

FEARN V BOARD OF TRUSTEES OF THE TATE GALLERY: A LOST OPPORTUNITY FOR THE UK'S PROTECTION OF PHYSICAL PRIVACY

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The inadequacies of English common and statutory law have left a noticeable gap in the UK's protection of physical privacy. Mann J's 2019 decision in Fearn v Board of Trustees of the Tate Gallery helped fill this gap as it acknowledged that overlooking between neighbours could constitute an actionable nuisance. A year later, the Court of Appeal reversed this development and reaffirmed that private nuisance cannot be used to combat breaches of privacy. This article evaluates the extent to which the High Court decision in Fearn was a useful and desirable tool for defending physical privacy in order to assess the correctness of the appellate decision. The article contends that Mann J's extension was a justified development as it conformed with precedent, the scheme and principles of private nuisance, the text and horizontal effect of art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, cases decided in the European Court of Human Rights, and broader policy. However, the article acknowledges that Fearn was also a problematic development with limited potential as a protection mechanism. Its limitations arose from the conflict between traditional understandings of the right to privacy and nuisance's association with property, the land-based rationale for compensation in nuisance, the standing restrictions retained from Hunter v Canary Wharf Ltd, irregularities with the common law's favourable attitude towards children's privacy, and Fearn's similarities to anti-harassment legislation. Overall, the article concludes that although Fearn was imperfect in its treatment of physical privacy, it was a step in the right direction and contributed at least partially to filling the persistent lacuna in English privacy law.

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I INTRODUCTION

The UK famously lacks a general privacy tort,¹ and its protection of physical privacy is particularly inadequate. Unlike informational privacy (which concerns the discovery and dissemination of private information), physical privacy is about unwanted access to the physical self.² The principal objection in cases involving physical privacy is not that the intruder has discovered something private about the victim, but that they have watched, listened or otherwise sensed the victim in circumstances where one could reasonably expect to be free from unwanted observation.³ As it stands, the English and Welsh courts have primarily developed actions concerning the publication of private information (such as breach of confidence), while common law protections of physical privacy are few and far between.⁴ Despite providing some degree of added protection, anti-harassment legislation is similarly incomprehensive.⁵ There is thus a clear gap in English and Welsh law's protection of physical privacy.

The 2019 High Court decision in *Fearn v Board of Trustees of the Tate Gallery* provided a new means to defend this aspect of the right to privacy as Mann J acknowledged that invasions of domestic privacy could support an action in private nuisance.⁶ However, the Court of Appeal reversed this development a year later and reasserted that overlooking cannot constitute an actionable nuisance.⁷

This article evaluates the utility and desirability of *Fearn* as a privacy protection mechanism, with the broader view of determining whether the Court of Appeal was correct to reverse Mann J's extension to the tort of private nuisance. Part II sets out the facts of *Fearn* and the reasoning and conclusions in both courts. Part III provides necessary background by tracing the history of nuisance and its earlier interactions with privacy. Part IV then examines justifications for Mann J's extension, including support from authority, compatibility with traditional doctrines in private nuisance, the requirements of art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), corresponding jurisprudence in the European Court of Human Rights,

1 *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 at [18]; Michael A Jones (ed) *Clerk & Lindsell on Torts* (22nd ed, Sweet & Maxwell, London, 2018) at [1-36]–[1-37]; and *Halsbury's Laws of England* (5th ed, 2015, online ed) vol 97 Tort at [562].

2 NA Moreham "Beyond Information: Physical Privacy in English Law" (2014) 73 CLJ 350 at 354.

3 At 354.

4 At 358–364.

5 At 364–366.

6 *Fearn v Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch), [2019] Ch 369 [*Fearn* (HC)].

7 *Fearn v Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104, [2020] Ch 621 [*Fearn* (CA)].

and general policy.⁸ Part V acknowledges several factors which limit *Fearn's* ability to safeguard physical privacy and which support the Court of Appeal's reasoning. These include tensions between the personal nature of privacy and the concern for property rights in nuisance, issues surrounding the basis of compensation and the standing restrictions in nuisance, inconsistencies with the special protection generally afforded to children's privacy, and *Fearn's* overlap with the Protection from Harassment Act 1997 (the PHA). Part VI concludes that while *Fearn* was by no means a flawless development which comprehensively filled the gap in English and Welsh privacy law, it was a step in the right direction. Although its scope as a means of defending physical privacy was limited, this could have been improved upon in subsequent decisions. In any case, Mann J's short-lived contribution to private nuisance was an objectively desirable extension given the lack of protection for physical privacy elsewhere at common law.

II FEARN V BOARD OF TRUSTEES OF THE TATE GALLERY

A The Facts and High Court Decision

In *Fearn*, the claimants owned flats with extensively glassed living areas which looked out towards a viewing platform surrounding the Tate Modern, an art gallery managed by the defendants.⁹ The claimants sought an injunction obliging the defendants to partially close the platform or to erect screening as visitors often watched, photographed and filmed their domestic activities.¹⁰ They advanced two claims, one of which was in private nuisance.¹¹ They argued that the Court had to apply the law of nuisance in light of the Human Rights Act 1998 (the HRA) in order to protect the art 8 right to private life.¹² Article 8(1) provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence".

Where a private nuisance claim involves loss of amenity, as in *Fearn*, the defendant's user must seriously interfere with the plaintiff's enjoyment of their land such that a reasonable person would find the interference unacceptable.¹³ This interference must be caused by an actionable nuisance, which is determined by having regard to all the circumstances, including the nature of the locality, the frequency of the interference and other activities in the area.¹⁴ Mann J noted that this inquiry is

8 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

9 *Fearn* (HC), above n 6, at [1].

10 At [1] and [10].

11 At [1], [89] and [128].

12 At [1] and [128].

13 *Halsbury's Laws of England* (5th ed, 2018, online ed) vol 78 Nuisance [*Halsbury's on Nuisance*] at [109], [112] and [113].

14 At [110].

analogous to determining whether a claimant has a reasonable expectation of privacy such that their neighbour's overlooking constitutes a breach of privacy.¹⁵ His Lordship accordingly viewed the ordinary test for nuisance as being compatible with the protection of physical privacy. The Judge acknowledged that nuisance could be extended under the HRA to protect domestic privacy as intentional overlooking could contravene art 8(1)¹⁶ and the PHA would not necessarily prevent all unjustifiable privacy invasions.¹⁷

However, Mann J found that the defendants' conduct was not actionable as it was consistent with the nature of the locality (an urban district in south London used for "residential, cultural, tourist and commercial purposes").¹⁸ Furthermore, the platform was not opened in order to allow visitors to gaze into the flats, but to provide a view of the city which incidentally included the claimants' homes.¹⁹ His Lordship also believed that the claimants had subjected themselves to an increased degree of sensitivity to privacy, as the flats' glassed design created a "self-induced incentive to gaze" analogous to cases involving oversensitive plaintiffs.²⁰ It was therefore reasonable for the claimants to take remedial steps to reduce the interference with their privacy.²¹

B The Court of Appeal Decision

Unsurprisingly, the claimants appealed the High Court judgment on the basis that Mann J had wrongly dismissed their action in private nuisance.²² The Court of Appeal affirmed the Judge's decision, but for very different reasons. After briefly surveying his Lordship's reasoning,²³ the Court concluded that private nuisance cannot support an action involving breach of privacy.²⁴ This was for five main reasons.

First, the Court observed that there was no case in which a nuisance action for overlooking had succeeded, but there were cases which indicated that no such action exists.²⁵ Statements to this effect

15 *Fearn* (HC), above n 6, at [175] and [220].

16 At [169]–[171].

17 At [169]–[171], [174] and [177].

18 At [190] and [196].

19 At [197].

20 At [204]–[205]. See *Robinson v Kilvert* (1889) 41 Ch D 88 (CA) for an application of the increased sensitivity principle.

21 *Fearn* (HC), above n 6, at [211] and [213]–[215].

22 *Fearn* (CA), above n 7, at [27].

