but first one should note that what immediately followed was a reference to *United States v. Causby* 328 U.S. 256 (1946) where the Supreme Court of the United States held that a landowner could not claim exclusive possession of unlimited airspace above his property--"[the] ancient doctrine that at common law ownership of the land extended to the periphery of the universe . . . has no place in the modern world"--but could claim exclusive possession of the immediate reaches of the enveloping atmosphere; and that the continual flying of army bombers emitting noise and glare as low as 83ft. above the claimants' land amounted to a taking for which compensation must be paid. Then there followed in the *Sears Roebuck* judgment a proposition that had been applied in a Massachusetts case about radio transmission: "Doubtless, in the absence of controlling police regulation, one may erect a structure upon his land as high as he desires and is able": *Richmond Bros Inc. v. Hagemann* 268 N.E. 2nd 680, 682 (1971). Finally the Illinois court said:

> ". . . it is clear to us that absent legislation to the contrary, defendant has a proprietary right to construct a building to its desired height and that completion of the project would not constitute a nuisance under the circumstances of this case."

The qualification is important. Control of building height is such a common feature of modern town planning regimes that it would be

inadequate to say that at the present day owners of the soil generally enjoy their rights usque ad coelum et ad inferos. Although the primary responsibility for enforcement falls on the administering authorities, I see no reason why neighbours prejudicially affected should not be able to sue in nuisance if a building does exceed height, bulk or location restrictions. For then the developer is not making either a lawful or a reasonable use of landowning rights. This is to treat planning measures not as creating rights of action for breach of statutory duty but as denoting a standard of what is acceptable in the community.

In the light of the versatility of human malevolence and ingenuity, it is as well to add a second qualification. The malicious erection of a structure for the purpose of interfering with television reception should be actionable in nuisance on the principle of such well-known cases as *Christie v. Davey* [1893] 1 Ch. 316 and *Hollywood Silver Fox Farm Ltd v. Emmett* [1936] 2 K.B. 468. Obviously this has no bearing on the present case or on the vast majority of cases. All the same it is not inconceivable. In his book Mr Justice Linden cites the case of *Attorney-General of Manitoba v. Campbell* (1983) 26 C.C.L.T. 168 where a farmer was found to have put up a 74ft. steel tower of no practical use in his farming, directly in line with the runway of an adjoining airport, with no purpose other than as part of a maliciously conceived plan to prevent the upgrading of the airport. This he did just before the effective date of a planning order covering the height and locality of adjacent structures. A mandatory injunction to dismantle the tower was granted and obeyed and not appealed from. Even so the defendant did appeal successfully against an award of solicitor-and-client costs, and two of the three members of the Court of Appeal thought that he would have had a good chance of success in an appeal against the injunction: see [1985] 4 W.W.R. 334. I do not think, however, that the view that malice is irrelevant in nuisance would have wide acceptance today.

Even putting malice aside, compliance with planning controls is not itself a defence to a nuisance action, as is brought out by the pighouse case *Wheeler v. J. J. Saunders Ltd* [1996] Ch 19, an instance of an injudicious grant of planning consent, procured apparently by the supply of inaccurate and incomplete information. But it must be of major importance that the Canary Wharf Tower, although said to be the highest building in Great Britain and certainly an exceptional feature of the London skyline, was built in an enterprise zone in an urban development area and authorised under the special procedure designed to encourage regeneration.

The Canary Wharf project in general, and the tower at One Canada Square in particular, were obviously of a scale totally transforming the environment. There was an original planning condition that building heights were not to exceed 120ft. except by agreement with the enterprise zone authority. Agreements were obtained and it is not suggested that they were insufficient for what was done. Under the fast-track procedure the rights of residents were limited to the making of representations regarding the project. It may that what seems plain with hindsight, that there would be a dramatic effect on television reception, was not at first sufficiently realised. After a year or so, however, the problem was rectified by the establishment of a relay station and adjustment of the aerials of affected properties (apparently without cost to the owners). Although this was presumably the result, not of representations under the statutory procedure, but of subsequent complaints, it does show that the right to make representations is not necessarily without real value. The tower is clad in stainless steel and the windows are metallised but it would seem hopeless to contend that the use of these materials and the design of the tower constituted any unreasonable or unexpected mode of constructing a building of this height. In these circumstances, to adopt the words of Staughton L.J. in *Wheeler* at p. 30, the tower falls fairly within the scope of "a strategic planning decision affected by considerations of public interest."

