A Room with a View in English Nuisance Law: Exploring Modernisation Hidden within the 'Textbook Tradition'

1. Introduction

This article critically examines the consensus among tort scholars that an injured view is not in any circumstances actionable under English nuisance law or, as Richard Buckley puts it, that 'it has long been clear that the law of nuisance does not confer protection upon enjoyment by an occupier of an attractive view or prospect.'[1] The 'authority' on which the consensus rests is *Bland v Moseley*,[2] an unreported Tudor case in which Sir Christopher Wray CJ stated that no action in nuisance lies for 'stopping' a 'pleasing prospect'. There are, I argue, reasons to doubt that this case strongly supports the consensus. One is that the claim centred on loss of light, thus Wray's categorical denial of liability in nuisance for causing injury to a neighbour's view is obiter. Another is that Wray's approach does not appear to have withstood nineteenth century modernisation in the law. In particular, it is difficult to reconcile with Lord Westbury's opinion in *Tipping v St Helen's Smelting*[3] that nuisance remedies 'sensible personal discomfort', covering *anything* that 'injuriously affects the senses or the nerves'.

The idea under consideration of a mismatch between formal law and academic exposition opens onto well-charted territory. David Sugarman made an important contribution to this with his critique of the 'English textbook tradition'.[4] Sugarman's thesis is that Victorian and Edwardian-era legal scholars, exemplified by Professor Frederick Pollock, wrote textbooks that emphasised the permanence of common law principles, downplaying their changeability. They did so in order to counter a negative impression of the common law as chaotic and unpredictable, and thereby unworthy of a university education. The crucial part of Sugarman's analysis for present purposes is that textbook understandings of the common law are 'not reducible' to the law itself.[5] Against this, William Twining has suggested that formative legal scholars were attuned to the common law's spontaneity, and that Pollock was in fact in the vanguard of a proto-realist understanding of 'living law'.[6] In defence of Sugarman, I argue that Pollock and other scholars writing about nuisance overlooked the modernity of contemporary case law. The problematic consensus regarding *Bland* is an important legacy of this.

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[1] R A Buckley, *Law of Nuisance* (London: Butterworths, 1981) p 34. Similarly emphatic language can be found in more general tort texts, such as Keith Stanton's statement regarding nuisance that 'loss of view...is the most obvious form of loss that is excluded' (K Stanton, *The Modern Law of Tort* (London: Sweet and Maxwell, 1994), p 391).

[2] National Archives, KB 27/1302 m 254 (Trinity 1587); Harvard Law School MS 16 fol 402, reproduced in J Baker and S F C Milsom (eds), *Sources of English Legal History* (Oxford: Oxford University Press, 1986) p 598.

[3] (1865) 11 HL Cas 642.

[4] D Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition', in W Twining (ed*), Legal Theory and the Common Law* (Oxford: Basil Blackwell, 1986) p 26. For a helpful overview of Sugarman's thesis, see F Cownie, 'Are We Witnessing the Death of the Textbook Tradition' (2006) 3 European Journal of Legal Education 79, and W Twining, Blackstone's Tower (London: Sweet and Maxwell 1994) pp 135-137.

[5] Sugarman, ibid p 28. See too the distinction between lex lata (law as it is) and lex ferenda (law as it ought to be) in A Fernandez and M Dubber (eds), Law Books in Action: Essays on the Anglo-American Legal Treatise (Oxford: Hart Publishing, 2012) p 1.

[6] Twining, Blackstone's Tower (n 4 above).

The analysis begins with close attention to the decision in *Bland*, in its social and economic context (section 2). Beyond the relatively minor difficulty arising from the absence of an official report of this case,[7] lie more substantial difficulties centring on the content of Wray's judgment. The ratio of the case is that an interference with a neighbour's light, such as to cause 'terrible darkness', is actionable, because it renders land uninhabitable. In medieval and early modern times, the words 'view', 'prospect' and 'light' were used interchangeably, and it is against this backdrop that Wray sought to introduce doctrinal precision, by distinguishing between injury to light (as something which is actionable because it is essential to the enjoyment of all land), and injury to a view of pleasing scenery (as something which is not). The dichotomy between light and view fitted broadly adequately with contemporary modes of enjoying property, for whilst possession of a pleasing view was 'necessary' to the landed elite - which invested heavily in beautiful property both for its intrinsic aesthetic value and as a symbol of grandeur - this investment was protected by the law of waste.