23 At [50]–[52].

24 At [52] and [85].

25 At [53].

appeared in *Chandler v Thompson*, *Tapling v Jones* and *Turner v Spooner* (authorities that discuss the opening of new windows which overlook a neighbouring property).²⁶ The Court posited that while there is a difference between opening new windows and a structure like the viewing platform whose whole purpose is to overlook, "the issue of principle as to whether or not an invasion of privacy by overlooking is actionable ... is the same".²⁷ The Court also noted that nuisance does not address privacy concerns in other common law jurisdictions, citing the High Court of Australia's decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*.²⁸ In the Court's view, "the overwhelming weight of judicial authority" was that overlooking cannot constitute a nuisance.²⁹

Secondly, the Court believed this made sense "for historical and legal reasons" as there is a longstanding absence of rights to light, air flow and prospect.³⁰ The absence of such rights is policy-based as their existence would limit urban construction and the Court deemed this to be analogous to the absence of an action for overlooking in nuisance.³¹

Thirdly, the law does not provide a remedy for every annoyance to a neighbour, even if that annoyance is considerable.³² It was therefore not self-evident that overlooking should be actionable in nuisance. The Court drew this line of reasoning from *Hunter v Canary Wharf Ltd*, a well-known case in which the claimants unsuccessfully sued for interferences with television broadcasts caused by newly constructed buildings.³³

Fourthly, policy considerations militated against the *Fearn* extension.³⁴ Unlike conventional annoyances such as dirt and fumes, the Court believed that it would be difficult to apply the reasonable user test to determine whether overlooking materially interferes with the amenity value of the affected land.³⁵ It would also be difficult to provide "clear legal guidance" on how courts should assess the frequency and intensity of overlooking.³⁶ Further, the Court distinguished what it saw as the primary

26 *Fearn* (CA), above n 7, at [54]–[57], citing *Chandler v Thompson* (1811) 3 Camp 80, 170 ER 1312, *Turner v Spooner* (1861) 30 LJ Ch 801 (Ch) and *Tapling v Jones* (1865) 20 CBNS 166, 144 ER 1067 (HL).

27 At [56].

28 At [66]–[69], citing *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

29 At [74].

30 At [75] and [78].

31 At [75] and [78].

32 At [79].

33 At [79], citing *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL) at 699.

34 At [80].

35 At [81].

36 At [81].

issue in cases of overlooking (invasion of privacy) from the traditional concern of nuisance (damage to proprietary interests),³⁷ and noted that there are "already other laws which bear on privacy", an area in which the legislature "is better suited than the courts".³⁸

Fifthly, the Court believed that overlaying private nuisance with art 8 (as Mann J had done) would significantly distort the tort. Mere licensees currently have no cause of action in nuisance, but art 8 would confer a right on anyone who had a reasonable expectation of privacy in the affected premises.³⁹ Moreover, in assessing a person's reasonable expectation of privacy under art 8, the court would need to consider matters which are irrelevant in nuisance, such as the plaintiff's particular sensitivities and the defendant's competing Convention rights.⁴⁰ The Court also implied that existing causes of action (such as misuse of private information and the PHA) provide sufficient protection for privacy.⁴¹ The Court of Appeal judges therefore saw "no sound reason to extend" private nuisance under art 8 and reversed the *Fearn* extension.⁴²

III PRIVATE NUISANCE

A History and Purpose

In order to evaluate the utility and desirability of the High Court decision in *Fearn*, as well as the correctness of the appellate decision, a general understanding of the history and purpose of private nuisance is required.

Private nuisance first emerged in the 12th century as an adjunct to the assize of novel disseisin, an ancient action concerning interferences that wholly deprived landowners of the opportunity to exercise their rights in land.⁴³ This action typically applied where a freeholder was dispossessed of their property by a newcomer.⁴⁴ From its nascent beginnings, nuisance has been concerned with interests in land, rather than personal well-being or individual autonomy. In this regard, it is noteworthy that while the tort may provide a remedy against wrongful action, it is not *about* wrongful

37 At [84].

38 At [84].

39 At [91].

40 At [92]–[93].

41 At [72], [84] and [94].

42 At [95].

43 FH Newark "The Boundaries of Nuisance" (1949) 65 LQR 480 at 481.

44 Donald W Sutherland *The Assize of Novel Disseisin* (Oxford University Press, Oxford, 1973) at 3.

action.⁴⁵ It is about providing a hierarchy of rights in land between freeholders.⁴⁶ Nuisance aims to prohibit and compensate for an ongoing or recurrent activity or state of affairs which unreasonably interferes with the claimant's land or use of land.⁴⁷ This includes interferences with physical rights (such as the right to draw water) and intangible rights (such as the right to peace and quiet), which are described as amenity.⁴⁸ Evidently, the nuisance action is, and always has been, inherently tied to the parties' respective properties.⁴⁹

Claims for personal injury are also unavailable in nuisance as the tort is aimed at preventing unreasonable interferences with the plaintiff's rights in land, rather than preventing their physical discomfort per se.⁵⁰ Even where an actionable nuisance causes physical discomfort, compensation is not directed towards personal injury occasioned by the defendant's user. Rather, it is directed towards the diminution in the amenity value of the land.⁵¹ As one scholar aptly remarked, nuisance applies not to the plaintiff's interest in bodily security, but to their "interest of liberty to exercise rights over land in the amplest manner".⁵²

Given that nuisance is concerned with property rights and not personal wrongs, claimants must have a legal interest in the affected land in order to sue.⁵³ Mere occupants (including family members with no proprietary interest over the land in question) cannot bring independent actions.⁵⁴ As will be discussed in Part V, the history, purpose and aims of private nuisance inhibit *Fearn's* utility as a privacy protection mechanism and offer some support to the Court of Appeal's decision.

B Nuisance and Privacy

Although the above summary might make nuisance seem like an odd choice for protecting physical privacy, the *Fearn* extension was a consequence of the fact that England and Wales lack a

45 Allan Beever *The Law of Private Nuisance* (Hart Publishing, Oxford, 2013) at 15.

46 At 15.

47 John Murphy *The Law of Nuisance* (Oxford University Press, Oxford, 2010) at [1.05].

48 Carol Harlow *Understanding Tort Law* (3rd ed, Sweet & Maxwell, London, 2005) at 84; and *Read v J Lyons & Co Ltd* [1945] KB 216 (CA) at 236.

49 Murphy, above n 47, at [3.03].

50 At [3.09]; and *Hunter v Canary Wharf Ltd*, above n 33, at 692 and 696.

51 Murphy, above n 47, at [3.09]; Bill Atkin "Nuisance" in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) 533 at 537; and *Hunter v Canary Wharf Ltd*, above n 33, at 706.

52 Newark, above n 43, at 489.

53 *Hunter v Canary Wharf Ltd*, above n 33, at 688–689, 703 and 724; Atkin, above n 51, at 556; and Harlow, above n 48, at 93. A legal interest includes the right to exclusive possession: Atkin, above n 51, at 556.

54 *Hunter v Canary Wharf Ltd*, above n 33, at 692–694.

universal privacy tort. English and Welsh courts must protect privacy indirectly via a plethora of existing legal actions.⁵⁵ But before *Fearn*, there were two conflicting common law theories as to whether privacy constituted a domestic amenity which could be safeguarded through nuisance.

According to several cases contrary to Mann J's decision in the High Court, nuisance cannot be used to protect domestic privacy. Many of these cases were cited by the Court of Appeal in *Fearn*. For instance, the Court in *Turner v Spooner* stated that landowners are not prevented from opening new windows "on the mere ground of invasion of privacy", even if the windows would overlook neighbouring premises.⁵⁶ Likewise, the majority in *Victoria Park* indicated that landowners may look over their neighbours' fences and see what occurs on their land without incurring tortious liability.⁵⁷ They also explicitly stated that an occupier's rights in land "do not include freedom from the view" of neighbouring occupiers.⁵⁸ Similar observations appear in *Tapling v Jones*.⁵⁹

Other decisions provide a different view. For example, a nuisance action was upheld in *Walker v Brewster* where the defendant's fetes attracted people who sat on a wall adjoining the plaintiff's property, thereby destroying their privacy.⁶⁰ Admittedly, other activities (including a noisy brass band and fireworks) contributed to the Court's conclusion in *Walker*, though the intensive watching was a part of the defendant's actionable interference.⁶¹ In *Bernstein of Leigh (Baron) v Skyviews & General Ltd*, Griffiths J commented obiter that persistent aerial surveillance that would affect a landowner's enjoyment of their property may constitute a nuisance.⁶² Private nuisance has also been used to protect against indirect interferences with privacy, such as where neighbours take photographs of activities conducted on the claimant's land from outside its boundaries.⁶³

Importantly, a nuisance claim succeeded in respect of unwanted telephone calls in *Khorasandjian v Bush* even though the plaintiff was living at her parents' home as an occupant when the calls occurred.⁶⁴ The Court in *Khorasandjian* found for the plaintiff on the basis that her enjoyment of her

⁵⁵ *Wainwright v Home Office*, above n 1, at [18]; *Jones*, above n 1, at [1-36]–[1-37]; and *Harlow*, above n 48, at 17.

