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THE NEED FOR A LEGAL INTEREST IN LAND IN ACTIONS FOR PRIVATE NUISANCE – THE END OF THE DEBATE?

The need for a proprietary interest in land on the part of the plaintiff in an action for private nuisance has for several years been the subject of judicial and academic debate. In a case decided recently by the House of Lords that debate appears, at least where the English courts are concerned, to have been resolved. This article examines the House of Lords' decision and considers its implications for courts elsewhere.

I. INTRODUCTION

ONE of the most questioned rules in tort law is the rule which requires the plaintiff in an action for private nuisance to establish a legal interest in land before he can sue. For some time, commentators have doubted whether this rule is either necessary or desirable, and in the last few decades courts deciding private nuisance cases in various jurisdictions have shown a marked willingness to relax their attitude towards the issue of *locus standi*. However, in the recent decision of the House of Lords in the case of *Hunter* v *Canary Wharf Ltd,*[1] the question of whether a legal interest in land on the part of a plaintiff is essential in this tort was examined at length, and their Lordships now appear (in England, at least) to have re-established the historical requirement that a person must show himself to be the legal owner or occupier of land before he may bring an action for private nuisance.

This article will look at the reasons for there being such strong differences of opinion in this area of tort law. It will examine the views expressed by advocates for both sides of the argument and will analyse the opinions of their Lordships in *Hunter* v *Canary Wharf*. It will then seek to show why, in spite of the authoritative determination which has now been made by the English courts, the debate about whether or not a plaintiff who brings

[1] [1997] 2 WLR 684 (*Hunter* v *Canary Wharf*). The case actually involved claims against two separate defendants, one being Canary Wharf Ltd and the other the London Docklands Development Corporation. See *infra*, text at note 31.

an action under this tort should be required to establish a legal interest in land is likely to continue.

II. The Historical Position

Of the various definitions of private nuisance, one of the clearest (and one that has been approved judicially) is that it is 'an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it'.[2] As the definition indicates, private nuisance has, throughout its history, been inseparably linked with the concept of property rights. Professor Newark, in his seminal article on the tort published in the late 1940s, described it as "a tort to land. Or to be more accurate ... a tort directed against the plaintiff's enjoyment of rights over land".[3] This reflected the traditional view of private nuisance, a view which led to two limitations being associated with the tort – first, that the plaintiff could sue only if he had a legal interest in land, and secondly (though this was always a more debatable proposition), that his claim must be for damage to, or for interference with his rights over, the land itself[4] and could not generally extend to claims for personal injuries.[5]

2 WVH Rogers, *Winfield and Jolowicz on Tort* (14th ed, 1994) at 404.

3 "The Boundaries of Nuisance" (1949) 65 LQR 480, at 482.

4 Some judges and commentators even take the view that *only* interference with the use and enjoyment of the land should be compensable, and that there should not even be claims in private nuisance for actual physical damage to land. See, *eg*, Conor Gearty, "The Place of Private Nuisance in a Modern Law of Torts" [1989] CLJ 214. This article was referred to by Lord Goff in *Hunter* v *Canary Wharf* (*supra*, note 1, at 695).

5 Professor Newark (*supra*, note 3, at 490) considered that actions for personal injuries should not generally be allowed in private nuisance claims, although he conceded that "It may well be that where an actionable nuisance is committed which in addition to interefering 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." There is little English authority on the point, but there are various cases from other jurisdictions in which personal injury claims have been allowed (see, *eg*, *Devon Lumber Co Ltd* v *MacNeill* (1988) 45 DLR (4th) 300 and *O'Regan* v *Bresson* (1977) 23 NSR (2d) 587). Modern commentators have tended to take the view that personal injury claims should be allowed (see, *eg*, Martin Davies, "Private Nuisance, Fault and Personal Injuries" (1990) 20 UWALR 129), although some (such as Gilbert Kodilinye in his article "Standing to sue in private nuisance" (1989) 9 LS 284) consider that a distinction should be drawn between personal injuries sustained through intereference with the use and enjoyment of land (which should be recoverable) and personal injuries consequent upon material damage to the land (which should not). It is noteworthy that in *Hunter* v *Canary Wharf*, Lords Goff, Lloyd and Hoffmann all expressed grave reservations about personal injuries being recoverable in private nuisance (see *supra*, note 1, at 695, 699 and 710). Lord Cooke, the dissenting judge, was, on the other hand, strongly of the opinion that personal injury claims *should* be allowed (*ibid*, at 719-720).

The case of *Malone* v *Laskey*,[6] decided at the beginning of the present century, is commonly cited as the authority for the proposition that a plaintiff in a private nuisance action must have a legal interest in land. The husband of the plaintiff in that case was employed by a company which allowed him to occupy a house as a mere licensee. Neither he nor the plaintiff had any proprietary interest in the house. The plaintiff was injured when a bracket fell on her while she was in the lavatory. The accident was caused by vibrations from the defendants' operations in the house next door. She sued in nuisance and negligence, but failed in both actions.[7] In deciding the nuisance claim, Sir Gorell Barnes P stated:

> ... in my opinion the plaintiff has no cause of action ... Many cases were cited in the course of 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 nuisance ...[8]

The correctness of this approach, and the need for the plaintiff to be complaining of interference with the enjoyment of his legal rights in land, has been acknowledged and reiterated by eminent judges in many subsequent cases,[9] and, until comparatively recently, the requirement that a plaintiff must have a legal interest in land was widely accepted, certainly by the English courts. In order to establish the requisite *locus standi*, plaintiffs have traditionally been required to show either that they are the owners of the freehold[10] or that they are legal tenants of the land. Persons with

6 [1907] 2 KB 141.

