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The Future of Tort Law: Property, Technology and, Most Importantly, People
Reflections on Donal Nolan, *Questions of Liability* (Hart 2023)

Victoria Evans and Jodi Gardner*

This Article reviews, reflects, and builds on, Donal Nolan's Questions of Liability; a book made up of a collection of 12 of Nolan's most influential pieces (and one new addition). In doing so, we adopt two themes; (1) we explore the ability of the law of tort, as advocated by Nolan, to adapt to new legal and social challenges relating to property; and (2) we seek to focus on the people in tort and property dialogue and add this 'class' back into Nolan's writing. We explore both themes in relation to contemporary product liability, which is explored in chapter 14 (the only previously unpublished chapter), and through an exploration of how Nolan's scholarship on nuisance could be used to combat the cladding scandal.

* Dr Victoria Evans (née Ball) is a Lecturer in Private Law at the Dickson Poon School of Law at King's College London. Professor Jodi Gardner is the Brian Coote Chair of Private Law at the University of Auckland. We would like to thank Professor Sarah Green for her helpful comments on an earlier draft of this work and the reviewers and the editor of the Journal of Law, Property, and Society for their comments and support in getting this review published.

I. Introduction

Questions of Liability is a collection of 12 of Donal Nolan's most influential and important articles and book chapters on the law of tort. This collection of previous work is combined with a new chapter on product liability[1] and a new introduction reflecting on the different pieces' impact considering new developments and other subsequent commentary. The work is split into three sections (after the new introduction): Negligence; Nuisance and *Rylands v Fletcher*; and finally, Tort in General. What was both surprising and impressive was how these essays, written as individual chapters and papers over a series of decades, could come together in a way that made the volume seem more like a monograph than a collection of separate essays. This is especially true for the chapters on negligence. The chapters – despite being written separately over a period of 15 years – cohere in a way that gives the impression of a unified

[1] Donal Nolan, *Questions of Liability: Essays on the Law of Tort* (Hart 2023) Chapter 14.

analysis of negligence (albeit with some changes in the relevant law at different stages). It is a testament to Nolan's breadth of influence that he has published widely cited, important, and novel contributions in all aspects of negligence, from *Duty of Care* to *New Forms of Damage* and *Causation*.

It would be impossible to give Nolan's' book the attention it deserves in one article; a response could be written on many, if not all, of the individual chapters. As a result, this piece aims to review, reflect, and build on, Donal Nolan's *Questions of Liability* by focusing on two underlying themes. The first is to reflect on what this collection adds to the development of tort law, and how we can apply Nolan's ideas to allow tort actions to adapt to new legal and social challenges relating to property. In the Introduction, Nolan argues that negligence, as a tort having a very broad sweep, 'can easily adapt to new problems thrown up by societal and technological change'.[2] We use this review as an opportunity to reflect on whether contemporary product liability and nuisance issues, as viewed through Nolan's scholarship, can adapt in a similar way.

The second theme focuses on the *people* in tort and property dialogue and attempts to add this 'class' back into Nolan's writing. Nolan himself highlights in the book's introduction that his scholarship was 'what Lord Burrows has recently labelled 'practical legal scholarship', intended for an audience of other academics, students and legal practitioners.'[3] Writing for this breadth of audience is a skill; his writing is consistently strong, and he has an expert ability to describe even the most complex of subjects in an accessible

[2] ibid 3.
[3] ibid 3.

and thoughtful manner. This partly explains the influential nature of his work – everyone can gain something from the papers – from the novice student to the experienced scholar. However, we note that the one 'class' missing from this list is the *people* actually affected by the legal principles discussed by academics, studied by students, and practised by lawyers. Nolan's scholarship focuses on the internal coherence of our legal system; whilst commendable and important, this type of scholarship can overlook the real-world impact of the law. Far too often, the lived experience of people interacting with the legal system is an entirely different world from the pages of glossy textbooks or the sophistication of academic writings.[4] The lived experience is often even not reflective of the judgments coming from the highest courts of the land. The 'everyday' person will struggle with the cost of litigation, particularly in light of the legal aid cuts experienced across many countries, including the United Kingdom.[5]

Our discussions on product liability and nuisance show how Nolan's work could accommodate the perspective of the person in the street and/or highlights where the work needs to change to recognise the interests of those whom the law protects, especially in relation to property. In Part II we outline how Nolan's arguments towards a return to fault-based liability can have a negative impact on individual's access to redress when harmed by faulty products/property. Part III

[4] There is considerable discussion on this in criminal and family law, but it is lacking in the private law area: for one exception see; Iain Ramsay and Jodi Gardner, 'Key Themes in Landmark Consumer Law Cases' in J Gardner and I Ramsay, *Landmark Cases in Consumer Law* (Hart Publishing 2024), chapter 1.

[5] For discussion of this see; Jodi Gardner & Mary Spector, 'Austerity and Access to Justice: Exploring the Role of Clinical Legal Education in Cambridge', in Dan Wei, James P. Nehf and Claudia Lima Marques, (eds.), *Innovation and the Transformation of Consumer Law* (2020).

then applies Nolan's view that private nuisance is a tort against land to the novel challenge of defective buildings in light of the cladding scandal. Both aim to question how some of Nolan's work could be used to help the population (or subsets of it), and/or highlight where reform is needed to recognise the recipients of tort law in property-related challenges.

While Nolan's work is a work of tort law, this review focuses on the intersection that Nolan's scholarship has with property law. It does so by questioning the potential that nuisance has to solve the distinctive property problem of unsafe cladding,[6] and by showing the issues arising in relation to unsafe products and the current, and suggested framework, that relates to them.

II. Product Liability

Chapter Fourteen, the final chapter, is Nolan's distinctly unique contribution to the collection; it is the one substantive chapter that has not been previously published. It focuses on the failures and limitations of the Consumer Protection Act 1987 ('CPA'), arguing there is no adequate justification for strict product liability in tort. Nolan highlights that – hypothetically – due to the new-found 'freedom' and ramifications of Brexit, the UK could repeal the CPA and return to a negligence-based approach for defective products (or implement an alternative approach).

Nolan's overall argument for the repeal of the CPA is, in his own words, 'primarily grounded on the conclusion that the

[6] A problem discussed in the previous edition of the Journal of Law, Property and Society, see, Susan Bright, 'Resilient High-Rise Property? Grenfell Tower and Beyond' (2023) 8(1) Journal of Law, Property and Society 9

justifications that have been put forward for imposing strict liability for damage caused by defective products do not hold up to scrutiny'.[7] It is therefore more of a negative-based analysis (i.e. 'there is no justification for this approach') than a positive-based one (i.e. 'here is a better alternative'). This gives the impression of looking at the issues on a theoretical or academic level, as opposed to a practical one. Nolan advocates that product liability should return to a fault-based approach, as it is more coherent with general tort liability. Theoretical coherence is therefore favoured over real-world impact of law reform.

As has been previously outlined, there has been limited academic analysis of the CPA and its impact on tort law and/or society more generally.[8] The authors strongly believe that there is a need for more academic analysis in this area, including how society can best protect people from defective products or compensate them for any harm suffered as a result of a defect. Nolan's contribution to the debate is therefore very welcome, especially as it questions the fundamental nature of a regime that is so arguably flawed, and a provides a theoretically grounded and novel analysis of the legal situation and its challenges.