⁵⁶ *Turner v Spooner*, above n 26, at 803.

⁵⁷ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*, above n 28, at 494 and 507.

⁵⁸ At 507.

⁵⁹ *Tapling v Jones*, above n 26, at 179.

⁶⁰ *Walker v Brewster* (1867) 5 LR Eq 25 (Ch) at 34.

⁶¹ At 34; and Ursula Cheer and Stephen Todd "Invasion of Privacy" in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) 977 at 981, n 12.

⁶² *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479 (QB) at 489.

⁶³ *Raciti v Hughes* (1995) 7 BPR 14,837 (NSWSC) at 14,840; and *Jones*, above n 1, at [1-36].

⁶⁴ *Khorasandjian v Bush* [1993] QB 727 (CA) at 734–735.

parents' home (and implicitly her right to privacy) had been interfered with.⁶⁵ The Court's characterisation of privacy as an amenity in land is evidenced by Dillon LJ's endorsement of a passage from *Motherwell v Motherwell* in which the Supreme Court of Alberta rejected counsel's submission that the common law lacks "the resources to recognise invasion of privacy as either included in an existing category or as a new category of nuisance".⁶⁶ Insofar as it conferred standing on those without a proprietary interest, *Khorasandjian* was overruled in *Hunter*.⁶⁷ However, the majority in *Hunter* did not speak directly to the question of whether privacy can constitute an amenity in land and only disapproved of *Khorasandjian* with respect to the standing issue.⁶⁸ As such, the Court's indication in *Khorasandjian* that the right to privacy may be protected through nuisance arguably survives. Finally, Lord Hoffmann identified nuisance as one of several torts which may give effect to privacy interests in *Wainwright v Home Office*.⁶⁹

IV JUSTIFICATIONS FOR THE FEARN EXTENSION

In light of the above, there are several reasons why Mann J's extension was a justified development which provided an effective and desirable means of protecting physical privacy. The following points therefore cast doubt on the correctness of the appellate decision.

A Precedent

First, the High Court decision in *Fearn* was supported by a body of precedent as earlier cases had already recognised that privacy could be defended through nuisance. Many of these cases were glossed over by the Court of Appeal. The Court disregarded *Walker v Brewster* when it asserted that "there has been no reported case in this country in which a claimant has been successful in a nuisance claim for overlooking".⁷⁰ Other authorities, including *Khorasandjian*, *Motherwell* and even Lord Hoffmann's seminal statement in *Wainwright*, were also ignored.⁷¹ While many of the cases supporting *Fearn* are equivocal or merely persuasive, the number of decisions which contradict the

65 At 745; and Harlow, above n 48, at 17 and 117.

66 *Motherwell v Motherwell* (1976) 73 DLR (3d) 62 (Supreme Court of Alberta) at [11] and [25]–[28]; and *Khorasandjian v Bush*, above n 64, at 734–735.

67 Cheer and Todd, above n 61, at 980, n 11; and *Hunter v Canary Wharf Ltd*, above n 33, at 688–689, 691–692, 703 and 724.

68 *Hunter v Canary Wharf Ltd*, above n 33, at 689–692, 694–695 and 706–707.

69 *Wainwright v Home Office*, above n 1, at [18].

70 *Fearn* (CA), above n 7, at [53].

71 *Wainwright v Home Office* is mentioned at [84] of the Court of Appeal's judgment in *Fearn*, but no attention is paid to Lord Hoffmann's indication that nuisance may protect privacy. See *Wainwright v Home Office*, above n 1, at [18].

Court of Appeal's viewpoint makes it an overstatement to suggest that the "overwhelming weight of judicial authority" totally precludes overlooking being actionable in nuisance.⁷²

Furthermore, although the Court of Appeal was entitled to draw on *Victoria Park* as a persuasive authority, this case is distinguishable from *Fearn* in an important respect. This is because the structure in *Victoria Park* provided a view of an outdoor racecourse, not the interior of someone's home.⁷³ It was therefore inappropriate for the Court to simply adopt *Victoria Park* without explaining why this seemingly important factual distinction between the two cases was not problematic for the Court's analysis.⁷⁴ It was also questionable for the Court to rely on *Victoria Park* as bolstering the statements in *Turner, Tapling* and *Chandler*,⁷⁵ as *Victoria Park* involved a structure that was specifically designed to overlook. It did not involve the mere opening of new windows.

More fundamentally, the Court relied inappropriately on *Chandler, Turner* and *Tapling* to support its analysis as these cases examined the very different circumstance of opening new windows which simply *happened* to overlook a neighbour's property.⁷⁶ While these authorities indicate that overlooking per se is not actionable, they do not address the profoundly different situation in *Fearn* which involved a structure whose whole purpose was to overlook.⁷⁷ Indeed, each of the passages from these cases that were quoted by the Court of Appeal are directed expressly to the opening of new windows.⁷⁸ It seems dubious to characterise them as expressing a general "issue of principle".⁷⁹ Further, even if the Court's interpretation of these authorities were correct, the reasoning in them is antiquated and comes from a time when judges were hardly cognisant of any right to privacy.⁸⁰ It is odd that a modern court should give these cases such credence, especially in a post-HRA context.

Those points aside, the *Fearn* extension did not go beyond the restrictions of English precedent on nuisance and privacy more generally. Mann J emphasised that the plaintiffs' children did not have

72 *Fearn* (CA), above n 7, at [74].

73 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*, above n 28, at 481.

74 The Court did not explain why it was appropriate to apply *Victoria Park*, except for stating that the reasoning in that case was "consistent with the views expressed by judges in this jurisdiction": *Fearn* (CA), above n 7, at [69].

75 *Fearn* (CA), above n 7, at [69].

76 *Turner v Spooner*, above n 26, at 802; and *Tapling v Jones*, above n 26, at 169–170 and 179.

77 *Fearn* (HC), above n 6, at [159]–[161].

78 *Fearn* (CA), above n 7, at [54], [55] and [58]–[60].

79 At [56].

80 *Tapling v Jones* and *Turner v Spooner* were both decided in the early 1860s. *Chandler v Thompson* was decided in 1811, but was incorrectly cited as being a decision from 1911 in the unreported version of *Fearn* (CA), above n 7, at [54]. These cases were decided well before privacy became a cognisable legal right, or even a developed legal concept.

their own claim because they were not landowners.⁸¹ He therefore applied the standing restrictions affirmed in *Hunter*, left intact one of the fundamental requirements in nuisance (that the claimant have an interest in the affected land), and avoided distancing the action from its central focus on protecting property rights. *Fearn* also conformed with the incremental development of common law privacy protections contemplated by Lord Hoffmann in *Wainwright*.⁸² No "high-level right to privacy" was created and landowners' privacy rights fell to be balanced against those of fellow freeholders.⁸³ Mann J's conclusion is thus defensible on precedential grounds, both with respect to nuisance cases and in light of the English courts' broader approach to developing privacy protections. This support for his Lordship's decision was (ironically) largely overlooked on appeal.

B Compatibility with the Scheme of Private Nuisance

Although the Court of Appeal identified ways in which the *Fearn* extension could distort private nuisance, there are other respects in which nuisance and privacy are very compatible. This is first because it is logical and convenient to characterise physical privacy as an amenity in land within the traditional framework of nuisance. After all, the right to private life is an intangible interest which can naturally be connected with domestic comfort. The European Commission of Human Rights has already recognised this, as art 8 is seen to comprise "the right to establish and develop relationships with other human beings".⁸⁴ For instance, a person can reasonably expect to spend time with their family (especially their children) at home without unwanted surveillance. The reasonable landowner may likewise expect to use residential premises for more innately private activities, such as being intimate with a partner. This has also been linked with art 8 as sexual expression and autonomy in relationships contribute to the right to private life.⁸⁵ Interferences with domestic activities of this kind can understandably be seen as involving a loss of amenity in land, a categorisation consistent with the European Commission's construction of art 8 in *X v Iceland* and ECHR cases concerning sexuality.⁸⁶ Consequently, physical privacy can naturally be associated with the use and enjoyment of land and can be incorporated into the conventional scheme of the private nuisance action.

81 *Fearn* (HC), above n 6, at [217].

82 *Wainwright v Home Office*, above n 1, at [18].