Attention is then given to modernisation in the definition of actionable injury in the nineteenth century, through the reception into law of Lord Westbury's opinion in *Tipping* (Section 3). Lord Westbury reasoned that things which are pleasing to some properties but not others *do* sound in nuisance, albeit on a locality-specific basis that differs from the universal actionability of physical injury. The remarks in *Tipping* about actionable injury are situated alongside a line of cases of the 1850s, concerning unpleasant odours from brickworks (*Walter v Selfe,*[8] *Hole v Barlow*[9] and *Bamford v Turnley*).[10] They highlight significant differences of judicial opinion as to whether nuisance law protected against injured sensibility in the absence of 'physicality'. Lord Westbury's speech in *Tipping* provided resolution. In some of the literature, this aspect of *Tipping* is interpreted as a response to industrial pollution, and the perceived need to differentiate between the interests of proprietors in town and country.[11] By contrast, I argue that Lord Westbury was principally responding to the emergence of suburbia, whose bourgeois residents invested heavily in the look (and smell etc) of land, without the security of the elite-oriented law of waste. That created a vacuum filled by nuisance law.

Section 4 addresses doctrinal reasons that sometimes are advanced in support of the permanence of the 'Rule in *Bland*'. Consideration is given to six reasons in particular, viz: (i) 'sensible personal discomfort' does not engage the sense of sight; (ii) 'discomfort' is not an aesthetic criterion; (iii) an injured view is not an 'emanation' from land; (iv) a neighbour wishing to protect a pleasing view can adequately do so through agreeing a restrictive covenant; (v) the management of pleasing views is the province of planning regulation; and (vi) excluding this injury is necessary to control the floodgates of nuisance litigation. This reasoning is

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[7] The significance of the unreported status of this case is that judges may decline to accept submissions on points of law arising from it: Lord Chief Justice of England and Wales, Practice Direction: Citation of Authorities (2012) para 10. (https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Practice+Directions/lcj-pract-dir-citation-authorities-2012.pdf). This is unlikely to be a problem with an iconic case like *Bland*.

[8] (1851) 4 De G & Sm 315.

[9] (1858) 140 ER 1113.

[10] (1860) 122 E.R. 25.

[11] Notably J Brenner, 'Nuisance Law and the Industrial Revolution' (1974) 3 *Journal of Legal Studies* 403 (arguing that Lord Westbury sought to facilitate the industrialisation of towns and cities). For qualified support, see J McLaren, 'Nuisance Law and the Industrial Revolution: Some Lessons from Social History' (1983) 3 *Oxford Journal of Legal Studies* 155 and B Pontin, 'Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence' (2012) 75 *Modern Law Review* 1010. For a broadly supportive judicial statement, see Lord Hoffmann in *Hunter v Canary Wharf* [1995] AC 665, 705.

untested judicially, for in no English common law nuisance case is the actionability of injury to a pleasing view part of the ratio.[12] Elsewhere in the common law world, interferences with pleasing views have occasionally found protection in the case law, broadly within the parameters of *Tipping*. The clearest example is the South African case of *Waterhouse Properties v Hyperception Properties*,[13] in which obstruction of a 'beautiful' view was held actionable in nuisance by virtue of a property and locality that was 'pretty' and 'exclusive'.

It is concluded (in section 5) that whilst the topic of injury to a view is easily dismissed as rather niche, and indeed of modest practical importance - 'a broken window is more important than a broken view'[14] - in reality, injury of this kind can be a very serious matter, not only in private law but also in public law terms.[15] Sugarman's critique of the textbook tradition in relation to the topic at hand is best understood not as an outright rejection of doctrinal scholarship (in favour of, say, a more theoretical or empirical 'alternative'),[16] as much as a call for greater emphasis on the inherent corrigibility of doctrinal exposition, mirroring case law itself. Whether a claim in nuisance lies for an injured view is ultimately a matter for the courts, but it is hoped that the material explored below will be useful when the time comes for the courts to rule on the matter.

2. The Rule in *Bland v Moseley*

This section addresses medieval and early modern nuisance law relating to injured views. In its very earliest iteration, eight or more centuries ago, nuisance law principally remedied interferences with agrarian usages of land (e.g. raising or lowering of hedges, dykes, millponds, or obstruction of roads).[17] Complaints about what can be loosely called 'residential amenity' are not discernible until the 1300s, in connection with the assize of nuisance.[18] Intriguingly, a substantial number of complaints in this setting centred on loss of view. For example, in a case of 1329, John and Isabel de Castleacre successfully protected from obstruction a view of an

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[12] For occasional chancery court cases on this point, see below n 133 and 137.

[13] [2004] ZAFSHC 97.