There was great potential in the arguments, and it is clear that Nolan, as a master of many aspects of tort law, sought to use and apply his exceptional breadth of knowledge to develop novel approaches and arguments within this context. In the opening comments, Nolan explains that it is something he has been mulling over for a significant part of

[7] ibid 393.

[8] Jodi Gardner and Sarah Green, 'Continuing the Illusion' in Kylie Burns, Jodi Gardner, Johnathan Morgan and Sandy Steel (eds.) *Torts on Three Continents: Essays in Honour of Jane Stapleton* (OUP 2024).

his career. Unfortunately, there was so much going on in the chapter and such a range of points, that the limited scope did not do justice to the overall arguments and left many of the concepts feeling incomplete. It left us wondering if Nolan should have added an additional chapter from this already published material and left this concept, and his thoughts on strict liability, for a further developed paper (or possibly monograph) on the topic. This would have allowed the analysis and examples to be fully formed, providing a potentially more convincing overall argument.

a. Premise of the Chapter

Nolan's book is grounded in 'practical legal scholarship'; an analysis intended for an audience of other academics, students and legal practitioners."[9] As outlined above, one of the themes of this review is how this approach often overlooks the *people* impacted by the law; and nowhere is this more acute than in the chapter on rethinking strict liability for consumer products. The impetus behind the Council Directive on Liability for Defective Products[10], which led to the Consumer Protection Act 1987 was the thalidomide scandal. The images of babies born with serious disabilities, often living short, painful lives, highlighted the need to provide individuals harmed by consumer products with a clearer path to compensation from businesses involved in the

[9] *Questions of Liability* (n 1) 2.
[10] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

manufacture and/or sale of the product.[11] The 'strict liability'[12] was justified by the inequality of powers and the difficulty consumers had in providing adequate evidence of who actually breached their duties under the common law of negligence. The aim of the CPA is, unsurprisingly, to provide an additional level of protection to consumers. It is therefore interesting that the analysis in the chapter does not engage with the notion of a consumer or the important and diverse literature on consumer law. Even the word 'consumer' was only used half dozen times (outside quotes and references to legislation).

In addition to these concerns, we believe that there is no obvious pressing need to reduce the number of defective products cases. Of all the areas where the court system may be overwhelmed with tort law cases, the CPA is definitely not one of them. There are a mere handful of reported cases on product liability in UK courts, only one of which has proceeded to the Supreme Court.[13] This has two impacts, one which challenges Nolan's overall approach and one which potentially supports it. On one hand, the lack of cases means there are limited floodgate concerns. It is therefore unclear why Nolan feels there is a practical need significantly to reduce the already small pool of cases. Again, this seems to make the chapter feel more like an exercise in theoretical coherence as opposed to addressing any practical problem with the product liability

[11] Jane Stapleton, *Product Liability* (Butterworths, 1994).
[12] It is recognised that the regime is not actually strict liability and is probably more accurately described as 'stricter liability'; Jane Stapleton, "Products Liability Reform - Real or Illusory" (1986) 6(3) *Oxford J Legal Stud* 392; Jodi Gardner and Sarah Green, 'Continuing the Illusion' in in Kylie Burns, Jodi Gardner, Johnathan Morgan and Sandy Steel (eds.) *Torts on Three Continents: Essays in Honour of Jane Stapleton* (OUP 2024).
[13] This is admitted in the chapter; see *Questions of Liability* (n 1) 425.

regime. This approach is made even more confusing by Nolan's comments that 'simple laws help prevent litigation and make the resolution of the litigation that does occur easier, faster and cheaper. However, a strict liability tort regime exponentially complicates the law of product liability'.[14] Given the tiny number of cases, it is hard to see how a change of law could prevent or reduce the amount of litigation currently before the courts.

On the other hand, the lack of cases could show that there would be minimal negative outcomes to consumers if a fault-based systems was restored. This could mean that the benefits of increased coherency outweigh the negative impact of a strict(er) liability regime. We are, however, unconvinced by this argument, as it overlooks the impact that the legal regime has on parties' behaviours *outside* of litigation. Having a strict liability regime shapes the approach businesses take to their legal obligations and consumer protection more generally, which will have a considerable impact on the rights of people above and beyond the courtroom.

b. Role of Technology

Nolan very effectively highlights a range of challenges associated with the CPA regime, including the difficulty in distinguishing between products and services and the role of technological developments. He, quite rightly, points out that technological change has exacerbated a number of concerns with the application and scope of the CPA. These limitations are then utilised as further justifications for removing strict liability in tort law. These are fair concerns, but ones that are not particularly unique or insurmountable – for example, the

[14] ibid 404.

EU has already focused on how consumer protection laws should deal with technological advancements. The EU has responded to this challenge by *increasing* the scope of strict liability regimes in tort and clarify its application to new technological developments, as opposed to repealing or reducing the scope of the CPA or returning to negligence liability.

For example, in September 2022, the European Commission introduced the draft Artificial Intelligence Liability Directive. This Directive proposal aims to "adapt private law to the needs of the transition to the digital economy", by which it means making it more likely that consumers will be able to recover compensation when they suffer damage as a result of AI-based products.[15] This was prompted, at least in part, by the increasing difficulty of fitting AI-based products within the established strict liability regime, as a result of scientific and technological developments. From 13 December 2023 onwards, a new key instrument – the General Product Safety Regulation (GPSR) was also implemented in the EU to provide a complete product safety legal framework[16]. The key impetus for the

[15] Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) COM/2022/496.

[16] Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council and Directive (EU) 2020/1828 of the European Parliament and the Council, and repealing Directive 2001/95/EC of the European Parliament and of the Council and Council Directive 87/357/EEC.

GPSR is to "increase the protection of EU consumers against dangerous non-food products sold offline or online".[17]

These developments show that the challenges identified by Nolan can be resolved by *increasing* the scope of strict liability, and clearly identifying its application to AI products and other forms of technological change. It appears that Nolan has some sympathy for this approach, as one of the alternative approaches he recommends involves creating legislation that requires damage caused by new technologies (for example a robot or drone) to be compensated by a 'stipulated person or entity',[18] arguing that this would help gain social acceptance of the technological development.

c. Theoretical Justifications versus Concrete Benefits

The bulk of Nolan's arguments are focused on the theoretical justifications for strict liability in tort law, with significant time dedicated to responding to arguments put forward in support of strict liability. The chapter however does not make any substantive reference to practical benefits of holding businesses – at least on paper – strictly liable for harm caused by their products. This reflects an ongoing trend in private law scholarship to focus on the theoretical basis and/or the law as it is in textbooks, as opposed to lived experiences of day-to-day individuals.[19]

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[17] For further information on these reforms, see https://commission.europa.eu/business-economy-euro/product-safety-and-requirements/product-safety/general-product-safety-regulation_en#:~:text=The%20GPSR%20requires%20that%20all,regulated%20in%20other%20EU%20legislation.

[18] *Questions of Liability* (n 1) 423,

[19] Cf, for example, the work of Robert A. Prentice & Mark E. Roszkowski, 'Tort Reform and the Liability Revolution: Defending Strict Liability in Tort for Defective Products' (1991) 27 *Gonz L Rev* 251; Mark E. Roszkowski & Robert A. Prentice, Reconciling Comparative Negligence and Strict Liability: A Public Policy Analysis' (1988) 33 *ST. Louis U. LJ.* 19.

