

HOUSING AUTHORITIES AND THEIR LACK OF RESPONSIBILITY IN TORT FOR ANTI-SOCIAL TENANTS

*Hussain and another v Lancaster City Council*¹

I. INTRODUCTION

A case which recently came before the English Court of Appeal raised interesting issues with respect to both the responsibility of landlords for nuisances committed by their tenants and the liability of statutory bodies for the (arguably negligent) exercise of their statutory powers. In addition, the court considered the difficult question of the relationship between actions in nuisance and negligence and their respective roles in tort law.

Although the decision reached by the Court of Appeal in *Hussain's* case was based on well established authorities, the court nevertheless interpreted the existing cases very narrowly, and the decision militates against any extension of the limited remedies available in tort law to persons with grievances of this kind.

II. THE FACTS

The plaintiffs, Malazam Hussain and Linda Livingstone, owned a shop and a residential property on a council housing estate in the North of England run by Lancaster City Council.² They had purchased both the shop and the residence under 'right to buy' legislation, but almost all of the other occupants of properties on the estate still rented these properties as secure tenants of the council. The plaintiffs claimed that they had, on over a hundred occasions between June 1991 and April 1997, been the victims of repeated ill-treatment and harassment from as many as a hundred and six persons (primarily the council's tenants, but also the tenants' visitors and others).

¹ [1999] 2 WLR 1142 ("*Hussain's* case").

² "The council".

Their claims involved allegations that they had been the subject of threats and racist abuse both inside and outside the shop, that people delivering goods to the shop had been taunted and intimidated, and that they had had their stock stolen. They also alleged that the glass in both their shop window and bedroom windows had been smashed on several occasions, that the shutters had been ripped off, that the garage door had frequently been broken, and that a tree had once been placed in front of the shop doorway. Even more seriously, the plaintiffs alleged that the property had been attacked with petrol bombs and that, on one occasion, a mattress and other combustible material had been placed against the shop doorway and set alight.

The plaintiffs had called the police to deal with many of the attacks when they took place. The police, however, had had limited success in catching the perpetrators of the various offences, since the culprits had almost always dispersed by the time officers arrived at the plaintiffs' property. Although some of the most persistent offenders had been apprehended and prosecuted for breach of the peace or criminal damage, they had only been fined or bound over, and the criminal courts had no power to exclude them from the estate.

III. THE ACTION

Given the inability of the criminal courts to protect them from further acts of harassment and damage, and given the substantial physical damage which they had already sustained, the plaintiffs sought a civil remedy in the form of an injunction and a claim for damages, including aggravated damages, against the council. Their claim against the council was for its having caused or permitted nuisances to be committed against them and for having acted negligently in failing to protect them from these nuisances.³ This claim was supported by reference to the council's standard form of tenancy agreement, which provided that every tenant must ensure that he, the people living with him, and his visitors "... show proper consideration towards other residents in the area; ... not do anything which may cause discomfort, annoyance, or nuisance from noise, unreasonable or anti-social behaviour; ... not discriminate against, or harass any residents or visitors."

³ The plaintiffs' amended statement of claim alleged that the council: "... failed to cause the nuisance and acts of violence towards the plaintiffs to cease ... failed to institute and pursue possession proceedings and/or appropriate injunction proceedings, or take any or any effective steps against the perpetrators of the nuisance and acts of violence ... failed, as set out above, despite ample information being available from the plaintiffs, the police, and from its own officers or agents that would enable it to do so."