83 At [26]; and *Jones*, above n 1, at [1-37].

84 *X v Iceland* (1976) 5 DR 86 at 87; and NA Moreham and Tanya Aplin "Privacy in European, Civil, and Common Law" in NA Moreham and Mark Warby (eds) *Tugendhat and Christie: The Law of Privacy and the Media* (3rd ed, Oxford University Press, Oxford, 2016) 78 at [3.34].

85 *I v United Kingdom* (2002) 36 EHRR 53 (Grand Chamber, ECHR) at [57]; *Goodwin v United Kingdom* (2002) 35 EHRR 18 (Grand Chamber, ECHR) at [77] and [89]–[93]; *Dudgeon v United Kingdom* (1981) 4 EHRR 149 (ECHR) at [40]–[41]; and Moreham and Aplin, above n 84, at [3.32]–[3.34].

86 *X v Iceland*, above n 84; *I v United Kingdom*, above n 85; *Goodwin v United Kingdom*, above n 85; and *Dudgeon v United Kingdom*, above n 85.

Secondly, nuisance has been characterised as a flexible and versatile tort, so it can arguably be extended to protect novel amenities like privacy without much difficulty.⁸⁷ Protecting physical privacy accords with the ordinary test for liability in nuisance as the assessment of whether the claimant has a reasonable expectation of privacy fits easily into the inquiry of whether the defendant's user constitutes an actionable nuisance.⁸⁸ In this respect, it is not entirely clear why the Court of Appeal believed that it would be difficult to locate overlooking within the reasonable user test.⁸⁹ This is especially so given that the loss of amenity caused by unwanted watching is comparable to the loss of amenity caused by intangible disturbances, such as excessive noise. Logical criteria for assessing the intensity and frequency of overlooking could also be applied in line with the reasonable user test. For example, directed prying into a private bedroom while using binoculars would constitute a serious (and thus culpable) interference with domestic privacy, whereas intermittent and undirected glances towards a neighbour's backyard with the naked eye would cause only a marginal interference and would not be actionable. The Court of Appeal was therefore wrong to assert that there could be no "clear legal guidance" on how the nature of a defendant's overlooking might determine the legality of their conduct.⁹⁰ This further reflects the conceptual overlay between nuisance and privacy, and the potential for nuisance to accommodate privacy interests within an appropriate theoretical framework.

Thirdly, Mann J's concept of a "self-induced incentive to gaze" was doctrinally sound and demonstrates that *Fearn's* application in future cases would not necessarily pervert nuisance or the existing corpus of English privacy law. This is primarily because this concept accords with the conventional notion that oversensitive plaintiffs cannot succeed if the alleged nuisance would only disturb "elegant or dainty" habits of living.⁹¹ It is appropriate that this principle be transposed into a privacy-specific context as it would ensure consistency with cases involving other types of loss of amenity. The self-induced incentive to gaze principle also helps to unify *Fearn* with other common law privacy protections. There are equivalent rules in misuse of private information which provide that public figures have a reduced expectation of privacy and that those who court publicity have less ground to object to subsequent intrusions into their privacy.⁹² Like the above factors, this consistency strengthens the conceptual appeal of *Fearn* and its desirability as a privacy protection mechanism. The Court of Appeal failed to appreciate these points in its judgment.

87 *Hunter v Canary Wharf Ltd*, above n 33, at 711.

88 *Fearn* (HC), above n 6, at [175] and [220].

89 *Fearn* (CA), above n 7, at [81].

90 At [81].

91 *Robinson v Kilvert*, above n 20, at 94; and *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (QB) at 698.

92 *A v B plc* [2002] EWCA Civ 337, [2003] QB 195 at [11(xii)].

C Article 8, ECHR Jurisprudence and the Convention

Contrary to the Court's indication that there is "no sound reason" to extend private nuisance under art 8,⁹³ protecting physical privacy through nuisance is justified by the text of art 8 and ECHR jurisprudence. The wording of art 8 is clearly broad enough to mean that the right protected extends beyond informational privacy ("correspondence") and includes physical privacy ("private and family life" and the "home"). Moreover, given that nuisance (being a land-based tort) can logically be connected with domestic privacy, its extension in Mann J's decision accorded precisely with the reference to "family life" and the "home" in art 8. This understanding of the right to private life is supported by ECHR decisions, which confirm that art 8 captures physical (not just informational) privacy. In *Reklos v Greece* the Court stated that while the right to control the use of one's image generally involves the possibility of refusing publication, "it also covers the individual's right to object to the recording, conservation and reproduction" of that image.⁹⁴ In other words, publication is not a prerequisite to art 8 being engaged.⁹⁵ This was encapsulated in Mann J's extension in *Fearn* as nuisance has no publication requirement. The ECHR and European Commission have also recognised that art 8 protects against nuisances, such as noise pollution, chemical factory operations and toxic fumes.⁹⁶ Developing nuisance to better protect physical privacy as a component of the right to private life therefore conformed with the text of art 8 and its interpretation by the ECHR.

Since the right to physical privacy is guaranteed by art 8, the English courts must give effect to it when developing the common law pursuant to the HRA and as part of the UK's obligations under the Convention. However, as already noted, English law inadequately protects the *physical* aspect of the right to privacy. This is something which the Court of Appeal in *Fearn* did not adequately acknowledge as the judges saw the information-based laws of "confidentiality, misuse of private information [and] data protection" as being sufficient to address privacy concerns in the round.⁹⁷ This is clearly not the case as the existing common law actions predominantly concern informational privacy and require publication.⁹⁸ Although *Imerman v Tchenguiz* extended breach of confidence to cover situations where a person merely "looks at a document", this will not naturally apply where the

93 *Fearn* (CA), above n 7, at [95].

94 *Reklos v Greece* [2009] ECHR 200 at [40].

95 Moreham, above n 2, at 356–357.

96 *López Ostra v Spain* (1994) 20 EHRR 277 (ECHR) at [44]–[58]; *Guerra v Italy* (1998) 26 EHRR 357 (Grand Chamber, ECHR) at [56]–[60]; *Moreno Gómez v Spain* (2005) 41 EHRR 40 (ECHR) at [53]–[63]; and *Arrondelle v United Kingdom* (1982) 26 DR 5.

97 *Fearn* (CA), above n 7, at [84].

98 Moreham, above n 2, at 350–351 and 361–362.

defendant's conduct involves unwanted watching or recording, rather than the obtaining of information.⁹⁹

Alternative common law means of protecting physical privacy have also been obstructed by the courts. *Hunter* stunted the development of a harassment tort by its negative treatment of *Khorasandjian*,¹⁰⁰ and *Wainwright* confined the *Wilkinson v Downton*¹⁰¹ tort to cases where the claimant suffers actual harm amounting to a recognised psychiatric illness.¹⁰² This made *Wilkinson v Downton* virtually useless for preventing privacy breaches and the case has been even further circumscribed in *O (a child) v Rhodes (English PEN intervening)*.¹⁰³ Finally, while trespass can be used to protect physical privacy, it requires an incursion onto the claimant's land and is therefore unavailable where private activities are observed from outside its boundaries.¹⁰⁴

Legislative protection of physical privacy is similarly incomplete.¹⁰⁵ The offence of voyeurism in s 67(1) of the Sexual Offences Act 2003 only occurs where the offender "observes another person doing a private act" to obtain "sexual gratification".¹⁰⁶ The definition of "private act" in s 68(1) restricts the offence to situations where the victim has intimate body parts exposed, is engaged in sexual activity or is using a lavatory.¹⁰⁷ Even the PHA regime is limited as it requires "a course of conduct" occurring on at least two occasions and therefore fails to address one-off intrusions.¹⁰⁸

99 *Imerman v Tchenguiz* [2010] EWCA Civ 908, [2011] Fam 116 at [72]; and Moreham, above n 2, at 371–372.

100 *Hunter v Canary Wharf Ltd*, above n 33, at 691–692; and Harlow, above n 48, at 16–17. More particularly, the majority in *Hunter v Canary Wharf Ltd* overturned *Khorasandjian v Bush* to the extent that it had conferred standing on the mere occupants of a property affected by an actionable nuisance: *Hunter v Canary Wharf Ltd*, above n 33, at 698–699.

101 *Wilkinson v Downton* [1897] 2 QB 57 (QB).

102 *Wainwright v Home Office*, above n 1, at [47]; *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [2003] 3 All ER 932 at [11]–[12]; and Chris DL Hunt "The Common Law's Hodgepodge Protection of Privacy" (2015) 66 UNBLJ 161 at 169.