One justification, which is not adequately recognised by Nolan, is the practical benefits of a strict liability regime for consumer products. Businesses know that if an individual is harmed by their products, they can be liable as a result. This encourages out of court settlements, avoiding the cost and burden of litigation. Under the heading 'Why It Matters', Nolan comments that 'it is difficult to evaluate the case for or against strict product liability without an appreciation of what is at stake'.[20] With this starting point, we expected a data-driven, empirical analysis of the number of people affected by his proposed change – or at least some indication of the impact law reform would have on the people injured by defective products.

This was not the case, and instead, this section was devoted to a comparison between the CPA and the tort of negligence, concluding that they are remarkably similar. In fact, Nolan comments that 'while the repeal of the 1987 Act would have some concrete consequences for those involved in product liability litigation, in most case the outcome of the litigation will be the same'.[21] However, if the strict liability regime encourages out of court settlements and early compensation, this comparison is questionable as it leaves out a crucial part of the story.

[20] *Questions of Liability* (n 1) 394

[21] ibid 397. Although Nolan does later state that 'overlaying negligence with a complex regime of strict liability just to enable claimants to surmount problems of proof is the legal equivalent of using a sledgehammer to crack a nut', indicating that there must be some notable differences: *Questions of Liability* (n 1) 420.

d. Searching for Something Better - Alternative Approaches to the CPA

As the chapter is premised on there being limited difference between the CPA regime and negligence, Nolan contends that one of the most significant problems with strict product liability in tort 'is the complexity that it generates. All things being equal, the simpler the law is, the better it is'.[22] This discussion is fundamental to tort law going to the heart of balancing fairness with certainty, and where the line should be drawn.

If we put this debate to one side – (which we must, given the scope of this review) – Nolan's normative suggestions of an alternative approach to strict liability do not appear to fit the bill. If simplicity is the aim of the game, it is hard to see how the proposed alternatives[23] would do anything apart from making an already murky and complicated situation even more difficult. Some suggestions (such as limiting strict liability to manufacturing defects, adopting a strict liability regime for certain kinds of products or establishing a no-fault compensation scheme for injury caused by particular classes of products) draw further lines – arguably arbitrary – around different products whilst maintaining a majority of the deficiencies of the current regime. Others, such as reversing the burden of proof as to negligence and reforming the law of consumer contracts to enable third parties to rely on strict contractual warranties of fitness and safety in the contract of sale, would require significant amendments to the existing legal regimes.

[22] *Questions of Liability* (n 1) 404.
[23] Discussed ibid 420-424.

These approaches are very unlikely to result in a reduction of the cases before the courts, and instead could result in an influx of litigation attempting to refine and clarify the new approaches. At some points, this seems to be admitted. For example, when discussing the reversing the burden of proof in negligence, Nolan states that "the preconditions that would need to be satisfied before the burden of proof would be reversed (such as the presence of a 'defect') would necessarily give rise to some additional complexity";[24] This is a huge admission, one that potentially undermines the alleged benefits of Nolan's recommendation. Considering that the vast majority of the existing case law is focused on what is a 'defect', it is arguable that his proposal would actually *increase* the legal complexity.

It was also challenging to get a clear idea of the potential benefits of each approach, as this part of the chapter was just over three pages of text. Unfortunately, it made it difficult to understand how the different 'mitigating measures' could work in practice. It appears that Nolan is aware of the limitations of the alternatives suggested. They are explained on very brief and tentative grounds, with a number of explicit limitations used in the descriptions – 'possible', 'may', 'could', 'arguable', 'might be an appropriate solution' are all used. Audiences would therefore be forgiven for finishing this section with a distinct feeling that strict liability in tort is the 'democracy' of legal issues; it is the worst form of liability, until compared to every other form.

[24] ibid 422.

e. Product Liability and the Future

The current product liability regime is undoubtedly flawed containing, as it does, a number of problematic distinctions and theoretical challenges. Nolan correctly highlights the issues associated with distinguishing between products and services, defective software, public utilities, and liability for AI and automated systems.[25] These insights are not new, and there have been a number of academic pieces outlining and discussing the challenges[26]; some even before the CPA was enacted.[27] This is not however a unique situation in the tort law world; many other aspects, principles or causes of actions have been subject to similar criticisms.

Vicarious liability, also premised on strict liability, has been subject to ongoing academic and judicial analysis about the justifications, theoretical frameworks and limitations.[28]

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[25] ibid 399-400.

[26] Geraint G. Howells & Mark Mildred, 'Is European Products Liability More Protective Than the Restatement (Third) of Torts: Products Liability' (1998) 65 *Tenn L Rev* 985, Marshall S. Shapo, 'Comparing Products Liability: Concepts in European and American Law' (1993) 26 *Cornell Int'l LJ* 279; Geraint G. Howells & Mark Mildred (2002) 'Infected Blood: Defect and Discoverability a First Exposition of the EC Product Liability Directive' (2002) 65(1) *The Modern Law Review* 95; D. G. Owen, 'Products Liability Principles of Justice' (1991) 20(3) *Anglo-American Law Review* 238; Jane Stapleton, 'Software, Information and the Concept of Product' (1989) 9 *Tel Aviv University Studies in Law* 147.

[27] Jane Stapleton, "Products Liability Reform - Real or Illusory" (1986) 6(3) *Oxford J Legal Stud* 392.

[28] Including, but in no way limited to, Paula Giliker (ed) *Vicarious Liability in the Common Law World* (Hart Publishing 2022); Marco Cappelletti, 'A Pluralist View of Vicarious Liability in Tort' (2024) 140 *LQR* 62; Christine Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Hart Publishing 2019); *Trustees of the Barry Congregation of Jehovah's Witnesses (Appellant) v BXB (Respondent)* [2023] UKSC 15; *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215; *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1; *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660; *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677; *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355.

Despite these debates and criticisms, there is rarely a call for the abolition – or even a significant reduction in scope – of vicarious liability. In fact, it is a doctrine that has famously been reported as being 'on the move'.[29] In fact, the rapid expansion of vicarious liability provides a compelling argument against Nolan's concluding comment that 'the ideological underpinnings of strict liability have themselves collapsed, as the theories of tort advanced by instrumentalists have fallen out of favour'.[30] Yet similar concerns of lack of coherent theoretical justifications can seem to warrant the complete overhaul of the CPA.

Tort law is complex, and the rules are constantly developing.[31] There is an important distinction between finding considerable flaws in legal approaches on one hand and having sufficient justifications for significant reforms on the other. The second part requires not just criticism, but also a detailed consideration of the impact of the changes and an alternative, superior approach. This chapter convincingly does the former but falls down quite heavily on the latter. It has provided a detailed, nuanced and compelling outline of the many flaws associated with the CPA and liability for defective products. It has not however provided a convincing case for an alternative approach. It is a sage reminder to us all that theoretical coherence in tort law, whilst admirable, is largely an academic exercise.

As outlined by Horsey "tort law (like most areas of law) affects 'real people' and their lives, often with catastrophic

[29] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1; Lord Phillips of Worth Matravers, 'Vicarious Liability on the Move' (2015) 45 *Hong Kong Law Journal* 29.
[30] *Questions of Liability* (n 1) 425.
[31] John Murphy. 'Contemporary Tort Theory and Tort Law's Evolution' (2019) 32(2) *Canadian Journal of Law & Jurisprudence* 413.

effect".[32] Nolan has provided a stunningly detailed, researched and characteristically beautifully written account of the theoretical challenges in this area in an effort to create more coherence across tort law, but the impact that reforms may have on the people harmed by the products seems to have fallen to the wayside along the journey. We should not be so quick to remove the rights of individuals harmed by defective products in the search for theoretical coherence in a difficult and flawed area of law, especially without ensuring that any alternative approach provides an adequately fair and robust safety net.

