Wind-Farms – Whither Nuisance?

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Introduction

Nuisance, as a separate head of action, became part of Scots law by a process of osmosis which commenced in earnest during the eighteenth century.[1] Possibly, one of the outstanding and enduring features of common law nuisance is that it has traditionally suffered from definitional problems. Indeed, both academics and judges have struggled to give a comprehensive definition of the expression 'nuisance'. According to Pun and Hall, a 'private nuisance is perhaps, incapable of complete definition, given the wide and amorphous nature of the tort.'[2] Possibly, the pronounced difficulty which has been experienced by authors in proffering a convincing definition of nuisance is expressed by Prosser and Keeton who argue that '[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word, "nuisance."'[3] However, in the view of the present author, the most perceptive but, at the same time, the most incisive view of the definition of nuisance, certainly in practical terms, is given by Judge Langan in the recent statutory nuisance case of *Elvington Park Ltd v City of York Council*.[4] After alluding to the fact that there have been a variety of definitions of nuisance in both decided cases and also textbooks, the learned judge stated:

> As far as those in the cases are concerned, the relevant definitions were frequently framed in order to illuminate the particular question arising

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[1] For a comparison of nuisance in English and Scots law, see G. Cameron, 'Cross-border neighbour law', *Juridical Review*, [2014], 37.

[2] G. Pun and M. Hall, *The Law of Nuisance in Canada* (Canada, 2010), 56.

[3] W. Page Keeton (ed.), *Prosser and Keeton on Torts* (5th edn, St Paul, Minn., 1984), 616.

[4] [2011] E.W.H.C. 2213, [49]

> for decision. None of those found in the textbooks can be presented in the nature of a code which must be applied to all cases.

Indeed, with respect, the learned judge seems, almost, to be parodying the decision in the oft-cited and much earlier case of *Bamford v Turnley*[5] where the court expressed the view that:

> [the] nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on the surrounding circumstances […] as to make it impossible to lay down any rule of law applicable to every case.

It is instructive now to consider the definitions of nuisance which have been proffered by academic writers. Newark, in his seminal article on the subject of nuisance, 'The Boundaries of Nuisance,' and citing Erle C.J.'s (undelivered) judgement in *Brand v Hammersmith Rly*,[6] was of the opinion that '[w]hat is a nuisance is immersed in undefined uncertainty.'[7] The author goes on to somewhat laconically comment that nuisance is so intractable, both to define and, also, to analyse, that it immediately betrays its mongrel origins. The learned author also observes that the prime cause of this difficulty is that the boundaries of the tort of nuisance are blurred. In other words, the function of the law of nuisance is uncertain. Professor Winfield describes a nuisance as an 'unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it.'[8] More recently, another English author, Professor Murphy described nuisance as:

> 'any ongoing or recurrent activity or state of affairs that causes a substantial and unreasonable interference with a claimant's land, or with his use or enjoyment of that land."[9]

As far as Scottish authority is concerned, the expression 'nuisance' was not used as such by the institutional writers, Stair, Bankton and Erskine. However,

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[5] (1862) 3 B. & S. 66, 79.
[6] (1867) L.R. 2 Q.B. 223, 247.
[7] F. Newark, 'The Boundaries of Nuisance', *L.Q.R.*, 65 (1949), 480, 480.
[8] *Textbook on the Law of Tort* (1st edn, London, 1937), 462.
[9] J. Murphy, *The Law of Nuisance* (Oxford, 2010), 5.

Bell defined the expression, 'nuisance' as:[10]

> [w]hatever obstructs the public means of commerce and intercourse, whether in highways or navigable rivers; whatever is noxious or unsafe, or renders life uncomfortable to the public generally, or to the neighbourhood […] whatever is intolerably offensive to individuals in their dwelling-houses, or inconsistent with the comfort […] of life

In turn, Glegg described a nuisance as '[a]ny act which renders the enjoyment of life and property in the neighbourhood "uncomfortable," or subjects the neighbourhood "to material discomfort and annoyance" is a nuisance at common law.'[11] In *Interdict*,[12] H. Burn-Murdoch described a nuisance as an: 'Interference, substantial in degree (resulting from conduct that is not a matter of legal right absolute) with another's person's use or enjoyment of either (a) heritage owned or lawfully occupied by that other (the interference operating through means intangible or transient), or (b) a public place (the interference operating through any physical means).'[13]

As far as judicial authority is concerned, in the most-cited Scottish nuisance case of *Watt v Jamieson*,[14] Lord President Cooper (sitting, for some reason, in the Outer House) emphasised that, in ascertaining whether any adverse state of affairs was capable of ranking as a nuisance in law, the 'proper angle of approach is from the standpoint of the victim as opposed to that of the alleged offender.' In proceeding to proffer a definition of nuisance, his Lordship stated:[15]

> The balance in all such cases has to be held between the freedom of a proprietor to use his property as he pleases, and the duty on a proprietor not to inflict material loss or inconvenience on adjoining proprietors or adjoining property and, in every case, the answer depends

[10] Bell, *Principles*, para. 974.

[11] J. Lindsay Duncan (ed.), *A. T. Glegg, The Law of Reparation in Scotland* (4th edn, Edinburgh, 1955), 324.

[12] H. Burn-Murdoch, *Interdict in the Law of Scotland* (Edinburgh and Glasgow, 1933), 202.

[13] In D. M. Walker, *The Law of Delict in Scotland* (2nd edn, Edinburgh, 1981), 955, the author observes that: 'Nuisance covers any use of property which causes trouble or annoyance to neighbours'. See also W. J. Stewart, *Delict* (4th edn, Edinburgh, 2004), 36, where it is stated that: 'Nuisance arises where a person uses his land in such a way that is more than the pursuer should have to tolerate.'

[14] 1954 S.C. 56, 57.

[15] Ibid., 58.

> on considerations of fact and degree. The critical question is whether what he is exposed to was *plus quam tolerabile* when due weight has been given to all surrounding circumstances of the offensive conduct and its effects. I do not consider that our law accepts as a defence that the nature of the user complained of was usual, familiar and normal. Any type of use which in the sense indicated above subjects adjoining proprietors to substantial annoyance, or causes material damage to their property, is *prima facie* not a reasonable use.

Therefore, in essence, in order to ascertain whether the adverse state in question ranks as a nuisance, one has to assess whether the conduct of the defender is unreasonable in the circumstances.

In the House of Lords case of *Southwark v Mills*[16] Lord Millett stated that, 'the law of nuisance is concerned with balancing the conflicting interests of adjoining owners […] in practice, the law seeks to protect the competing interests of both parties so far as it can.' For this purpose, it employs the control mechanism described by Lord Goff of Chieveley in *Cambridge Water v Eastern Counties Leather Ltd*[17] as 'the principle of reasonable user-the principle of give and take.'

However, the concept of unreasonableness is amorphous. Indeed, Murphy describes the concept of unreasonable user in terms of the law of nuisance as 'one of the main, yet most controversial control devices within the law of private nuisance'.[18] In turn, Lord Wright in the House of Lords case of *Sedleigh-Denfield v O'Callaghan*,[19] in attempting to define the concept of unreasonableness in terms of the law of nuisance, expressed the view that

> '[i]t is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society'.

Summarising the above attempted definitions of the law of nuisance is, of course, most difficult. However, a common theme which runs through these broad definitions of the law of nuisance is the requirement for existence of a state of affairs on the defender's land which has some form of negative impact

[16] [2001] 1 A.C. 1, 20.
[17] [1994] 2 A.C. 264, 299.
[18] Murphy, *The Law of Nuisance*, para. 1.14
[19] [1940] A.C. 880, 903.

(loosely defined) on the enjoyment of the land of the pursuer. Essentially, the law is attempting to strike a balance between the competing rights, or interests, of proprietors of land, each of whom has the right to enjoy his land. Such a conflict between proprietors of land is pragmatically, albeit crudely, resolved by the courts imposing a duty on each not to use his land in such a way as to unreasonably interfere with his neighbour's enjoyment of land. Such an affirmative duty is sometimes expressed in the maxim '*sic utere tuo ut alienum non laedas*' (use your property in such a way as not to harm your neighbour).[20] However, at best, this maxim is vague and, at worst, almost a meaningless shibboleth. The maxim's utility in its practical application to novel situations such as the advent of wind-farms is also limited. Unfortunately, in the development of the law of nuisance there has been no equivalent to the celebrated neighbourhood principle, which was enunciated in *Donoghue v Stevenson*,[21] to proffer guidance to the courts. In particular, there is little to offer insight into the problems posed by wind-farms, an issue which is addressed below.