Staughton L.J. used those words in distinguishing the decision of Buckley J. in *Gillingham Borough Council v. Medway (Chatham) Dock Co. Ltd* [1993] Q.B. 343, a case somewhat similar to the present case, in that it concerned the development of a new commercial port on the site of a disused naval dockyard. Heavy vehicle traffic at night undoubtedly had a seriously deleterious effect on the comfort of local residents, but the judge held that, although a planning consent could not authorise a nuisance, it could change the character of the neighbourhood by which the standard of reasonable user fell to be judged. This principle appears to me to be sound and to apply to the present case as far at least as television reception is concerned. Although it did interfere with television reception the Canary Wharf tower must, I think, be accepted as a reasonable development in all the circumstances. The effect of the tower on television reception was extensive enough to bring the concept of public nuisance into play, but I see no material difference on this point between public and private nuisance.

For these reasons, while not satisfied that a categorical universally applicable answer can be given to the issue about television reception, I agree that in this case the claim of nuisance consisting of interference with such reception cannot succeed; but I would dismiss the appeal from the Court of Appeal's ruling that occupation of a property as a home provides a sufficiently substantial link to enable the occupier to sue in private nuisance, to the extent that the ruling relates to interference with amenities as distinct from injury to the land.

LORD HOPE OF CRAIGHEAD

My Lords,

The issues which are before us in these two actions are, I believe, best examined from the standpoint of principle. The word "nuisance" is difficult to define precisely. It has been said to be protean when questions are raised as to the conduct which may give rise to liability. But the underlying principles, which distinguish the tort of nuisance from the tort of negligence for example, are I think capable of reasonably precise definition in the light of the authorities. Once those principles are appreciated it should be relatively easy to identify those who have a right to

sue for a remedy in private nuisance and those who have not. A principled approach is also the best guide to the right answer to the question whether an actionable nuisance has been demonstrated in the television action. It is tempting to depart from principle out of sympathy for the plaintiffs or in search of a remedy for some objectionable activity, but in this area of the law it is important to resist the temptation and to rely instead on the guidance of principle. To do otherwise would risk confusion and be likely to lead to uncertainty in the development of the law, as the point would ultimately be reached when each case would have to be determined entirely on its own facts.

The tort of nuisance is an invasion of the plaintiff's interest in the possession and enjoyment of land. It is closely linked to the law of property and is often regarded as part of the law of neighbourhood. English law and Scots law differ as to the scope of nuisance as a legal category: see *Stair Memorial Encyclopaedia,* vol.14, Nuisance para. 2019. In Scots law, for example, the law relating to servitudes--such as the servitude rights of air, light and prospect--are regarded as falling outside the scope of nuisance, whereas in English law--as the present case demonstrates--the law relating to easements is usually treated as a branch of the same legal category. In my opinion the English approach as disclosed by the authorities serves to emphasise the point that we are concerned here essentially with the law of property. The function of the tort, in the context of private nuisance, is to control the activities of the owner or occupier of property within the boundaries of his own land which may harm the interests of the owner or occupier of other land.

The tort of negligence is also, in a very real sense, concerned with the relationship between neighbours. But, as can be seen clearly since the development of this branch of the law in *Donoghue v. Stevenson* [1932] AC 562, the answer to the question, "who in law is my neighbour,?" is a different one from that which would be given in the context of property law. A duty of care is owed to all those who are so closely and directly affected by my act that I ought reasonably to have them in contemplation. These persons may include the owners or occupiers of property which lies beside the property of which I am the owner or occupier. But the duty of care is not restricted to those who are in law the owners or occupiers. It extends to anyone who may happen to be present on that property whom my acts or omissions may affect. Of course, it extends to many other situations also which have nothing to do with the ownership or occupation of property. In the present case however it is helpful to see how the two torts may overlap in relation to each other. In some cases they may provide concurrent remedies, although the tort of nuisance is a tort of strict liability in the sense that it is no defence to say that the defendant took all reasonable care to prevent it. It is concerned only with the mutual duties of adjoining or neighbouring landowners of which, as Lord Macmillan said in *Read v. J. Lyons & Co. Ltd.* [1947] AC 156, 173 trespass and nuisance are the congeners. Where it is available it will be unnecessary to rely also on the tort of negligence. In other cases it may be necessary to rely on the tort of negligence, because the person who is affected by the act or omission on the neighbouring property has no interest in the land where he or she happens to be at the time. Mere presence on that land, in circumstances where a duty in law to those present there is owed by the owner or occupier of the neighbouring property, is enough to enable the person to sue in negligence.

