The Law of Private Nuisance BY ALLAN **BEEVER** [Oxford: Hart Publishing, 2013. xiv + 163 pp. Hardcover: £35.00]

The law of private nuisance is riddled with archaic rules and modern contradictions, and in recent years, it has received significant attention from the courts and legal scholars as it attempts to evolve to address interferences with one's access to telecommunications and sunlight in an increasingly urbanised environment. In *The Law of Private Nuisance*, Allan Beever criticises the proclivity of a majority of commentators for describing the law of private nuisance "as coming in separate parts" and therefore engaging in an exercise of "limited rationality" (at p. 3). Beever claims to propose an alternative framework that "focuses on the prioritising of property rights" (at p. 2).

The book is divided into 13 chapters. In Chapter 2, Beever addresses the limitations of the "conventional view" of private nuisance as outlined in textbooks and assumed to be generally accurate by most commentators (at p. 5). He identifies four notions which he claims are "mistaken" (at p. 7): (i) the concept of 'reasonableness' is the key to understanding the law; (ii) the point of the law is to achieve certain social goals, such as environmental protection and the efficient allocation of land use; (iii) the law is expressed in parts where different rules apply—that is, the law is understood to be disunified; (iv) the law must be understood to contain numerous exceptions to the general rules and principles that must be learnt independently, such as the location, sensitivity and duration rules. Some of Beever's most trenchant criticisms of the orthodox understanding may be found here. He charges that, unlike in the law of negligence, 'reasonableness' in the law of nuisance "has no explanatory power" and "has no fixed meaning" (at p. 11). In particular, Beever argues (at p. 12):

> The claim that the interference is unreasonable, then, simply means that it is an interference that, other things being equal, should not have happened or should not be allowed to continue. Thus, 'reasonable' and 'unreasonable' are merely labels for the intuitive response to the question 'Should the defendant be liable?' Reasonableness cannot be the key to understanding this area of the law.

Beever suggests that the key to understanding nuisance is corrective or commutative justice, and that the law of private nuisance is really unconcerned with personal responsibility. In Chapter 3, he surveys a number of landmark decisions like *Bamford v. Turnley* (1862) 3 B. & S. 66, 122 E.R. 27, *St Helen's Smelting Co v. Tipping* (1865) 11 H.L. Cas. 642, 11 E.R. 1483 (H.L.), *Hunter v. Canary Wharf* [1997] A.C. 655 (H.L.) and *Miller v. Jackson* [1977] Q.B. 966 (C.A.) and concludes that "[f]undamental uses of land are given priority because they are fundamental" (at p. 27). Beever contends that the balancing exercise does not imply an inquiry into distributive or public policy concerns, and should instead be concerned with placing the property rights that are in conflict in some kind of hierarchy: that the more fundamental rights trump the less fundamental. He rejects 'ordinary usages of mankind' as an index for reasonableness (at p. 17) but does not explain what his preferred 'fundamental use' might entail.

Chapters 4 and 6 deal with the conventional considerations in private nuisance, such as the location, the sensitivity of the claimant, the duration of the interference

and coming to a nuisance, while Chapter 5 examines the issue of describing the conflict between the parties. In particular, Beever asserts that (at p. 47):

> The conventional view is wrong to hold that attention to policy is the mark of a legal analysis engaged with its subject matter. On the contrary, that attention is the mark of an analysis that has turned away from the law to consider something else. Policy is, quite literally, a distraction.

This view of legal doctrine as a closed system of rights adjudication that must be maintained in separation from policy considerations is questionable. In negligence law, the legal test for duty of care under the *Caparo Industries plc v. Dickman* [1990] 2 A.C. 605 (H.L.) formulation as laid down by the House of Lords explicitly includes policy considerations. In Singapore, the second stage of the test in *Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency* [2007] 4 S.L.R.(R.) 100 (C.A.) for duty of care requires an examination of normative factors beyond the relationship of the parties in dispute which involves "value judgments which reflect differential weighing and balancing of competing moral claims and broad social welfare goals" (at para. 85). At this stage, the court is expected to evaluate the anticipated impact of a holding of a duty of care upon a diverse range of legal persons, including persons who will, in future, occupy positions similar to the claimant and defendant, and those who will be indirectly affected by the rule applicable as between the present parties in dispute.