7 The negligence action would, though, have been decided differently today. The decision in this respect was overruled by the House of Lords in *AC Billings & Sons Ltd* v *Riden* [1958] AC 240.

8 *Supra*, note 6, at 151. The fact that the claim was for personal injuries was not discussed by the court. For this reason, *Malone* v *Laskey* is sometimes cited as a favourable (or at least a not *un*favourable) authority by those advocating the view that private nuisance should extend to claims for personal injuries. For discussion of the differing views on recovery of damages for personal injuries in private nuisance actions, see *supra*, note 5.

9 See, *eg*, the dicta of Lord Wright in *Sedleigh Denfield* v *O'Callaghan* [1940] AC 880, at 902-3, Lord Simonds in *Read* v *J Lyons & Co Ltd* [1947] AC 156, at 183, and Lord Templeman in *Tate & Lyle Food and Distribution Ltd* v *Greater London Council* [1983] 2 AC 509, at 536-7.

10 Usually such plaintiffs are owner-occupiers, although on occasions owners not in occupation of the land have brought successful actions based on permanent damage to their reversions.

no legally recognised interest at all (such as mere licensees) have, for the greater part of this century, been completely excluded from bringing private nuisance claims.

Even in England, though, there have always been exceptions to the rule that the right to sue must be based on formal legal title to land. Plaintiffs able to bring evidence of exclusive rights of occupation have, in several cases, been granted injunctions in the tort of private nuisance,[11] and commentators have referred to these cases as indicating that the law in the area has never been entirely clear-cut.[12] There are, moreover, jurisdictions in which, for some years now, a more flexible approach has been taken to the issue of *locus standi*. In the United States, for example, private nuisance claims are commonly based simply on occupancy (usually by family members of the person with the legal interest in the land),[13] and there are Canadian and Australian decisions in which a similar approach has been adopted.[14]

In recent years, a growing number of academics throughout the Commonwealth have come to condemn the requirement that a plaintiff must have a legal interest in land before he may sue for private nuisance. They see the rule as an anachronistic and unrealistic survivor of the days when

[11] See, *eg*, *Foster* v *Warblington Urban District Council* [1906] 1 KB 648, where a person who had, for many years, been in *de facto* possession of land was held to have a cause of action, and *Newcastle-under-Lyme Corp* v *Wolstanton Ltd* [1947] Ch 92, where a licensee with an exclusive right to possess land was held to be entitled to sue. Although the decision in *Foster* v *Warblington Urban District Council* pre-dated *Malone* v *Laskey* (*supra*, note 6) by a year, its principle is universally accepted as having survived *Malone* v *Laskey*. Indeed, the two cases, both decided by the Court of Appeal, shared the distinction of being decided by Fletcher Moulton LJ.

[12] See, *eg*, Gilbert Kodilinye (*supra*, note 5), and Bridgeman and Jones "Harassing conduct and outrageous acts: a cause of action for intentionally inflicted mental distress?" (1994) 14 LS 180.

[13] The *American Law Institute, Restatement of the Law, Torts*, 2d (1979), section 821E (referred to by Lord Cooke of Thorndon in his dissenting judgment in *Hunter* v *Canary Wharf (*see *infra*, text at note 63)) includes a statement that, where members of the family are concerned, "... occupancy is a sufficient interest in itself to permit recovery for invasions of the interest in the use and enjoyment of 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 ... When there is interference with the 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".

[14] See, *eg*, the Canadian cases of *Motherwell* v *Motherwell* (1976) 73 DLR (3d) 62 and *Devon Lumber Co Ltd* v *MacNeill* (*supra*, note 5). *Motherwell* v *Motherwell* was instrumental in causing the English Court of Appeal to relax its position with regard to *locus standi*. See discussion *infra*, text at note 21. See, too, the Australian case of *McLeod* v *Rub-A-Dub Car Wash (Malvern) Pty Ltd* (unreported, but summarised [1976] VR at 657) which, although not involving a familial claim, supports the notion that mere occupancy can give rise to a claim in private nuisance.

almost all legal rights stemmed from the land – days when society was based upon the distinction between landowners and serfs – and they argue that, in a modern society, it is both ridiculous and unfair to deprive a person with a genuine grievance of a cause of action simply because he cannot overcome an artificial legal obstacle which has little, if anything, to do with the real substance of his claim.[15]

III. The Decision in *Khorasandjian* v *Bush*[16]

In the light both of the more liberal approach creeping into other jurisdictions, and of the increasing weight of academic opinion favouring a relaxation of the legal interest in land rule, the English courts were faced in 1993 with the question of whether to adhere strictly to the decision in *Malone* v *Laskey*[17] or to depart from it in order to offer a remedy to a deserving plaintiff who would otherwise have had no cause of action available to her in tort. The question arose in *Khorasandjian* v *Bush*, a case which reached the Court of Appeal.