Wind-Farms

From what has been said, thus far, it is clear that what constitutes a nuisance is difficult to define in the abstract. In effect, the courts have to decide a case in the face of a given factual background. The law of nuisance was crystallised during the nineteenth century when the industrial revolution was in full swing. Indeed, one can argue that the law is steeped in its Victorian past to the extent that modern nuisance law reflects, in some ways, at least, the rights of the landed proprietor of that era. This raises, of course, the question as to whether the law of nuisance is capable of meeting modern day challenges. However, what challenges, and in particular, what new challenges, does the law of nuisance face in the twenty-first century? The advent of wind-farms must surely rank as one such challenge. Indeed, wind-farms present the Scottish courts with an obvious and, indeed, formidable challenge, in terms of the law of nuisance. Wind overtook hydropower in 2007 as the U.K.'s largest renewable energy source. However, wind-turbines cause noise. Furthermore, wind-turbines also have a negative visual impact, that is to say, wind-farms are not aesthetically attractive. Furthermore, it has been claimed that wind-farms can reduce the

[20] See e.g. H Burn-Murdoch *Interdict* (Edinburgh, 1933), 207.
[21] 1932 S.C. (H.L.) 31.

value of homes by up to eight per cent.[22] As Samuels pertinently observes, a wind-turbine proposal (that is, a planning application to develop a wind-farm which is submitted to the relevant planning authority) inevitably gives rise to a conflict situation.[23] Perhaps no other topic has generated more interest, especially in local newspapers, than wind-farms.[24]

While, at the time of writing, there is a pronounced paucity of case law which concerns noise from wind-farms, it seems likely that the law of private nuisance will be invoked in the future.[25] This article will, therefore, discuss, firstly, how the law of nuisance may respond to noise pollution from wind-farms and, secondly, to their negative visual impact. However, before one proceeds to consider these issues, wind-farms may have the capacity to interfere with the use of land in more subtle and less publicised forms. It has been recently reported that two wind-turbines which were installed during 2013 have not yet been switched on because they would compromise safety at a nearby airport on account of their capacity to interfere with radar systems there.[26]

Wind-Farms and Noise

As far as noise pollution from wind-farms is concerned, the majority of complaints from opponents of wind-farms mainly relate to what is commonly described as 'amplitude modulation' or 'whooshing' or 'whoomphing' sound which can be heard close to turbines as they cut through the air.[27] In some circumstances the rotation of the blades through the air may create a more noticeable 'whoomph' or 'thump'. This feature is 'commonly known as "enhanced" or "other" amplitude modulation'.[28] There may also be audible

[22] *Daily Telegraph*, 1 November 2013.

[23] A. Samuels, 'Wind Turbine law: an overview', *J.P.L.*, [2013], 1255, 1255.

[24] *Southern Reporter*, 10 May 2014.

[25] For a general discussion of wind farm noise and private nuisance see S. Ring and B. Webb, 'Wind farm noise and private nuisance: a return to common sense', *J.P.L.*, [2012], 892.

[26] *Daily Telegraph*, 13 May 2014.

[27] *The Guardian*, 16 December 2013. In a few cases there have been complaints about what is called 'Enhanced amplitude modulation' noise which comprises, partly, 'thumping' noise: see *Report published by Renewable UK: Wind Turbine Modulation: Research to Improve Understanding as to its Cause and Effect* (2013), 4, http://www.renewableuk.com/en/publications/index.cfm/wind-turbine-amplitude-modulation, accessed 1 July 2015.

[28] See W. Norris, 'Wind farm noise and private nuisance: issues arising in *Davis v Tinsley*', *J.P.L.*, [2012], 230, 230.

low frequency tones. These are associated with the mechanical noise generated by rotating components (such as the generator or the gearbox) contained within the nacelle of the turbine, and have sometimes been described as the 'hum'.[29] Samuels observes that in relation to the measurement of noise from wind-farms, a simple dBA level is no criterion, because levels and perceptions depend upon many factors, such as location, contours, climate, wind strength, design, height, spacing, proximity, and also the size and angles of the blades. The noise from the turbine may be regular and rhythmic, or irregular and intermittent.[30] The potential noise problem from wind-turbines has been recognised for some time. Indeed, in 1996, the Working Group on Wind Turbine Noise produced a Report on wind-turbine noise, ETSU-R-97.[31] The purpose of the Report was to provide advice to developers and planners on environmental assessment of noise from wind-turbines.[32]

At the time of writing,[33] there is no U.K. case law where noise from wind-farms is the subject matter of a private nuisance action. However, it is instructive to reflect on the wide variety of sources which have been held to constitute a nuisance at common law. The motley list includes noise from print works,[34] building works,[35] a sawing mill,[36] singing,[37] cattle,[38] horses,[39] an oil refinery,[40]

[29] Ibid., 230.

[30] Samuels, 'Wind Turbine law: an overview', 1259.

[31] See the *Report on the findings of a Working Group on Wind Turbine Noise (Final Report)* (September 1996), http://regmedia.co.uk/2011/08/02/etsu_r_97.pdf, accessed 1 July 2015. See also the Institute of Acoustics, *Good Practice Guide to the Application of ETSU-R-97 for the Assessment and Rating of Wind Turbine Noise* (2013), http://www.ioa.org.uk/sites/default/files/IOA%20Good%20Practice%20Guide%20on%20Wind%20Turbine%20Noise%20-%20May%202013.pdf, accessed 1 July 2015.

[32] For a discussion of ETSU see A. Paul, 'Noise from wind turbines and ETSU-R-97', *J.P.L.*, [2013], 271.

[33] June 2014.

[34] *Rushmer v Polsue and Alfieri* [1906] 1 Ch. 234. See also, *Heather v Pardon* (1877) 37 L.T. 393; and *Smith v Jaffray* (1886) 2 T.L.R. 480.

[35] *Andreae v Selfridge and Co. Ltd* [1938] Ch. 1. See also *Wherry v K.B. Hutcherson Pty Ltd* (1987) Aust. Torts Reports 80 and *City of London v Bovis Construction Ltd* (1989) 153 Local Govt Rev. 166. See also *Webb v Barker* (1881) W.N. 158; and *De Keyser's Royal Hotel (Ltd) v SpicerBrothers Ltd and Minter* (1914) 30 T.L.R. 257; and *Husey v Bailey* (1894–5) 11 T.L.R. 221. See also, *Hoare v McAlpine* [1923] 1 Ch. 167 where it was held that the rule in *Rylands v Fletcher* applied to vibrations which emanated from pile driving operations. See also *Bower v Richardson* [1938] 2 D.L.R. 309.

[36] *Gilling v Gray* [1910] T.L.R. 427. See also *Gort (Viscountess) v Clark* (1868) L.T. 343.

[37] *Motion v Mills* (1897) 13 T.L.R. 427.

[38] *London, Brighton and South Coast Railway v Truman* (1886) 11 App. Cas. 45.

[39] *Ball v Ray* (1873) 8 Ch. App. 467.

[40] *Allen v Gulf Oil Refinery Ltd* [1981] A.C. 1001.

an unruly family,[41] power boats,[42] a children's playground,[43] a military tattoo,[44] the firing of guns,[45] military aircraft,[46] amusements,[47] dancing,[48] church bells,[49] quarrying,[50] recreational activities,[51] an electricity-generating station,[52] a dairy,[53] speedway racing,[54] a forge,[55] pigeons,[56] vehicle repair,[57] religious services,[58] aeroplane engine testing,[59] boilers,[60] a nursery,[61] pumping stations,[62] fetes,[63] a steam organ,[64] a 24 hour shop,[65] and a gas engine.[66]

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[41] *Smith v Scott* [1973] Ch. 314.

[42] *Kennaway v Thomson* [1981] Q.B. 88.

[43] *Dunton v Dover D.C.* (1978) 76 L.G.R. 87. See also, *Compton v Bunting* (1939) 83 Sol. Jo. 398.

[44] *Webster v Lord Advocate* 1984 S.L.T. 13.

[45] *Hollywood Silver Fox v Emmett* [1936] 2 K.B. 468. See, also *MacGibbon v Robinson* (1953) 2 D.L.R. 689.

[46] *Dennis v M.o.D.* [2003] E.H.L.R. 297.

[47] *Becker v Earl's Court* (1911) 56 Sol. Jo. 73. See also *Winter v Baker* (1886) 3 T.L.R. 569 and *Walker v Brewster* (1867) L.R. 5 Eq. 25.

[48] *Johnson v Clinton* (1943) 4 D.L.R. 572. See also *Goldfarb and Ono Ltd v Williams* [1945] I.R. 433. See also *The New Zealand and Windsor Hotel Co. v Johnston* [1912] I.R. 327 and *Clark v Sloane* [1923] N.Z.L.R. 1129.