The plaintiffs also relied on the council's equal opportunity policy, which stated that: "[the council] views any form of racial harassment as a serious offence and ... will take action against anyone who harasses others", and on the Housing Act 1985, which gave a court the power to make an order for possession in respect of a secure tenancy when it considered it reasonable in circumstances where "the tenant or a person residing in the dwelling house has been guilty of conduct which is a nuisance or annoyance to neighbours".⁴ In addition, reference was made to Part IX of the Highways Act 1980 under which the council (pursuant to an agreement with Lancashire County Council) had assumed the statutory obligation "to assert and protect the rights of the public to the use and enjoyment of any highway".⁵

In July 1997, Master Rose ordered that the plaintiffs' statement of claim⁶ be struck out and the action be dismissed on the ground that it disclosed no reasonable cause of action. In October of the same year, the matter came before Harry Wolton QC, sitting as a deputy judge in the Queen's Bench Division. Concentrating on the nuisance claim, and bearing in mind that the case involved a striking out order (an order which should only be made if it was plain and obvious that the claim was bound to fail), the deputy judge reversed Master Rose's order. In reaching his decision, he relied primarily on the case of *Page Motors Ltd v Epsom and Ewell Borough Council*,⁷ on the basis of which he concluded that it was reasonably arguable that the council could be held liable in nuisance to the plaintiffs. The council then appealed to the Court of Appeal, arguing that this finding was wrong and that the action should be struck out.

IV. THE DECISION OF THE COURT OF APPEAL

Since the action involved a motion to strike out the claim as being unsustainable in law even if all the relevant allegations could be substantiated, the judges in the Court of Appeal proceeded on the assumption that all the allegations were true. The court therefore addressed its attention solely to the question of whether, on the assumed facts, an action could be sustained in either nuisance or negligence.

Counsel for the plaintiffs relied primarily on the nuisance argument, treating the negligence argument as an additional claim on the special facts of the case. Counsel for the council understandably argued that no action

⁴ Schedule 2, ground 2 and section 84.

⁵ Ss 130(1) and (2).

⁶ See *supra*, note 3.

⁷ (1982) 80 LGR 337 ("the *Page Motors* case").

could be sustained under either tort. Hirst LJ, giving the main judgment of the court,⁸ dealt first with the nuisance argument, then the negligence one, and went on briefly to discuss the relationship between the two torts.

(a) *Nuisance*

On the nuisance issue, counsel for the plaintiffs argued that a landlord (certainly a local authority landlord) who knew or ought to have known of a nuisance being committed by his tenant in the neighbourhood of the tenant's premises, but who failed to take reasonable steps within a reasonable period to control or prevent the nuisance should be held to have caused, continued or adopted the nuisance and should be made liable to any neighbour of the tenant who had been harmed by the tenant's acts. In addition, if the acts complained of occurred on land for which the landlord was responsible, but which was not the subject of a tenancy, the landlord's liability should extend to the acts of persons residing with or even merely visiting the tenant.

During the course of submissions on this issue, the court was referred to the seminal article on nuisance by Professor Newark, which took the view that claims in nuisance must relate to activities by the defendant on the defendant's land which adversely affected the plaintiff's use of the plaintiff's land.⁹ Putting on one side for this purpose arguments by counsel for the council that, in cases of physical damage to land, negligence rather than nuisance should offer the appropriate remedy in tort,¹⁰ Hirst LJ agreed that, for an action in nuisance to succeed, the defendant must be on his land at the time when he caused the relevant damage to the plaintiff's land. In this respect, his Lordship relied on the statements of Lord Goff of Chieveley in *Hunter v Canary Wharf Ltd*,¹¹ who approved of Professor Newark's approach,¹² and of Lord Wright and Lord Porter in *Sedleigh-Denfield v O'Callaghan*,¹³ both of whom regarded the defendant's use of his land as a prerequisite for an action in nuisance.¹⁴ Since, in *Hussain's* case, the

⁸ The other two judges were Thorpe and Hutchison LJ.

⁹ "The Boundaries of Nuisance" (1949) 65 LQR 480 (at 489).

¹⁰ These arguments were based, in particular, on the views expressed by Professor Gearty in his article "The Place of Private Nuisance in the Modern Law of Torts" [1989] CLJ 214. For further discussion of this article, see *infra*, text at note 42.

¹¹ [1997] AC 655 ("*Hunter v Canary Wharf*").

