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PRIVATE NUISANCE IN SINGAPORE: FROM FORESEEABILITY TO RECIPROCITY

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Although a tort of strict liability, private nuisance is counterintuitively established when some form of 'fault' exists, causing confusion among judges, practitioners, and scholars. In early Singapore law, this conundrum has led to varying approaches in private nuisance cases, with safety, foreseeability, and fault itself taking turns as the key factor for establishing liability. Recently, the apex court in Singapore held that neither fault in the strict sense nor foreseeability is relevant; instead, the tort is regulated by the unreasonable user test. While this clarification is welcome, problems persist with the concept of unreasonable user. Going forward, Singapore courts should not adopt the claimant-sided test laid down by the majority in the UK Supreme Court decision of Fearn v Tate. Instead, inspiration should be drawn from the minority judges' open-textured approach, which aligns well with the principle of reciprocity.

I. INTRODUCTION

A. Context and Issues

The term 'nuisance', used once upon a time to merely describe generic wrongs, has for several centuries taken on a far more targeted definition in law: the wrongful disturbance of the enjoyment of real property falling short of a forcible trespass or ouster.[1] Although a source of confusion for some time, it is settled today that nuisance law can be divided into two further branches: public and private nuisance; and often pleaded along with private nuisance is the related rule in *Rylands v Fletcher*.[2] *Ex facie*, private nuisance – the focus of this article – seems straightforward enough. At a general level, private nuisance targets unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it – and this interference is only unlawful if it is unreasonable.[3] Moreover, a consequence of private nuisance being a 'tort against land' is that a

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[1] John Baker, *Introduction to English Legal History*, 5th ed (Oxford: Oxford University Press, 2019) at 451.

[2] [1868] UKHL 1. The rule in *Rylands v Fletcher* is sometimes considered as a sub-set of private nuisance: see *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61 at [9] [*Transco*].

[3] James Goudkamp & Donal Nolan, *Winfield and Jolowicz on Tort*, 19th ed (United Kingdom: Sweet & Maxwell, 2014) at [15-008] [Winfield and Jolowicz].

claimant only acquires *locus standi* if he has an interest in land.[4] Finally, the tort is not actionable per se and hence, damage must be proven. In Singapore, private nuisance shares these basic requirements – following the UK to this extent.[5]

However, this simple introduction belies considerable uncertainty which plagues private nuisance. The following summary, although by no means comprehensive, usefully contextualises the problems with the tort. Firstly, at a more abstract level, the *raison d'etre* of the tort has never been decisively settled. It is generally agreed that private nuisance is "firmly rooted in the protection of landholding rights".[6] Yet, the law seems unwilling to relinquish its ties to environmental protection, public benefit, and achieving social goals,[7] despite the growing recognition that such concerns are appropriately addressed by statute.[8] Secondly, that private nuisance is a tort of strict liability is the source of much confusion. Strict liability suggests that liability arises irrespective of whether parties are at fault. Nevertheless, an assessment of fault often finds its way into private nuisance, according to some free-floating standard.[9] Perhaps this is unsurprising since a core requirement of the tort is that interference must be unreasonable – a term which likely entails some form of blameworthiness.[10]

Thirdly, and most controversially, is the very requirement of unreasonable interference – stemming from the fact that "unreasonable" has never been properly defined in the context of nuisance. Unlike in negligence, 'reasonableness' has no fixed meaning; the law of nuisance has operated without a specific definition for the term at the very core of the tort.[11] Indeed, the prevailing view is that "unreasonable" denotes no more than a conclusion that a defendant should be liable, failing to provide a legal standard or test.[12] Instead, courts, lawyers, and academics have relied on abstract maxims and disjointed subsidiary rules to guide their application of private

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[4] *Hunter v Canary Wharf Ltd* [1997] UKHL 14 [*Hunter*]. In coming to its judgement, the House of Lords relied heavily on F. H. Newark, "The Boundaries of Nuisance" (1949) 65:4 L Q Rev 480 [Newark].

[5] Gary Chan, *The Law of Torts in Singapore*, 2nd[nd] ed (Singapore: Academy Publishing, 2015) at [10.035] [Chan].

[6] Winfield and Jolowicz, *supra* note 3 at [15-008].

[7] Conor Gearty, "The Place of Private Nuisance in a Modern Law of Torts" (1989) 48:2 Cambridge LJ 214 at 215–216 [Gearty].

[8] For an outline of Singapore's use of statute-based nuisance to protect the environment, see Chan, *supra* note 5 at [10.034].

[9] Allan Beever, *The Law of Private Nuisance* (Cambridge: Cambridge University Press, 2013) at 9 [Beever].

[10] Christian Witting, *Street on Torts*, 16th ed (Oxford: Oxford University Press, 2021) at 423 [Witting].

[11] Beever, *supra* note 10 at 11.

[12] *Fearn v Board of Trustees of the Tate Gallery* UKSC 4 at [19] [*Fearn*].

nuisance. For example, the tort is informed by unhelpful generalities such as the rules of "give and take, live and let live";[13] and *sic utere tuo ut alienum non laedas*.[14] Similarly, several ancillary principles – such as the rules of coming to the nuisance, abnormal sensitivity, public utility, malice, *inter alia* – apply selectively and with numerous exceptions, depending on the context.[15] These provide some (limited) guidance in the absence of a formal test to establish liability, but fail to address important questions which invariably arise in application – such as whether private nuisance's focus is on the claimant (and his enjoyment of land), or the defendant (and the acceptability of his use of his land), if either. Whether an interference amounts to private nuisance is always a question of degree,[16] accentuating the need for "unreasonable" to be defined.