[49] *Hadden v Lynch* [1911] V.L.R. 5. See also *Soltau v De Held* (1851) 2 Sim. (N.S.) 132, 61 E.R. 290 and *Hardman v Holberton* [1866] W.N. 379. See R. Bloor, 'Clocks, Bells and Cockerels', *Ecc. L.J.*, 3 (1993-95), 393.

[50] *Harris v James* (1876) 45 L.J.Q.B. 545. See also, *Calvert v Gardiner*, *The Times*, 22 July 2002.

[51] *Ward v Magna International* (1994) 21 C.C.L.T. (2[d]) 178.

[52] *Knight v Isle of Wight Electric Co.* (1904) 73 L.J. Ch. 299. See also, *Heath v Mayor of Brighton* (1908) 24 T.L.R. 414. See also *Calvert v St Pancras B.C.* [1904] 1 Ch. 707.

[53] *Painter v Reed* [1930] S.A.S.R. 295. See also *McKelvey v Invercargill Milk Supply Co. Ltd* [1928] N.Z.L.R. 223. See also *Tinkler v Aylesbury Dairy Co. Ltd* (1888) 5 T.L.R. 52.

[54] *Coventry v Lawrence* [2014] 2 W.L.R. 433. See also, *Stretch v Romford F.C.* (1971) 115 S.J. 741 and *Tarry v Chandler* (1934) 79 Sol. Jo. 11.

[55] *Goose v Bedford* (1873) 21 W.R. 449. See also *Roskell v Whitworth* (1871) 19 Sol. Jo. 804.

[56] *Fraser v Booth* (1949) 50 S.R. (N.S.W.) 113.

[57] *Kidman v Page* [1959] Qd R. 53.

[58] *Prinsloo v Shaw* [1938] A.D. 570 where the nuisance comprised loud and strident singing, yelling, frenzied praying, stamping of feet, clapping of hands and groaning. See also *Hackney L.B.C. v Rottenberg* [2007] Env. L.R. 24 which was a statutory nuisance case, where the noise consisted of shouting, chanting and jumping on internal floors.

[59] *Bosworth-Smith v Gwynnes Ltd* (1920) 122 L.T. 15.

[60] *Halsey v Esso* [1961] 2 All E.R. 145. See also *Gaunt v Fynney* (1872) 21 W.R. 129.

[61] *Moy v Stoop* (1909) 25 T.L.R. 262. See also *Compton v Bunting* (1939) 83 Sol. Jo. 398.

[62] *Harrison v Southwark and Vauxhall Water Co.* [1891] 2 Ch. 409.

[63] *Walker v Brewster* (1867) 17 L.T. (N.S.) 135.

[64] *Barham v Hodges* [1876] W.N. 673.

[65] *O'Kane v Campbell* [1985] I.R. 115.

[66] *McEwan v Steedman and McAllister* 1911 2 S.L.T. 397.

What one can deduce from the variety of noise sources which have been the subject of successful nuisance actions is that the courts have refrained from differentiating between the various types of noise which have been the subject of a nuisance action. Unreasonably loud noise from a wind-farm would, therefore, be capable of ranking as a nuisance in law. This almost seems like a statement of the obvious. However, wind-farms differ from factories, racing circuits, milk-bottling plants etc., in that not only do they create noise: the source of the noise (i.e. the wind-turbine) is also visibly moving and, therefore, has a negative visual impact on the neighbourhood simultaneously. This raises the question as to whether such a combination of adverse circumstances could be taken into account by a court in a nuisance action. This would, in the last analysis, depend on the general flexibility of the law of nuisance which will be discussed after the visual impact from wind-farms is discussed.

The Visual Impact of Wind-Farms

In this section of the article one addresses the issue as to whether the law of nuisance could provide those who live in the vicinity of a wind-farm with a remedy for any negative visual impact posed by that wind-farm. Indeed, Tromans observes that a perennial ground for challenge in a town and country planning context is that the proposed wind-farm would have an adverse visual impact on the surrounding landscape.[67] The learned author observes, however, that to generalise is unhelpful. The matter will turn on the size of the turbines, the site, and the topography of the landscape. Whilst there are a plethora of cases where noise (albeit, as explained above,[68] not wind-farm noise) in general, has been held to rank as a nuisance, there are very few cases in the U.K. where the claimant or pursuer has succeeded in a nuisance action, simply on the basis that the defender is carrying out an activity which is visually unattractive. For example, could a disgruntled householder successfully invoke the law of nuisance to obtain redress for the loss of amenity in respect of the presence of a wind-farm in the vicinity of his house? Generally, the adverse state of affairs which is the subject of a nuisance action comprises some form of pollution, such as noise, smoke, smell etc., emanating from the defender's premises. A fundamental issue here, of course, is whether one can successfully raise an action in nuisance in relation to a state of affairs which, although visually

[67] S. Tromans 'Legal Issues in Assessing Wind Turbine Impacts' *United Kingdom Environmental Law Assocation e*-law, Issue 59 (September, 2010) 6, 11.

[68] See text accompanying notes 33–66 above.

unattractive, is simply confined to the land of the defender? That is to say, in the context of the present discussion, could one raise an action in nuisance in respect of the mere presence of a wind-farm on the land of the defender? There is no direct authority on this point. However, in *Hunter v Canary Wharf Ltd*[69] [1997] 2 All ER 426 the plaintiffs claimed damages for interference with their television reception at their homes by a very tall tower. The House of Lords held that an action in nuisance failed. Their Lordships were of the view that the mere presence of a building that interfered with the reception of television signals did not rank as a nuisance in law. Unfortunately, in the context of the present discussion, there was little discussion as to whether an emanation from the defendant's premises was a condition precedent to liability in nuisance, in general. However, Lord Goff expressed the view[70] that occasional activities which take place on the defendant's land which are so offensive to neighbours can constitute an actionable nuisance in law.[71] In short, and importantly in the context of the present discussion, there was no doctrinal reason why a state of affairs which poses simply a negative visual impact to the neighbourhood cannot rank as a nuisance.

The obvious difference between tall buildings and wind-farms, in the context of the present discussion, is that wind-turbine blades revolve, and can, therefore, have a strobe effect. Whilst wind-turbines potentially present a greater negative visual impact than the mere physical presence of a tall building, in the final analysis the straightforward question which requires to be answered, in doctrinal terms, is whether the law of nuisance in Scotland regards an impact on the visual senses of a potential pursuer as falling within its scope. There is some authority, albeit paltry, that visually offensive activity, which takes place on the property of the defender, can rank as a nuisance in law. For example, according to Bell, a nuisance could consist of a state of affairs which was 'intolerably offensive to individuals in their dwelling houses or inconsistent with the comfort of life, whether by stench (as the boiling of whale blubber) by noise (as a smithy in an upper floor) or by indecency (as a

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[69] [1997] 2 All E.R. 426.

[70] Ibid., 432.

[71] In *Barratt Homes Ltd v Dwr Cymru Cyfyngedig* (No. 2) [2013] 1 W.L.R. 3486, 3504, where the defendant local authority had intentionally obstructed the drains of the claimant developer from discharging into a public sewer, Lloyd Jones L.J. expressed the view, *obiter*, that, in order to succeed in an action for nuisance, it was not necessary to establish that the offending state of affairs which was the subject matter of the action emanated from the defendant's premises.

brothel next door).'[72]As far as case law is concerned, in *Smith v Cox*[73] it was held that the drying of cow hides within the site of a public road was a nuisance.

Whereas, as far as Scots law is concerned, there is no authority on whether a state of affairs on property which presents a negative visual impact to individuals in the vicinity can rank as a nuisance, there is English authority to the effect that a brothel in the vicinity of residential property could rank as a nuisance in law. For example, in *Thomson-Schwab v Costaki*[74]it was held that since the plaintiff, who resided in property which was situated close to a brothel, could see prostitutes and their clients leaving and entering the premises, this state of affairs ranked as a nuisance. Similarly, in *Laws v Florinplace*,[75] the defendants established a sex shop and cinema in the vicinity of the plaintiff's premises. It was claimed on the plaintiff's behalf that the defendant's activities would threaten the ordinary enjoyment of family life in the street where the plaintiff lived and would also be an embarrassment and a potential danger to young persons, especially young girls who might meet with indecent suggestions.[76] Importantly, Vinelott J. was of the view that, as far as the private law of nuisance was concerned, there was no need for a physical emanation from the defendant's premises.

Unlike a nuisance action which is based on noise pollution, odour, or light pollution, one of the main problems which would confront the courts in recognising the negative visual impact of wind-farms on neighbouring proprietors is that the courts would have difficulty in recognising an individual interest which is really capable of being measured by an objective standard.[77] Indeed, Pound argues that the law can recognise an interest in the peace and comfort of one's thoughts and emotions only to a limited extent.[78] The learned dean goes on to argue that a hurdle standing in the way of the courts is that an objective standard is required by the social interest with which the individual interest must be balanced. More recently, Osbourne has argued that the courts are much more reluctant to impose liability for non-intrusive conduct that interferes with the comfortable enjoyment of land.[79] In the learned author's

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[72] *Principles* (10th edn, Edinburgh, 1899), para. 974.