¹² *Ibid*, at 687-688.

¹³ [1940] AC 880 ("the *Sedleigh-Denfield* case").

¹⁴ Lord Wright referred to "the unreasonable and unjustified interference by the defendant in the user of his land with the plaintiff's right to enjoy his property" and Lord Porter referred to the occupier's liability for "a nuisance existing on his property" (*ibid*, at 904 and 919).

council's tenants had not been on their own properties when they damaged the plaintiffs' property, Hirst LJ held that this was not a "true" nuisance case, and that their acts fell outside the scope of the tort.

This requirement – that the defendant must be on his land when the nuisance is committed – may (as will be discussed below)¹⁵ be relaxed in certain circumstances, but Hirst LJ did not consider or discuss those circumstances, presumably because he regarded them as inapplicable on the facts of the case.

The next question was whether – even if it were possible to overlook the requirement that the wrongdoer must be on his property when he caused the damage – it would in law be possible to hold the defendant council, which had not itself committed the wrongs, responsible for its tenants' acts. In this respect, Hirst LJ referred to the case of *Smith v Scott*,¹⁶ which he held would deprive the plaintiffs' of any action, unless (as counsel for the plaintiffs argued) it had been overtaken by the later decision in the *Page Motors* case.¹⁷

In *Smith v Scott*, a local authority had placed a homeless family, which was known to be likely to cause disturbances, in a house next door to a property owned by the plaintiff. Although the tenancy agreement had specifically prohibited any nuisances being committed, the tenants had performed numerous acts of nuisance, for which the plaintiff sought to hold the local authority liable. Sir John Pennycuik V-C, however, held that:

It is established beyond question that the person to be sued in nuisance is the occupier of the property from which the nuisance emanates. In general, a landlord is not liable for nuisance committed by his tenant, but to this rule there is ... one recognised exception, namely, that the landlord is liable if he has authorised his tenant to commit the nuisance ... [However] this exception has, in the reported cases, been rigidly confined to circumstances in which the nuisance has either been expressly authorised or is certain to result from the purposes for which the property is let ... The exception is not based on cause and probable result, apart from express or implied authority.¹⁸

¹⁵ See *infra*, text at note 25 *et seq.*

¹⁶ [1973] Ch 314.

¹⁷ *Supra*, note 7.

¹⁸ *Supra*, note 16, at 321-322.

Hirst LJ observed that this statement had subsequently been approved by the Court of Appeal in the case of *Elizabeth v Rochester-upon-Medway City Council*,¹⁹ and that it was also consistent with dicta in earlier decisions such as *Rich v Basterfield*²⁰ and *Malzy v Eichholz*.²¹

His Lordship then turned to the *Page Motors* case, which had formed the basis both for the decision of Harry Wolton QC in the lower court and for the arguments of counsel for the plaintiffs in the Court of Appeal. In that case, the defendant council owned some open land on which gipsy caravans had camped illegally for some years. The plaintiffs were business tenants on an estate which was also owned by the council, and their premises adjoined the land on which the gipsies had settled. The gipsies performed many acts of nuisance over several years which adversely affected the plaintiffs' business. The plaintiffs sued the council, arguing that the council was responsible for the nuisances because it had not exercised its power to re-possess the land (which it could have exercised at any time), but had instead facilitated the gipsies' stay by providing water and waste disposal services. The Court of Appeal in that case agreed that the council should be held liable. Adopting Lord Wright's dictum from the *Sedleigh-Denfield* case that a person who had not created a nuisance would not be liable "unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it",²² Ackner LJ concluded that, since the council on the established facts had deliberately allowed the gipsies to stay on the site for more than five years in order to avoid the problem of finding an alternative site for them, it *could* be regarded as having "adopted" the nuisance and could therefore be held liable to the plaintiffs.