Chapter 7 is provocatively titled "A Nuisance Coming to You" and this is where Beever offers a different approach to cases like *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880 (H.L.) and applies his 'fundamental use' analysis. He argues that "though most of the cases examined are rightly decided, they cannot have been decided for the right reasons" (at p. 76). In emphasising that "the law of nuisance is use-based, not fault-based" (at p. 82), Beever reiterates that one is liable for uses of one's land if that use interferes with a more fundamental use of another's land, regardless of whether one was at fault or not. Unfortunately, the criteria for objectively determining what a 'fundamental use' might be for the establishment of a hierarchy of fundamental uses was not provided.

Chapter 8, titled "Fault and Foreseeability", is perhaps the crux to understanding Beever's objections to the conventional view of the law of private nuisance. Beever maintains that "if nuisance is a tort of strict liability, it is odd that it requires foreseeability… [i]f liability is strict, then there is no reason to insist that the defendant have been able to foresee the claimant's injury" (at pp. 100, 101). He found the position taken in the decision in *Cambridge Water Co Ltd v. Eastern Counties Leather plc* [1994] 2 A.C. 264 (H.L.) to be incoherent as it was stated there that strict liability in nuisance law does not require negligence but nevertheless requires foreseeability. However, Beever does not address the point frequently made in the analysis of duty of care in negligence law that foreseeability of harm is a limiting criterion to ensure that indeterminate liability is not imposed, and in this regard, foreseeability may therefore not seem to be as incongruous in the law of private negligence as he suggests. Strict liability is imposed in specific scenarios—as opposed to fault-based—because particular justice rationales and policy considerations on balance support it. Even under the aegis of commutative justice, it does not require the automatic exclusion of foreseeability from the considerations of liability. The idea of strict liability arises

because of a need to do justice between certain classes of individuals in society, and the removal of the requirement of foreseeability of harm may expose a defendant to liability in an indeterminate amount for an indeterminate time. Perhaps "strict" is a misnomer after all, when what the courts really require is not a proof of fault but a proof of foreseeability in a private nuisance claim.

Chapter 9 touches on the rule in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330, and Chapter 10 addresses the question of who can sue and who can be sued. The latter chapter is a far more interesting read as Beever highlights the difficulty that the law of private nuisance faces in adhering to the conventional rules as it attempts to engage with the contemporary concern of harassment. Referring to a number of Canadian decisions on finding a right to occupation sufficient to support an action in private nuisance, he makes a compelling argument here that the courts should recognise the moral personality of children and the primary rights that arise from it, such that children should have rights superior to strangers. Chapter 11 makes some brief observations on the defence of statutory authority and the penultimate Chapter 12 provides short comments on remedies.

This is an ambitious book. It offers a comprehensive expert evaluation of the inconsistent interpretation of various principles in the law of private nuisance. It promises a different and potentially controversial perspective to this area of law. Unfortunately, Beever's claim that less fundamental rights must give way to more fundamental rights is not clearly supported by an articulation of criteria for judges to determine which property right is more fundamental than the other. In his consideration of the New York Court of Appeal decision in *Hay v. Cohoes Co*, 2 N.Y. 159 (1849), there was a hint that maybe a particular use of land must yield "to those upon which all beneficial use ultimately rests" (at pp. 18, 19). But his methodical treatment of all the elements of a private nuisance claim, including standing, defences and remedies, does not develop his central thesis of prioritising fundamental use in a cohesive fashion. The remarkably short conclusion in Chapter 13 makes it unequivocal that private nuisance is not really a tort of strict liability, but it nonetheless leaves the reader wondering what it really is.

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