B. Scope of Article

This article does not seek to resolve, or even cover all the issues outlined above. Instead, more modestly, it aims to survey Singapore's approach to this private nuisance quandary – and provide suggestions for improvement. Part II first traces the various approaches taken by local courts, culminating in the Court of Appeal's landmark decision in *Pex International Pte Ltd v Lim Seng Chye* ("*Pex*").[17] Subsequently, in Part III, it is argued that although the court's clarification in *Pex* is welcome, issues with the concept of unreasonable interference remain. Therefore, Part IV discusses how Singapore may further develop its law on private nuisance based on the UK Supreme Court's decision in *Fearn v Board of Trustees of the Tate Gallery*,[18] suggesting that the open-textured approach of the minority is preferrable to the claimant-sided test of the majority. Finally, Part V concludes.

Notably, Singapore's statutory tort – the Community Disputes Resolution Act 2015 ("CDRA")[19] – does not render private nuisance obsolete in any way, simply because the CDRA only regulates interference with enjoyment or use of *a place of residence*.[20] Private nuisance thus has

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[13] *Bamford v Turnley* (1862) [1861-73] All ER Rep 706 [*Bamford*].
[14] Use your own property in such a way as not to harm that of others. See Winfield and Jolowicz, *supra* note 3.
[15] Beever, *supra* note 10 at 7.
[16] *Clerk & Lindsell on Torts*, 20th ed (United Kingdom: Sweet & Maxwell, 2010) at [20-10].
[17] [2020] 1 SLR 373 [*Pex*].
[18] *Supra* note 13.
[19] *Community Disputes Resolution Act 2015* (2020 Rev Ed Sing) [CDRA].
[20] CDRA, *supra* note 20, s 4. S 3 defines "place of residence" as a house, a flat, an apartment or other dwelling place used for the purpose of residence.

a considerably wider scope, covering *commercial* disputes as well. Where the stakes are high and obtaining a court order is a priority, private nuisance is also the more appropriate route. Under the CDRA, such legal remedies (as provided for in s 5) are treated as a last resort and only issued when all conciliatory options like mediation have been exhausted.[21] Therefore, private nuisance remains a tort very much deserving of academic discussion.

II. TRACING THE DEVELOPMENT OF PRIVATE NUISANCE IN SINGAPORE

A. The Law before Pex: Two Limiting Principles

Before 2019, Singapore courts had few opportunities to properly discuss the intricacies of private nuisance. On the rare occasion when private nuisance was argued before the Court of Appeal, the claims were simply dismissed on evidentiary grounds.[22] Similarly, cases coming before the High Court have mostly been straightforward enough to warrant no more than a cursory discussion of the law.[23] Three High Court cases stand out as exceptions, which must be examined to appreciate the current state of private nuisance in Singapore.

The first case is *Tesa Tape v Wing Seng Logistics* ("*Tesa Tape*").[24] Conducting the business of repairing and storing containers on its premises, the defendant stacked its containers on top of one another and side by side, creating a huge mono-block of containers – consistent with standard practice in container depots. During a thunderstorm, some of these containers fell onto the claimant's property, causing damage. At first blush, the decision arrived at is straightforward: Choo J held that although such stacking of containers was insufficient to give rise to private nuisance, the defendant was still liable because it failed to take reasonable precautions to prevent a foreseeable event (the thunderstorm was not considered an act of God). However, the precise reasoning behind this seemingly simple conclusion requires further unpacking. Notably, factors such as "safety" and "fault" were heavily relied upon, leaving it unclear if they were free-standing

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[21] *Parliamentary Debates Singapore: Official Report* vol 93 (13 March 2015) (Lawrence Wong, Minister for Culture, Community and Youth).
[22] *Epolar System Enterprise Pte Ltd v Lee Hock Chuan* [2003] 2 SLR(R) 198 at [8]; *Goh Sin Huat Electrical Pte Ltd v Ho See Jui (trading as Xuanhua Art Gallery)* [2012] 3 SLR 1038.
[23] See e.g. *AXA Insurance Singapore Pte Ltd v Chandran s/o Natesan* [2013] 4 SLR 545; *Shi Ka Yee v Nasrat Lucas Muzayyin* [2016] 4 SLR 972.
[24] *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR(R) 116 [*Tesa Tape*].

considerations or under the umbrella of what is "reasonable".[25] Regardless, this might be seen as somewhat curious given the court's view that nuisance is not a "fault-based" tort.[26] Furthermore, these factors – as well as foreseeability and taking of precautions – were analysed along with the negligence inquiry, potentially bringing the two torts closer to one another.[27] Again, this is perhaps inconsistent with the court's acknowledgement that negligence and nuisance occupy distinct spaces in tort law.[28] There is much to be said – and that will be said in due course – about the court's approach in the case. However, for now, it suffices to note that *Tesa Tape* represents a somewhat 'multi-factorial' approach to assessing private nuisance, without particular emphasis on any one factor.