Hirst LJ in *Hussain's* case did not, however, consider that the decision in the *Page Motors* case laid down any new principle which would undermine the authority of *Smith v Scott*. He treated it simply as a decision which, for two reasons, was distinguishable on its facts.

¹⁹ Unreported, 26 April 1993, Court of Appeal (Civil Division) Transcript No 456 of 1993.

²⁰ (1847) 4 CB 783. In that case, it was held: "If a landlord lets premises, not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are used or not, the landlord cannot be made responsible for the acts of the tenant."

²¹ [1916] 2 KB 308: "It is quite a novel doctrine to me that permission by a lessee to use demised premises for a purpose which may or may not involve or create a nuisance is a wrong act on the part of the landlord, and that the landlord can be rendered liable merely because a person does carry on that business in such a manner as to create a nuisance" (*per* Lord Cozens-Hardy MR, at 315-316).

²² *Supra*, note 13, at 904.

The first reason given by his Lordship was that the *Page Motors* case clearly satisfied the technical requirement that the nuisances complained of must emanate from land which the wrongdoing “tenants” actually occupied, whereas *Hussain’s* case did not. This finding is perhaps somewhat surprising, since – as was pointed out by a subsequent Court of Appeal in the even more recent case of *Lippiatt v South Gloucestershire Council*²³ – the court in the *Page Motors* case in fact paid “no attention ... to the question whether the acts complained of took place on or off the defendant’s land”.²⁴ On the other hand, it seems that a distinction *can* be drawn between *Hussain’s* case and cases such as the *Page Motors* case and *Lippiatt’s* case (which, like the *Page Motors* case, involved a complaint that gypsies or travellers who illegally occupied land owned by the local authority had committed acts of nuisance against neighbouring tenants which the local authority had done nothing to prevent). It was held in *Lippiatt’s* case that the situation in *Hussain’s* case was distinguishable because there the individual wrongdoers left their various properties separately and then, either as individuals or in small groups, perpetrated the acts complained of: “their conduct was not linked to, nor did it emanate from, the homes where they lived”.²⁵ In *Lippiatt’s* case (and presumably also in the *Page Motors* case), however, “the travellers were allowed to congregate on the council’s land and ... they used it as a base for the unlawful activities of which the plaintiffs, as neighbours, complain”.²⁶ This, it was held in *Lippiatt’s* case, allowed the court to treat the acts complained of as emanating from the defendant local authority’s land even when they actually occurred elsewhere. Assuming that one accepts this as a valid basis for relaxing the normal rule, and assuming, too, that the same reasoning can be applied to the decision in the *Page Motors* case, then (regardless of whether the acts complained of in that case actually took place on the defendant local authority’s land or elsewhere) it can be argued that the facts of the *Page Motors* case were indeed sufficiently different from those of *Hussain’s* case to justify the distinction which the Court of Appeal in the latter case drew between them.

The second reason given by Hirst LJ for distinguishing the *Page Motors* case was that in that case “the council deliberately continued the gypsies’ possession on policy grounds, and provided them with a water supply, skips, *etc*, thus in effect adopting the gypsies’ nuisance, [whereas] no similar adoption occurred in the present case”.²⁷ By focusing only on the narrow

²³ [1999] 3 WLR 137 (“*Lippiatt’s* case”).

²⁴ *Ibid*, at 145.

²⁵ *Ibid*, at 146.

²⁶ *Ibid*.

²⁷ *Supra*, note 1, at 1161-1162.

“adopting the nuisance” aspect of the *Sedleigh-Denfield* case as offering sufficient grounds for an action against a landlord, Hirst LJ seems in this respect to have side-lined the wider alternative ground for liability which was indicated in Lord Wright’s dictum – that of unduly delaying remedial action in respect of a nuisance of which the defendant is aware. In this respect, his Lordship’s judgment appears to have confirmed the traditional assumption that the courts will not readily make landlords liable for unauthorised nuisances committed by their tenants.