III. Nuisance

In this final substantive section, we want to move away from the newly trod world of the CPA into much more familiar ground, the impact of Nolan's work on the development of nuisance principles. What, however, remains the same is our focus on the role and importance of people in the law. We argue that Nolan's chapters on nuisance can be used to shape the development of this area to provide greater protection to individuals struggling to find alternative legal mechanisms to get compensation and/or rectification for defective premises.

[32] Kirsty Horsey 'Why Recognising Diversity in Tort Law Matters' in K Horsey (ed) *Diverse Voices in Tort Law* (Bristol University Press 2024) 5. There is a wealth of engaging and insightful literature on the impact of tort law on real people. See, for example, Prue Vines and Arno Akkermans, *Unexpected Consequences of Compensation Law* (Hart Publishing 2022); Kylie Burns, 'The forgotten injured: Can tort compensate for public regulatory failure in residential aged and disability care?' (2024) 29(2) *Torts Law Journal* 99; Genevieve Grant and Esther Lestrell, 'Evaluating the impacts of the Civil Procedure Act 2010 (Vic): critical disclosure and unanswered questions' (2021) 10(1) *Journal of Civil Litigation and Practice* 75.

f. A Reflection on Nolan's Work on Nuisance

Nolan is arguably best known for his work on nuisance[33] and *Rylands v Fletcher* for which he has been cited extensively by courts across the globe,[34] including recently, by the UK Supreme Court.[35] It is therefore not surprising that there was a freestanding part of the collection dedicated to his work in this area.

Nolan's work on nuisance is influential in its focus on the action as a 'tort against land' where he advocates and develops the 'property tort analysis' of nuisance, which has a number of real-world consequences for who can sue in private nuisance and for what.[36] In his 2012 piece that now makes up Chapter Nine, he argues that when nuisance is understood as a 'tort against land', and a tort that protects rights in land, it represents a 'thoroughly coherent cause of action'.[37] This argument was similarly central in his 2019 essay, which makes up Chapter Ten of this work, where again he advocates the importance of seeing nuisance as a 'tort against land', where the gist of the wrong is the diminished utility of the land itself, as opposed to the inconvenience and discomfort suffered by the occupiers.[38]

When reflecting on the importance of the property tort analysis in the Introduction Chapter,[39] Nolan recognises that

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[33] Any reference to nuisance in this piece refers to the tort of private nuisance.
[34] *Hunter v Canary Wharf [*1997] AC 655; *Smith v Inco Ltd* [2011] [2011] O.J.No. 4386; *Network Rail Infrastructure Ltd v Wiliams* [2018] EWCA Civ 1514; *Nottingham Forest Trustee Ltd v Unison Networks Ltd* [2022] NZRMA 264; and, *Hunt Leather Pty Ltd v Transport for NSW* [2023] NSWC 840.
[35] *Fearn v Trustees of the Tate Gallery* [2023] UKSC 4; *Jalla v Shell* [2023] UKSC 16.
[36] *Questions of Liability* (n 1) 255.
[37] ibid 255.
[38] ibid 286-7.
[39] ibid 16.

his approach has recently been endorsed by the Court of Appeal in *Williams v Network Rail Infrastructure Ltd*[40] and by the Supreme Court in *Fearn v Tate Gallery*[41]; both of which, (especially the latter) represent significant and important decisions in the law of nuisance. In fact, a significant part of the new introduction (in relation to nuisance) is spent reflecting on how his approach was endorsed (and in part departed from) in the *Fearn* decision. Indeed, *Fearn* is significant for, amongst other reasons, its recognition and acceptance that emanations do not underlie the tort. Hence, post-*Fearn,* it is clear that the physical invasion view of nuisance was mistaken and does not reflect the law.[42] This is noteworthy as one of the main goals of Nolan's 2019 piece was refuting this view of nuisance, which Nolan argues was growing in support at the time of his work.

The physical invasion view of nuisance sought (or seeks) to reformulate nuisance as a mini-trespass-like tort where the defendant is responsible for some physical invasion that falls short of trespass as normally construed.[43] Simon Douglas and Ben McFarlane, for example, argue that nuisance is a tort that deals with boundary crossing by 'intangible things' like smells and noises.[44] Nolan refutes this, arguing instead, that the essence of nuisance is not a boundary-crossing, but an interference with (or impairment of) the usability of the claimant's land,[45] focusing on the ability of the land itself to be used and enjoyed as opposed to the specific uses that a

[40] *Williams* (n 34) [40].
[41] *Fearn* (n 35)[9]-[11].
[42] ibid [13], Citing Nolan.
[43] *Questions of Liability* (n 1) 293.
[44] Simon Douglas and Ben McFarlane 'Defining property rights' in Penner J and Smith H (eds), *Philosophical foundations of Property Law* (OUP 2013).
[45] ibid 284.

claimant might want to put to it. This, Nolan argues, better reflects the fact that the tort focuses on the land itself as opposed to the discomfort or inconvenience of the occupiers; nuisance is not concerned with whether the claimant can use or enjoy her land at all, but only with whether (and to what extent) her land is capable of being used and enjoyed.[46] In *Fearn,* Lord Leggatt confirms this, stating that the harm which nuisance protects a claimant from is 'diminution in the utility and amenity value of the claimant's land, and not personal discomfort to the persons who are occupying it'.[47]

The following discussion questions whether Nolan's approach to nuisance, when interpreted as a property tort (or a land-based tort), and as reframed (in part) by *Fearn,* can be applied to help find a new solution to defective premises in light of the cladding scandal. This review is an appropriate forum to start the conversation about this potential new role for nuisance as it already calls for a reflection on Nolan's scholarship, and engagement with Nolan's own reflections about how his scholarship has been received in *Fearn*. This is because, despite *Fearn* reinforcing many of Nolan's claims about nuisance, which Nolan reflected on in his new introductory chapter, it has nonetheless been said that the decision 'transformed' nuisance,[48] and potentially opened the door to new types of nuisance claims being brought.[49]

As discussed in the introduction, Nolan argues that negligence, as a tort having a very broad sweep, 'can easily adapt to new problems thrown up by societal and

[46] ibid 287-8.
[47] *Fearn* (n 35) [11].
[48] See, for example, James Lee, Different views of Nuisance (2023) 139 LQR 535, 536.
[49] Craig Purshouse, *Essential Cases: Tort Law* (6th edn, OUP 2023).

technological change'.[50] This section of the review reflects on whether contemporary nuisance can adapt in a similar way. Can this new potential be used to find a remedy here for those very much in need? We argue below that Nolan's focus on the 'property' and 'land' in nuisance may help find a 'property'-based solution to this (at least partially) property problem.

g. Defective and Unsafe Buildings: The Cladding Problem

Since the Grenfell Tower Fire in London on 14 June 2017, many thousands of residential blocks of flats in England and Wales have been found to have serious fire-safety problems, resulting from the widespread use of combustible cladding and insulation, wooden balconies and the omission of cavity barriers.[51]