[15] Among the writers who have criticised the rule that a proprietary interest is necessary are Professor John G Fleming, who in *The Law of Torts* (8th ed, 1992) describes at 426 decisions allowing legal tenants of land to sue for nuisance while their family members have no cause of action as "senseless discrimination", a view also expressed in *Clerk & Lindsell on Torts* (17th ed, 1995) at 910-911, para 18-39, and Linden, *Canadian Tort Law* (5th ed, 1993) at 521-522. WVH Rogers, in *Winfield & Jolowicz on Tort* (*supra*, note 2) at 419-420 and Markesinis & Deakin, *Tort Law* (3rd ed, 1994) at 434-435 consider that rights should extend to long-time lodgers, *etc*. Other writers suggest that, at the very least, spouses should have the right to sue (see, *eg*, *Salmond & Heuston on the Law of Torts* (21st ed, 1996) at 63, and Todd, *The Law of Torts in New Zealand* (2nd ed, 1997) at 537. Gilbert Kodilinye in his article (*supra*, note 5), published in 1989, argued (at 288) that, under English law, spouses should be regarded as having *locus standi* both through their common law right of occupation of the matrimonial home and their statutory right of occupation under the Matrimonial Homes Act 1983 (and now the Family Law Act 1996). (The only possible equivalent of such provisions in Singapore law is s112(5)(f) of the Women's Charter, Cap 353, 1997 Rev Ed, which allows orders for exclusive occupation of a matrimonial home to be made on divorce, judicial separation or nullity). Kodilinye also favoured the concept of extending the right to sue to the children of the family, arguing (again at 288) that: "...to allow a right of action to children of the family is justifiable and in accordance with common-sense, for the occupation by such persons is as substantial and permanent as that of the parents, and the intereference with a child's enjoyment of land is likely to be no different from that suffered by his parents". (The views of many of these commentators were referred to by Lord Cooke of Thorndon in his dissenting judgment in *Hunter* v *Canary Wharf*. See *infra*, text at note 67).

[16] [1993] QB 727.

[17] The decision in *Malone* v *Laskey* has been followed in many English cases, including *Nunn* v *Parkes & Co* (1924) 158 L Jo 806, *Cunard and Wife* v *Antifyre Ltd* [1933] 1 KB 551 and *Metropolitan Properties Ltd* v *Jones* [1939] 2 All ER 202.

The case involved a young woman who, after terminating her relationship with a man a few years older than herself, suffered continual harassment from him in the form of assaults, threats of violence, and pestering telephone calls at both her parents' and her grandmother's homes. After many months of threatening and abusive behaviour, he was arrested and given a conditional discharge. A few months later, he was convicted and imprisoned for a short while for threatening to kill the plaintiff. After he was released from prison, he continued to pester and harass the plaintiff, who then applied for an interlocutory injunction to prevent him from bothering her. In the county court, the judge granted an injunction restraining the defendant from threatening or using violence to, or harassing, pestering or communicating with, the plaintiff in any way. The defendant appealed to the Court of Appeal on the ground that the words "harassing, pestering or communicating with" used in the injunction did not relate to any known tort, and thus could not protect any identifiable legal right.[18]

In the Court of Appeal, the majority[19] held that the court had jurisdiction in private nuisance to grant an injunction restraining the defendant from persistently harassing the plaintiff by making unwanted telephone calls. They held that this jurisdiction could be exercised in spite of the fact that the plaintiff had no proprietary interest (either freehold or leasehold) in the premises where the calls were received. They also held that the inconvenience and annoyance caused by such calls amounted, in and of itself, to actionable damage (in the form of interference with the ordinary and reasonable use and enjoyment of property) and that it could therefore be restrained *quia timet* without the need to prove further injury. This conclusion (*ie,* that the distress caused by the calls was enough to constitute actionable damage) led the majority on to hold that the situation also fell within the aegis of the tort generally known as the rule in *Wilkinson* v *Downton*,[20] a tort which protects a plaintiff from deliberately "bad" acts, but which is available only where the plaintiff can establish that he has suffered legally recognised damage.

In deciding that a proprietary interest in land was not essential to a private nuisance claim, the majority relied on the Canadian decision of appellate

[18] If the parties had been married or cohabiting, the court would have been empowered under section 1 of the Domestic Violence and Matrimonial Proceedings Act 1976 to grant an injunction against molestation. However, no such statutory power existed in England with regard to other classes of persons at the time when *Khorasandjian* v *Bush* was decided (nor, incidentally, would any such power exist in Singapore).

[19] Dillon and Rose LJJ.

[20] [1897] 2 QB 57.

division of the Alberta Supreme Court in *Motherwell* v *Motherwell*.[21] That case (decided almost two decades earlier) had involved a family dispute, in which one member of a family kept making harassing telephone calls to other members of the same family. The recipients of the calls all sued the person responsible for the offending calls, seeking injunctions to prevent her from calling again. One of the plaintiffs, however, was not the owner of the house to which the calls were made, but the wife of the owner. The Court nevertheless held that she was entitled to sue, even though she had no legal interest in her husband's property. Clement JA, in giving his judgment in that case, expressed the view that:

> 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 her husband ...[22]

Adopting this reasoning, Dillon LJ, who gave the majority judgment in *Khorasandjian* v *Bush*, stated that, from time to time, the courts have to reconsider existing law in the light of changed social conditions, and he suggested that it would be:

> ... 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 she has received the calls.[23]

Dillon LJ then held that the general distress which must necessarily have been suffered by the plaintiff in receiving the calls constituted actionable damage, in spite of the fact that in the earlier (and very similar) case of *Burnett* v *George*,[24] the Court of Appeal had held that, under the existing law, an injunction to prevent telephone calls which harassed and molested the plaintiff could be granted only where the calls could be shown to be calculated to impair the plaintiff's health. The "existing law" considered

[21] *Supra*, note 14. The decision in *Khorasandjian* v *Bush* arguably went further, though, since it allowed a claim by a child as opposed to a claim by the rather more easily accepted category of a spouse.

[22] *Ibid*, at 78.

[23] *Supra*, note 16, at 734.