103 *O (a child) v Rhodes (English PEN intervening)* [2015] UKSC 32, [2016] AC 219. The Supreme Court in this case held that the required mental element for the *Wilkinson v Downton* tort is an intention to cause physical harm, or severe mental or emotional distress, which then results in a recognised psychiatric illness; mere recklessness will not suffice: at [83]–[84] and [87]. Furthermore, the Court indicated that while such an intention could be inferred from the evidence in appropriate cases, it cannot be imputed as a matter of law: at [81]–[82].

104 Hunt, above n 102, at 165.

105 Moreham, above n 2, at 361–362.

106 At 365.

107 At 365.

108 Sections 1(1) and 7(3).

The UK's protection of physical privacy is far less comprehensive than its protection of informational privacy. In this context, the High Court decision in *Fearn* expanded on the situations in which physical privacy could be protected as it provided a novel method of defending domestic privacy without any requirement for publication. This in turn balanced the emphasis on informational privacy which has dominated English and Welsh common law and thus gave greater effect to art 8. By consequence, *Fearn* helped fill a "conceptual gap" in the law's patchy protection of privacy.¹⁰⁹ This was justified (indeed, required) by the horizontal effect of art 8 as it aligned with the judiciary's obligation to act consistently with the Convention when developing the common law and to extend existing legal actions to better protect Convention rights.¹¹⁰ On this analysis, Mann J's judgment ultimately went towards fulfilling the UK's Convention obligations, which include the application of "an adequate legal framework" for protecting art 8 rights.¹¹¹ His Lordship's extension was an advantageous development (and its reversal a step backwards) in the broader context of English and Welsh privacy law.

It should be noted at this stage that the *Fearn* extension only partially filled the gap in the UK's protection of physical privacy as it captured certain behaviours that are already covered by the PHA, as was noted by the Court of Appeal.¹¹² However, *Fearn* had the advantage of providing a common law (as opposed to a statutory) cause of action, so the courts could have developed it in order to offer protection extending beyond the PHA scheme. The common law's versatility is therefore another justification for the *Fearn* extension, even if it covered situations already largely addressed by the Act. Moreover, as it stood, *Fearn* could have offered a remedy where a PHA claim would otherwise fail. The PHA, for instance, requires that the defendant's conduct be sufficiently serious to warrant criminal sanctions, but private nuisance has no such requirement.¹¹³ Similarly, it is unclear whether the claimants in *Fearn* could have sued the trustees of the Tate Modern under the PHA for disturbances caused by gallery visitors, though they could clearly do so in nuisance. As such, and despite its similarities with the PHA, *Fearn* did offer added protection to physical privacy in accordance with the requirements of art 8, the HRA and the Convention.

¹⁰⁹ Moreham, above n 2, at 371.

¹¹⁰ *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2008] Ch 57 at [25].

¹¹¹ *Söderman v Sweden* [2013] ECHR 1128 (Grand Chamber) at [85].

¹¹² *Fearn* (CA), above n 7, at [72] and [84]. Part V of this article discusses this point in greater detail.

¹¹³ *Dowson v Chief Constable of Northumbria Police* [2009] EWHC 907 (QB) at [51]; and Mark Thomson and Nicola McCann "Harassment and the Media" (2009) 1 JML 149 at 152. Ironically, the Court of Appeal acknowledged that overlooking between neighbours is "quite different" to the behaviour targeted by the PHA: *Fearn* (CA), above n 7, at [72].

D Policy

Lastly, although the Court of Appeal believed that *Fearn* was undesirable from a policy perspective, there are several policy factors which support Mann J's decision. Generally speaking, English and Welsh law should strive to protect both informational and physical privacy as this would recognise that a violation of rights occurs where someone intrudes into another's private space without later disclosing private information.¹¹⁴ Judicial recognition of physical privacy is an inherent good in itself as it allows for more comprehensive protection of the right to privacy. *Fearn* at least partly achieved this by providing a privacy-related action not dependent on the discovery or publication of information. Additionally, *Fearn* helped keep UK privacy protections in step with common law developments overseas which specifically target breaches of physical privacy, such as the intrusion into seclusion tort which exists in New Zealand. It thereby went towards "modernising" English and Welsh privacy law. Developments like this are much needed from a general standpoint, especially since no universal right to privacy exists in England and Wales.

According to the Court of Appeal, one of the main policy factors which militated against the *Fearn* extension was the notion that privacy concerns are better left to legislative intervention, not court action.¹¹⁵ It is unusual that the Court expressed this view as the judiciary clearly has a place in developing the law of privacy. This is demonstrated by the very fact that new causes of action like misuse of private information have evolved at common law pursuant to art 8. Given the absence of a truly comprehensive legislative scheme for defending physical privacy, it might reasonably be expected that the courts would take a more active role in this area until Parliament moves to legislate.

The Court of Appeal was also misguided in relying on *Wainwright* to support its view that privacy-related law-making should be reserved for Parliament. The Court cited Lord Hoffmann's statements at [33] of *Wainwright* as indicating that privacy "requires a detailed approach which can be achieved only by legislation", not common law principle.¹¹⁶ However, Lord Hoffmann's comments in that passage were directed towards a particular type of intrusion into privacy which he believed required statutory intervention (CCTV camera surveillance) and the broader question of whether the UK should adopt "a general tort for invasion of privacy".¹¹⁷ His Lordship was not discussing the extension of an existing tort to offer added protection to privacy via indirect means, which is exactly the kind of development contemplated earlier in his judgment.¹¹⁸ As such, *Wainwright* is not an authority for the

¹¹⁴ Moreham, above n 2, at 350–351.

¹¹⁵ *Fearn* (CA), above n 7, at [84].

¹¹⁶ At [84].

¹¹⁷ *Wainwright v Home Office*, above n 1, at [33] as cited in *Fearn* (CA), above n 7, at [84].

¹¹⁸ *Wainwright v Home Office*, above n 1, at [18]. Note especially his Lordship's comment at [18] that "there are gaps, cases in which the courts have considered that an invasion of privacy deserves a remedy which the

proposition that only Parliament may develop new privacy laws. The courts may do so, provided they do not create a universal right to privacy. As mentioned above, Mann J never purported to create a "high-level right to privacy" in *Fearn*.¹¹⁹ He expressly framed his judgment in the context of Lord Hoffmann's indication that "the courts can, where appropriate, give effect to [art 8] by developing existing causes of action".¹²⁰ The Court of Appeal's policy objections to the *Fearn* extension were therefore mistaken.

Taken together with the preceding points, this suggests that *Fearn* was a useful and desirable progression for the protection of physical privacy under English and Welsh law, and that the Court of Appeal was wrong to overturn the development that Mann J had introduced.

V LIMITATIONS TO FEARN

Notwithstanding the above, the *Fearn* extension was limited as a tool for defending physical privacy, and was hampered by several conceptual and practical deficiencies. This section examines these deficiencies and acknowledges the support that they lend to the Court of Appeal's decision.

A *Privacy as an Aspect of Personhood, not Property*

To begin with, although privacy can be characterised as an amenity in nuisance, this does not fully conform with conventional understandings of the right to privacy. This is because privacy is traditionally seen as a personal interest, not one incidental to or contingent on rights in land. This is reflected in perhaps the most seminal description of the right to privacy, that provided by Warren and Brandeis, who stated that "[t]he principle which protects personal writings" is "not the principle of private property, but that of an inviolate personality".¹²¹ Modern conceptions of privacy have defined the right to privacy as involving "a dignitary interest rather than a proprietary claim" from the very beginning.¹²² The notion that privacy is an aspect of personhood has continued to feature in virtually all major delineations on the nature of the right.¹²³ Julie Inness defined privacy in terms of intimacy, while Edward Bloustein believed that it encapsulates one's "essence as a unique and self-determining

existing law does not offer. Sometimes the perceived gap can be filled by judicious development of an existing principle."

¹¹⁹ *Wainwright v Home Office*, above n 1, at [26]; and *Jones*, above n 1, at [1-37].

¹²⁰ *Fearn* (HC), above n 6, at [172].

¹²¹ Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890) 4 Harv L Rev 193 at 205.

¹²² Stephen Penk "Thinking About Privacy" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) 1 at 4.

¹²³ At 4.

human being" and embraces "individual dignity, personal autonomy, integrity and independence".¹²⁴ It is also important to recall the ECHR's observation that art 8 covers "the *individual's* right to object to the recording" of their own image as it is attached to their "personality".¹²⁵ Accordingly, the ECHR has also viewed the right conferred by art 8 as being personal in nature.