A year later, faced with yet another private nuisance case, the High Court went in a slightly different direction. In *OTF Aquarium Farm (formerly known as Ong's Tropical Fish Aquarium & Fresh Flowers) (a firm) v Lian Shing Construction Co Pte Ltd (Liberty Insurance Pte Ltd, Third Party)* ("*OTF Aquarium*"), the claimant sued the defendant in private nuisance for carrying out drainage works on neighbouring land which resulted in flooding that killed its (the claimant's) arowana fishes.[29] In her analysis of this simple set of facts, Ang J focussed almost exclusively on just one factor: foreseeability of damage. *Tesa Tape* was only relied on to the extent of illustrating that a defendant's state of knowledge is critical to satisfying the criterion of reasonable foreseeability; factors such as 'safety' and 'fault' were simply not referred to, while unreasonable use of land was equated with creating or continuing a hazard which the occupier knew/should have known carries a foreseeable risk of damage to a neighbour.[30] Ultimately, Ang J held for the claimant since the flood damage was "the type of damage that the defendant ought reasonably to have foreseen as being liable to flow from its conduct" – merging the nuisance and negligence inquiries again, as in *Tesa Tape*.[31] Therefore, the principle emerging from *OTF Aquarium* is that private nuisance is governed by a test of foreseeability of damage.

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[25] *Ibid* at [6].
[26] *Ibid* at [8].
[27] *Ibid* at [6], [14]–[15], [22].
[28] *Ibid* at [8].
[29] [2007] SGHC 122 [*OTF Aquarium*].
[30] *Ibid* at [26].
[31] *Ibid* at [27].

The third High Court case dealing extensively with private nuisance is *Lim Seng Chye v Pex International Pte Ltd* ("*Lim Seng Chye*").[32] Again, the facts of the case are simple. The first defendant, together with the contractor that it had engaged, carried out construction involving hot works at its property. Resultingly, a fire occurred at the adjoining property which belonged to the claimant. Although the claimant's claim in negligence was dismissed, Chionh JC (as she then was) found the first defendant liable in both private nuisance and under the rule in *Rylands v Fletcher*. On the former, the judge relied on both *Tesa Tape* and *OTF Aquarium* to conclude that liability in private nuisance is "controlled" by two main principles. The first limiting principle is that of foreseeability of harm – derived from both cases. Applying this principle, Chionh JC held that the possibility of harm eventuating was foreseeable because the first defendant ought to have known that the commissioned work would involve hot works, which it ought to have known would cause a fire.[33] Secondly, from *Tesa Tape*, the court derived that the other limiting principle governing private nuisance is the concept of unreasonable use of land – which Chionh JC found on the part of the first defendant, because the work was "foreseeably unsafe".[34] Therefore, the main contribution of *Lim Seng Chye* to Singapore's law is that foreseeability of harm and unreasonable use of land are the two control mechanisms governing private nuisance. However, parenthetically, two observations can be made: (1) the language used, and facts considered, in the analysis of both limiting principles overlap; and (2) under the umbrella of these two main limiting principles, there is still room to consider some of the *Tesa Tape* factors, such as safety.

A recapitulation is in order. In the wake of the three High Court cases, private nuisance in Singapore was governed by the two limiting principles of foreseeability of damage and unreasonable use of land – with three important caveats. Firstly, under the umbrella of these two limiting principles, the court *might* yet consider factors such as safety or fault. Secondly, there is significant overlap between the two limiting principles – the same facts used in the consideration of one will be used in the consideration of the other. Thirdly, while it is possible for a claim in nuisance to succeed where a claim in negligence fails, there may be overlap between the two torts.[35] With this in mind, the Court of Appeal decision in *Pex* can now be examined.

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32 [2019] SGHC 28 [*Lim Seng Chye*].

33 *Ibid* at [121].

34 *Ibid*.

35 In *Hygeian Medical Supplies Pte Ltd v Tri-Star Rotary Screen Engraving Works Pte Ltd (Seng Wing Engineering Works Pte Ltd, third party)* [1993] 2 SLR(R) 411 at [20], the court similarly held that "When one party's occupation or use of land results in injury to another party, the ingredients for liability in negligence and in nuisance are often the same".

B. The Law after Pex: And Then There was One

On appeal, the outcome of *Lim Seng Chye* was upheld by the Court of Appeal in *Pex*. However, Steven Chong JA took the opportunity to make important clarifications on the law. In his view, a distinction must be drawn between foreseeability of *the type of harm* and foreseeability of the *risk of harm*.[36] The former refers to the remoteness of damage, which is relevant in the same way causation is relevant – not as a requirement to establish liability, but as a limit to the damages claimable. Contrastingly, the latter refers to "foreseeability of damage", as used in *OTF Aquarium* and *Lim Seng Chye*. Ultimately, the Court of Appeal held that this is strictly irrelevant to private nuisance and has been incorrectly held to be a limiting principle of the tort.[37] Carefully examining the landmark English cases, the apex court of Singapore concluded that foreseeability of the risk of harm was not historically relevant to private nuisance. According to Chong JA, the position on foreseeability was clear until *Transco plc v Stockport Metropolitan Borough Council*;[38] as clarified by Lord Goff in *Cambridge Water Co Ltd v Eastern Counties Leather plc*,[39] foreseeability of the risk of harm is irrelevant to nuisance except in special circumstances where the nuisance originated from a third-party source. The House of Lord's decision in *Transco*, that foreseeability of the risk of harm is a requirement of private nuisance, was hence regarded as a misstep in the law – stemming from a failure to distinguish between the two types of foreseeability.[40] Therefore, in one fell swoop, the Court of Appeal departed from the earlier decisions of the High Court to remove foreseeability of the risk of harm as a limiting principle altogether.[41] The principle of unreasonable interference was instead considered the appropriate and sole control mechanism of private nuisance.