[24] (1986) [1992] 1 FLR 525.

by the Court of Appeal in *Burnett* v *George*, though, was not that of private nuisance (which the court in that case never even discussed, presumably because of the plaintiff's lack of a proprietary interest in land) but the rule in *Wilkinson* v *Downton*, as applied in cases such as *Janvier* v *Sweeney*.[25] Dillon LJ in *Khorasandjian* v *Bush* distinguished the decision in *Burnett* v *George* on the basis that it did not even discuss the tort of private nuisance. However, instead of stopping there and simply deciding that the calls constituted damage in the form of interference with the use and enjoyment of land under the tort of private nuisance,[26] he went on to hold (notwithstanding the fact that no actual injury to health had been established) that the pestering calls also gave rise to damage of a type sufficient to bring the defendant's conduct within the scope of *Janvier* v *Sweeney*. Thus the real basis for the decision to allow the plaintiff's claim in *Khorasandjian* v *Bush* appears to lie in a kind of twilight zone between the torts of private nuisance and the rule in *Wilkinson* v *Downton* – extending and adapting both to offer a remedy for harassment where no remedy previously existed.

Peter Gibson J dissented. He considered that the decision in *Burnett* v *George* (with which he agreed) precluded molestation and harassment from being regarded as actionable wrongs in their own right, and observed that only where there was proof that they caused or were designed to cause legally recognisable damage would they become actionable.[27] Peter Gibson J then went on to examine the validity of applying the tort of private nuisance to the facts of the case. In this respect, while recognising that there were cases in which even plaintiffs without formal proprietary title to land had succeeded in actions for private nuisance based on long-established rights of exclusive occupation or possession,[28] he stated:

> ... I know of no authority which would allow a person with no interest in land or right to occupy land to sue in private nuisance. Given that the purpose of an action in nuisance is to protect the right to use and enjoyment of land ... it seems to me to be wrong in principle if a

[25] [1919] 2 KB 316.

[26] There was no argument over the fact that pestering and offensive telephone calls could amount to actionable damage in private nuisance (assuming that the matter of *locus standi* could be settled). In both *Motherwell* v *Motherwell* (*supra*, note 14) and the Australian cases of *Stoakes* v *Bridges*, [1958] QWN 5 and *Alma* v *Nakir* [1966] 2 NSWLR 396, Commonwealth courts had already recognised that telephone calls of this nature were actionable, and counsel for the defendant in *Khorasandjian* v *Bush* effectively conceded the point.

[27] *Supra*, note 16, at 742.

> mere licensee or someone without such right could sue in private nuisance.[29]

This strong dissent notwithstanding, the effect of the majority decision in *Khorasandjian* v *Bush* was to remove the need for a proprietary interest in land on the part of a plaintiff wishing to sue in the tort of private nuisance. The decision was approved by a number of commentators, though often more for the remedy which it offered to the victims of harassment than for the impact which it had on the tort of private nuisance as such.[30] Issues of harassment were, however, totally irrelevant when *Hunter* v *Canary Wharf* – a case which turned purely on straightforward nuisance claims – came to be decided. And when the House of Lords re-examined the issue of *locus standi* in that case, *Khorasandjian* v *Bush* was subjected to critical analysis.

IV. The Decision in *Hunter* v *Canary Wharf*

The case arose from two actions brought by plainitiffs living in the Docklands area of London. In the first action, a number of residents claimed damages in nuisance and negligence (though only the nuisance claim survived) against the first defendants, Canary Wharf Ltd. The claim was for interference with the reception of television broadcasts in their homes, interference which they claimed was caused by a large building erected by the defendants. Some of the plaintiffs were the owners or legal tenants of these homes, while others were family members or partners of persons with the relevant proprietary interest. In the second action, the plaintiffs (some of whom again had a legal interest in the land and some of whom did not) claimed damages in nuisance, negligence, and under the rule in *Rylands* v *Fletcher*[31] (though this latter claim did not survive) against the second defendants, London Docklands Development Corporation. The claim related to deposits of dust and dirt on their properties, which they alleged were caused as a result of the construction by the defendants of a link road in the vicinity of their homes.

In both actions, orders for the trial of a number of preliminary issues of law were made by Judge Fox-Andrews QC. These were heard by Judge Havery QC, who, with respect to the first action, held that, although

[28] See *supra*, note 11.

[29] *Supra*, note 16, at 745.

[30] See, *eg*, Bridgeman and Jones, *supra*, note 12, at 203-205. The writers, though, expressed the view that the task of creating a tort of harassment would be better undertaken by parliament.

interference with television reception was capable of constituting actionable nuisance, only persons with an exclusive right to the possession of land were entitled to sue in private nuisance. With respect to the second action, where there was no question that the nuisance caused by the road construction would be actionable, the only relevant finding was that (as with the first issue) only those with the requisite legal interest could sue.

The Court of Appeal reversed both these findings.[32] Neill, Waite and Pill LJJ held that the mere presence of a building in the line of sight between a television transmitter and other properties did *not* constitute an actionable interference with the use and enjoyment of land, but that the occupation of a property as a home *did* provide a sufficient basis for bringing an action in private nuisance.[33]

The cases were appealed together to the House of Lords. The plaintiffs in the first action appealed against the finding that the building's interference with television transmissions was not an actionable nuisance, and the defendants in both actions appealed or cross-appealed against the finding that an action in private nuisance was available without the need to establish proprietary rights to land.