This understanding of privacy is fundamentally different from the origins, character and purposes of private nuisance. As discussed above, nuisance emerged from an action which was tied wholly to land ownership and which was aimed at preventing the freeholder's dispossession. Even today, the tort remains exclusively concerned with protecting rights associated with the use or enjoyment of land, not the personal rights of individual occupants.¹²⁶ This was expressly confirmed in *Hunter* as the majority indicated that claims for personal injury are not available in nuisance, but only in negligence or other torts protecting in personam rights.¹²⁷ On a fundamental level, it would be doctrinally undesirable to conceptualise physical privacy as something parasitic to land usage as this would conflict with the standard definition of the right to privacy. Tying physical privacy to property would also be inconsistent with existing legal actions which treat privacy invasions as personal wrongs. So, while physical privacy can be categorised as an amenity in land, the tension between privacy's classical association with individual autonomy and the proprietary nature of private nuisance makes doing so problematic.¹²⁸ This ultimately reduces *Fearn's* doctrinal appeal as a method for protecting physical privacy.

From another perspective, if the *Fearn* extension were reinstated, this tension between personal and proprietary interests could threaten the purity of the nuisance action. Although this did not occur in the High Court decision in *Fearn*, nuisance's traditional focus on property rights could be gradually overtaken by a growing concern for the emotional harm of individual freeholders, particularly when it comes to the quantum of damages and the discretionary awarding of injunctions in nuisance claims. This threat would be compounded if elements from in personam privacy actions were allowed to influence the development of nuisance-based privacy protections. For these reasons, too, the *Fearn* extension was doctrinally limited and, if reintroduced, would need to be developed cautiously.

124 Julie C Inness *Privacy, Intimacy, and Isolation* (Oxford University Press, Oxford, 1992) at 78; Edward J Bloustein "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYU L Rev 962 at 971; and Penk, above n 122, at 4.

125 *Reklos v Greece*, above n 94, at [40] (emphasis added).

126 Murphy, above n 47, at [3.03].

127 *Hunter v Canary Wharf Ltd*, above n 33, at 692–694 and 707.

128 The Court of Appeal alluded to this issue when it stated that the fundamental concern in overlooking cases is "invasion of privacy", not "damage to interests in property" which is the traditional ambit of private nuisance: *Fearn (CA)*, above n 7, at [84].

B The Basis of Compensation in Nuisance

Additionally, the rationale for awarding compensation in private nuisance is problematic when applied in privacy-related contexts. This is because the personal harm typical of cases involving breach of privacy may conflict with the land-based foundations of nuisance remedies. In private nuisance, compensation is awarded on the basis of loss of amenity rather than the harm the claimant has personally suffered.¹²⁹ This analysis is not appropriate for privacy invasions as the fundamental wrong complained of will seldom be a violation of property rights. Instead, claimants will generally point to the defendant's interference with their personal autonomy and the resulting emotional distress which they have suffered.¹³⁰ Tellingly, this was the nature of the complaint in *Fearn* as the entire High Court case was argued on the basis that the defendants' behaviour constituted "an actionable invasion of ... privacy", not necessarily a wrong committed against the claimants' land.¹³¹ The fact that the claimants were not primarily concerned with a loss of amenity is reflected in that they brought an alternative HRA action totally independent from their proprietary interests. Emotional upset (not interference with property rights) also featured prominently in the claimants' evidence,¹³² as some stated that "they felt as if they were in a zoo" and another that the visitors made her feel "sick to her stomach".¹³³

While a loss of amenity will of course occur where there has been a breach of domestic privacy, the overlap between the harm with which nuisance is traditionally concerned (interference with the use and enjoyment of land) and the more personal harm which typically accompanies privacy invasions is incomplete. Thus, in cases involving a breach-of-privacy-type nuisance, real care would need to be taken to ensure that compensation is awarded on the basis of loss of amenity and not emotional distress. This is because an interference with property rights would rarely be the core of the harm complained of. Rather, a claimant would usually be seeking compensation for the personal harm occasioned by the defendant's intrusions. Awarding compensation on this basis would need to be avoided if the nuisance doctrine were to remain pure. From a remedial standpoint, this conflict between the traditional rationale for awarding remedies in nuisance (loss of amenity) and the individual harm typical of privacy cases impedes the extent to which *Fearn* could act as an effective tool for defending physical privacy.

Moreover, the method for calculating damages in nuisance is poorly suited to compensating for the personal harm that accompanies breaches of privacy. This is because the quantum of damages

129 Murphy, above n 47, at [3.09]; Atkin, above n 51, at 537; and *Hunter v Canary Wharf Ltd*, above n 33, at 706.

130 Bloustein, above n 124, at 968 and 970. Again, this issue features in the Court of Appeal's discussion in *Fearn* (CA), above n 7, at [84]. See above n 128.

131 *Fearn* (HC), above n 6, at [1].

132 At [11]–[17].

133 At [11] and [14].

"does not depend on the number of those enjoying the land" or their individual discomfort.¹³⁴ The "true measure of liability" is "the extent to which the nuisance has impeded the comfortable enjoyment of the plaintiff's property".¹³⁵ In other words, the court's determination must always be directed to "the effect on the amenity of the land".¹³⁶ Although the court may consider the number of people present at the affected premises, this can only be a guide and is not the focus of its inquiry.¹³⁷ The sums that would be awarded in personal injury claims will also generally be an inappropriate analogy for the calculation of damages in nuisance.¹³⁸ As such, the personal harm suffered by individual residents in a privacy-related nuisance claim will be largely marginalised in the court's assessment of damages. While this would not occur if an injunction were awarded, that remedy is discretionary.¹³⁹ This risk for marginalisation is worsened by the fact that the awarding of remedies in nuisance is only aimed at the landowner's loss of amenity. The loss suffered by occupants who lack proprietary interests is effectively ignored and in no way contributes to the rationale for providing compensation. The basis for measuring damages (and more generally, of awarding remedies) in nuisance is thus ill-suited to the personal harm typical of privacy cases. This means that the *Fearn* extension would always be a limited means of protecting physical privacy from a remedial perspective.

C Standing Restrictions

Perhaps the greatest issue with *Fearn's* potential as a privacy protection mechanism flows on from the traditional standing restrictions of private nuisance. These require that claimants have a proprietary interest in the affected land in order for them to be able to sue. Even if Mann J's extension were reinstated on appeal to the Supreme Court, the retention of these restrictions would significantly inhibit *Fearn's* ability to defend physical privacy for several reasons.¹⁴⁰

First, the standing restrictions conflict with the personal nature of privacy as residents without a legal interest in land that is being affected by a neighbour's unreasonable overlooking could not vindicate their rights by bringing independent claims in nuisance. This is despite the fact that such residents possess a privacy right attaching to their own person and suffer individual harm because of their neighbour's intrusive conduct, notwithstanding their lack of a legal interest in the affected premises. As noted above, the ECHR accepted in *Reklos* that art 8 involves a personal right, but the

¹³⁴ *Hunter v Canary Wharf Ltd*, above n 33, at 696.

¹³⁵ At 724–725.

¹³⁶ At 724.

¹³⁷ At 724–725.

¹³⁸ *Halsbury's on Nuisance*, above n 13, at [227].

¹³⁹ At [230].

¹⁴⁰ The following discussion assumes that the *Fearn* extension may be reinstated, and the traditional standing restrictions retained, by the Supreme Court on appeal.

protection that art 8 affords against nuisances is also regarded as going beyond proprietary interests.¹⁴¹ It would therefore be inconsistent with ECHR jurisprudence to limit a person's ability to defend their right to privacy through nuisance on the basis of whether they possess such an interest. This inconsistency would also raise questions regarding the UK's compliance with the Convention and the court's fulfilment of its duty to develop adequate protections for Convention rights. Ultimately, if the *Fearn* extension were ever reintroduced, restricting the right to bring nuisance proceedings in this way would sit poorly with the personal definition of privacy adopted by the ECHR, courts and scholars. At the same time, it would cast doubt on whether the judiciary were truly protecting "private and family life" for non-freeholders (including children) as mandated by art 8.