While most people are aware of the deaths caused by the defective cladding on this particular building, it was only the tip of the iceberg. The scale of the problem is significant, according to UK government estimates: around 10,000-12,000 medium and high-rise buildings need life-critical safety work.[52] Figures are similar across the common law world. Cladding Safe Victoria, within their review, found that 1,588 buildings are within the scope of their work, showing that hundreds of thousands of families are at risk.[53] Despite the critical nature of the problem, the common law has been unable to find an effective solution; the search for a solution,

[50] ibid 3.
[51] Susan Bright and Ben McFarlane, 'Private Law Failings and Policy Development Following the Grenfell Tower Fire' in Jodi Gardner, Amy Goymour, Janet O'Sullivan and Sarah Worthington (eds) *Politics, Policy and Private Law Volume I: Tort, Property and Equity* (Hart 2023) 127.
[52] Susan Bright, 'Resilient High-Rise Property? Grenfell Tower and Beyond', (2023) 8(1) Journal of Law, Property and Society 9, 11.
[53] Cladding Safety Victoria, *Annual Report 2022-2023,* page 6.

however, has been focused (primarily) on contract law or negligence, and in the creation of the Building Safety Act[54] in the UK (which has not proved to be as successful as hoped).[55] There has not been, until now, a serious examination of what additional steps property law can take to help solve this crisis. This is interesting because at least part of the complexity of the cladding scandal problem is *caused* or (at least) exacerbated by the property law methods used to facilitate flat 'ownership' and particularly the leasehold structure on which flats are 'owned' in the UK.[56]

The problem is that property law itself provides no answers; it does not deal with this type of, as Nolan would say, *liability* question.[57] Instead, we can only look to tort, and particularly the land-based tort of nuisance, for answers to this kind of liability question. Indeed, Nolan in Chapter Nine, does point out that when nuisance is rightfully seen as a property tort, the result is that it calls into question the distinction commonly drawn between the 'law of property' on the one hand and the 'law of obligations' on the other.[58] He argues, that this should force us to accept that the law of nuisance is as much part of land law as the law of breach of contract is part of contract law,[59] and so, nuisance (as well as the other property torts) are 'merely constituent elements of the wider law of property'.[60] Nuisance can, therefore, be viewed as part of property law's response.

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[54] Specifically, section 123 and 124.
[55] Ministry of Housing, Communities & Local Government, *Building Safety Remediation: monthly data release - June 2024,* published 18 July 2024
[56] Susan Bright, Resilient property (n 52) 15.
[57] Nolan is clear that the writing in the collection is about liability in tort, as opposed to concerning remedies. See *Questions of Liability* (n 1) 1.
[58] *Questions of Liability* (n 1) 280.
[59] ibid.
[60] ibid 270.

But, thus far, little attention has been paid to what the property torts, or nuisance specifically, can do. Does the reformulation of nuisance in *Fearn*, twinned with Nolan's recognition of the land-based tort protecting the utility of land, help in providing a 'somewhat-property' answer to the cladding scandal question? The potential scope for nuisance to provide an answer actually *arises* from the flat ownership structure. This is because the freeholder building owner, and the leaseholder flat 'owner' hold different estates in 'land' allowing them to be conceived of as 'neighbours' within the tort. From this starting point, the aim here is to start thinking about the potential for this type of claim.[61]

While the other property torts help show the boundaries of property in terms of the hard and fast lines about exclusion, nuisance adds colour to the picture. Nuisance, as confirmed by Nolan as *not* protecting the right of exclusion, is about the balancing of rights of neighbours – 'about the terms on which owners can relate to one another and to others, about what would be fair and reasonable for an owner to ask others to bear.'[62] It highlights the uses of property and the powers and limits of owners to do things on their own land when others could be unfairly affected. We question how the safety, and control of one's own safety, relates to an owner's control and rights relating to land so as to fall within the remit of nuisance.

[61] It is impossible to consider this fully in a note of this size, but the authors wanted to use this opportunity to start the conversation and raise the potential argument. Nolan's scholarship, and the recognition in the introduction about how his scholarship has been received in *Fearn* makes this an appropriate forum for this discussion.

[62] Christopher Essert, 'Nuisance and the Normative Boundaries of Ownership' (2016) 52 Tulsa Law Review 85, 88.

h. Making a Claim in Nuisance for Unsafe Cladding

To illustrate the role that nuisance might be able to play in relation to unsafe cladding, it is worth running through the elements needed to establish a nuisance claim, according to Nolan's scholarship, but integrating into this discussion elements of the *Fearn* decision. Some of his important ideas that have already been discussed in Part A above do help to open up the potential for a claim in this context. For example, the confirmation that emanations do not underly nuisance is a necessary preliminary step in any potential claim, as is the recognition that nuisance is a property tort, as this allows us to explore nuisance as the closest thing to a 'property' response to the cladding scandal the common law can offer. To continue the exploration of a nuisance claim relating to unsafe cladding we take as our starting point the requirements of nuisance as discussed in chapter nine. Nolan defines nuisance as an '*unlawful non-trespassory interference with the private use and enjoyment of land*'.[63]

On this basis, the starting point is the requirement of an 'unlawful' interference,[64] and Nolan argues that traditional definitions of nuisance (to some extent left behind in *Fearn*) that talk of the 'unlawfulness' of the interference, hide an important distinction. In particular, they conceal that there are, to his mind, two distinct questions underlying the 'unlawful interference' requirements. The first is whether there was an interference with the use and enjoyment of land which is *potentially* actionable; and the second is whether that interference is substantial enough so that it *is,* in fact, actionable.[65]

[63] *Questions of Liability* (n 1) 258.
[64] ibid.
[65] ibid 260.

For the first question, Nolan argues that there is a threefold classification of natural rights, acquired rights, and no rights, which operate as a preliminary filter for nuisance cases.[66] As such, there are situations where the action complained of does not concern a natural or acquired right, and so, regardless of the severity of the interference it could not amount to a nuisance.[67] On this basis, pre-*Fearn*, it might have been argued that freedom from overlooking or some kind of right of privacy was actually not a natural or acquired right, and therefore, any interference, despite the severity, would not be able to found a claim. However, while above it is acknowledged that the majority in *Fearn* do adopt many of the arguments Nolan has made over the years, this is not an idea they adopt.

Rather than agreeing with Nolan's reasoning, Lord Leggatt confirmed that there was no *a priori* limit on the cause of action, and instead, nuisance can be caused by any means. In the post-*Fearn* world then, Nolan's views of the 'threefold scheme' cannot be held to be the case, and now anything can potentially amount to a nuisance, or at least a limit of the kind discussed by Nolan cannot be recognised. As such, this creates no barrier to a potential claim in nuisance based on unsafe cladding.

The second step of an 'unlawful interference', according to Nolan, is that the interference needs to be *substantial*. In common law systems, this is often referred to as the requirement that there is an 'unreasonable user'.[68] Nolan criticises this terminology, and indeed post-*Fearn* the test or requirements have changed. Post-*Fearn,* the nuisance

[66] ibid 258-9.
[67] ibid 261.
[68] ibid 264.

requirements engulfing the requirement of a substantial interference were articulated by Lord Leggatt as first questioning whether there was *a substantial interference with the ordinary use of the claimant's land*?[69] And, secondly, by recognising that there is a priority accorded to the general and ordinary use of land over more particular and uncommon uses. "Substantial" was used in the first limb of the test as meaning that the interference with the use of the claimant's land must exceed a minimum level of seriousness to justify the law's intervention. It was said to be synonymous with terms like "real", "substantial", "material" and "significant".[70] But, as Nolan has noted, this is an objective standard, as the focus is on the ability of the land to be used or enjoyed, or the 'usability' of the land, as opposed to specific uses that those occupying wish to make.