The Court of Appeal gave three reasons justifying its decision. Firstly, the removal of foreseeability of the risk of harm as a component of private nuisance preserves the distinction between the torts of negligence and private nuisance. Whereas negligence focusses on a defendant's conduct, nuisance focusses on vindicating a claimant's interest and rights over his land. To hold foreseeability as a liability-determinant for not only negligence (appropriately so) but also

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[36] *Pex*, *supra* note 18 at [2].
[37] *Ibid* at [51]–[55].
[38] *Transco*, *supra* note 2.
[39] [1994] 1 All ER 53 [*Cambridge Water*].
[40] *Pex*, *supra* note 18 at [45]–[46].
[41] However, at [60], the court noted that the correct decision was nonetheless reached in *OTF Aquarium* and *Tesa Tape*.

nuisance would bring the two torts too close to one another, making it difficult to justify their continued co-existence.[42] Secondly, as alluded to, removal of foreseeability as a limiting principle for liability is consistent with the original scope of nuisance as set out in the older cases.[43] Thirdly, drawing inspiration from *Xpress Print Pte Ltd v Monocrafts Pte Ltd*,[44] the Court of Appeal placed especial emphasis on the need to use property in a manner as not to injure that of another in Singapore's land-scarce context. Therefore, a stricter test for private nuisance (in the sense that liability is more easily found) was preferred – which removing the limiting principle of foreseeability of the risk of harm was thought to facilitate.[45] This decision (and therefore, Singapore's current law on private nuisance) can now be evaluated.

III. *EVALUATING PEX*

A. Pex Accords with the Fault-Free Foundations of Private Nuisance

The eradication of foreseeability of risk of harm as a limiting principle is a welcome contribution by *Pex* to Singapore's law on private nuisance. Understanding why this is so requires an appreciation of two points, which will be addressed in turn. First, the *raison d'etre* of private nuisance has nothing to do with fault, and second (and relatedly), foreseeability and fault are inextricably linked.

1. *Private Nuisance is about reciprocal use of land*

As alluded to in Part I, the underpinnings of private nuisance have never been clear. Multiple explanations have been advanced, ranging from protecting the environment and realising social goals, to punishing unacceptable conduct and regulating standards of neighbourly conduct.[46] Consequently, several commentators have been tempted to view the tort as lacking in doctrinal clarity or coherent purpose.[47] Yet, the true justification, nature, and objective of private nuisance is in fact glaringly obvious. It appears or is at least hinted at in most academic texts and cases, but is frequently obfuscated by the various alternatives proffered *ex abundanti cautela*. For example, in

[42] *Pex*, *supra* note 18 at [56].
[43] *Ibid* at [57].
[44] [2000] 2 SLR(R) 614.
[45] *Pex*, *supra* note 18 at [58].
[46] Gearty, *supra* note 7.
[47] *Ibid* at 214–216.

St Helen's Smelting Co v Tipping, Veale J asserted that "the law must strike a balance between the right of the plaintiff on the one hand to the undisturbed enjoyment of his property, and the right of the defendant on the other of use his property for his own lawful enjoyment".[48] Similarly, the authors of Winfield and Jolowicz note that "[p]rivate nuisance is firmly rooted in the protection of landholding rights",[49] while Nolan argues that "private nuisance can only be understood as a tort which protects rights in land".[50] What these statements (and several others) have in common is the notion that *the law of private nuisance must balance one landowner's rights against that of another*. Therefore, the Court of Appeal in *Pex* was astute in its observation that private nuisance focusses on "vindication of the plaintiff's interests and rights over his land" and on "determining the proper balance between neighbouring landowners".[51] Indeed, *this is the crux of private nuisance*. Rooted in values of reciprocity, as well as commutative and equal justice, this view is entirely sensible.[52] The law must prioritise property rights by allowing the more fundamental interests of one landowner to prevail over the less fundamental interests of another landowner.[53]

The corollary of this, and of much importance, is that fault is irrelevant to private nuisance. If the focus is on competing *property rights* of landowners, looking at the objectionability or acceptability of parties' conduct – their fault – would simply be barking up the wrong tree. This is also historically supported by the strict liability nature of private nuisance. In Newark's seminal article, it is argued that private nuisance began as a strict-liability tort but gradually and regrettably became infected with elements of fault due to infiltration by the tort of negligence.[54] The concept of unreasonable interference – which will be unpacked and properly defined in due course – can be misleading because lexically, "unreasonable" plausibly connotes fault.[55] However, this must not detract from the essential strict liability nature of private nuisance,[56] which sets it apart from the fault-based tort of negligence.[57] Although the Court of Appeal in *Pex* did not explicitly discuss

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48 (1865) 11 ER 1483 692.
49 Winfield and Jolowicz, *supra* note 3 at [15-007].
50 Donal Nolan, "'A Tort Against Land': Private Nuisance as a Property Tort" in Donal Nolan & Andrew Robertson, eds, *Rights and Private Law* (London: Hart Publishing, 2011) 459 [Nolan & Robertson].
51 *Pex*, *supra* note 17 at [56].
52 Beever, *supra* note 9 at 13. See also *Fearn*, *supra* note 12 at [20]: Lord Legatt agrees to the extent that equal justice guides the application of private nuisance.
53 Beever, *supra* note 9 at 21.
54 Newark, *supra* note 4. For an argument against this view, see J. M. Eekelaar, "Nuisance and Strict Liability" (1973) 8:2 Irish Jurist 191 at 197.
55 Peter Cane, 'What a Nuisance!' (1997) 113:4 L Q Rev 515 at 520.
56 Witting, *supra* note 10 at 423.
57 Winfield and Jolowicz, *supra* note 3 at [3-006].

strict liability, it opined that unlike negligence, private nuisance does not have the objective of making one responsible for a fall in his standards of behaviour below that which is expected in a particular society.[58] In doing so, the court implicitly confirmed that the finding of fault is irrelevant to establishing liability in private nuisance. Instead, the tort is distinct from negligence, with its own unique mechanism and objectives.