The standing restrictions also marginalise the privacy rights of parties who (despite not having a proprietary interest) use the land in question to substantially the same extent as those with legal title. As Lord Cooke noted in *Hunter*, it is perfectly logical to grant continuing occupants a right to sue for loss of amenity.¹⁴² This is because the "right of occupation" enjoyed by residents is essentially identical to the rights of the landowner where there is an interference with the use or enjoyment of land, rather than material damage to the land itself.¹⁴³ This is especially so with respect to domestic privacy as all members of a household can reasonably expect to do certain activities without unwanted surveillance. Bathing and using the toilet are sufficient examples. As such, occupants who use land to the same degree as the landowner should be able to defend their privacy by bringing an independent action. However, the standing restrictions prevent them from doing so and instead oblige them to rely on proprietors to bring a claim on their behalf. This discounts the privacy interests of those without legal rights in the affected land and makes *Fearn* highly inaccessible as a means of protecting physical privacy.

Similarly, if an occupant and an owner use land in substantially the same way, the loss of amenity which they suffer because of privacy invasions must also be substantially the same.¹⁴⁴ It would therefore be fundamentally unjust to discriminate between parties affected by a breach-of-privacy-type nuisance on the basis of legal ownership as the harm suffered by those with and without proprietary interests is largely identical. Such injustice and discrimination would be perpetuated by the standing restrictions if they continued to apply to privacy-related claims in nuisance.

141 David Harris and others *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd ed, Oxford University Press, Oxford, 2009) at 367–368. This point was noted by the Court of Appeal when it indicated that art 8 would confer standing on anyone who has a reasonable expectation of privacy in the affected premises: *Fearn* (CA), above n 7, at [91].

142 *Hunter v Canary Wharf Ltd*, above n 33, at 712.

143 John G Fleming *The Law of Torts* (8th ed, The Law Book Company, Sydney, 1992) at 426; and Allen M Linden and Bruce Feldthusen *Canadian Tort Law* (8th ed, LexisNexis Butterworths, Markham (Ontario), 2006) at 581.

144 See *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672, the facts of which help demonstrate this point.

Evidently, there is a strong argument that the standing restrictions should be discarded (at least in loss of amenity cases) as they considerably limit *Fearn's* potential to protect physical privacy. This sort of limitation is undesirable given the law's already scanty treatment of non-informational privacy. Further, granting standing to residents with a continuing right to the use of an amenity would not necessarily transform nuisance "from a tort to land into a tort to the person".¹⁴⁵ The court's focus would still be directed towards the claimant's loss of amenity (not their personal injury) as only those with a sufficiently substantial right to the use and enjoyment of land could sue.¹⁴⁶ There is accordingly no principled reason for prohibiting continuing occupants from being able to sue in respect of breach-of-privacy-type nuisances and removing this prohibition would greatly improve *Fearn's* accessibility as a protection mechanism. Unfortunately, the standing restrictions featured prominently in the Court of Appeal's reasons for discarding Mann J's extension,¹⁴⁷ and it is unlikely that they would be relaxed in the Supreme Court even if *Fearn* were reinstated. They therefore represent a major constraint on *Fearn's* capacity to protect physical privacy.

D Privacy and Children

Another significant issue with *Fearn* is a consequence of the standing rules. This is because excluding the claims of parties who do not possess property rights in the affected land is inconsistent with the special protection generally afforded to children's privacy in English and Welsh law.¹⁴⁸ This heightened concern for children is most clearly reflected in misuse of private information as, under this action, a child has their own right to privacy independent from the rights of their parents,¹⁴⁹ and there are considerations which may mean that a "child has a reasonable expectation of privacy where an adult does not".¹⁵⁰ Similarly, although a child's right to privacy "is not a trump card", any adverse effect to their best interests will bear "considerable weight" in a claim involving misuse of private information.¹⁵¹

English and Welsh law clearly ascribes particular importance to children's privacy. However, the High Court decision in *Fearn* contains several statements conflicting with that general position which,

145 *Hunter v Canary Wharf Ltd*, above n 33, at 693.

146 Margaret R Brazier (ed) *Clerk & Lindsell on Torts* (17th ed, Sweet & Maxwell, London, 1995) at [18–39].

147 See *Fearn* (CA), above n 7, at [45] and [91].

148 Although the Court of Appeal did not expressly discuss this issue, it agreed that children have no right to sue in nuisance: *Fearn* (CA), above n 7, at [45].

149 *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481 at [14] and [16]. Compare the New Zealand Court of Appeal's approach in *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [161] and [260]. See also Rosemary Tobin "Privacy and Children" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) 305 at 310–312.

150 *Weller v Associated Newspapers Ltd* [2015] EWCA Civ 1176, [2016] 1 WLR 1541 at [29].

151 At [40].

if left unchanged, would be highly problematic when applied to nuisance cases involving breaches of children's privacy. Mann J first stated that "the particular need to protect children" did not carry "much weight" in his assessment of whether there was an actionable nuisance.¹⁵² This was despite the fact that two claimants would not allow children to visit the flats in case they were photographed and subjected to "high levels of scrutiny".¹⁵³ This contradicts the courts' usual approach to children's privacy interests, making *Fearn* a conspicuous outlier in the broader law of privacy.

Mann J's more controversial statement is that the children's privacy interests in *Fearn* were "part of the greater privacy interests of the parent owners" and did not "add anything substantial to the latter's significant interests".¹⁵⁴ This limits *Fearn*'s utility as a privacy protection mechanism for two reasons. First, Mann J's conclusion that the children's interests did not add "anything substantial" to those of their parents is entirely inconsistent with the uncontentious position that children's privacy rights are generally given special weight in English and Welsh law.¹⁵⁵ Second, the Judge's indication that the children's privacy expectations formed part of the interests "of the parent owners" did exactly what the Court of Appeal said courts should avoid in the seminal case of *Murray v Express Newspapers plc* – it conflated a child's expectation of privacy with the rights of their parents.¹⁵⁶ Bundling children's interests with those of their parents would admittedly make determining whether there is an actionable nuisance more straightforward than if their interests were considered separately. Nevertheless, this conflation of rights is contrary to one of the defining trends of English and Welsh privacy law and is therefore undesirable.

When coupled with Mann J's statement that the children in *Fearn* did not have their own claim because they were not landowners,¹⁵⁷ his Lordship's approach would greatly marginalise children's privacy interests in nuisance actions. This is because a child will very seldom hold a property right entitling them to bring independent proceedings. Moreover, given that children's privacy interests were conflated with those of the adult landowners in *Fearn*, the special protection usually afforded to them would be substantially neutralised if the courts were to examine whether there was an actionable nuisance using Mann J's decision as a guiding authority. This could have been avoided if Mann J had considered the impact on the claimant freeholders of seeing their children exposed to unwanted attention as part of their broader loss of amenity. But he did not do so and instead directed the court's inquiry towards the landowners' privacy interests, effectively excluding those of their children. Not only was this a significant departure from the common law's general treatment of children's privacy,

¹⁵² *Fearn* (HC), above n 6, at [217].

¹⁵³ At [14], [16] and [17].

¹⁵⁴ At [217].

¹⁵⁵ At [217].

¹⁵⁶ At [217]; and *Murray v Express Newspapers plc*, above n 149, at [14] and [16].

¹⁵⁷ At [217].

it also stunted the potential for nuisance to act as a means of protecting familial privacy in line with art 8. In these respects, *Fearn* is significantly constrained in its ability to defend children's privacy and departs from the standard position under UK privacy law. While this may not support the Court of Appeal's decision directly, it indicates that *Fearn* would need to be reworked to serviceably protect privacy and be consistent with other common law privacy-related actions in England and Wales.

E Overlap with the PHA

Finally, there is a significant (though incomplete) overlap between the PHA and Mann J's extension to the law of nuisance. This challenges *Fearn*'s utility as although the High Court decision gave some added protection to physical privacy, it only partially filled the gap in English and Welsh privacy law vis-à-vis the PHA.

The protection afforded by the PHA is reasonably extensive and many types of intrusions into physical privacy may constitute harassment,¹⁵⁸ including surreptitious surveillance, photographing and videoing.¹⁵⁹ Judges also take a liberal approach in determining whether conduct falls under the PHA as "harassment".¹⁶⁰ The PHA is applied with the particular aim of protecting privacy as it is construed with art 8 in mind.¹⁶¹ Consequently, many behaviours which could form the basis of a nuisance action (including the surveillance, photographing and videoing that was actually complained of in *Fearn*) may already be covered by the PHA.

