1

Introduction

I. General

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

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

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

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

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

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

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

II. Outlook

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

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

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

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

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

solve different problems or indeed with the decisions that those courts reached. The problem, then, is that when one adds these explanations together, inconsistency results.

What is even less surprising is the fact that when the explanations offered by judges are brought together, they typically fail to provide a cohesive analysis of the law. Thus, even when we escape inconsistency, we are faced with incoherence. It is in these circumstances that interpretation is required. If we are to make sense of law of this kind, it will be necessary to go beyond the explanations offered by the courts.

This does not imply that the law will cease to operate without the academic's interpretations. As my car will function regardless of the state of my knowledge concerning the internal combustion engine, the law in the courts will continue to operate without the fuel of academic analysis. But on the other hand, I cannot claim to understand the functioning of my car simply on the basis that it is running well. The primary purpose of explanation is understanding.

That said, unlike cars, law is a social, norm-governed institution. Given that, developing a proper understanding of the law is likely to allow us to see previously invisible problems with it and to notice ways of improving it that were formerly opaque. Moreover, properly understanding the law is a prerequisite for properly evaluating it. It should be uncontroversial to say that law is not to be evaluated solely by what it does; it must also be judged according to why it does what it does. And the 'why' here is not solely or even most importantly a question about judges' subjective intentions. Rather, in order to know why the law does something, we must be able to explain the law. Evaluation requires interpretation.

How does the law of nuisance fit into this picture? It is an area of the law not presented to us coherently. This is most plainly revealed in the proclivity of commentators to describe the law as coming in separate parts – physical injury versus interference with comfort, for instance. We examine this tendency in the following chapter. We might describe this as a 'divide and explain' approach. The problem is that, by dividing, this approach cannot explain. No doubt distinctions must be made and areas of the law will receive different explanations, but those explanations must explain the differences or they entirely fail. It is no use saying that there are two parts of the law, explaining each part, but not why there are two parts or why they receive different explanations. That is a form of limited rationality.[4]

Accordingly, the law of nuisance cries out for interpretation, for an understanding that explains it adequately. This is an attempt to provide one.

[4] A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart, 2007) 22–23.

III. Scope

This book is concerned only with the law of private nuisance. It does not attempt an analysis of public or statutory nuisances. I think it unlikely that there are explanatorily helpful connections between these concepts. These actions are called nuisances because they respond to troublesome events that share a similar character (noise, fumes, etc). And it is characteristic of the common law to think that its actions are to be understood in terms of the unwanted events (that is, losses) to which they respond. Thus, it can seem natural to think that the nuisances are all linked.

But it is surely quite unlikely that the key to understanding an action is the character of the undesirable event to which it responds. For instance, if I intentionally make smoke on my property in order that it spread to your neighbouring land and destroy your health, there is more than one moral basis upon which you are able to complain. You might accuse me of trying to injure you, of not caring enough for you, or of using my land in an inappropriate way, for instance. Legal actions that recognised those complaints would all respond to the same unwanted event, but they would possess importantly different structures.

I make no claim, therefore, that the analysis presented here has anything to teach us about public or statutory nuisance. Our focus is firmly on private nuisance.

IV. Use

This book places considerable emphasis on the concept of use. Because of this, and because some lawyers are inclined to adopt an ultra-literal interpretation of the concept, it is necessary to say something about the concept as employed here now.

To use something is to put that thing to one's purposes. This can be done physically or otherwise. Just as I use my fingers to type these characters, I might use my son to deliver a message. Likewise, use does not necessarily imply positive action; it is not inconsistent with omission. Thus, we can avoid the interminable and in the end pointless analysis as to whether a certain event was an act or an omission.[5] If I set up my back yard as a rock concert venue, then I am using it as such when rock bands play there, even if I am at the time fast asleep in a hotel on the other side of the world.

[5] It is pointless, because an omission can always be described as an act. For example, failing to turn up to the meeting can be described as staying at home and watching TV. Similarly, trying to sit still is clearly an action. I can succeed or fail to do it, though it could also be described from certain perspectives as an omission.