[73] 5th July 1810, F.C..

[74] [1956] 1 W.L.R. 335.

[75] [1981] 1 All E.R. 659.

[76] Ibid., 663.

[77] [Anon] 'The Modern Tendency Towards the Protection of the Aesthetic', *W. Va. L.Q.*, 44 (1937), 58, 59.

[78] R. Pound, 'Interests in Personality', *Harv. L.Rev.*, 38 (1915), 343, 362.

[79] P. Osborne, *The Law of Torts* (3rd edn, Toronto, 2007), 366.

opinion, the recognition of such rights poses a much greater threat to the defendant's freedom of land use. Unfortunately, Osbourne does not elaborate on this point. However, the gist of his argument seems to be that beauty, as well as ugliness, lies in the eye of the beholder. Therefore, to allow one to recover for what is, in effect, an assault to the eye, would set a dangerous precedent. However, there is some U.S. authority to the effect that an unpleasant site can rank as a nuisance in law.[80]

By way of conclusion as to whether the law of nuisance would recognise a claim which was based on the negative visual impact of a wind-farm, whilst there is little direct authority on the point, there is no doctrinal reason, *prima facie*, why such a claim could not succeed. This proposition is founded on the simple fact that the law makes no distinction in terms of the form by means of which the pursuer's interest in land is invaded. In short, the law adopts a stoically neutral stance. Whilst, as just stated, the law could, theoretically, regard the negative visual impact of a wind-farm as a nuisance, the author must, *perforce*, consider the grounds on which the modern law can do so.

The Flexibility of the Law of Nuisance

As has already been mentioned, in order to determine whether the law of nuisance could be successfully invoked to deal with both the noise and, especially, the visual impact presented by wind-farms, one must now examine the flexibility of the law.

Whilst the development of the law of nuisance is, to say the least, pedestrian, it has in the past certainly shown itself capable of rising to new environmental challenges. The leading nineteenth century case of *St Helens Smelting Company v Tipping*[81] (which was decided at a time when the law of nuisance was being developed) serves as a pristine example of how the courts have developed the law in order to take account of advances in industry and technology. It will be recalled that the plaintiff in that case, who owned an estate situated in the Black Country, raised an action against St Helens Smelting Company. The former claimed that the effluvium from the defendant's works had damaged shrubs on his premises. By way of a defence, the latter claimed that, by reason of the fact that the locality was industrial in nature and heavily polluted, this factor should be taken into account by the court when considering if the user of the defendant's land was unreasonable and, therefore, ranked as a

[80] See *Parkersburg Builders Material Company v Barrack* 118 W.Va. 608; 191 S.E. 368 (1937).
[81] (1865) 11 H.L. Cas. 642.

nuisance. The House of Lords, in deciding in favour of the plaintiff, held that the locality factor, in terms of the law of nuisance, was redundant in circumstances where the plaintiff had sustained sensible (or physical) damage to his property. In short, whereas one could take into account the nature of the locality if one was considering whether any adverse state of affairs (for example noise) simply impacted on the personal comfort of the plaintiff, the locality factor was redundant if the defendant's activities caused physical or sensible damage to the plaintiff's property.[82]

The next important development in terms of the law of nuisance came with the House of Lords case of *Sedleigh-Denfield v O'Callaghan*.[83] In this case, a local authority trespassed on the land of the defendant and proceeded to construct a culvert on a ditch. One of the employees of the defendant knew of the existence of the culvert. Furthermore, the defendants also used the culvert in order to get rid of the water from their own property. However, the culvert was not properly constructed, the upshot of which was that it became blocked by detritus. A heavy thunderstorm caused the ditch to flood. The plaintiff's land became flooded. The House of Lords held the defendant liable in nuisance by virtue of both continuing and also adopting the nuisance.[84]

The Privy Council had an opportunity to consider the law relating to nuisances which were created on the defender's land by third parties in the celebrated case of *Goldman v Hargrave*.[85] In that case, a tall gum tree, which was situated on the defendant's land, was struck by lightning and then caught fire. The defendant cut the tree down the following day. However, he did not take any further steps to stop the fire from spreading, preferring simply to let the fire burn itself out. Several days later the weather changed. The wind became stronger and, also, the air temperature increased. This caused the fire

[82] For a stimulating discussion of this case see A. W. Brian Simpson, 'Victorian Judges and the Problem of Social Cost: Tipping v St Helen's Smelting Company (1865)' in idem, *Leading cases in the Common Law* (Oxford, 1995), 163.

[83] [1940] A.C. 880. For a useful discussion of this case, see M. Lunney, '*Goldman v Hargrave* (1967)' in C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Tort* (Oxford and Portland, Oregon, 2010), 199.

[84] It should be observed that in *Marcic v Thames Water Utilities Ltd* [2012] 2 A.C. 42 the House of Lords held that the learning in *Sedleigh-Denfield* was inapplicable to determining the liability of a public utility in terms of whether it was liable to the claimant for damage which had been caused to his property. The property had been inundated by effluent which had escaped from the defendant's sewer. For a discussion of *Marcic* and its relevance to Scotland, see F. McManus, 'Marcic rules OK? Liability in the law of nuisance in Scotland for escapes from overloaded sewers', *Water Law*, [2008], 61.

[85] [1967] 1 A.C. 645.

to revive. The fire then spread over the plaintiff's land which was damaged. The Privy Council held that the defendant was liable for the damage, in that he had failed to remove the nuisance from his land. However, in deciding whether the defendant had failed to attain the standard of care which the law demanded of him, one was required to adopt a subjective approach. One would therefore, require to take into account the resources of the defendant. In turn, one would expect less of the occupier of small premises than of the owner of a larger property. Again, less would be demanded of the infirm than of the able-bodied.

The learning in *Goldman* was followed in *Leakey v The National Trust*.[86] In that case, the plaintiffs owned houses which were situated at the base of a steep conical hill which rejoiced in the name of the 'Burrow Mump'. Part of the hill, which adjoined the plaintiffs' land, had become unstable. The condition of the hill was made known to the defendants by the plaintiffs. However, no remedial action was taken by the defendants. A few weeks later there was a substantial fall of earth and tree stumps from the hill on to the plaintiffs' land. The plaintiffs brought an action in nuisance. The Court of Appeal held the defendants liable in nuisance. The court refused to draw a distinction between an adverse state of affairs which had been foisted on the defendants by man-made activities and one which had arisen by the operation of nature. The judgement of Megaw L.J. is particularly interesting in terms of the affirmative duty which the law imposes on the occupier of land in relation to nuisances which have been foisted upon him. In his Lordship's view, the extent of the harm to the plaintiff's premises, should an accident occur, the practicability of preventative action, the cost of the relevant works, and also the time which is available to take the necessary remedial action, were all relevant factors which fell to be taken into account in determining liability on the part of the defendant.[87] One would also take into account the defendant's age and personal means.[88]

This, now famous, trilogy of cases, the learning in which was endorsed by the House of Lords in the Scottish case of *Smith v Littlewood Organisation Ltd*,[89] provides evidence that the law of nuisance is not static and is quite capable

[86] [1980] Q.B. 485.

[87] Ibid., 524.

[88] Ibid., 526.

[89] [1987] A.C. 241. The learning in the trilogy has since been applied by the English courts in a number of cases which include *Delaware Mansions Ltd v Westminster City Council* [2002] 1 A.C. 321 and *Bybrook Barn Garden Centre Ltd v Kent County Council* [2000] B.L.G.R. 302.

of change in relation to different forms of activities which take place on the defender's land. The trilogy also demonstrates how the law of nuisance was capable of reforming itself in order to balance the duties which are owed by the occupier of land to his neighbour in the context of a tripartite situation: that is to say, one in which that occupier has an adverse state of affairs from an external source whether human, as in *Sedleigh-Denfield,* or by virtue of an act of nature, as in *Goldman*. In the last analysis, the trilogy demonstrates the flexibility of the law of nuisance. However, not only does this, now almost famous, trilogy of cases demonstrate the flexibility of the law, it provides authority for the proposition that the law of nuisance, in reforming itself, is reluctant to draw a distinction as to the nature of the external threat which is posed to the enjoyment of the pursuer's land.