There are also similarities between the tests for liability in nuisance and the PHA. This makes it probable that the PHA covers many *Fearn*-type intrusions into domestic privacy. Sections 1(1) and 7(3) require that there be "a course of conduct" occurring on at least two occasions. Likewise, a defendant's behaviour must ordinarily involve a recurrent activity or state of affairs to be an actionable nuisance.¹⁶² No PHA claim will be available where the course of conduct was reasonable "in the particular circumstances",¹⁶³ and the court must examine the context in which conduct occurred in

158 NA Moreham "Intrusion into Physical Privacy" in NA Moreham and Mark Warby (eds) *Tugendhat and Christie: The Law of Privacy and the Media* (3rd ed, Oxford University Press, Oxford, 2016) 429 at [10.07]. This is similar to the Court of Appeal's points at [72] and [84] of *Fearn* (CA), above n 7.

159 *Howlett v Holding* [2006] EWHC 41 (QB), [2006] All ER (D) 162 (Jan) at [19]–[26]; *C v Crown Prosecution Service* [2008] EWHC 148 (Admin), [2008] All ER (D) 117 (Feb) at [74]–[75]; and Thomson and McCann, above n 113, at 153–157.

160 *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224 at [66]; and Thomson and McCann, above n 113, at 150–151.

161 *Hipgrave v Jones* [2004] EWHC 2901 (QB) at [21]; and Moreham, above n 158, at [10.04], n 5.

162 Murphy, above n 47, at [2.18].

163 Section 1(3)(c).

deciding whether it constitutes harassment.¹⁶⁴ This is substantially similar to the question in nuisance of whether a defendant's user is reasonable in the circumstances and having regard to the nature of the locality. In this respect, Gage LJ's indication that "[w]hat might not be harassment [under the PHA] on the factory floor ... might well be harassment in the hospital ward"¹⁶⁵ echoes Theisger LJ's observation that "what would be a nuisance in *Belgrave Square* would not necessarily be so in *Bermondsey*".¹⁶⁶ Given that both the PHA and nuisance tests consider the reasonableness of the defendant's conduct and the locale in which it occurred, it seems likely that they would capture similar behaviours. The requirement under the PHA that a course of conduct be sufficiently serious so as to be "oppressive and unacceptable"¹⁶⁷ is also akin to the requirement in nuisance that the defendant's user substantially interfere with the plaintiff's rights.¹⁶⁸ Furthermore, both nuisance and the PHA involve the application of an objective test.¹⁶⁹ The criteria for determining whether conduct constitutes harassment are, therefore, markedly similar to those for assessing liability in private nuisance. This makes it probable that the *Fearn* extension targeted behaviours that are already captured by the PHA.

In terms of legislative history, Parliament likely intended for the PHA to cover many situations addressed by *Fearn* as the PHA was partly designed to combat disruptive neighbours.¹⁷⁰ Parliament acknowledged that "harassment may be caused in or from a private house" and that the PHA would capture "those who harass their neighbours by a course of conduct".¹⁷¹ This reinforces the Court of Appeal's opinion that the types of privacy complaints which arose in *Fearn* represent "an area in which the legislature has already intervened".¹⁷²

Ultimately, all this suggests that a significant overlap exists between the *Fearn* extension and the PHA and, therefore, that *Fearn* could only ever partially fill the gap in English and Welsh privacy protections. However, it should be remembered that *Fearn* did expand on the UK's protection of physical privacy (even if not comprehensively) as it could have offered remedies in situations

164 *Majrowski v Guy's and St Thomas's NHS Trust*, above n 160, at [30]; and NA Moreham "Harassment by Publication" in NA Moreham and Mark Warby (eds) *Tugendhat and Christie: The Law of Privacy and the Media* (3rd ed, Oxford University Press, Oxford, 2016) 269 at [6.24].

165 *Sunderland City Council v Conn* [2007] EWCA Civ 1492, [2008] IRLR 324 at [12].

166 *Sturges v Bridgman* (1879) 11 Ch D 852 (CA) at 865.

167 *Majrowski v Guy's and St Thomas's NHS Trust*, above n 160, at [30] and [66].

168 *St Helen's Smelting Co v Tipping* (1865) 11 HLC 642 at 650, 11 ER 1483 (HL) at 1486.

169 Moreham, above n 164, at [6.06]; and Murphy, above n 47, at [2.05] and [2.21].

170 (17 December 1996) 287 GBPD HC 781, 783–784 and 788; and (24 January 1997) 577 GBPD HL 917 and 923.

171 (17 December 1996) 287 GBPD HC 783–784.

172 *Fearn* (CA), above n 7, at [84].

excluded from the PHA. Being a common law action, it was also more adaptable than legislation. *Fearn's* similarities to the PHA simply limit, but do not entirely negate, its utility as a privacy protection mechanism.¹⁷³

VI CONCLUSION

Overall, the *Fearn* extension was in many ways a justified development which was inappropriately reversed by the Court of Appeal. Mann J's decision was backed by precedent and the authorities relied on in the Court of Appeal are either distinguishable or unhelpful. Moreover, there is a degree of conceptual compatibility between privacy interests and traditional concepts in the law of nuisance, such as loss of amenity, the increased sensitivity principle and the central inquiry as to whether the defendant's user constitutes an actionable nuisance. Protecting domestic privacy through nuisance is also justified by the text and horizontal effect of art 8, ECHR jurisprudence and general policy. Perhaps most significantly, *Fearn* increased the range of circumstances in which physical privacy could be defended despite its overlap with the PHA. It therefore went some way to fulfilling the UK's international obligations under the Convention. Objectively speaking, *Fearn* was a useful and desirable progression in English and Welsh privacy law. The Court of Appeal failed to recognise its worth and, with all respect, was wrong to annul Mann J's extension.

That said, the High Court decision in *Fearn* had its defects, and its usefulness as a tool for defending physical privacy was constrained by practical and conceptual deficiencies. Being fundamentally personal in nature, the right to private life is not easily compatible with the proprietary origins of nuisance, such that tying physical privacy to land could threaten the purity of the nuisance action. *Fearn* was limited from a remedial perspective as a worrying tension exists between the compensation rationales in nuisance and the personal harm typical of privacy cases. Similarly, the nuisance measure of damages is ill-equipped to compensate for harm of this kind. Even if the *Fearn* extension were reinstated, the current standing restrictions make it highly inaccessible as a means of protecting physical privacy. The standing restrictions also directly contradict the notions of individual autonomy and personhood which underpin the right to privacy, as well as ECHR case law concerning art 8. These restrictions are objectively indefensible, marginalise the interests of those without rights in the affected land and perpetuate injustice. Mann J's disregard for children's privacy interests is also inconsistent with the special protection generally offered to them at common law and seriously limits *Fearn's* ability to protect familial privacy. Lastly, *Fearn's* overlap with the PHA reduces its utility and

¹⁷³ The original version of this article included a section discussing problems posed by Mann J's practical misapplication of the law (such as his misapplication of the increased sensitivity principle) to the facts in *Fearn*. The Court of Appeal made similar critiques and applied essentially the same reasoning in its obiter discussion of whether Mann J was correct to dismiss the plaintiffs' claim, assuming that nuisance could apply to the defendants' conduct: see *Fearn* (CA), above n 7, at [96]–[102]. It is therefore unnecessary to repeat my original analysis here.

novelty, and indicates that Mann J's development could not comprehensively fill the gap in UK privacy law. All these factors lend support to the Court of Appeal's decision.

But despite its failings, *Fearn* was a step in the right direction for English and Welsh privacy law. While its efficacy as a protection mechanism was limited, this was mainly due to the standing restrictions and Mann J's misstatements regarding the importance of children's privacy interests. If future litigation relaxed the standing rules and allowed for more meaningful consideration of children's privacy concerns in nuisance-based claims, the courts could develop nuisance into a more robust defence mechanism for the right to physical privacy. The *Fearn* extension was, therefore, a welcome development in the broader context of English and Welsh privacy law and should have been retained given the inadequate attention paid to physical privacy at common law and in statute.

The fact that the courts do not recognise a universal tort of privacy means that there will always be tensions when an existing action is extended to address novel privacy complaints. Judges need to be more willing to work around these tensions if they are to fulfil their duty under the HRA with respect to art 8. In short, the Court of Appeal should not have discarded the *Fearn* extension and its decision to do so constitutes a lost opportunity for the UK's protection of physical privacy. Hopefully, the Supreme Court will be more receptive towards this development in the law and will help set a course for the further evolution of nuisance in ways serviceable to the right to privacy.¹⁷⁴

174 See *Fearn v Board of Trustees of the Tate Gallery* [2021] 1 WLR 568 (SC), in which the Supreme Court granted the claimants permission to appeal the Court of Appeal's decision.