[14] J Murphy, *The Law of Nuisance* (Oxford: Oxford University Press, 2010) p 43.

[15] For a robust statement of the *public* interest in 'beautiful' scenery, backed by public law provision, see Parliamentary debate on the Florence Convention (Council of Europe, European Landscape Convention (2000)), and in particular Lord Judd:

> 'What is a society worth living in? It is a society that values landscape, beauty and aesthetic considerations. If we undermine those, what on earth are we doing?' (House of Lords Debates, 13 June 2008, col 763)

See further J Holder, 'Law and Landscape: The Legal Construction and Protection of Hedgerows' (1999) 62 *Modern Law Review* 100. By contrast, the concern in this article is with private law.

[16] For an overview of this debate, see Cownie (on the role of UK research funding regimes on lowering the esteem of textbooks) and, more generally, the collection of essays in R Gestel et al, *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge: Cambridge University Press, 2017), especially Part II).

[17] S F C Milsom, *The Historical Foundations of the Common Law* (London: Butterworths, 1969) p 118; D Coquillette, 'Mosses from an Old Manse: Another Look at some Historic Property Cases about the Environment' (1979) 64 Cornell L R 761, 770; J Loengard, 'The Assize of Nuisance: Origins of an Action at Common Law (1978) 37 *Cambridge Law Journal* 144.

[18] See especially the records of the London assizes. *London Assize of Nuisance, 1301-1441: A Calendar* (London: London Records Society, 1973).

adjoining courtyard.[19] Two years later, Isabel Goldchep obtained a remedy against John Ruddok, who 'piled up his firewood against her window so high above the upper stone frame that it is completely obscured, and the light, view, air and clarity (*claritatem*) impeded'.[20] Complaints about loss of view are as common as those directed at loss of light and polluted air, and far outnumbered complaints about noise.

Yet it is unclear that parties in these cases were using the term 'view' in a recognisably modern sense, of aesthetically pleasing scenery.[21] Janet Loengard suggests that injury to view (*visum*) and light (*lumen*) typically were pleaded interchangeably in this setting.[22] That is crucial to bear in mind in interpreting *Bland*, on which today's consensus regarding the exclusion of loss of view from the protection of the enjoyment of land offered by nuisance largely rests. The crux of the complaint in *Bland* was that the defendant's newly built dwelling plunged the claimant's into 'terrible darkness'; the house became like a 'dungeon'.[23] Though loss of view is alluded to in Wray's speech, there no mention of the character of the view that the defendant's property obscured, including whether it was pleasing and, if so, how. The 'how?' question is particularly pertinent, because it directs attention to the limited accessibility of scenery from Tudor dwellings, owing to window glazing being too opaque to reveal pleasing scenery; glazed windows let in light but did not afford a clear view of the world outside.[24]

It is therefore extremely doubtful that the exclusion from nuisance law of liability for an injured view has anything to do with ratio of *Bland*. Even so, it seems inescapable that the notion of injury to light and to prospect having profoundly different legal significance accorded well with judicial opinion at the time. The prevailing opinion was that nuisance law protected only those aspects of property that are essential to enjoyment in all cases, such as some light. In contrast:

> for prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect.[25]

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[19] Ibid, Case No 305.
[20] Ibid, Case No 312.
[21] On linguistic issues in the context of early modern case law, see generally M Lobban, 'Introduction: the Tools and Tasks of the Legal Historian', in A Lewis and M Lobban, *Law and History* (Oxford: Oxford University Press, 2004) pp 3-4.
[22] J Loengard, 'Common Law and Custom: Windows, Light and Privacy in Late Medieval England', in S Jencks, J Rose, C Whittick (eds) *Laws, Lawyers, Text* (Leiden: Brill, 2012) p 279, p 287.
[23] *Bland*, n 2.
[24] On early modern glazing and its limited role in furnishing residential comforts, see: C Woolgar, *The Senses in Late Medieval England* (New Haven: Yale University Press, 2006) p 63; Caroline Barron, *London in the Middle Ages* (Oxford: Oxford University Press, 2004) p 251; and J E Crowley, *The Invention of Comfort: Sensibilities and Design in Early Modern Britain* (Baltimore: John Hopkins University Press, 2001) pp 61-68. In poorer Tudor dwellings, windows were not glazed but covered by linen cloth (Woolgar p 73). Clear glazing was invented in the late seventeenth century: H Louw and R Crayford, 'A Constructional History of the Sash Window, c 1670-1725' (1998) 41 *Architectural History* 82. On the transformation of landscape architecture accompanying this technological change, see R Williams, *The Country and the City* (Oxford: Oxford University Press, 1973) Ch 12 (entitled 'Pleasing Prospects').
[25] See above n 2, as reproduced in *Aldred's Case* (1610) 9 Co Rep f57b; (1610) 77 ER 816 660.