On the basis of the decision in *Hussain’s* case, one might be tempted to conclude that the *Page Motors* case, which appeared to herald the start of a more liberal approach to nuisance actions against landlords, was in fact nothing more than the first of a few rarely applicable cases²⁸ which reached singular decisions as to the liability of landlords for the acts of their tenants on rather unusual facts. Such a conclusion might well be justified, particularly if the majority of courts in the future choose to regard adopting or authorising the nuisance as the sole exception to the rule that the occupier of land is the only person liable for nuisances emanating from it. However, it should be noted that Evans LJ in the Court of Appeal in *Lippiatt’s* case (which was decided only months after *Hussain’s* case) offered an alternative basis for liability, when he suggested: “It may be that the correct analysis ... is that ... the owner ... of the land is liable ... for a nuisance which he himself has created by allowing the troublemakers to occupy his land and to use it as a base for causing unlawful disturbance to his neighbours ... If that is correct, then strictly the question whether an owner ... has “adopted” a nuisance will not arise”.²⁹ Such an analysis (which this writer would argue is to be preferred to the analysis in *Hussain’s* case) would allow future courts to take a much broader approach to making landlords liable for the acts of their tenants or other occupiers.

²⁸ Hirst LJ also rejected the applicability of two other recent decisions which counsel for the plaintiffs argued were relevant. The first, *Northampton Borough Council v Lovatt* (1997) 96 LGR 548, which concerned the eviction by a council of its tenants under the Housing Act on the grounds of their persistent anti-social and criminal activities, he considered not to be relevant to the question of the responsibility of a landlord for his tenant’s acts. The second, *Chartered Trust plc v Davies* [1997] 2 EGLR 83, which concerned a shopping mall in which a pawnbroker’s business interfered with the ability of neighbouring tenants to acquire passing trade, he also considered to be distinguishable, on the ground that it involved a unique situation in which the landlord’s special role in the management of the shopping mall required him to intervene to prevent one tenant from causing economic damage to another.

²⁹ *Supra*, note 23, at 146. Mummery LJ took the view that “an occupier of land may be held liable in nuisance in these exceptional circumstances: the plaintiff’s use and enjoyment of his rights in his land is interfered with by the continuing presence on the defendant’s land of person’s whose actual or apprehended activities include, to the knowledge of the defendant, harmful acts repeatedly committed by them on the plaintiff’s land from their

(b) *Negligence*

Hirst LJ then turned to the alternative claim in negligence. On this issue, counsel for the plaintiffs argued that where a local authority knew or ought to have known of conduct by tenants or others on land for which it was responsible which was likely to cause physical damage or personal injury to another it would, under certain circumstances, owe a duty of care. This duty of care would arise if (i) the local authority had so conducted itself as to assume responsibility to take steps to stop that conduct; (ii) it had led the person likely to be injured to rely on it to take such steps; (iii) it had effective means of controlling the conduct; and (iv) it had failed to act within a reasonable period despite the severity of the conduct. That duty would be breached by the authority's failure to act if such failure led to a person suffering damage. On the specific facts of the case, the claim was that the council had negligently failed to exercise its powers under the Housing and Highway Acts, that this failure had caused the plaintiffs to suffer damage, and that it should therefore compensate them.

Hirst LJ considered that the plaintiffs' claim on this ground must fail for several reasons. One was the considerable emphasis which he placed on the decision of Sir John Pennycuik V-C in *Smith v Scott*,³⁰ (a case decided in negligence as well as nuisance). In *Smith v Scott*, Sir John referred to Lord Reid's judgment in *Home Office v Dorset Yacht Co Ltd*,³¹ which had included a warning against the expansion of negligence into specific, well-entrenched areas of the existing law – one such area being the “long chapter of the law determining in what circumstances owners of land can and in what circumstances they may not use their proprietary rights so as to injure their neighbours”.³² In the light of this statement, and in light of the fact that, in the tort of nuisance, it was extremely difficult to make landlords liable for the acts of their tenants, Sir John considered that the tort of negligence could not be extended to make the local authority in *Smith v Scott* liable for such acts. Hirst LJ, applying this reasoning, reached the same conclusion with respect to the action against the council in *Hussain's* case.

base on land occupied by the defendant” (*ibid*, at 147). Only Sir Christopher Staunton considered that it might be necessary to make use of the “coming to the nuisance” exception, and this he applied liberally when he suggested that “the council may be found to have adopted the nuisance by failing to exercise its power to turn out the travellers once their habitual misbehaviour became apparent” (*ibid*, at 149).