The recent case of *Willis v Derwentside D.C.*[90] illustrates another interesting development in the law of nuisance, and, furthermore, demonstrates its flexibility in dealing with different forms of negative external circumstances. The case concerned a claim for damages in nuisance, negligence and, also under the rule in *Rylands v Fletcher. In Willis* the claim arose from the escape of CO_2 gas from land which was owned by Derwentside District Council (the 'Council'). The claimants (W.) owned a house (the 'Property') and also occupied adjacent land, which included two barns, as licensees of the Council. Immediately south of the property lay a disused drift or adit. The mouth of the adit lay on land which the Council had acquired from the National Coal Board (N.C.B.) in 1978. For many years before it was sealed in 2006–7, the mouth of the adit was open to the air, access to it being obstructed only by an iron barred grille and undergrowth. Since it lay at the lowest part of the disused workings, the adit formed a natural point of egress for CO_2 which was generated in the colliery coal seams. In short, CO_2 and depleted oxygen, or 'stythe' gas, was emitted from the mouth of the adit. Since stythe gas is heavier than air, the former can accumulate close to the ground in dangerous concentrations in poorly ventilated buildings. The Council discovered that the adit was emitting stythe gas in spring 2006. However, it delayed taking appropriate remedial measures for some months. W. claimed that the stythe gas had, *inter alia*, caused the death of some of the animals which W. kept on the premises. W., therefore, claimed that the Council was liable in nuisance, in that it had failed to take immediate action on discovering the existence of the adverse state of affairs.

[90] [2013] E.W.H.C. 738.

After rejecting the claim in terms of the rule in *Rylands v Fletcher*, Briggs J. turned to deal with the claim in terms of the law of nuisance. His Lordship drew attention to the fact that the Council had not itself created the adverse state of affairs which was the subject matter of the action.[91] However, the Council had tolerated the presence of the nuisance after it had become aware of its existence. Under the now famous trilogy of cases of *Sedleigh-Denfield v O'Callaghan*,[92] *Goldman v Hargrave*,[93] and *Leakey v National Trust*,[94] (which were not cited) as we have just observed, an occupier of land is liable for damage which is caused by a nuisance on his land if he does not take reasonable steps to abate the nuisance after he becomes aware of its existence. Therefore, in the view of his Lordship, the Council came under an obligation to remedy the cause of the escape of gas from the adit itself, or from the drain which ran beneath it, only after the Council had discovered the respective escapes in the spring of 2006.[95] Of interest was the fact that his Lordship went on to hold that the obligation on the part of the Council to abate the nuisance involved providing the claimants with information about the causes of the escape, the levels of gas being emitted and, also, the design of the remedial works with which the emissions are planned to be abated.[96] In the last analysis, W. were not provided with such information, the upshot of which was that W. were compelled to take independent advice, at a cost. His Lordship held that W. should be compensated for this expenditure.

Whilst it is well-established now that the occupier of land comes under a duty to abate a nuisance once he becomes aware of it, *Willis* is significant in that the Court held that the Council's legal obligation to W. extended to keeping W. suitably informed about the causes of the gas escape etc.. No authority was cited for this novel approach to the law of nuisance. However, *Willis* does take the law further and, importantly, illustrates a more general point to the effect that the law of nuisance is flexible, not least in its willingness to allow the claimant to recover pure economic loss. It is trite law, indeed, that the courts have, over the years, displayed a pronounced disinclination to allow claims for pure economic loss.[97] Viewed in such a context, *Willis* does, in the

[91] Ibid., [51].
[92] [1940] A.C. 880.
[93] [1967] 1 A.C. 645.
[94] [1980] Q.B. 485.
[95] [2013] E.W.H.C. 738, [55].
[96] Ibid., [69].
[97] See, e.g., *Spartan Steel & Alloys Ltd v Martin and Co. (Contractors) Ltd* [1972] 3 All E.R. 557 and *Murphy v Brentwood D.C.* [1990] 3 W.L.R. 414.

view of the author, represent more than an incremental step, not simply in terms of the law of nuisance, but also, generally, in terms of the law of tort. To what extent *Willis* represents Scots law is, of course, uncertain. However, given the fact that Scottish courts have tended to follow English case law in determining which forms of invasion of interests of land are capable of ranking as a nuisance in law, the endorsement of *Willis* would not run contrary to the development of the law north of the Border.

Nuisance and Environmental Regulation

We have seen how the law of nuisance has adapted to different challenges which have been posed by the physical environment. However, to what extent, if any, has the law of nuisance been influenced by the regulation of the external environment? The capacity of the law of nuisance to adapt to the way that the external environment is regulated is demonstrated in a number of cases where it has been held that the grant of planning permission, if implemented, can notionally alter the character of the locality in terms of the law of nuisance, the upshot of which is that a state of affairs which would otherwise rank as a nuisance in law would no longer be so. For example, in *Gillingham v Medway (Chatham Docks) Ltd*,[98] a dock company obtained planning permission to operate the former naval dockyard in Chatham as a commercial port. However, once the port was in operation, the local authority received a number of complaints concerning noise which emanated from the port. At first instance, Buckley J. held[99] that, in determining whether the noise in question ranked as a nuisance, one had to ascertain the character of the neighbourhood in terms of the planning permission for use of the dockyard as a commercial port. In short, the grant of planning permission, if implemented, could notionally transform the nature of the locality.

This approach to the effect of planning permission was followed by the Court of Appeal in *Wheeler v Saunders*,[100] and, more recently, by the same court, in *Watson v Croft Promo-Sport*.[101] The relevant case law was reviewed in the recent Supreme Court case of *Lawrence v Fen Tigers Ltd*.[102]

[98] [1993] Q.B. 343.

[99] Ibid., 360.

[100] [1996] Ch. 19.

[101] [2009] E.W.C.A. Civ. 15.

[102] [2014] 2 W.L.R. 433. See D. Howarth, 'Noise and Nuisance', *C.L.J.*, [2014], 247. See also N. Westaway, 'Coventry v Lawrence: nuisance redefined', *Env. L.Rev.*, [2014], 211. The Irish courts have rejected the proposition that if the defendant is complying with

The facts of the case were simple. In 1975, the fourth defendant obtained planning permission to construct a stadium, which was to be used for various motor sports, including speedway and also stock car racing. In 1992 he obtained planning permission to use agricultural land which was situated towards the rear of the stadium as a motocross track for one year. He constructed a track there. The permission was renewed on a number of occasions, until permanent permission was granted in 2002. The permissions placed conditions, both in terms of the frequency and also the times of the activities at the stadium, but did not place any conditions on the level of noise which was to be emitted during those activities. In 2006 the claimants bought a house which was situated close to the stadium and track. In response to complaints about the noise which was generated by motor sports at the stadium and track, the local authority served abatement notices, in terms of the Environmental Protection Act 1990, c.43, on the second defendant who organised events at the stadium, and also upon the third defendant, who had been granted a lease of the land on which the track was situated. After works were carried out to reduce the noise, the planning authority took no further action. The claimants then took proceedings in private nuisance against the second to fourth defendants, amongst others.

At first instance, the judge held that the planning permissions for the uses of the stadium and the track did not change the character of the area so as to affect his assessment of what noise levels and frequency would constitute a nuisance, and that, on all the evidence which was before him, the operation of the activities at the stadium and track both before and also after the abatement works constituted a noise nuisance to the claimants. The judge also rejected a claim, by way of defence, that the defendants had acquired a prescriptive right to create the nuisance in question by virtue of the activities which took place at the stadium having lasted for more than twenty years. On appeal, the Court of Appeal held that the implementation of planning permission had changed the character of the land for the purposes of the law of nuisance in such a way that the noise from both the stadium and track was to be regarded as simply an established part of the character of the locality. The claim in nuisance, therefore, failed. The claimants successfully appealed to the Supreme Court.

The Supreme Court held that it was possible for the owner of land to acquire, by prescription, an easement (i.e. a legal right to allow one to carry

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planning permission this gives that party the right to commit a civil wrong to neighbouring proprietors. See, e.g., *Cork C.C. v Slatery Precast Concrete Ltd* [2008] I.E.H.C. 291 and *Lanigan v Barry* [2008] I.E.H.C. 29.

out an activity over another parcel of land) to emit noise, provided that the noise had been emitted for twenty years, albeit not continuously. However, it would be open to the defendant to claim that the complaint could only have arisen because of some post-acquisition change of use of that property by the claimant. The court also held that, in determining whether an activity caused a nuisance by noise, the court had to assess the level of noise which, objectively, a normal person would find it reasonable to tolerate given the established pattern of uses, or character, of the locality in which the activity concerned was carried out. For that purpose, the defendant could rely on his own activity on his land, in so far as it could be shown that such activity was a lawful part (that is to say, it did not rank as a nuisance in law) of the established pattern of uses of the area. In this respect, any implementation of planning permission for the defendant's activity could be relevant to an evaluation of the established pattern of uses in the locality. Similarly, the terms and conditions of planning permission could be taken into account in order to evaluate the acceptability of the complained of noise. However, the defendant could not rely on a planning permission which permitted the very noise which was alleged to constitute a nuisance, as making such a noise an established part of the locality. Furthermore, planning permission was not a major determinant of liability, notwithstanding the fact that the grant related to a major development.