2. *If fault is irrelevant, so must foreseeability be*

The argument advanced thus far is that private nuisance exists to balance the rights of neighbouring landowners, *ergo* fault is not relevant to the tort. As will be explained, it therefore follows that the Singapore Court of Appeal's removal of foreseeability (of the risk of harm) as a component of private nuisance in *Pex* must be correct. One might argue that (1) foreseeability is not tantamount to fault, and (2) hence, requiring the risk of harm to be foreseeable does not contradict strict liability. However, there is only truth to (1), but not (2), because foreseeability is *only ever* relevant as a precursor to determining fault – making its place in private nuisance unjustified.

It is true that foreseeability itself is not equal to fault. Simply, one cannot prevent harm which is not foreseeable in the first place. Therefore, it is abundantly logical that a defendant may not be at fault despite the risk of harm being foreseeable.[59] Foreseeability indicates if precautions *could have been* taken but not whether *the defendant could have* taken those precautions in the circumstances – whether he is at fault. Therefore, foreseeability is a precondition to fault.

However, it is precisely for this reason that foreseeability is inconsistent with the strict liability that underpins private nuisance – it is a prerequisite for fault, no more or less. As argued by Beever, foreseeability is important only because of its connection to prevention, which thereby indicates fault and negligence liability.[60] A condition of liability that the risk of harm must be foreseeable thus has no place in a tort which is neither fault-based nor negligence-based. After all, it is difficult to meaningfully separate the concepts of fault, negligence, and foreseeability from one another.[61]

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[58] *Pex*, *supra* note 17 at [56].
[59] *Beever*, *supra* note 9 at 99.
[60] *Ibid* at 99. This view arguably also finds support in OTF Aquarium, supra note 28 at [22].
[61] Beever, *supra* note **Error! Bookmark not defined.** at 100. Beever also argues that foreseeability is a mistake introduced into the law of private nuisance via two key English cases.

Therefore, while arguable that foreseeability might not technically flout strict liability, its inextricable link with fault and negligence is undeniable. *Ex hypothesi*, insisting on its retention will only bring private nuisance and negligence/fault closer to one another and run the risk of assimilating the former into the latter – a most undesirable outcome that would undermine strict liability and reciprocal use of land.

Summarising, in addition to the three reasons given by the Court of Appeal in *Pex*, moving away from foreseeability of the risk of harm is desirable because it coheres with the fault-free foundations of private nuisance. Although fault and foreseeable harm are admittedly often found along with private nuisance,[62] that does not change the fact that these considerations should be irrelevant to private nuisance – lest doctrinal clarity be diminished.

B. *Pex does not Define Unreasonable Interference*

Despite *Pex* being a step in the right direction, the Court of Appeal did not elaborate on the concept of unreasonable interference, which it left the mantle of limiting private nuisance with. It will be argued that "unreasonable" in private nuisance is an inherently empty concept, and that the reciprocity-based rationale of the tort must take precedence to prevent fault and foreseeability from sneaking back into private nuisance under the guise of "unreasonableness".

1. *An empty concept*

Described both as a test and a principle,[63] the core tenet of reasonableness in private nuisance suffers from one major issue: it does not mean anything. Beever and several other commentators have persuasively advanced this view. Instead, "reasonable" or "unreasonable" are merely a shorthand for lawful or unlawful,[64] or labels for the intuitive response to whether a defendant should be liable.[65] Accordingly, it is no surprise that courts struggle to convincingly verbalise their basis for finding an interference to be unreasonable: in *Lim Seng Chye* for example, the exact same facts and similar language was used for both the finding of foreseeability and unreasonable use.[66]

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[62] *Transco*, *supra* note 2 at [6].
[63] *Pex*, *supra* note 17 at [56], [59].
[64] Winfield and Jolowicz, *supra* note 3 at [15-010].
[65] Beever, *supra* note 9 at 12.
[66] *Lim Seng Chye*, *supra* note 32 at [121].

Thus, as most recently conceded by the UK Supreme Court in *Fearn*, "unreasonable" has no explanatory force.[67] If courts persist with "unreasonable interference" as the standard for private nuisance liability, the term must be treated as no more than a mere vessel for the *raison d'etre* of private nuisance: balancing conflicting rights and interests of landowners. *Ex hypothesi*, in applying the reasonable user test, the court would simply be asking if the rights of the claimant or defendant are more deserving of protection. Understood this way, there is no harm in unreasonable interference being the fundamental criterion for private nuisance.

2. The risk of reversion to foreseeability and fault

However, it may be preferrable to abandon the language of reasonableness altogether due to the confusion it engenders. As mentioned, the term "unreasonable" is misleading because of the temptation to assume that it has a similar meaning as in negligence. If such erroneous analogising is made, then the concepts of fault and foreseeability might find their way back into the domain of private nuisance due to the role that they play in negligence. Concerningly, there are already signs that this might happen in Singapore. In finding "unreasonable use of land" in *Pex*, the Court of Appeal considered that the hot works were done in the presence of strong winds and in close proximity to flammable mattresses.[68] Unsettlingly, this is arguably just another way of stating that the risk of harm was foreseeable – the very limiting principle that was held to be no longer part of private nuisance. Similarly, in reconciling *Tesa Tape*, the Court of Appeal in *Pex* held that the same facts creating reasonable foreseeability and negligence equally established that there was an unreasonable use of land.[69] This illustrates that the language of "unreasonable" should be abandoned altogether to prevent the law of private nuisance from reverting to fault and foreseeability, albeit under the guise of "unreasonable". Again, the key question is simply whether one landowner's property rights should triumph over that of another.