³⁰ *Supra*, note 16.

³¹ [1970] AC 1004 (“the *Dorset Yacht* case”).

³² *Ibid*, at 1026.

Another reason for Hirst LJ's rejection of the claim was the difficulty – in the absence of exceptional circumstances – of making a defendant liable in negligence for harm caused not by the defendant himself but by the deliberate acts of a third party, as evidenced by the decisions in the *Dorset Yacht* case itself and in the later case of *Smith v Littlewoods Organisation Ltd*.³³

Most significantly, though, Hirst LJ considered that the action was doomed to fail in the light of the “very narrow and restricted scope for claims for negligence in relation to the exercise of statutory powers”³⁴ laid down by the House of Lords in two landmark decisions. In the first, *X (Minors) v Bedfordshire County Council*,³⁵ Lord Browne-Wilkinson observed that “the courts should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrongdoing of others”,³⁶ and in the second, *Stovin v Wise*,³⁷ Lord Hoffmann stated that:

... the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.³⁸

Taking Lord Browne-Wilkinson's caution into account, and given that, in his opinion, neither of Lord Hoffmann's conditions was satisfied on the facts of *Hussain's* case, Hirst LJ accepted the argument of counsel for the council that:

At the end of the day, it was for the local authority, not the court, to decide matters of policy such as how much of the local authority's resources should be allocated to this particular problem, and what steps if any the local authority should have taken and at what juncture in relation to the various incidents.³⁹

³³ [1987] AC 241 (“*Smith v Littlewoods*”).

³⁴ *Supra*, note 1, at 1162.

³⁵ [1995] 2 AC 633.

³⁶ *Ibid*, at 751.

³⁷ [1996] AC 923.

³⁸ *Ibid*, at 953.

³⁹ *Supra*, note 1, at 1163.

On the facts, therefore, his Lordship held that it would not be fair, just and reasonable to hold the council liable for its failure to exercise its powers under either the Housing Act or the Highways Act.⁴⁰

This decision certainly accords with other recent decisions on the exercise of statutory powers, and its predictably negative approach to actions in negligence against statutory bodies is unsurprising. One might, however, question the blanket tendency of courts to apply Lord Browne-Wilkinson's caution against imposing a duty of care on those "charged by Parliament with the task of protecting society from the wrongdoing of others".⁴¹ These words of warning are coming to be used as the basis for refusing claims not only against the police and certain social services (whose central task clearly is one of protection) but against all kinds of statutory bodies. Once Lord Browne-Wilkinson's observation is applied to bodies whose protective role is – like that of the council in *Hussain's* case – not central but merely incidental, it is difficult to envisage any statutory body which will *not* be excused on this ground from owing a duty of care to aggrieved individuals.

(c) *The relationship between nuisance and negligence*

In presenting his client's case, counsel for the council submitted that, regardless of the overall merit of the plaintiffs' claim in nuisance, it should fail at least in so far as it related to physical damage to land. This, he argued, was because physical damage claims ought to be confined to the realm of negligence. His argument in this respect was based primarily on views expressed in an influential article by Professor Gearty⁴² about the place of nuisance in tort law:

D owes P a duty to take reasonable care to avoid causing damage to his property ... This duty of care should properly belong to the tort of negligence. The label 'nuisance' should play no part in its formulation or application ... Private nuisance should be restricted to the protection of property from non-physical damage, *ie*, noxious fumes and noise and the like. With its independence assured, and freed from negligence's debilitating concern with the yardstick of the reasonable defendant,

⁴⁰ Hirst LJ took the view that, in the context of the Highways Act, it would not be fair, just and reasonable to impose liability in negligence, "since it would then be necessary for them in effect to police the entire highway system within their area of responsibility, which would place an intolerable burden on them ...". (*Ibid*).