With respect to the first issue, all five judges in the House of Lords[34] affirmed the decision of the Court of Appeal. The issue was decided on the basis that, even though nowadays interference with television viewing *might* be protected by the law of nuisance (as in the Canadian case of *Nor-Video Services Ltd* v *Ontario Hydro*),[35] in this case there was no actionable nuisance to which the interference could be ascribed. It was held that a building for which planning permission had been granted could not, in and of itself, constitute a nuisance. The owner of the land had the right to build on his land whatever he chose, subject only to building controls, and his neighbours would generally not be entitled to complain about any inconvenience or obstruction caused by the building itself. Their Lordships suggested that, had some special activity which interfered with the plaintiffs' television reception been carried on in the building (an activity similar, for example, to that in the case of *Bridlington Relay Ltd* v *Yorkshire Electricity Board*),[36]

31 (1868) LR 3 HL 330.

32 [1996] 2 WLR 348.

33 Pill LJ said: "I regard satisfying the test of occupation of property as a home provides a sufficient link with property to enable the occupier to sue in nuisance ... It appears to me, as it did to Dillon LJ [in *Khorasandjian* v *Bush*], to be right in principle and to avoid inconsistencies, for example between members of the family, which in this context cannot now be justified" (*ibid*, at 365).

34 Lord Goff of Chieveley, Lord Lloyd of Berwick, Lord Hoffmann, Lord Cooke of Thorndon and Lord Hope of Craighead.

35 (1978) 84 DLR (3d) 221 at 223.

then the finding might have been different (and the old law as represented by that case might have been overruled).

With respect to the second issue – that relating to the need for a legal interest in land – four of the five judges[37] held that the decision of the Court of Appeal should be reversed, and every judge gave a lengthy exposition of his reasons for deciding as he did.

Lord Goff of Chieveley placed considerable emphasis on Professor Newark's article, which had so strongly asserted the need for a proprietary interest in land on the part of a plaintiff in an action for private nuisance.[38] His Lordship examined the case law prior to *Khorasandjian* v *Bush* and concluded that, apart from the limited exception represented by occupiers in exclusive possession of land,[39] "it has for many years been settled law that that a person who has no right in land cannot sue in private nuisance".[40] He then went on to examine the decision of the Court of Appeal in *Khorasandjian* v *Bush* and concluded that it "must be overruled in so far as it holds that a mere licensee can sue in private nuisance".[41]

Lord Goff objected to the decision in *Khorasandjian* v *Bush* for two main reasons. The first was that he considered the Canadian case of *Motherwell* v *Motherwell* (which influenced the Court of Appeal in deciding to allow Ms Khorasandjian's claim) to have been based on a misunderstanding of the existing English law. His Lordship reasoned that the exclusive occupation cases which the court had used to allow the wife's claim in *Motherwell* v *Motherwell* had been misapplied. He took the view that the Appellate Division of the Supreme Court of Alberta, whilst recognising that there was a significant distinction to be drawn between someone who was 'merely present' in a property and one who could establish 'occupancy of a substantial nature',[42] had wrongly assumed that the wife of an owner of property fell within the latter, rather than the former, category. He concluded that, since the wife's claim in *Motherwell* v *Motherwell* did not give rise to anything like as strong a claim as those of the plaintiffs in the exclusive occupation

[36] [1965] Ch 436.

[37] Lord Cooke of Thorndon dissented.

[38] Lord Goff (*supra*, note 1, at 691) quoted from Professor Newark's article (*supra*, note 3, at 488-489): "A sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them from 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."

[39] See *supra*, note 11.

[40] *Supra*, note 1, at 692.

[41] *Ibid*, at 697-698.

[42] This distinction was drawn by Clement JA in *Motherwell* v *Motherwell* from his interpretation

cases to which the Supreme Court of Alberta had referred, her claim should not have been allowed. The weight given to the decision in *Motherwell* v *Motherwell* in deciding *Khorasandjian* v *Bush* must, consequently, undermine the decision of the Court of Appeal in that case.[43]

The second reason for Lord Goff's objection to the decision in *Khorasandjian* v *Bush* was that he considered that the Lord Justices in the Court of Appeal had removed the need for a proprietary interest in land in actions for private nuisance not because they had any real desire to liberalise the tort of private nuisance for its own sake, but because they wanted to be able to offer a remedy for harassment where none would otherwise have been available. In his Lordship's words:

> If a plaintiff ... is harassed by abusive telephone calls, the gravamen of the complaint lies in the harassment which is just as much an abuse, or indeed invasion of her privacy, whether she is pestered in this way in her mother's or 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 artifically limited to harassment which takes place in her home. I myself do not consider this 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.[44]

Lord Goff went on to point out that this basis for the decision in *Khorasandjian* v *Bush* had since been rendered redundant by the statutory recognition of a tort of harassment in the Protection from Harassment Act 1997. The case was thus both wrong *and* irrelevant and should be overruled. Having dismissed *Khorasandjian* v *Bush*, he made it clear that none of the academic articles or cases from other jurisdictions to which he had been referred convinced

of the decision in *Foster* v *Warblington Urban District Council* (*supra*, note 11).

43 Lord Lloyd of Berwick expressed similar views in this respect (see *supra*, note 1, at 700), although he did concede that the decision in *Motherwell* v *Motherwell* might have been justifiable in Canada based on a cause of action for invasion of privacy (a cause of action not available under English, or, for that matter, Singapore law).

44 *Ibid*, note 1, at 695. Lord Lloyd, dealing with the same point, expressed a similar view (at 700-701): "I can well understand Dillon LJ'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

him that there was any justification from departing from the decision in *Malone* v *Laskey*, and he therefore held that (with the exception of spouses with statutory rights of possession under the relevant family law legislation), family members of persons with a legal interest in land should not be entitled to bring actions in private nuisance.