Coke cited this approvingly in *Aldred's Case*.[26] Likewise, William Blackstone wrote of a 'fine prospect' being a 'mere pleasure' as opposed to 'an indispensable requisite to every dwelling'.[27]

Wray and Coke were operating within a philosophical-legal milieu dominated by natural law theory, which was at the height of its influence in Tudor/Stuart times, but on the wane when Blackstone was writing.[28] Natural law in this setting framed the question of the scope of actionable injury in terms of rational deduction from a fixed premise in the judicially-defined 'natural necessities' of land. As stated by Coke, these are wholesome air (*salubritas aeris*), minimum light (*neccesitas luminis*), and a catch-all sense of basic habitability (*habitato hominis*). A pleasing view is axiomatically not essential to land's habitability, being a matter of delight (*delectatio inhabitantis*). Looking briefly ahead to later in the analysis, this approach came under strain in an increasingly bourgeois society, whose individualism found expression in suburbs built upon the pillars of delight and respectability.

Remaining with the early modern period, and sticking with the necessity/delight dichotomy, a conundrum thrown up by *Bland* concerns the premium placed on pleasing views by the contemporary landed establishment.[29] Royalty and aristocracy invested substantially in properties having spectacular outlooks over delightful surroundings. Writing today, the architectural historian Oliver Creighton gives a number of examples.[30] One is Kenilworth Castle, whose occupants enjoyed 'sitting windows' designed to look onto thoughtfully landscaped grounds (notably a large ornamental mere).[31] The royal palace at Clarendon had female bedchambers, each with a window that opened onto an intimate view of an attractive private garden.[32] Windsor Castle contained numerous rooms with expansive views over, variously, pleasure gardens, the deer park, hamlets and villages.[33] Pleasing views in these settings served an important dual function. As well as being delightful to the eye, and thus of intrinsic aesthetic value, a room with a view positioned the proprietor at the apex of society. [34]

In practice, however, the elite was not prejudiced by Wray's obiter dictum. Elite estates were of such extensive territorial reach that proprietors had almost complete mastery of the scenery viewable from the principal dwellings, and did not tend to fear the 'spoiling' acts or omissions of neighbours.[35] Rather, the main threat to a beautiful outlook came from *insiders* – i.e. tenants of the estate, who were minded to remove, say, an attractive tree-lined vista.

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[26] Ibid. See further R Monson, E Plowden, C Wray, J Manwood, *A Briefe Declaration For What manner of speciall Nusance concerning private dwelling Houses* (London: Holborne, 1639).

[27] W Blackstone, *Commentaries on the Laws of England* (Oxford: Oxford University Press, 1752), Book III, Ch 3.

[28] On the 'heyday' of natural law thinking in early modern England, see D Ibbetson, 'Natural Law and Common Law (2001) 5 Edin L R 4. See further Coquillette, above n 17, 769-773.

[29] On the importance of the landed elite to the development of the common law see J Getzler, 'Theories of Property and Economic Development' (1996) 26 *The Journal of Interdisciplinary History* 639. See in the context of nuisance law Pontin, above n 11, 1011.

[30] O H Creighton, 'Seeing is Believing: Looking Out on Medieval Castle Landscapes' (2011) 14 Concillium Medii Aevi 79.

[31] Creighton, ibid, 85.

[32] Ibid 80.

[33] Ibid, 85.

[34] 'In the middle ages an elevated view over the landscape was something special and unusual, to be experienced by the privileged minority' (ibid 80-81). According to Raymond Williams, the landed aristocracy lavished fortunes on landscape improvement, as an exemplar of 'elevated sensibility' which justified this rank's elite place within society (n 24, p 121).

[35] The position changed with the monster nuisances of the industrial revolution, which prompted the elite's reliance on nuisance law (Pontin, above n 11, 1017-18).