In *Fearn* Lord Leggatt reasoned that:

> It is not difficult to imagine how oppressive living in such circumstances would feel for any ordinary person – much like being on display in a zoo. It is hardly surprising that the judge concluded that this level of visual intrusion would reasonably be regarded by a homeowner as a material intrusion.

An analogy can be drawn here; causing one to fear for their physical safety would surely be a similar level of intrusion into the ordinary enjoyment and use of land? When reflecting on *Fearn,* Eileen Weinert argued that '[a]n important aspect of the amenity value of real property is the freedom to

[69] *Fearn* (n 35)[21].
[70] *Fearn* (n 35) [22].

conduct your life in your own home without being constantly watched and photographed by strangers'[71] surely the freedom to conduct your own life with certainty about your safety should similarly fall within nuisance? And indeed, the literature written about cladding is littered with stories about how the cladding scandal has removed the ability of those occupiers to conduct their own lives: 'There are many heartbreaking stories involving financial fears, dashed hopes, and destroyed life plans, yet this building safety scandal engulfing residential apartment blocks in England is far from being solved.' [72]

Linking back to the above discussion of nuisance more generally, it is a tort that determines the scope of property rights, and this is something that Nolan himself recognises, but has also been said by other scholars, such as Essert.[73] A recognition that a claim based on feeling unsafe in a house with flammable cladding would not be actionable (or capable of being brought) suggests that being or feeling safe in one's own home is not a part of the property right of 'ownership'. And as Emma Lees said at the time of the Court of Appeal decision in *Fearn* a 'conclusion that one's ownership rights do not encompass the ability to provide oneself with a safe and private space is problematic.'[74]

Regardless, there are other ways in which a claim could be articulated or focused: a possible avenue is based on the reduction in value of the flats, or the inability to mortgage or sell them. In Chapter Ten Nolan argued that there are some

[71] Eileen Weinert, Fearn v Tate: Avert your eyes, I object to your gaze (2023) 34(2) Ent LR 77, 77.
[72] Susan Bright, Resilient property (n 52) 11.
[73] Essert (n 62).
[74] Emma Lees, '*Fearn v Tate Galleries*: Privacy and the Law of Nuisance *Environmental Law Review*, *23*(1), 49, 54.

things that could not be a nuisance, or that would be 'excluded' from nuisance because while the activity in question 'harms' the claimant, it does not affect the usability of land.[75] The example given in this chapter is conduct that reduces the market value of land without impairing the utility of it; so a company that triggers a collapse in the house prices in the area by closing down the main source of local employment could not be considered a nuisance.[76] We think that this is clearly distinguishable from scenarios relating to cladding – where the land as a financial asset is harmed, but the utility of the land to be enjoyed and lived in is also affected, usually significantly. Here we think we can look to the more recent decision in *Williams* for how a claim might be raised or labelled.[77]

In *Williams,* the Court of Appeal criticised the recorder for allowing a claimant to pursue a claim for 'pure economic loss' as the purpose of private nuisance was not to protect the value of property as an investment or a financial asset.[78] The Court of Appeal, however, reframed the decision and claim, arguing that, in the case, Japanese knotweed did not only carry the risk of future physical damage to the land, but 'the mere presence of its rhizomes, imposes an immediate burden on the owner of the land in terms of an increased difficulty in the ability to develop, and in the cost of developing, the land, should the owner wish to do so', and this was sufficient to see it as an interference with the amenity value of the land.[79]

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[75] *Questions of Liability* (n 1) 288.
[76] ibid.
[77] *Williams* (n 34).
[78] ibid [48].
[79] ibid [55].

Surely the claim relating to cladding could be raised in the same or at least a similar way, sidestepping the pure economic loss issue? Or, if seen as a claim for economic loss, it could, in line with Sandy Steel's post-*Williams* argument, be said that a reduction in the value of the property does indirectly reduce the ability to use it. He commented that 'it reduces the amount, for instance, which one could obtain by re-mortgaging the property, and this reduces one's ability to carry out, for instance, expensive building projects on one's land.'[80] This is exactly the situation that many leaseholders find themselves in; in most cases, flats are now un-marketable to anyone requiring a mortgage.[81]

The second element of the new reformulation of the substantial interference/reasonable user test post-*Fearn* is that there is a priority accorded to the general and ordinary use of land over more particular and uncommon uses.[82] One aspect of this is that an occupier cannot complain if the use interfered with is not an ordinary use; the potential claimants in a cladding nuisance case, the long leaseholders, are not doing anything unusual but merely trying to live in their flats and so this is not applicable. The other aspect is that even where the defendant's activity substantially interferes with the ordinary use and enjoyment of the claimant's land, it will not give rise to liability if the activity is itself no more than an ordinary use of the defendant's land.[83] This stops normal uses of land e.g. living in a house without adequate soundproofing from being

[80] Sandy Steel, 'The gist of private nuisance' (2019) 135 LQR 192, 194-195. Do note, however, Sandy Steel goes on to argue that different justifications could (and should) be given as to why loss in value cases cannot be allowed.
[81] Susan Bright and Ben McFarlane (n 51) 129.
[82] *Fearn* (n 35) [24].
[83] ibid [27].

a nuisance. We do not think a landlord's behaviour could be described as ordinary use – the cladding has been proved to be unsafe, and the government has called for its removal – so taking no action in light of this can hardly be 'ordinary'. It is worth noting here that the reformulation of the reasonableness criteria into a common and ordinary use test has been criticised.[84] Specifically, it has been argued that it is 'likely to create uncertainties in future cases'.[85] We want to use this uncertainty to develop and push the boundaries of the action to favour the *people* in tort law (the claimants in a potential cladding scenario).

The next stage of the enquiry relevant for us here relates to who can be sued, and to some extent, by whom. The latter is taken first by Nolan in Chapter Nine, and in relation to cladding there appear to be no significant problems as it was made clear in *Hunter v Canary Wharf* and reiterated in Chapter Nine (and in *Fearn*), that to bring a claim the claimant must have a proprietary interest in the affected land.[86] Flat 'ownership' in the common law system rests largely on the leasehold structure.[87] The individual 'owners' of the flats are owners of the leasehold estates, they have property rights which will enable them to bring a claim – this is well settled and in cases like *Fearn* and *Hunter* the claimants, as occupiers of flats, were long leaseholders.

The more controversial element is whom can this action be brought against. Nuisance is often said to be a tort which

[84] See, for example, James Lee (n 48) 539.
[85] Jeevan Hariharan, 'The view from the top: visual intrusion as nuisance in Fearn v Tate Gallery' (2024) 87(3) MLR 697, 707.
[86] See for example *Questions of Liability* (n 1) 270; *Hunter* (n 34); *Fearn* (n 35).
[87] Some flat ownership is through commonhold, but this is minimal and so the focus will be on the typical leasehold structure.

deals with interferences between neighbours. Nolan, however, terms it a misconception that the defendant needs to own the neighbouring land and traces this misconception (in part) to a focus on the old assize of nuisance which was an action only available between two freeholders.[88] The modern tort of private nuisance, however, did not grow from the assize of nuisance, but instead developed out of the action on the case,[89] and this did not have the same limit of being an action only against two freeholders. Indeed, we rightfully accept that the claimant need not be a freeholder,[90] and so the hold from the assize of nuisance is not that strong.