The court also held that where a claimant had established that the defendant's activities constituted a nuisance, the primary remedy was an injunction. However, the court had power to award damages instead of an injunction. In considering whether to do so, the court was free to take account of the effect on persons, other than the claimant, who would remain badly affected by the nuisance if an injunction was not granted. In allowing the appeal, the Supreme Court held that the noise from the defendant's activities had not caused a nuisance to the claimant's land for a sufficiently long period as to establish a right by prescription. Furthermore, the defendants could not rely on the defence that the claimants had come to the nuisance. Finally, the existence of planning permission was not determinative of the character of the locality in terms of the law of nuisance.

For Lord Neuberger, there was no doctrinal reason why a right to make a noise could not be acquired by prescription.[103] In his Lordship's view, the extent of prescriptive right to transmit sound waves was highly fact-sensitive, and might

[103] Ibid., [32].

often depend, not only on the amount and the frequency of the noise emitted, but also on other factors, including the character of the neighbourhood and the give and take between neighbours.[104] Lord Neuberger emphasised that for the defence to succeed, the noise in question required to constitute a nuisance for the relevant prescriptive period.[105] His Lordship also recognised the well-established principle that 'coming to a nuisance' was no defence in law.[106] However, his Lordship stated *obiter* that it might well be a defence, in certain circumstances, for a defendant to contend that the defendant's pre-existing activity constitutes a nuisance only because the claimant has either changed the use of, or built on, his own land.[107] With respect, the author finds it difficult to accept this proposition, which was based on scanty authority. Such a defence would seem to be capable of denying worthy claimants a remedy. For example, suppose the pursuer, an accountant (A.) purchases office premises which are situated close to a milk-bottling plant. A. occupies the premises during the day, when the noise from the plant is not unreasonably loud, and, therefore, does not constitute a nuisance. However, after a few years, A. decides to retire. A., therefore, converts the former office to a dwelling house and then lives there. However, soon A. becomes reasonably discomfited by noise from the plant during the night and in the early hours of the morning, and so he sues the occupier of the plant in nuisance. If Lord Neuberger's approach is followed, A. would be denied a remedy. However, in the author's opinion it would seem unfair to deny A. a remedy in such circumstances. In effect, A. would not be denied a remedy if he had not previously occupied the relevant premises which is affected by noise but now A. cannot succeed in a nuisance action simply because he has changed the use of the premises. However, it should be conceded that Lord Neuberger stated that the defence would be confined to a situation only where the claimant's senses were adversely affected.[108]

As far as the assessment of the character of the locality, for the purpose of assessing whether a defendant's activities constituted a nuisance, was concerned, Lord Neuberger was of the view that, at times, it might be difficult to identify the precise extent of the locality, or the precise words to describe the character of the locality. Thus, in the view of his Lordship, the concept of the 'character' of the locality may be too monolithic in some cases. A

[104] Ibid., [38].
[105] Ibid., [43].
[106] Ibid., [47].
[107] Ibid., [58].
[108] Ibid., [56].

better description might be, 'the established pattern of uses' in the locality. In the instant case, the defendant's activities were to be taken into account in determining the character of the locality. However, in so far as the defendant's activities constituted a nuisance, such activities should be disregarded in determining the character of the locality.[109] For his Lordship it was both illogical as well as unfair to the claimants for the court to take these into account. In his Lordship's view, to take activities which were causing a nuisance into account would involve the defendants invoking their own wrong against the appellants in order to justify their continuing to commit that very wrong against the defendant.[110] Unfortunately, Lord Neuberger did not cite any authority for this novel non-defence in a nuisance action. Whilst one can see the logic which underpins this approach, in the view of the author, it is not without difficulties in its application. For example, suppose P resides in a house, which is situated at the edge of an industrial estate. P has been affected by noise from factory X for about twenty five years. The noise amounts to a nuisance. However, the noise has remained more, or less, constant for that period of time, the upshot of which is that P's right to raise a successful nuisance action against the occupier of factory X is lost, by way of prescription. However a new factory, factory Y, is built near factory X. Factory Y makes the same amount of noise as factory X and discomfits P. P therefore, sues the occupier of factory Y. If Lord Neuberger's approach is followed, factory X would fall to be ignored for the purpose of determining the character of the relevant locality but factory Y would be included. In the author's opinion, it seems unacceptable to ignore factory X but include factory Y in determining the character of the locality. Surely, both factories should be taken into account? To further illustrate how the application of Lord Neuberger's approach could work to the unfair disadvantage of the pursuer, one can vary the facts of the above scenario slightly. Suppose, factory A emits enough noise to annoy P, but not quite enough noise to constitute an actionable nuisance. Factory B emits simply one decibel more noise than factory A and does cause a nuisance. It would, in the author's view, seem artificial to exclude B but include A in determining the character of the locality.

Lord Neuberger then went on to discuss the inter-relationship of planning permission and nuisance. This topic, of course, is a controversial, and grey, area of the law of nuisance. For his Lordship, the grant of planning permission

[109] Ibid., [65].
[110] Ibid., [73].

for a particular use was potentially relevant to a nuisance claim in two ways.[111] First, the grant of planning permission could permit the very noise which was alleged by the claimant to constitute a nuisance. In such a case, the question was the extent, if any, to which the planning permission could be relied on as a defence to the nuisance claim. Secondly, either the grant of planning permission or the conditions attached to such permission could permit the defendant's property to be used for a certain purpose. The question which would fall to be answered here would be to what extent, if any, that permission had changed the character of the relevant land.

For his Lordship, the significance of planning permission, in terms of the law of nuisance, was that the implementation of such permission could give rise to a change in the character of the locality in question.[112] However, such implementation, in his Lordship's view, was no different (subject to one possible point) from any other building work or change of use, which, indeed, did not require planning permission.[113] Thus, if the implementation of the planning permission results in the creation of nuisance to the claimant, the implementation of that permission, subject to one possible point, could not be said to have changed the character of the locality in question, except, as was discussed above, (1) to the extent to which such implementation would not have created a nuisance, or (2) where the defendant could show a prescriptive right to create the nuisance, or, (3) where the court had decided to award the claimant damages rather than an injunction in respect of the nuisance.

Lord Neuberger then went on to discuss the possible proviso which he alluded to above.[114] That was the extent, if any, to which the defendant, in seeking to rebut a claim in nuisance, could rely on the fact that planning permission had permitted the very noise (or other disturbance) which is alleged by the claimant to constitute a nuisance, or which is relied upon by a defendant to change the character of the land. In order to answer this question, Lord Neuberger discussed the cases where the courts have accepted the proposition that, whereas planning decisions and planning permission cannot, *per se*, authorise the creation of a nuisance, such administrative acts can change the character of the locality for the purpose of the law of nuisance.[115] In the then most recent case, namely, *Watson v Croft Pro. Sport Ltd*,[116] the

[111] Ibid., [77].
[112] Ibid., [82].
[113] Ibid., [82].
[114] Ibid., [83]
[115] Ibid., [84]-[85].
[116] [2009] 3 All E.R. 249.

majority of the judges in the Court of Appeal were of the view that only if such permission authorised a major development could such a decision have this effect. However, in the opinion of Lord Neuberger, this approach was untenable.[117] In his Lordship's view, no distinction fell to be drawn between a strategic planning decision and other planning decisions. Such a view was underpinned by the Court of Appeal decision in *Barr v Biffa Waste Services Ltd*[118] where Carnwath L.J. (as he then was) expressed the view that the common law should not 'march in step' with statutory law.[119] Lord Neuberger, therefore, concluded that, normally, the fact that the activity which causes the alleged nuisance had been granted planning permission was of no assistance to the defendant in a nuisance action.[120] However, his Lordship stated that there could be occasions where the grant of planning permission could be of some relevance in a nuisance case.[121] For example, the fact that the noisy activity is acceptable to the relevant planning authority after 0830hrs, or the fact that noise is limited to a certain decibel level in a particular locality, may be of real value, at least as a starting point, in a case where the claimant is contending that the activity gives rise to a nuisance if such activity starts before 0930hrs or the noise is below the permitted decibel level.