Lord Lloyd of Berwick took the view that there are three classes of private nuisance claims: nuisance by encroachment on a neighbour's land; direct physical injury to a neighbour's land; and interference with a neighbour's quiet enjoyment of land. He was willing to acknowledge the attraction of the argument that private nuisance claims based on interference with the use and enjoyment of land should be available to anyone whose use and enjoyment of the land was actually adversely affected, and he accepted the proposition that such cases were theoretically distinguishable from claims involving encroachment on, or actual damage to land, where a legal interest in land on the part of the person bringing the claim would obviously be essential. He also had some sympathy with the "superficial logic" of writers who had suggested that the law should be modernised and freed from "undue reliance upon the technicalities of land law"[45] in order to allow the compensation granted to a homeowner who suffered damage along with the other two or three members of his household to be proportionately greater than the compensation awarded to a person living alone who suffered the same nuisance. However, his Lordship ultimately rejected such an approach on the ground that:

> ... it is one thing to modernise the law by ridding it of unnecessary technicalities; it is another to bring about a fundamental change in the nature and scope of a cause of action ... the essence of a private nuisance claim 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 ...There is no difference of principle ... the quantum of damages in private nuisance does not depend on the number of those enjoying the land in question ... 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.[46]

Lord Lloyd's sentiments were echoed by Lord Hoffmann, who considered the argument that a legal interest in land was unimportant in cases involving interference with the use and enjoyment of land to be based on a fundamental

law ... It would be to change the whole basis of the cause of action."

45 Lord Lloyd referred specifically to the views expressed in *Clerk & Lindsell on Torts* (*supra*, note 15, at 910-911, paras 18-39).

misunderstanding of the landmark decision in *St Helen's Smelting Co* v *Tipping*.[47] It was in that case that the distinction between acts causing 'material injury to the property' and those causing 'sensible personal discomfort' was first drawn. In Lord Hoffmann's opinion, the distinction between the two types of nuisance had wrongly been interpreted by later judges (and by commentators) to mean that, although where damage to property was involved a legal right to land would be essential, the same would not be true where damage to the senses was concerned. He stated:

> In the case of nuisances "productive of sensible personal discomfort", the action is not for causing discomfort to the person, but ... for causing injury to land ... 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 ... the damages cannot be increased by the fact that the interests in land are divided; still less according to the number of persons residing on the premises ...
>
> 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.[48]

Lord Hoffmann saw no reason for this rule to be abandoned. Like Lords Goff and Lloyd, he objected to the way in which *Khorasandjian* v *Bush* had "distorted" the principles of the common law to fill in a perceived gap. The Prevention of Harassment Act 1997 having now filled that gap, he saw no further need to consider the case. He did not go as far as Lords Goff and Lloyd, however, and he chose to treat it as a distinguishable case of intentional harassment rather than as one of private nuisance which required to be overruled.

Lord Hope of Craighead agreed with the other majority judges. He held that only those with a legal interest in land should be able to sue, and he reasoned that the measure of damages awarded to a person with such an interest should, in every case, be related to the diminution in the value of the plaintiff's interest in the property, and therefore be unaffected by the number of people on the land. He also held that *Motherwell* v *Motherwell*

46 *Supra*, note 1, at 698-699.
47 11 HL Cas 642, at 650.

and *Khorasandjian* v *Bush* (both of which in his opinion turned on issues of privacy outside the scope of private nuisance) were "flawed" because they flouted the legal interest in land rule. He therefore concurred in holding that those of the plaintiffs in the present case who had no proprietary interest in land lacked the requisite *locus standi* and that, regardless of any finding about the actionability or otherwise of the interferences complained of, they must, for this reason, fail in both actions.[49]

Lord Cooke of Thorndon, however, took an entirely different view. He began his judgment by saying that, in his opinion, there was no reason why a modern court examining private nuisance – a tort noted for its "flexibility and versatility"[50] – should feel compelled to hold that a plaintiff must have a proprietary interest in land. In acknowledging that he was about to disagree with the rest of his colleagues on this occasion, he observed that:

> ... 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.[51]

And later in his judgment he stated:

> ... 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 favourably with the approach of the present-day Court of Appeal in *Khorasandjian* and this case.[52]

Lord Cooke was of the opinion that private nuisance actions could arise in such varying circumstances and could be based on such diverse facts,

48 *Supra*, note 1, at 708-709.
49 *Ibid*, at 724-728.
50 *Ibid*, at 713.
51 *Ibid*.

that the law had to be able to differentiate them one from another and to develop approaches which, if not tidy, would nevertheless offer remedies to suit the different situations.

Where claims for damage to property were concerned, Lord Cooke accepted that "it is no doubt generally true ... that damages must not be increased by any subdivision of interests".[53] Where actions relating to the use and enjoyment of land were concerned, however, he saw the situation as quite different. He quoted his fellow judge, Lord Goff (with whom he was, of course, taking issue in this case), as having recently acknowledged that the governing principle in such cases was that of "give and take as between neighbouring occupiers of land",[54] and, unlike Lord Hoffmann, he took the view that *St Helen's Smelting Co* v *Tipping*[55] had actually created a separate type of action for claims of this kind. In Lord Cooke's view, just as a distinction had been drawn between actions for physical damage to property and interference with the use and enjoyment of land in terms of the conditions for their coming about, so a distinction could equally logically be drawn between the two actions as far as the right to sue was concerned.