So where it is the tort of nuisance which is being relied upon to provide the remedy--and I believe that the same rules should apply whether the remedy sought is that of an injunction or in damages--the plaintiff must show that he has an interest in the land that has been affected by the nuisance of which he complains. Mere presence on the land will not do. He must have a right to the land, for example as owner or reversioner, or be in exclusive possession or occupation of it as tenant or under a licence to occupy. It may then be said that there is an unlawful interference with his use or enjoyment of the land or of his right over or in connection with it: see *Newcastle-under-Lyme Corporation v. Wolstanton Limited* [1947] 1 Ch. 92, 107 per Evershed J. Exceptionally, as in *Foster v. Warblington U.D.C.* [1906] 1 K.B. 648, his actual occupation of the land will be enough to demonstrate that he has a sufficient interest for a right of action in nuisance to exist. For the purposes of the present case however the important point to notice is that which Lord Wright made in *Sedleigh-Denfield v. O'Callaghan* [1940] AC 880, 902-3: "With possibly certain anomalous exceptions, not here material, possession or occupation is still the test".

The effect on that interest in land will also provide the measure of his damages, if reimbursement for the effects of the nuisance is what is being claimed, irrespective of whether the nuisance was by encroachment, direct physical injury or interference with the quiet enjoyment of the land. The cost of repairs or other remedial works is of course recoverable, if the plaintiff has required to incur that expenditure. Diminution in the value of the plaintiffs' interest, whether as owner or occupier, because the capital or letting value of the land has been affected is another relevant head of damages. When the nuisance has resulted only in loss of amenity, the measure of damages must in principle be the same. I do not see how an assessment of the damages appropriate for claims for personal injury at the instance of all those who happened to be on the land can be the right measure. If this were so, the amount recoverable would depend on the number of those affected, not the effect on the amenity of the land. At best is no more than a guide to the true measure of liability, which is the extent to which the nuisance has impeded the comfortable enjoyment of the plaintiff's property.

This approach is illustrated by the following passage in the opinion of Lord Kinnear in the Scottish case of *Harvie v. Robertson* (1903) 5 F 338, 346, where the pursuer sought interdict against the defender from carrying on the operation of lime-burning on his land:

> "I agree entirely in what was said by Lord Adam that the question whether a proprietor complaining of such injury has a title and interest to interfere does not depend exclusively upon present injury to his land. He is entitled to take into account not only the actual inconvenience and discomfort caused to people living on the ground by noxious fumes, but also the injury to the value of the property and the prospect of using it for advantageous purposes, other than those to which it is actually applied at the moment."

In my opinion the decision in *Khorasandjian v. Bush* [1993] QB 727 is open to criticism because the majority who adopted the same approach as that taken in *Motherwell v. Motherwell* (1976) 73 D.L.R. (3d.) 62--a decision which I think, with respect, is equally flawed on this ground - failed to apply the general rule of law, noted by Peter Gibson J. at p. 745A-D, that only an owner or occupier of the property affected can maintain an action for private nuisance. The interlocutory order which was made in that case and was held on appeal to have been

worded appropriately was in the widest terms. It restrained the defendant from "using violence to, harassing, pestering or communicating with" the plaintiff. It was so widely drawn that it covered the defendant's conduct wherever he happened to be when making the unwanted telephone calls and wherever the plaintiff happened to be when she received them. Its use of language demonstrates that the case was concerned with the invasion of the privacy of the plaintiff's person, not the invasion of any interest which she might have had in any land. I would be uneasy if it were not possible by some other means to provide such a plaintiff with a remedy. But the solution to her case ought not to have been found in the tort of nuisance, as her complaint of the effects on her privacy of the defendant's conduct was of a kind which fell outside the scope of the tort.