While we have struggled to find examples of claims being brought against landlords in their own right (as in being brought against them in response to their own actions), there are many examples of cases where claims have been brought against landlords based on the activities of their tenants, and this supports the idea that a landlord is a plausible defendant.[91] Regardless, 'scant authority' did not stop the Supreme Court from developing nuisance in *Fearn* and so the hurdle might not be insurmountable.[92]

i. Remaining Controversial Elements

There remain some elements of nuisance not yet discussed that pose some challenges. Here we deal very briefly

[88] See *Questions of Liability* (n 1) 271. Citing: D Ibbetson, *A historical Introduction to the Law of Obligations* (OUP, 1999) 99.
[89] See *Questions of Liability* (n 1) 271. Citing: A K Kiralfy, *The Action on the Case* (Sweet & Maxwell, 1951) 55-56.
[90] See *Hunter* (n 34) and *Fearn* (n 35) where the claimants were long leaseholders.
[91] See, for example, *Malzy v Eichholz* [1916] 2 KB 308*; Sampson v Hodson-Pressinger* [1981] 3 All ER 710; *Tetley v Chitty* [1986] 1 All ER 66; *Southwark London Borough Council v Tanner* [2001] 1 AC 1.
[92] Francis McManus, 'Nuisance Fearn v Board of Trustees of the Tate Gallery [2023] UKSC 4' (2023) 172 Rep. B 4, 7.

with three of those potential challenges that are most relevant to this review.

The first is that questions arise as to whether the state of the premises alone, or the physical attributes of a building themselves, are capable of being nuisances. This was recently left open in *Fearn*. Here Lord Leggatt said, 'I would not wish to rule out the possibility that there could be extreme cases where the design or construction of a building is so unusual and far from anything that could actually be expected that it might do so.'[93] We argue that this clearly leaves scope for claims of this kind.

If the state of the building alone is capable of being a nuisance, a further question that flows is whether the landlord is an appropriate defendant to a claim of this kind. The landlord, in many, though not all situations (as some developers stay on as the landlord), was not the party that initially installed the defective cladding. Regardless, we identify the landlord as an appropriate defendant *because* we focus on the leasehold structure of flat ownership and the intricacies of property law as contributing to the difficulty resolving issues in the cladding scandal. This is in line with recent legal developments.[94] For example, changes brought about by the Building Safety Act 2022 (BSA) mean that (i)

[93] *Fearn* (n 35) [76].

[94] The importance of ensuring coherence between the common law and statute has been widely discussed: see Lord Hodge, 'The scope of judicial law-making in the common law tradition' (2020) 84 *Rabels Zeitschrift für ausländisches und internationals Privatrecht* 211, 222. See also, Kit Barker, 'Private Law as a Complex System: Agendas for the Twenty-First Century' in Barker, Fairweather and Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017); Jane Stapleton, *Three Essays on Torts* (Oxford Univeristy Press 2018); Andrew Burrows, 'The Relationship Between the Common Law and Statute in the Law of Obligations' (2012) 128 *LQR* 232; Jodi Gardner and John Murphy, 'Concurrent liability in contract and tort: a separation thesis' (2021) 137 *LQR* 77.

landlords are now under a duty (whether or not responsible for the defect) to take steps to prevent risks from materialising, effectively imposing a duty to remediate[95] and (ii) many landlords will now be unable to claim service charges in respect of cladding remediation costs.[96] This makes claims against landlords both appropriate (linked to their breach of duty) and desirable (as many long leaseholders will not have the cost passed on through their service charge).[97]

The leasehold structure splits the control of the individual flats and the wider building. The landlord holds the freehold of the building (an estate in land).[98] The individual flats are 'owned' as long leases.[99] This long leasehold gives the holders rights akin to 'ownership' to the flat itself for the period of time of the leasehold, but importantly the control of the building as a whole, including the structure and the common parts remains with the freeholder; meaning that the individual leaseholder does not have any estate or interest (or control) over the building as a whole. This allows freeholders and leaseholders to be interpreted as neighbours within the tort, each owning and controlling separate estates or 'land'.

Those who are suffering, the leaseholders who are living in unsafe (and devalued) flats, are not the parties who have

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[95] Bright and McFarlane, 'Private Law Failings' (n 51**Error! Bookmark not defined.**) 145.

[96] By s 117(2) protection is available only for buildings that are at least 11 metres high or have at least 5 storeys.

[97] Do note, flowing from the above analysis, the developers themselves might be able to have a claim against them in nuisance, as there is no requirement that the defendant/creator of the nuisance created the nuisance through the use of their *own* land, or that the nuisance originated in their *own* land. See, for example, the Court of Appeal decision in *Barratt Homes Limited v Dwr Cymru Cyfyngedig (Welsh Water)* [2008] EWCA 1552 and *Jalla* (n 35) [2].

[98] Section 1(1)(a) Law of Property Act (LPA) 1925.

[99] Section 1(1)(b) LPA 1925.

control over the building in order to remedy it. This control of the structure and exterior (and by extension the cladding) is held by the freeholder landlords who are 'using' or 'occupying' that land (the land in question being the overall building). There is Supreme Court authority (with the trespass to land context) that the paper title holder will be presumed to be in possession of land (and by extension occupation)[100] as such, the freeholder would be deemed to be both the owner and the user/controller of this 'land'. And so, it is landlord/freeholder who has to *want* to remediate the buildings; they hold the power and control. As the controller/occupier they have 'continued' or 'adopted' the nuisance created by the developers and can thus be liable in nuisance. The defendant landlord clearly knew/knows (or ought to have known) of the issue relating to unsafe cladding, and despite this knowledge, and the duty imposed by the BSA 2022, they have not acted to resolve the issue.

The final potential sticking point (discussed here) is that a claim like this has not been made before. But novel types of nuisance claims are not new, and the courts have shown themselves willing to adapt and respond to different scenarios reframing and contorting nuisance if necessary.[101] Indeed, post-*Fearn* commentators have suggested that '…the list of the various ways in which the pursuer's enjoyment of his land can be adversely affected, is not closed.'[102] On this basis we argue there is scope to expand nuisance, just as nuisance was stretched in *Fearn* to fill a lacuna relating to privacy, it might

[100] See *Star Energy v Bocardo* [2010] UKSC 35, [2011] 1 AC 380.
[101] See, for example, discussion in John Murphy, 'Judicial Gap-Filling in the Law of Torts and the Rule of Law' in J Gardner, A Goymour, J O'Sullivan and S Worthington, *Politics, Policy and Private Law: Tort, Equity and Land* (Hart Publishing 2023).
[102] McManus (n 92) 8.

once against be able to be 'stretched' to help the claimants in other scenarios.[103]

This leads to an interesting point about what nuisance *should* be doing and what it *should* be responding to. Nuisance does sometimes come under critique for the inequality it perpetuates;[104] It perpetuates the struggles between the 'haves and have-nots', the cosy privileged classes of London's Belgravia and those living in the one-time slums of Bermondsey.[105] Indeed, post-*Fearn* some were critical of how the court managed and dealt with the balancing act as between the wealthy owner's privacy and the rights of the public, Jeevan Hariharan argued this was *why* there was such negative reactions flowing from the decision.[106] It once again gives an example of how the law has developed in this area to protect a privileged and particular class at the expense of others. [107]And any 'glossy' textbook account of nuisance conceals this lived experience[108] – this reflects a theme we hoped to raise, the *people* affected by tort law. How can such people be brought into the consideration; here we are arguing that the uncertainty and fuzziness on the boundaries of nuisance could be taken advantage of to do some 'good'. Allowing nuisance claims for cladding could reassess the balance between the haves and the have-nots in nuisance and bring the people that tort law affects more centrally into the picture.