To avoid doubt, the primary advantage of understanding private nuisance from the perspective of competing landowners' rights, rather than unreasonable interference, is the reduced risk of infiltration by notions of fault, foreseeability, or negligence. This allows the court to properly dedicate and apply its mind to deciding the appropriate balance between parties. Naturally, the

[67] *Fearn*, *supra* note 12 at [8].
[68] *Pex*, *supra* note 17 at [62].
[69] *Ibid* at [60].

precise mechanics of how these rights should be balanced against one another still needs further clarification – to which this article turns.

IV. REFLECTIONS ON THE UK SUPREME COURT'S DECISION IN *FEARN*

When the opportunity arises to clarify how competing landowners' rights should be balanced, *Fearn* will no doubt be considered, given the recent and relevant decision of the UK Supreme Court. Importantly, it is recalled that private nuisance is about *reciprocal* land use. Formulistic approaches which ignore the various circumstances surrounding the parties' interest must hence be eschewed in favour of a dynamic and holistic method. Therefore, Singapore should depart from the claimant-sided approach proposed by the majority in *Fearn* and instead adopt the open-textured approach advocated in the dissenting judgment of Lord Sales (with whom Lord Kitchin agreed). As this Part will illustrate, this approach will provide useful guidance on how private nuisance should operate in Singapore.

A. Factual Background and Case History

Like many private nuisance cases, the facts of *Fearn* are not complicated. The claimants owned flats in high-rise residential property opposite the Tate Modern art gallery in central London. To allow the claimants to enjoy the picturesque views, the flats were constructed using a significant amount of glass, including floor to ceiling windows. The defendants in this case were the Board of Trustees of the Tate Gallery. On the top floor of the Tate Modern, a new viewing gallery extension was built to give visitors a panoramic view of London. However, several visitors of the viewing gallery also peered into the claimants' flats and took photos. Therefore, the claimants brought an action in private nuisance, seeking injunctive relief to prevent members of the public from observing their flats from the Tate Modern viewing gallery.

At first instance, Mann J found that the defendants were not liable in private nuisance because there was no unreasonable use of land. In coming to this decision, the Judge considered various factors such as how the viewing gallery was used, the locality of central London, the special sensitivity that the claimants had submitted themselves to by staying in flats built with predominantly glass windows. On appeal, the Court of Appeal disagreed with this finding and held that there was indeed unreasonable interference based on the facts, which should generate liability

in private nuisance. Nevertheless, the appeal was dismissed by reason of "mere overlooking" being incapable of redress within the confines of the tort of private nuisance.

Finally, the Supreme Court unanimously disagreed with the Court of Appeal's finding that mere looking was outside of the scope of private nuisance. However, the Law Lords disagreed on whether there was in a fact a nuisance. While the majority (consisting of Lord Leggatt, Lord Reed and Lord Lloyd-Jones) found for the claimants, Lord Sales and Lord Kitchin took the opposing view that the Tate did not create a private nuisance. In essence, the majority and minority reached divergent conclusions because of a disagreement as to the appropriate standard for private nuisance – which will now be turned to.

B. *The Balancing Approach of the Minority is to be Preferred*

Leading the majority, Lord Leggatt adopted a claimant-sided approach heavily based on *Bamford v Turnley*.[70] Essentially, there are two stages to this test. Firstly, it must be asked if the defendant caused substantial interference to the claimant's ordinary use and enjoyment of property – if the interference complained of does not exceed a minimum level of seriousness to justify the law's intervention, the tort of private nuisance cannot be invoked at all.[71] Whether an interference is sufficiently "real", "substantial", "material", or "significant" requires an objective assessment of whether there has been a diminution in the utility and amenity value of the claimant's land.[72] Secondly, liability in private nuisance does not arise although substantial interference has been caused *unless* the defendant carries out an activity that *is not* ordinary use of the land.[73] To be more specific, once (1) substantial interference is established, private nuisance will be found if the defendant's acts complained of are not (2A) necessary for the common and ordinary use and occupation of land, and/or (2B) not conveniently done.[74] Importantly, this is a claimant-sided test in that liability is predominantly determined based on the defendant's use of land – rather than considering the land usage of *both* claimant and defendant.[75] Therefore, applying this test to the

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[70] *Bamford*, *supra* note 13 at 83.
[71] *Fearn*, *supra* note 12 at [22].
[72] *Ibid* at [23].
[73] *Ibid* at [27].
[74] *Bamford*, *supra* note 13 at 83.
[75] Lord Leggatt acknowledges that "[a claimant] cannot complain if the use interfered with is not an ordinary use" because "priority is accorded to the general and ordinary use of land over more particular and uncommon uses" (at [24]–[25]). However, it is clear from the rest of the judgement that the majority's test

facts, Lord Leggatt found that the result was simple. The Tate was liable in private nuisance because its viewing gallery caused substantial interference to the ordinary use and enjoyment of the claimants' flats, and the Tate's operating of this public viewing gallery was not necessary for the common and ordinary use of its land.[76]