⁴¹ *Supra*, note 36.

⁴² See *supra*, note 10.

there is no reason why nuisance ... should not thrive once again. It is submitted that the cases have now reached the point where this move is possible. It is also desirable because it accords with principle and greatly simplifies the law.⁴³

Since Hirst LJ concluded that there could be no action in either nuisance or negligence for *any* of the damage claimed in *Hussain's* case, it was not necessary for him to decide whether the claims for physical damage to property ought or ought not to be sustainable in nuisance. However, having examined cases such as *Smith v Littlewoods* (in which Lord Goff, referring to situations in which a defendant fails to prevent a dangerous thing from spreading to and damaging his neighbour's land, stated: "it is difficult to believe that, in this respect, there can be any material distinction between liability in nuisance and liability in negligence")⁴⁴ and having taken account of the decision in *Hunter v Canary Wharf* (in which the same judge appeared to approve of Professor Gearty's views),⁴⁵ his Lordship observed:

... it seems to me clear that the law is moving strongly in the direction favoured by Professor Gearty, *viz*, to assimilate the law of nuisance into that of negligence in cases involving physical damage ...⁴⁶

If Hirst LJ's observation in this respect is correct, then we may be witnessing the start of a new era for the tort of nuisance. Whether the coming of that era is a matter for celebration is, however, open to debate. Professor Gearty may see the removal of claims for physical damage to property from the ambit of nuisance as both clarifying and strengthening the tort. Others, however, will see the transfer of such claims to the tort of negligence as an incursion which, coming on top of the restrictions imposed (or, more accurately, re-imposed) in *Hunter v Canary Wharf*,⁴⁷ will limit still further the scope and influence of this historic tort.

⁴³ *Ibid*, at 242.

⁴⁴ *Supra*, note 33, at 274.

⁴⁵ *Supra*, note 11, at 692.

⁴⁶ *Supra*, note 1, at 1163.

⁴⁷ *Supra*, note 11. Their Lordships held in that case that only the owner or legal tenant of land could sue in nuisance, thus overruling the decision of the Court of Appeal in *Khorasandjian v Bush* [1993] QB 727 and reaffirming the rule in *Malone v Laskey* [1907] 2 KB 141.

V. CONCLUSION

The decision of the Court of Appeal that the claims for nuisance and negligence in *Hussain's* case lacked sufficient merit even to go to trial will disappoint anyone who was hoping to witness the start of a more relaxed approach to these two torts. While the decision may not exactly come as a shock – the courts have traditionally been cautious in their approach to the liability of landlords in nuisance, and recent cases on liability for the negligent exercise of statutory powers have given little cause to believe that any major extension is to be expected in this area of law in the near future – it is nevertheless somewhat dispiriting. For, in addition to confirming the rarity of successful actions in negligence against statutory bodies for the exercise of their statutory powers and in nuisance against landlords for the anti-social acts of their tenants, *Hussain's* case suggests that we may be about to see a further encroachment into the tort of nuisance if actions for physical damage to land are removed from its sphere. In practice, most physical damage claims which would succeed in nuisance will probably also succeed in negligence, but, as this writer has argued before,⁴⁸ to reduce the ambit of an old, established tort simply because a more modern and popular tort has eclipsed it may create more problems than it solves.

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⁴⁸ See, *eg*, Fordham “The Demise of the Rule in *Rylands v Fletcher*” [1995] SJLS 1 at 27 and Fordham, “Breach of Statutory Duty – A Diminishing Tort” [1996] SJLS 362 at 388.

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