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[103] Weinert (n 71) 79.
[104] Joanne Conaghan and Wade Mansell *The Wrongs of Tort* (2nd edn Pluto Press 1999) 124, 124.
[105] Kirsty Horsey and Erika Rackley *Tort Law* (8th edn), [579].
[106] Hariharan (n 85) 710.
[107] ibid 710.
[108] Horsey and Rackley (n 105).

IV. Further Reflections

Reviewing a collection of essays, written by the same person over a period of several decades, was an unusual but enjoyable process. Considering the breadth and quality of Nolan's scholarship, we were not surprised that one or both of us had read all of the preexisting essays before, and that the different pieces had shaped our understanding, writings about, and enjoyment of tort law immensely. Whilst the respect towards the work and its author was the same, the experiences were different. For one of the authors, some of the articles took her back to her undergraduate law days in Australia; others reminded her of her first years teaching tort law for the first time in Oxford; she poured over 'Deconstructing the Duty of Care' when writing an article on *volenti*.[109] Her own analysis was undoubtedly stronger for having taken an alternative approach to Nolan's, and having to build her response accordingly. For the other author, Nolan's work on nuisance was highly influential in her PhD research which explored the property torts – his papers arguing for the importance of seeing nuisance as a land-based/property tort were foundational to her work. They also continue to be foundational in the author's writings on *Fearn*.[110]

While we understand that selection choices were bound to have been difficult (not least because Nolan has produced to date more than many academics manage in an entire career) some of his most well-known and already widely cited pieces

[109] Jodi Gardner, 'Rethinking Risk-Taking: The Death of *Volenti*?' (2023) 82(1) *Cambridge Law Journal* 110.
[110] Victoria Ball, 'The "property" in [Tate] modern nuisance: case comment on Fearn v Trustees of the Tate Gallery' (2023) 87(2) *Conveyancer and Property Lawyer* 205.

could have been excluded in lieu of other, lesser-known pieces. Nolan has, for instance, a number of excellent chapters and articles on underexplored areas (such as the relationship between tort law and human rights and liability for psychiatric injury). The inclusion of these in a collection like this could have breathed new life into pieces that possibly did not get the attention they deserved when originally published.[111] That said, just as the two authors could not agree on what their selection would have been, any group of scholars would be bound to disagree about what should or should not be included in this project.

Each chapter is thoroughly researched and meticulously cited. This collection is truly a treasure trove of both primary and secondary source analysis from across the globe.[112] Disappointingly, however, the breadth of sources and references does not correspond with the diversity of existing scholarship. Academic references were often limited to, or disproportionately focused on, a small group of male academics. This narrow focus is apparent as early as the preface – of the 26 names mentioned regarding advice, observations and comments received in the preparation of this book, only two were female academics. It seems particularly notable that some leading academics, such as Jane Stapleton

[111] For example, Donal Nolan, 'Negligence and Human Rights Law: A Case for Separate Development' (2013) 76(2) *Modern Law Review* 286; Donal Nolan, '*Alcock v Chief Constable of South Yorkshire Police* (1991)' in Mitchell & Mitchell (eds) *Landmark Cases in the Law of Tort* (Hart Publishing 201); Donal Nolan, 'Psychiatric Injury at the Crossroads' [2004] *Journal of Personal Injury Law* 1.

[112] The French *Code Civil*, *Bürgerliches Gesetzbuch* – the German Civil Code, the Italian Civil Code, the *Restatement of torts* from the US, cases from the United States of America, the Supreme Court of Ireland, Australia, Canada, extra-judicial writing from Australia, academics from Canada, Australia, Singapore, Ireland, and the United States of America, all feature.

and Sarah Green, were not included in this list of the 'who's who' of tort law scholarship.[113] Academia has become more aware of citation bias, including over the timeframe that these essays have been written. We would therefore have hoped to see an increase in representation in the newly produced Introduction chapter, but there is no sign of it. This chapter offered Nolan the opportunity to reflect on his scholarship and how it fits more broadly into the questions of liability in tort law, allowing a correction of the existing gender imbalance. Unfortunately, women scholars and judges remain a notable minority in this part of the book as well.[114] On our count, while there were 36 references in the Introduction to work by male scholars, there were only five references to work by females.[115]

This lack of diversity raises a number of concerns both for the authoritative nature of the collection, and for the nature of private law academia in general. An inclusion of a wider variety of voices would have assisted the collection to take its place as a reflection of the important questions of liability in tort law more generally; academic work is improved by engaging in a wider variety of voices. In tort law, where victims of so many torts are disproportionately women and

[113] We note that Jane Stapleton's scholarship was cited several times in the product liability chapter. However, this is not a surprise. As outlined by Jodi Gardner and Sarah Green, Jane is one of a handful of people who have written in this area. Her work has been predominant in the academic and judicial development of this area of law: 'Continuing the Illusion: Product Liability in the United Kingdom' in Burns, Gardner, Morgan and Steel, *Reflecting on Tort Law: Essays in Honour of Jane Stapleton* (Oxford University Press, 2024).

[114] With the notable exception of the work of 'junior scholars' on damages in fn 23, including damages for wrongful conception and fn 49 on psychiatric injury.

[115] With a further two sources being co-authored by male and female scholars. We note that one male author had four separate academic pieces of work of theirs cited - almost the same number as the female authors in total.

other vulnerable groups, it is particularly important for academia to recognise the wide range of viewpoints and voices.[116] On the second point, this book is part of a disconcerting trend in private law academia in which women's voices and contributions are far too often side-lined. Having someone of Nolan's prestige take the opportunity of a project of this magnitude to take active steps to diversify the academics and voices used would have been a powerful step in the right direction. The more high-profile work that seeks to address the unconscious sidelining of women's academic voices, the closer we will come towards fairer more reflective scholarship.

Nolan's scholarship is rightfully celebrated for its contribution to understanding tort law, and we have been honoured to have the opportunity to review and reflect on his work over a number of decades. Academics understandably develop their own experience, methodologies and pedagogical approaches, and Nolan's work, as showcased in this collection, is clearly highly accomplished. One of the least developed aspects in his writings is, however, thinking about the *people* affected by the law. This is true of many dominant voices in private law academia; too often conceptual elegance leaves no room for reflecting on the lived experiences of those living under the law. We argue here that Nolan's new contribution in Chapter Fourteen is an example of this. The search for theoretical coherence may have negative practical outcomes for those harmed by defective products. We, therefore, took the opportunity in Part III to show how Nolan's contributions to understanding nuisance *can* be used to help

[116] For further discussion, see Kirsty Horsey 'Why Recognising Diversity in Tort Law Matters' in K Horsey (ed) *Diverse Voices in Tort Law* (Bristol University Press 2024).

people, and put their interests back into rigorous theoretical discussions. This shows how tort law can develop to solve novel property problems, further adding to the long list of achievements arising out of Nolan's academic writings.