Since Lord Cooke considered that the key to the question of who could sue in private nuisance turned on determining who could actually be said to occupy land or premises, much of his judgment focused on the definition and scope of the expression "occupier". He observed that the House of Lords had never before actually been called on define the expression precisely,[56] and he suggested that "where intereference with the 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".[57]

In examining the decisions in *Motherwell* v *Motherwell* and *Khorasandjian* v *Bush*, Lord Cooke disagreed with the views of his colleagues. They were of the opinion that Clement JA in *Motherwell* v *Motherwell* had misunderstood and misapplied the exclusive occupation cases. Lord Cooke, however, considered that Clement JA had merely used those cases to show that there

[52] *Ibid*, at 719.

[53] *Ibid*, at 713.

[54] See Lord Goff's judgment in *Cambridge Water Co* v *Eastern Counties Leather plc* [1994] 2 AC 264, at 299.

[55] *Supra*, note 47.

[56] Lord Cooke referred to the dictum of Lord Simonds in *Read* v *J Lyons & Co Ltd* (*supra*, note 9), which suggested that a proprietary or other interest in land would be necessary, but he took the view that the dictum was merely *obiter*.

were exceptions to the general rule requiring an interest in land. He felt that Clement JA had not sought to draw a parallel with them, but had based his decision on the "altogether different and wider considerations relating to the family home."[58] Lord Cooke went on to say that he agreed with the court in that case that, however acceptable the decision in *Malone* v *Laskey* might have been when it was decided, it was not appropriate in a modern society, where a wife is no longer considered subservient to her husband.[59]

With regard to the decision in *Khorasandjian* v *Bush*, Lord Cooke accepted that the status of children posed more problems, but he nevertheless concluded that the approach of the majority of the Court of Appeal in that case, supported as it was by "the weight of North American jurisprudence"[60] should be respected and followed. He cited in support of this view the fact that children are these days protected by various conventions on human rights, some of the provisions of which are specifically designed (irrespective of property interests) to give them the right not to be subjected to nuisances within their own homes.[61] In his Lordship's opinion, such international standards ought to be relevant in shaping the common law.

Although Lord Cooke shared the view of his colleagues that a remedy for harassment in a situation such as that in *Khorasandjian* v *Bush* would be essential to cover annoyance or harm caused to a child of the house outside the home, he disagreed with them to the extent that they felt that an action in nuisance was, therefore, the inappropriate remedy to offer even when that annoyance or harm was suffered within the home. In his Lordship's view, a child ought to be able to sue for nuisances within his or her home, regardless of the fact that he or she might have to sue under other torts for acts occurring in other places. In support of his view that the right to sue in nuisance should extend to the child of a home, Lord Cooke made use of "the vast sea of United States case law".[62] He referred to the relevant section of the American Restatement[63] and to various American cases,

[57] *Supra*, note 1, at 714.

[58] *Ibid*.

[59] *Ibid*.

[60] *Ibid*, at 715.

[61] Lord Cooke referred (*ibid*) in particular to Article 16 of the United Nations Convention on the Rights of the Child (which declares, *inter alia*, that no child shall be subjected to unlawful interference with his or her home and that the child has the protection of law against such interference), and to 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 (both of which have been construed as giving protection against nuisances).

[62] *Ibid*, at 716.

[63] *Supra*, note 13.

including *Hosmer* v *Republic Iron & Steel Co,*[64] a case decided only six years after *Malone* v *Laskey*, in which Sayre J had accepted in the clearest terms the right to bring an action in private nuisance on behalf of a (non-property owning) child who had died through inhaling noxious fumes in his home. Lord Cooke quoted from Sayre J's judgment:

> 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.[65]

Lord Cooke also mentioned more recent cases (such as that of *Bowers* v *Westvaco Corporation*)[66] in which children have been held by the American courts to be entitled to recover as the lawful occupants of homes, and he referred to the many academic writers and commentators throughout America and the Commonwealth who, in recent years, have advocated a more relaxed approach to the issue of *locus standi* in private nuisance actions.[67] Unlike Lord Goff and the other majority judges, Lord Cooke considered the views of these writers to be of assistance in suggesting the future direction of what he described as a "hitherto unsettled issue".[68] He conceded that there would be borderline areas[69] in which it would be questionable whether occupants of houses should be able to sue in private nuisance, but concluded that:

> it would seem weak ... to refrain from laying down a just rule for spouses and children on the ground that it is not easy to know where

64 (1913) 60 South. 801.
65 *Ibid*, at 801-802.
66 (1992) 419 SE (2d) 661.
67 See *supra*, note 15.
68 *Supra*, note 1, at 718.
69 The examples which Lord Cooke gave (*ibid*, at 719) included lodgers and *de facto* partners, whom he felt should be able to complain of serious interferences with their domestic amenities, and non-resident employees in commercial premises, whom he felt need not have the right to sue in private nuisance for disruptions to their comfort, since they would be

> to draw the line regarding other persons ... Occupation of the property as a home is, to me, an acceptable criterion consistent with the traditional concern for the sanctity of family life ...[70]

Lord Cooke would, therefore, have upheld the finding of the Court of Appeal and he would have allowed all the members of families occupying the relevant properties to be treated as having the requisite *locus standi* to sue in private nuisance. He was, however, aware that his was a lone voice in this respect.

