THE LAW OF PRIVATE NUISANCE

It is said that a nuisance is an interference with the use and enjoyment of land. This definition is typically unhelpful. While a nuisance must fit this account, it is plain that not all such interferences are legal nuisances. Thus, analysis of this area of the law begins with a definition far too broad for its subject matter, forcing the analyst to find more or less arbitrary ways of cutting back on potential liability. Tort law is plagued by this kind of approach.

In the law of nuisance, today's preferred method of cutting back is to employ the notion of reasonableness. No one seems to know quite what 'reasonableness' means in this context, however. This is because, in fact, it does not mean anything. The notion is no more than the immediately recognisable symptom of our inadequate comprehension of the law.

This book presents a new understanding of the law of nuisance, an understanding that presents the law in a coherent and systematic fashion. It advances a single, central suggestion: that the law of nuisance is the method that the common law utilises for prioritising property rights so that conflicts between uses of property can be resolved.

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The Law of Private Nuisance

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To Tana

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Introduction

I. General

In an era of regulation, it is perhaps surprising that the law of private nuisance retains the vitality that it does. If my neighbour is annoying me, it is generally quicker and easier to have our dispute settled through other means. Why, then, has the law of nuisance not faded away? Why have the calls for the expansion of regulation not been sufficiently loud effectively to abolish this area of the law? What does the law offer us that regulation does not?

Moreover, though the social importance of the law of private nuisance has shrunk, this has not prevented important developments from occurring. On the contrary, especially in the United Kingdom, recent years have witnessed a number of important decisions from the courts, including *Hunter v Canary Wharf*,[1] one of the most significant cases of the last 100 years.

What is perhaps even more interesting is that, though the law of private nuisance continues to attract significant academic attention, the vast majority of this has been from law and economics scholars based in the United States. In the UK and elsewhere in the Commonwealth, the law of nuisance has been somewhat neglected. Thus, John Murphy begins his recent monograph on this area of the law by remarking that his was the first book-length examination of this law since 1996.[2]

I think it fair to say that, putting law and economics aside, this area of the law is under-theorised. As a result, the student of this law – whether scholar or practitioner – has little to guide her beyond the often conflicting, or at least apparently conflicting, case law. In particular, what is lacking is a sense of what this area of the law is about. We have no framework that seems to enable us to understand it. (This topic is pursued in detail in chapter two.)

This book is an attempt to provide such a framework. It is not a textbook on the law of private nuisance. Its analysis is by no means comprehensive. The book examines only those issues most important to our understanding of the law. And it aims to show that those issues, and by implication the others that are not canvassed, can be understood in a coherent and systematic fashion.

[1] *Hunter v Canary Wharf* [1997] AC 655 (HL).
[2] J Murphy, *The Law of Nuisance* (Oxford, Oxford University Press, 2010) vii.

No doubt, there is much more to be said about the law of nuisance. And I particularly wish to resist the suggestion that this book is intended to provide some kind of mechanical formula for determining the law in this area. The book is best understood as advancing a suggestion: that the law of nuisance is better understood by rejecting the contemporary understanding of it and beginning again with an approach that focuses on the prioritising of property rights. The book is only a beginning. But it is a beginning that I hope academics and practitioners will find useful in developing their understanding of the law.

II. Outlook

Like any area of the law, the law of nuisance can be difficult to understand. A major reason for this is that common law subjects of this kind are not formulated as wholes then neatly presented to us. Rather, we receive the law as an accumulation of a great many judicial decisions. It is largely because of this that this material must be interpreted by academics, whose primary function is not simply to learn the decided cases but to make sense out of what they find. In that way, the legal academy performs the same function – aiding understanding – as the rest of the university and appropriately serves the rest of the legal community.

There is no reason, in principle, why purely descriptive accounts of the law cannot be genuinely explanatory. If the law has been developed in the courts so that it presents an explanation adequate to it, then the academic has no interpretive role to play. She may, of course, question the justifications offered for the law by the courts and perhaps suggest alternative, prescriptive, theories. But in those circumstances, representing the law requires only a form of journalism: a reporting of what has been expounded elsewhere.

In saying this, I do not mean to deride journalism or the journalistic skill as it applies to law. It can take great skill to depict the decisions of courts in a way that permits the reader easily and efficiently to develop her understanding. Many of the greatest textbooks are journalistic in this sense (though they are never solely journalistic).

The problem is that law is seldom such that purely descriptive accounts are genuinely explanatory. Judges, of course, give explanations for their decisions. And it is always important to give due consideration to the explanations offered. They will only very occasionally be far wide of the mark.[3] But given that judges make decisions in response to particular problems that they are required to solve – cases, in other words – it is hardly surprising that the explanations they provide frequently conflict with other explanations provided by other courts looking to

[3] *cf* AC Danto, *The Philosophical Disenfranchisement of Art* (New York, Columbia University Press, 1986) 44–45.