In contrast, the dissenting Lord Sales (with whom Lord Kitchin agreed) preferred an objective test of reasonable reciprocity and compromise.[77] Unlike this holistic approach, the interests of both the defendant *and* the claimant are taken into account – unlike the claimant-sided test of the majority. Therefore, while the commonness and ordinariness of a defendant's use of land continue to be pertinent, they are not the sole determinants of private nuisance. Instead, the court must consider other factors such as whether the claimant could reduce the friction between the competing uses through modest adjustments.[78] Applying this test, Lord Sales found that the trial judge was correct to find that the Tate was not liable in private nuisance – contrary to what the Court of Appeal held. In his view, although the visual intrusion was no doubt significant, the alleged nuisance arose in central London. The claimants were expected to use curtains, blinds, or other screening measures to limit such annoyance which is typical of community life in the area – especially since the claimants' building was constructed so as to involve a heightened degree of sensitivity.[79]

At a general level, the open-textured approach of the minority is preferrable because it facilitates the core purpose of private nuisance, as articulated in Part III. If the tort is based on equal justice and the golden "rule of give and take, live and let live" – as acknowledged by the majority[80] – then the test it propounds is counterintuitive. Such a one-sided approach provides only half of the equation required to determine the appropriate balance between neighbouring landowners and their respective use of land.[81] As put succinctly by the dissenting Lord Sales, "the claimant's user should not of necessity trump the ordinary right of the defendant to use its property in a new way,

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is solely predicated on the defendant's use of land. Lord Sales similarly understands Lord Leggatt's judgement as such (at [227]).

[76] *Fearn*, *supra* note 12 at [50].

[77] *Ibid* at [240]. Lord Sales uses the language of "reasonableness", which was earlier argued to be an empty concept in the private nuisance context. However, at the heart of these "assessments of reasonableness" is clearly a balancing of the rights of one landowner against that of another (at [225]–[252]).

[78] *Ibid* at [241].

[79] *Ibid* at [271].

[80] *Ibid* at [34].

[81] *Pex*, *supra* note 17 at [56].

so as to eliminate all question of whether there is scope of a reasonable accommodation of the two uses";[82] "such an exclusive focus places excessive weight on one side of what is an inextricably two-sided relationship".[83]

As noted by Lord Sales, the majority erred in placing undue emphasis on *Bamford*. Whether the defendant's use of land is common and ordinary is of course an important factor in establishing private nuisance liability. However, it cannot be the only factor – the words of Bramwell B should neither be interpreted as statute nor applied as a mechanistic rule.[84] Further, this rigid test is contrary to private nuisance case law in both the UK and Singapore. For example, in *Cambridge Water*, Lord Goff was applying a wider test than simply asking if the defendant's use of land was common and ordinary – contrary to Lord Leggatt's reading of the case.[85] Similarly, in Singapore, courts have also considered other factors such as precautionary measures available to the claimant.[86] Therefore, to elevate the question of whether a defendant's use of land was common and ordinary as such would constitute a significant change to private nuisance – a misstep which must be avoided to preserve the tort's ability to fairly regulate private land usage.

Additionally, the majority's claimant-sided test is particularly undesirable in Singapore's context. Firstly, by focussing exclusively on one party, it risks fostering the erroneous perception that private nuisance is fault-based – contradicting the recent clarification by the Court of Appeal in *Pex* that foreseeability of the risk of harm is irrelevant to the tort. Secondly, the stakes are higher in land scarce-Singapore.[87] With high housing costs, building density, and population density, private nuisance disputes hold heightened significance – impacting not only the parties involved but also the broader societal fabric.[88] The need for a dynamic, nuanced, and most importantly, reciprocal approach to regulating landowners' rights is thus amplified. If the one-sided and claimant favouring test of the majority in *Fearn* is adopted, there is a real risk that harmony between neighbours will be diminished.

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[82] *Fearn*, supra note 12 at [241].
[83] *Ibid* at [227].
[84] *Ibid* at [241] and [243].
[85] *Ibid* at [246].
[86] *Tesa Tape*, *supra* note 24 at [14], *OTF Aquarium*, *supra* note 29 at [31]. This point will be further discussed below.
[87] This idea was alluded to by the Court of Appeal in *Pex*, *supra* note 17 at [58].
[88] For a fuller discussion of land scarcity in Singapore, see Goh Yihan, "Tort Law in the Face of Land Scarcity in Singapore" (2009) 26(2) Ariz J Intl & Comp L 335.

C. *Unpacking the Balancing Approach*

In *Fearn*, the majority judges' aversion to a balancing test was clearly motivated by a desire for certainty – Lord Leggatt, in particular, stressed that private nuisance "does not turn on some overriding and free-ranging assessment by the court".[89] However, this concern is misplaced. Ensuring a fair and appropriate allocation of rights between landowners remains paramount. Predictability in application is no justification for excessively empowering claimants, as the majority has done. Over time, courts can incrementally develop and refine a test that balances parties' rights not only in reciprocity, but also in predictability. This article will not discuss every aspect of how this balancing test should operate. Instead, it will unpack two factors which are central to the balancing test but mere afterthoughts under Lord Leggatt's approach – with the aim of highlighting the sensibility in eschewing rigidity for flexibility.

1. *Self-help measures available to the claimant*

It is recalled that private nuisance is a tort against land; thus, a claimant's failure to take protective steps against the alleged nuisance *per se* does not impact the probability of liability.[90] However, the *availability* of such precautionary measures becomes critical as it informs the court about whether the claimant's use of land is inherently more fundamental than the defendant's. In other words, self-help measures that could have and should have been taken to alleviate the interference complained of will usually militate against the finding of private nuisance. This is indicative that the claimant's use of land was not consistent with the ordinary habits of life and hence, not so fundamental.[91] Accordingly, as noted when outlining the facts of *Fearn*, Lord Sales found that the trial judge was right to have considered that the claimants were expected to use curtains in central London where some degree of overlooking is inevitable.[92] Importantly, this also coheres with the approach of Singapore courts: in *Tesa Tape* and *OTF Aquarium*, the viability of precautionary measures was similarly considered (and rightfully so, according to the Court of Appeal in *Pex*).[93]

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[89] *Fearn*, *supra* note 12 at [20].
[90] *Hunter*, *supra* note 4.
[91] *Fearn*, *supra* note 12 at [215].
[92] *Ibid* at [271].
[93] *Pex*, *supra* note 17 at [60].