As regards the relevance of the defendant's activity in determining the character of the relevant land for the purposes of the law of nuisance, Lord Carnwath was of the opinion that an existing activity could be taken into account.[122] The author, respectfully, agrees with his Lordship on this point, as previously explained.[123] However, for Lord Carnwath, the most difficult problem which was raised by the appeal was what his Lordship described as the 'planning history' of the defendant's activity.[124] At the outset, Lord Carnwath drew attention to the fact that the law of private nuisance, which was of far greater antiquity than modern planning law, also fulfils the function of protecting the interests of property owners.[125] However, in his Lordship's view, there were fundamental differences between planning law and the law of nuisance. Whereas the former exists to protect and promote the public

[117] [2014] U.K.S.C. 13, [87].
[118] [2013] Q.B. 455.
[119] Ibid., [92].
[120] Ibid., [94].
[121] Ibid., [96].
[122] Ibid., [187].
[123] See text accompanying notes 103–108 above.
[124] *Barr v Biffa Waste Services Ltd*, [191].
[125] Ibid., [193].

interest, the latter exists to protect the rights of particular individuals. His Lordship then went on to review the cases where the courts had held that the grant of planning permission had authorised a change to the character of the relevant land against which the reasonableness of the defendant's use of the land was to be judged.[126] Lord Carnwath then summarised how planning permission may be relevant in a nuisance action in two distinct ways.[127]

Firstly, such permission may provide evidence of the relative importance of the permitted activity as part of the pattern of uses of the area. Secondly, where a relevant planning permission includes a detailed and carefully considered framework of conditions governing the acceptable limits of a noise use, such conditions may provide a useful starting point or benchmark for the court's consideration of the same issues.

As far as the first point was concerned, Lord Carnwath addressed the question as to whether the relative importance of an activity was relevant to a nuisance action at all.[128] After stating that there should be a strong presumption against allowing private rights to be overridden by administrative decisions, in his Lordship's view, the relevance of public utility fell to be confined to the context of remedies rather than liability.[129] That is to say, in his Lordship's view, the public utility of the activity in question did not fall to be considered at the substantive stage, that is to say, when the court was considering whether the adverse state of affairs complained of ranked as a nuisance in law. Lord Carnwath, therefore, followed the approach which was taken by Buckley J. in *Dennis v Ministry of Defence*.[130] However, as regards the question whether such an approach represents the law of Scotland, in the Outer House case of *King v Lord Advocate*[131] Lord Pentland expressed the view that he was uncertain whether the decision in *Dennis* represented the law of Scotland.

As far as the relevance of planning permission in terms of the law of nuisance was concerned, Lord Carnwath accepted that in exceptional circumstances (in relation, in effect, to large scale developments) a planning permission may be the result of a considered policy decision by the competent authority, leading to a fundamental change in the pattern of uses which cannot sensibly be ignored in assessing the character of the area against which the

[126] Ibid., [195]-[216].
[127] Ibid., [218].
[128] Ibid., [220].
[129] Ibid., [222].
[130] [2003] Env. L.R. 741.
[131] [2005] C.S.O.H. 169, [17].

acceptability of the defendant's activity is to be judged.[132] In the author's view, what his Lordship seemed to be saying (it is not, with respect, absolutely clear) was that in such exceptional circumstances it was legitimate to take the social or public utility of the relevant activity into account at the substantive stage as opposed to the remedy stage. By way of conclusion on this point, Lord Carnwath's saying that the public utility of the defendant's activity should only be taken into account when the court is considering the appropriate remedy flies in the face of weighty authority.[133]

As far as the second point was concerned, Lord Carnwath stated that apart from large scale developments, planning permission might also be of some practical utility in a different way.[134] Where evidence shows that a set of conditions has been carefully designed to represent the authority's view of a fair balance (i.e. of the relevant competing uses of land) there was much to be said for the parties and their experts who were involved in a nuisance action to adopt such conditions as a starting point for their own consideration.[135] Evidence of failure to comply with such conditions, while not determinative, may re-enforce the case for a finding of nuisance under the reasonableness test.

The decision of the Supreme Court certainly means that a planning permission and a relevant development plan are not to be accorded as much status as was formerly the case in private nuisance actions. However, to what extent such planning decisions are relevant in a private nuisance action, unfortunately, remains uncertain. Lord Neuberger's judgement to the effect that planning permission is of 'some relevance' on occasion, is, with respect, confusing, to say the least. Furthermore, Lord Carnwath, unfortunately, did not clarify matters in this context, by stating that planning permission could be of relevance in a nuisance action if it struck a balance between competing uses of land. It may prove difficult to articulate these principles in practice.

By way of conclusion, in *Lawrence* the Supreme Court had a splendid opportunity to clarify the law as to whether planning permission which has been granted by the local planning authority can change the character of land in terms of the law of nuisance. Unfortunately, the opportunity was missed, and the relevance of planning permission in a private nuisance action still remains a notoriously grey area of law. Indeed, one can plausibly argue

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[132] Ibid., [223].

[133] See, e.g., *Harrison v Southwark Vauxhall Water Co.* [1891] 2 Ch. 409.

[134] Ibid., [224].

[135] Ibid., [226].

that *Lawrence* has muddied the waters further. For example, to what extent, if any, is it now legitimate to take into account national planning policy in attempting to strike a balance between competing interests in land, and also in ascertaining the public utility of the activity in question? Indeed, of relevance to the subject matter of this article, as far as windfarms are concerned, as far as the relevance of the Scottish National Planning Framework 3 (which makes specific reference to supporting the further deployment of onshore windfarms,)[136] could it be plausibly argued, in a private nuisance action, that such Scottish Government support gives weight to the argument that windfarms are of public utility?

The author also finds it difficult to reconcile the decision in *Lawrence* with that of the Court of Appeal in *Barr v Biffa Waste Services Ltd.*[137] The facts of *Barr* could not have been simpler. The defendant waste company operated a landfill site which accommodated pre-treated waste. The claimants, who lived in the vicinity of the site, had been affected by odours which emanated from the site for a period of five years. They brought an action in nuisance against the defendant. Biffa, by way of a defence, claimed that, firstly, if the smell from the site did rank as a nuisance, it could avail itself of the defence of statutory authority, and, secondly, by virtue of the fact that the defendant complied with both the terms of its permit which had been issued by the Environment Agency under the Pollution Prevention and Control Regulations and also with the conditions which were attached to its site licence under Part 2 of the Environmental Protection Act 1990, the use of the land where the adverse state of affairs existed was reasonable and, therefore, did not rank as a nuisance in law. At first instance, Coulson J. held ([2011] 4 All ER 1065) that, whereas the defendant company could not avail itself of the defence of statutory authority, the odour did not rank as a nuisance since it emanated from the reasonable user of land simply by virtue of the fact that Biffa Waste had complied with the terms of its permit. In his Lordship's view, it was necessary for the common law to 'march in step' with the relevant statutory regime. Coulson J. gave a very detailed account of both E.U. and also U.K. legislation which governed the disposal of waste. His Lordship expressed the view that both the weight, and also the extent, of such legislation was such that it would be unsatisfactory, to say the least, if the common law did not act in tandem with detailed environmental legislation. The common law required

[136] *Scottish National Planning Framework (S.N.P.F.) 3*, para. 2.7. At the time of writing (April 2014) the S.N.P.F. is before the Scottish Parliament for approval.

[137] [2012] E.W.C.A. Civ. 312.

to be flexible in order to survive. In the last analysis, the duties which Biffa Waste owed the occupiers were four-square with the defendants' obligations in terms of its compliance with the relevant permit. The claimants appealed.

The Court of Appeal upheld the appeal. The leading judgement was given by Carnwath L.J. (as he then was). On the issue as to whether the detailed statutory regime which governed the operation of the landfill had any impact on the application of the common law, there was simply no principle to the effect that the common law should march in step with a statutory scheme which covered a similar matter. In the last analysis, the statutory scheme for regulating landfill sites could not cut down private rights. It should be observed that while Carnwath L.J. tacitly accepted[138] the proposition that the implementation of planning permission could change the character of land for the purposes of the law of nuisance, he did not subject the case law to detailed scrutiny.

In comparing the decision in *Barr* with that of the Supreme Court in *Lawrence,* it seems inconsistent, on the one hand, for a court to accord no importance (in terms of private nuisance) to one environmental regulatory regime (a permitting regime), and then to allow another separate regime (a planning regime) to be accorded some moment, albeit in limited circumstances. The decision in *Lawrence*, of course, is not binding on the Scottish courts. In the view of the author, in the absence of authority on the relevance of planning in relation to the law of nuisance, it is suggested that the Supreme Court's decision in *Lawrence* does not represent the law of Scotland. The author bases this view on the grounds, albeit not particularly firm grounds, that in developing the law of delict, the Scottish courts display a tendency to set less store by the relevant statutory background to the facts of the case than courts south of the Border. The recent Inner House decision in *MacDonald v Aberdeenshire Council*[139] (which concerned a negligence action against a roads authority) illustrates this point.

Nuisance and Human Rights

When considering the general flexibility of the law of nuisance, one must, of course, address the impact on the law of nuisance by human rights jurisprudence. In short, to what extent, if any, has the law relating to nuisance

[138] Ibid., [85].