V. Conclusion

The law may now, in England, at least, be settled for the foreseeable future. But it is unlikely that this will mark the end of the debate. Although it is quite possible in theory to subscribe to the view held by the majority of their Lordships in *Hunter* v *Canary Wharf* that actions relating to interference with the use and enjoyment of property relate not to the discomfort suffered by those on the property but to the reduction in the usefulness of the property itself, it is not a view which has much to be said for it in practice. If a person creates a nuisance in the form of noise, smells, fumes or whatever, the harm which he does is to the people living near him who suffer from the effects of that nuisance. The property on which those people reside is not actually harmed by their suffering. It is both artificial and unrealistic to suggest that, of all the people living on a property who are affected by a nuisance, only the person with legal title should be able to sue on the ground that the action is really being brought for the property, not for its occupants.

Far more appealing is the approach favoured by Lord Cooke, by the majority of American courts, and by some Commonwealth ones, that actions for "sensible personal discomfort" should relate to the person suffering that discomfort, not to the property on which it is suffered. And these views are shared by many writers. As Trindade and Cane observe:

> A more promising approach would be to try to relate the "title" the plaintiff must have to the interests which the law of nuisance protects. If the damage in issue is physical damage to property then the person with the right to sue ought to be the person with the obligation to repair or the burden of repairing the property. A licensee will rarely be in this position ... Where the damage is personal injury or interference with comfort or amenities there seems no reason why any occupant

entitled to protection by their employers.

> should not recover since in these cases the plaintiff recovers not for damage to the property or diminution in its value but for his diminished enjoyment of it.[71]

In Singapore and Malaysia there have been comparatively few reported nuisance actions, and none in which the issue of whether a plaintiff requires a legal interest in land has been given specific consideration. The inference to be drawn from the cases, though, is that the courts here have traditionally followed the English approach as represented by the decision in *Malone* v *Laskey*. In *Pacific Engineering Ltd* v *Haji Ahmad Rice Mill Ltd*,[72] for example, an action brought on behalf of the "employees, invitees and servants" of the plaintiffs (who had suffered harm through a nuisance caused by the defendants) was decided purely as a public nuisance claim.[73] In deciding the case, the court referred several times to English textbooks which summarised the traditional distinctions between private and public nuisance, and which indicated the need for an interest in land when bringing an action for the former.[74] And in *Hiap Lee (Cheong Leong & Sons) Brickmakers Ltd* v *Weng Lok Mining Co Ltd* the Privy Council, hearing a case on appeal from Malaysia, held that "their Lordships have no doubt that on the facts found the respondents were guilty of [private] nuisance – that is to say an unlawful interference with the use or enjoyment by the appellants *of their land*".[75]

These decisions, however, pre-date the Application of English Law Act[76] and the abolition of appeals to the Privy Council.[77] Since the changes of the early to mid 1990s, Singapore courts have shown themselves willing

70 *Ibid*.

71 *The Law of Torts in Australia* (2nd ed, 1993) at 605.

72 [1966] 2 MLJ 142.

73 In public nuisance, no proprietary interest in land is required. Instead, the plaintiff must show that the crime of public nuisance has been committed and that he has suffered damage different in kind or greater in extent than that suffered by the general body of the public.

74 The case is not, however, wholly satisfactory as a guide to the attitude of the courts here, because even the claim by the plaintiffs for damage to their own property appears (although this not entirely clear from the judgment) to have been decided in public nuisance, in spite of the fact that, as the court recognised in the passages from the textbooks to which it referred, a claim for private nuisance could have been sustained.

75 [1974] 2 MLJ 1 at 4 (*per* Lord Cross) (italics mine).

76 No 35 of 1993.

77 See the Judicial Committee (Repeal) Act 1994, No 2 of 1994.

78 See, *eg*, the Court of Appeal decisions in *RSP Architects Planners & Engineers* v *Ocean Front Pte Ltd and another appeal* [1996] 1 SLR 113 (relating to recovery in negligence for purely economic loss) and *Chong Yeo & Partners and Another* v *Guan Ming Hardware & Engineering Pte Ltd* [1997] 2 SLR 729 (relating to the immunity of lawyers in actions

to depart from the prevailing English position where tort law is concerned,[78] and, if an issue relating to the right of a plaintiff with no legal interest in property to sue in private nuisance were to arise, there is no reason why the courts here should blindly adhere to the old English approach simply because it has so recently been sanctioned by the House of Lords.[79] To retain an archaic rule based on legal interest in land where the harm complained of is to person, not property, is both unnecessary and unjust. It is to be hoped that the courts in Singapore and Malaysia (and indeed the courts throughout the Commonwealth) will avoid being unduly influenced by the decision of the House of Lords in *Hunter* v *Canary Wharf*. There is much to be said for future courts adopting a more enlightened position. The focus in private nuisance actions (at least where the claim is for interference with use and enjoyment) ought to be on whether the plaintiff can establish lawful occupation of land, not on whether he can establish technical legal title to it.

MARGARET FORDHAM*

for negligence).

79 If a case were to arise involving an issue of harassment, there would be the additional argument that, in the absence of legislation in Singapore similar to the English Protection from Harassment Act, a *Khorasandjian* v *Bush* approach might be the only way to offer a remedy to a deserving plaintiff in this jurisdiction. However, given the somwhat artificial and circuitous reasoning which was necessary to allow the majority of the Court of Appeal in *Khorasandjian* v *Bush* to offer a remedy for harassment *via* the tort of private nuisance (see discussion, *supra*, text at note 26), it is suggested that a more appropriate way of dealing with the question of harassment in Singapore would be to enact legislation similar to the English Act.

* BA (Dunelm), Solicitor, England & Wales and Hong Kong; Teaching Fellow, Faculty of Law, National University of Singapore.