Against this view, Lord Leggatt argued in *Fearn* that taking into account the possibility of remedial steps would be 'far from give and take', and 'all one way'.[94] This would be true if defendants are automatically and unquestioningly immunised from private nuisance liability upon finding such remedial steps available. However, it bears repeating that this is not the case: the availability of self-help measures is but one of many factors relevant to balancing one landowner's rights against that of another. Moreover, there is a certain irony in the majority's concern that private nuisance would become excessively one-sided if self-help measures are relevant, considering how onerous the test it instead advanced is on defendants.

2. *Sensitivity of the claimant*

In the process of balancing the rights of one landowner against that of another, the court must examine if the interference complained of by the claimant resulted from the claimant's own sensitivity. If so, the fundamentality of the claimant's land use is diminished – militating against the defendant being liable. This is most logical, as liability in private nuisance does not arise based on the extent to which a *specific claimant's* use of land is affected, but rather on the extent to which the use of land by an *ordinary reasonable person* is affected.[95] To hold otherwise would be unfair as between the parties, placing an obligation on the defendant that the defendant would not otherwise have had.[96] A man who carries out an exceptionally delicate trade cannot complain because he is injured by his neighbour doing something which would not injure anything but that exceptionally delicate trade.[97] In *Fearn*, the claimant's sensitivity manifested not in the form of an activity carried out, but rather the manner in which the property was built (i.e., the predominantly glassed design of the flats). However, the law of private nuisance should not draw a distinction between these two "forms" of sensitivity. The fact remains that the friction between the two parties in *Fearn* arose in no small part from the claimant's particular vulnerability. The sensitive building should undoubtedly have been central to balancing the rights of the two parties.

Lord Leggatt acknowledged the relevance of a claimant's sensitivity, but heavily qualified this principle. Concerningly, it was held that a claimant's sensitivity can *never* exempt a defendant from liability in private nuisance once the defendant's use of land is deemed not common or ordinary –

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94 *Fearn*, *supra* note 12 at [83].
95 Beever, *supra* note 9 at 33.
96 *Ibid* at 34.
97 *Robinson v Kilvert* (1889) LR 41 Ch D 88 (CA).

apart from in "extreme cases of abnormal construction".[98] Put another way, irrespective of how abnormal a claimant's use of land may be (apart from extreme situations), such use is always considered more fundamental than that of the defendant, as long as the defendant's land usage was not common or ordinary. This severe limiting of sensitivity as a relevant factor must be rejected for two reasons. First, the majority applied its own test wrongly. As recalled, under Lord Leggatt's conception of private nuisance, common and ordinary use of land operates a "defence" for the defendant *only after* substantial interference is established. As substantial interference is to be ascertained objectively (as acknowledged by the majority),[99] the trial judge was right to inquire whether the Tate's viewing gallery would have amounted to a nuisance if the claimants had resided in a hypothetical alternative building designed in a less sensitive manner. Arguably, there was no substantial interference to begin with since the viewing interference complained of only occurred because of the predominantly glass-based structure of the claimant's building. Secondly, the "hopeless uncertainty" generated by considering a claimant's sensitivity when balancing parties' rights is overstated.[100] As mentioned, fairness encompasses more than mere certainty. Moreover, as noted by Lord Sales, there are many areas of the law where relations between parties with conflicting interests are governed by a balancing exercise.[101] In fact, it might be argued that the "extreme cases" exception that Lord Leggatt carved out to his own rule risks greater uncertainty, as it was left undefined what exactly qualifies as such. Therefore, a claimant's sensitivity should always be a relevant factor to determine the appropriate balance between landowners.

V. CONCLUSION

To conclude, the first objective of this article was to trace and evaluate the development of private nuisance in Singapore. Understanding that the tort does not operate based on a defendant's fault but, rather, by ascertaining the appropriate balance between landowners, it is clear that private nuisance cases in Singapore have been trending in the right direction. Particularly welcome is the Court of Appeal's clarification in *Pex* that, *inter alia*, foreseeability of the risk of harm is irrelevant to the tort.

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98 *Fearn*, *supra* note 12 at [65].
99 *Ibid* at [23].
100 *Ibid* at [67].
101 *Ibid* at [245].

However, the term "unreasonable interference", which the Court of Appeal has left to regulate private nuisance, continues to risk confusion due to its association with irrelevant concepts such as fault and negligence. Therefore, private nuisance should instead be understood through the lens of competing landowners' rights, such that parties' interests are appropriately balanced.

Naturally, further clarification is still needed on how such a balancing test should operate – the second objective of this article. *Fearn* was extensively analysed, given the recency and relevancy of the UK Supreme Court's decision. Ultimately, inspiration should be drawn from the minority's open-textured approach based on reciprocity, which aligns with both the foundations of private nuisance and Singapore's local context. Contrastingly, the rigid and claimant sided test of the *Fearn* majority should be rejected.

Notably, this article does not cover all aspects of private nuisance comprehensively. For example, issues such as the malice doctrine, the public interest factor, and the potential requirement of emanation were not discussed. Nonetheless, it is hoped that this article may guide future developments of the tort of private nuisance in Singapore.