[139] [2013] C.S.I.H. 83. For a discussion of this case see F. McManus, 'Delictual liability of roads authorities', *S.P.E.L.*, 164 (2014), 89.

been influenced by the development of the law relating to human rights? While this is discussed in the context of the visual impact of wind-farms, it is also relevant in terms of noise from wind-farms. Unfortunately, there is a paucity of case law on this subject. However, the impact of human rights law on the law of nuisance fell to be considered in the first instance case of *Dennis v M.o.D.*.[140] In that case, the claimants owned and lived on a large estate which was situated in close proximity to R.A.F. Wittering, which is home to the famous Harrier jet: a very noisy aircraft. Indeed, there are none noisier. The witnesses who gave evidence to the court described the noise from the aircraft as sometimes 'intolerable.' The claimants brought an action in nuisance against the M.o.D.. Buckley J. had no hesitation in holding that the noise from the Harriers amounted to a nuisance in law.[141] However, notwithstanding the fact that the noise in question did amount to a nuisance, it was also beyond dispute that the flying of military aircraft in the very manner which gave rise to the action in question redounded to the benefit of the general public.[142] Put simply, Britain needs its airforce, including aircraft, which inevitably cause a great deal of noise. However, to weigh this factor in the judicial scales when determining whether the noise in question amounted to a nuisance would, in the view of Buckley J., have deprived the claimants of a judicial remedy under common law.[143] Given the great social benefit which accrued to the U.K. from the use of the offending Harrier jets, it was appropriate to award damages to the claimant, rather than award an injunction or make a declaration to the effect that the adverse noise in question amounted to a nuisance.[144] Here, of course, Buckley J. addressed the relevance of social utility, not as a factor which should be taken into account in determining whether a nuisance existed, but, rather, in deciding which remedy should be granted. Whether *Dennis* represents the law of Scotland is unclear. In the Outer House decision of *King v Advocate General for Scotland*,[145] (which concerned a nuisance action in relation to noise from low-flying military aircraft) Lord Pentland did not express an opinion as

[140] [2003] E.H.L.R. 297.

[141] Ibid., 311.

[142] Ibid., 315.

[143] Ibid., 316.

[144] See, however, *McKenna v British Aluminium* [2002] Env. L.R. 721, where Neuberger J. (as he then was) supported the contention which was advanced by counsel to the effect that it would be inappropriate to extend the common law by way of the law of nuisance in order to give effect to Art. 8 of the E.C.H.R..

[145] [2009] C.S.O.H. 169, [17].

to whether the approach taken by Buckley J. in *Dennis* represented the law in Scotland.

To what extent human rights jurisprudence has influenced the factors which a court could take into account when determining whether a nuisance exists, therefore, remains uncertain. If, indeed, human rights law should influence the development of nuisance, one factor which may fall to be taken into account is whether the adverse state of affairs is typical of modern life. In *Fadeyeva v Russia*,[146] which concerned pollution, including noise from a steel works, the court held that in determining whether the pollution in question infringed Art. 8 of the E.C.H.R., one was required to consider whether the adverse state of affairs which was complained of was typical of modern life. In the House of Lords case of *Hunter v Canary Wharf Ltd*,[147] it was held that the mere presence of a tall building which interfered with the reception of television signals did not constitute an actionable nuisance. However, in the Court of Appeal Pill L.J. seemed to suggest[148] that whether any adverse state of affairs was commonplace might not be a relevant factor in a nuisance action if the subject matter of the action consisted of an activity as opposed to a static state of affairs.

There is no Scottish authority in terms of the law of nuisance as to whether one should take account of whether the subject matter of the action is typical of modern life. In the absence of such authority, it is the view of the author that such a factor should be taken into account since the law of nuisance should be responsive to circumstances which have become accepted by society as being a feature of the modern world. Such an approach would allow the law to become more dynamic and also responsive to the needs of society and, at the same time, facilitate a fairer balance being struck between competing uses of land, a concept which underpins the law of nuisance. As far as wind-farms in Scotland are concerned, whilst the presence of wind-farms is becoming more common on our landscape, one cannot claim that they are typical of modern life. Therefore, in the author's opinion, the court would be more inclined to decide that pollution from a wind-farm ranks as a nuisance.

By way of conclusion on whether the pursuer could succeed in an action which is based on the negative visual impact of a windfarm, one formidable obstacle to the law countenancing nuisance actions based on negative visual

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[146] App. No.55723/00 judgement of June 9, 2005.

[147] [1997] Env. L.R. 488.

[148] [1996] 1 All E.R. 482, 489.

impact is that what one is addressing is the effect which wind-farms have on the senses. In short, we really are considering the extent, if any, to which wind-farms depress us and, importantly, whether this is a type of harm which the common law will both recognise and also redress. Generally speaking, the common law has, traditionally, looked askance at how external events impact on the mind. For example, it was only comparatively recently in the development of the common law that the courts would countenance action which was based on the law of negligence, for harm which was caused by nervous shock.[149] Currently, as far as secondary victims of nervous shock are concerned (that is, those who simply witness a traumatic event, as opposed to being physically involved therein) the law insists that the event which causes the harm be sudden and that the claimant sustain nervous shock by witnessing harm to close relatives. However, here, one should be wary of accepting the view that one branch of the law can influence the development of another. The author has argued elsewhere that the law of delict is, generally speaking, an un-integrated subject.[150]

Conclusions

Perhaps there is no better time to discuss the subject of wind-farms in the context of the general development of the law of nuisance. Wind-farms, as mentioned above, are proliferating on the Scottish landscape (and offshore), not always to the delight of the neighbouring community. One could have reasonably foreseen, therefore, that to date, proprietors of land would have enlisted the law of nuisance to seek redress. However, there have been no decided cases in the United Kingdom, as a whole, on the subject of nuisance from wind-farms. As far as the Scots law of nuisance is concerned, the law has been generally slow-moving. There have been comparatively few cases on the law of nuisance, far fewer on the subject of noise nuisance, or cases concerning the negative visual impact of an activity. This, of course, is a consequence, firstly, of Scotland being a small jurisdiction, and, secondly, as far as the noise is concerned, the fact that the public normally attempt to enlist the aid of local authorities to redress noise problems. In the author's view, if a wind-farm nuisance action comes to the courts, one of the most

[149] See eg *Wilkinson v Downton* [1897] 2 Q.B. 57 which was one of the earliest of such cases.

[150] F. McManus and E. Russell, *Delict-A Comprehensive Guide to the Law in Scotland* (2nd edn, Dundee, 2011), 1.

contentious issues which will fall to be addressed is the relevance of planning permission to private law. The decision of the Supreme Court in *Coventry v Lawrence* above (which, as stated above, succeeds only in obfuscating the law, and which is not, of course, binding on the Scottish courts) will, no doubt, fall to be discussed. However, in the author's view, as stated above, the decision does not represent the law of Scotland. This approach is commendable in that it conduces to clarity. Public law, generally, presents a serrated edge to the common law. The courts have never felt particularly comfortable in integrating public law principles with those of the common law. Case law relating to the liability of public authorities for failure to exercise their powers serves as a good example in this context. As far as the law of nuisance is concerned, it has been demonstrated above that the law possesses the flexibility to address the potential problems which are presented by wind-farms. Whilst, as stated above, there have been no decided cases, there is little doubt that unreasonably loud noise from a wind-farm would rank as a nuisance in law. This almost seems a statement of the obvious. Much more problematic, of course, is whether a pursuer could recover in relation to the negative visual impact which is posed by a wind-farm. In this context, wind-farms present the courts with a novel problem, in that here, the offending activity comprises a state of affairs which is in motion, in contradistinction to (say) a tall building, as was the case in *Hunter*. However, in the author's opinion, in the absence of authority, such a form of visual impact *per se* would not rank as a nuisance. As far as noise is concerned, it has already been stated that unreasonably loud noise from a wind-farm could constitute a nuisance. What is arguable, however, is whether noise from a wind-farm, which would not *per se* constitute a nuisance since it is not sufficiently loud, could be regarded as a nuisance if one were to take into account the combined impact of noise and its visual impact, since here we have a bifurcated attack being made on the senses of the occupier of land. In the author's view, the court would not be acting contrary to authority if it did so. The law of nuisance possesses the flexibility to do so. Indeed, in *Sturges v Bridgman*[151] Thesiger L.J. observed that the law of nuisance is to be determined 'not merely by an abstract consideration of the thing itself, but in reference to its circumstances'.[152]

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[151] (1879) 11 Ch. D. 852, 858.

[152] The author would like to thank H. Thorsby, Barrister at Law, for his comments on an earlier draft of this chapter. Thanks are also due to the anonymous referee for his/her comments. However, any errors and other shortcomings in the chapter rest firmly with the author.