The importance of taking a principled approach to this matter can be seen on reading some of the observations of Hardie Boys J. in *Bank of New Zealand v. Greenwood* [1984] 1 N.Z.L.R. 525, 530 where he said:

> "The tort of nuisance is not capable of a single comprehensive definition, and it is sufficient for present purposes to state that we are concerned with that part of it which gives a remedy for certain interferences with the occupier's use or enjoyment of his land. It may on an appropriate occasion be necessary to emphasise the distinction between this kind of case and those where the complaint is of physical damage to the land or something upon it. For in the latter, liability is probably strict, whilst in the former, it is certainly arguable that fault must be established."

With great respect, I fear that this passage overlooks the distinction between the tort of nuisance and that of negligence. I make no criticism of the decision in that case, but there is a risk of confusion if the suggestion that a remedy in nuisance may be given on a basis other than that of strict liability, within the relevant meaning of that phrase, were to be applied more generally.

For these reasons, and for the reasons given by my noble and learned friends Lord Goff of Chieveley and Lord Hoffmann with whose speeches I have had the benefit of reading in draft and with which I am in full agreement, I also would allow the appeal of the defendants in the dust case and their cross-appeal in the television case.

The question whether interference with television reception by the presence of the Canary Wharf Tower in the defendants' urban development area is an actionable nuisance also raises an issue of principle. The starting point is to notice that what is being complained of is--and this is not meant to suggest that the complaint of interference is in itself at all unreasonable--simply the result of building this building on the land. It is a very large building and its cladding is made of stainless steel. But it is not suggested that it was designed in that way maliciously in order to interfere with the plaintiffs' television reception. Nor is it suggested that the interference was due to any activity or inactivity on or within the building which might have been stopped or otherwise dealt with by an injunction. There are no other special features about the case, such as an allegation of breach of contract or a breach of any statutory rules. If there is an actionable nuisance here, it can only be because a remedy exists by analogy with the law relating to easements.

The presumption however is for freedom in the occupation and use of property. This presumption affects the way in which an easement may be constituted. A restraint on the owners' freedom of property can only be effected by agreement, by express grant or--in the case of the easement of light--by way of an exception to the general rule by prescription. The prospective developer should be able to detect by inspection or by enquiry what restrictions, if any, are imposed by this branch of the law on his freedom to develop his property. He should be able to know, before he puts his building up, whether it will constitute an infringement.

The presumption also affects the kinds of easement which the law will recognise. When the easements are negative in character--where they restrain the owners' freedom in the occupation and use of his property--they belong to certain well-known categories. As they represent an anomaly in the law because they restrict the owners' freedom, the law takes care not to extend them beyond the categories which are well known to the law. It is one thing if what one is concerned with is a restriction which has been constituted by express grant or by agreement. Some elasticity in the recognised categories may be permitted in such a case, as the owner has agreed to restrict his own freedom. But it is another matter if what is being suggested is the acquisition of an easement by prescription. Where the easement is of a purely negative character, requiring no action to be taken by the other proprietor and effecting no change on the owner's property which might reveal its existence, it is important to keep to the recognised categories. A very strong case would require to be made out if they were to be extended. I do not think that that has been demonstrated in the present case.

There is no reported case where an easement against the interruption of the receipt of radio or television signals has yet been recognised. The closest analogy is with uninterrupted prospect, which cannot be acquired by prescription, but only by agreement or by express grant. Unless restricted by covenant the owner is entitled to put up whatever he chooses on his own land, even though his neighbour's view is interrupted. The interruption of view will carry with it various consequences. It may reduce amenity generally, or it may impede more particular things such as the transmission of visual signals to the land from other properties. That may be highly inconvenient and it may even diminish the value of the land which is affected. But the proprietor of the affected land has nevertheless no actionable ground of complaint. He must make other arrangements if he wishes to continue to receive these signals on his own property. Radio and television signals seem to me to fall into the same general category. They may come from various directions over a wide area as they cross the developer's property. They may be of various frequencies, more or less capable of interruption by tall or metal-clad structures. Their passage from one point to another is invisible. It would be difficult, if not impossible, for the developer to become aware of their existence before he puts up the new building. If he were to be restricted by an easement from putting up a building which interfered with these signals, he might not be able to put up any substantial structures at all. The interference with his freedom would be substantial. I do not think that it would be consistent with principle for such a wide and novel restriction to be recognised. If that is so for easements, then the same result must follow so far as a remedy in nuisance is concerned.

For these reasons I also would dismiss the appeal in the television action.

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