Protection of pleasing prospects in this setting was secured through the law of waste.[36] In *Packington's Case*,[37] the Lord Chancellor (Lord Hardwicke) ruled that a tenant for life who sought to destroy a sylvan landscape could be restrained by the reversioner. Similarly, in *Aston's Case*,[38] the same judge likened a tenant's attempt to destroy a picturesque tree lined view from the family mansion to the destruction of the mansion itself (granting an injunction prohibiting the waste). Fraley draws upon Victorian-era waste treatise author Wyndham Bewes in commenting that 'the law enforced waste strictly, holding landowners responsible for virtually *all* changes to the landscape'.[39] This is not to suggest that waste protected views per se, for there is no authority to indicate that it did. However, the protection of landscapes offered the next best thing.[40]

3. Nineteenth Century Modernisation in Actionable Nuisance: Understanding the Suburban Origins of 'Sensible Personal Discomfort'

Some of the extensive tort scholarship dealing with nuisance law during the industrial revolution treats the law as undergoing significant changes in response to the emergence of the industrial bourgeoisie – a theme which I examine in this section in connection with the modern fate of *Bland*.[41] One of the earliest analyses of this kind is Joel Brenner's.[42] His argument is that English courts applied nuisance law generously to wealth generating industrial polluters, sending out a clear signal that pollution in seats of industry was an acceptable price to pay for the material benefits of industrialisation. Brenner attributes particular significance to Lord Westbury's judgment in *Tipping*:

> If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality.[43]

In this dictum, Lord Westbury is justifying why an action for 'sensible personal discomfort' must be determined with reference to the character of the neighbourhood, with townsfolk expected to tolerate 'consequences' (discomforts) that others are not. Lord Hoffmann (in *Hunter*) commented that Lord Westbury here 'drew the line beyond which rural and landed

[36] See generally J Fraley, 'A New History of Waste Law: How a Misunderstood Doctrine Shaped Ideas about the Transformation of Law' (2017) 100 *Marquette Law Review* 861. For cases dealing with landscapes, and indirectly views, see *Packington v Layton* (1744) 3 Atk 215; and *Aston v Aston* (1749) 1 Ves Sen 264.
[37] Ibid.
[38] Ibid 266.
[39] Fraley, above n 36 (at 869) [my emphasis]. The author cites W Bewes, *The Law of Waste: A Treatise on the Rights and Liabilities which arise from the Relationship of Limited Owners and the Owners of the Inheritance with Reference to the Tenements* (London: Sweet and Maxwell, 1894) p 9.
[40] On the subtle distinction between 'view' and 'landscape', see M Lee, 'Knowledge and Landscape in Wind Energy Planning' (2017) 37 Legal Studies 3, 8-10. Applied to waste law, this area of common law can be understood as focusing on the physical sub-dimension of landscapes rather than the 'visual response'. This is returned to below (n 139 and associated text).
[41] Above n 2.
[42] Above n 11.
[43] *Tipping* 650. Brenner comments that this was 'discriminatory' against the urban proletariat (Brenner, n 11, 415).

England did not have to accept external costs imposed upon it by industrial pollution'.[44] However, Brenner's emphasis is less on the interests of the landed establishment and more on those of the new middle classes, and rightly, I argue, at least in connection with the topic at hand.[45]

As with any class-deterministic account of the development of the common law, regard must be had to Richard Epstein's cautionary argument that people with the wealth to litigate tort law do not necessarily have a zero sum interest in either a 'strong' or 'weak' provision.[46] As a rule of thumb, a wealthy person is as likely to be a victim as a perpetrator of a tort. This applies specifically to the present subject matter (I argue), insofar as the Victorian era bourgeoisie sought from the common law both a narrow and a broad definition of actionable nuisance. They sought a narrow definition from the perspective of the seats of industry in which personal wealth was generated, on the individualist rationale that the urban proletariat's members 'subjected themselves' to some pollution (roughly Brenner's argument), but they sought a *broad* definition to protect the amenities of affluent suburban neighbourhoods on the outskirts of urban conurbations (something that is overlooked in Brenner's analysis, but is supportive of his core thesis). Interestingly, social historians characterise suburbs as a new type of neighbourhood, where paramount importance was attributed to 'artistic beauty', 'display', 'tranquillity' and 'gentility'.[47] They were, it is said, 'an instrument of moral, aesthetic and sanitary improvement [and] – a least at the beginning – of class segregation'.[48]

Brenner's analysis of common law change does not deal with this aspect of the law's socio-economic context, nor crucially does it acknowledge the possibility that social change led to doctrinal change. Brenner locates change at a less formal – or more covert - level of the law's application (de facto rather than de jure).[49] His point is that change was hidden to conceal the underlying increase in power of the middle classes, but this makes his work an unwitting contributor to Sugarman's 'textbook tradition'. Sugarman's 'tradition' is characterised by Victorian era English legal academics who sought to downplay the changeability of the common law in order to emphasise its principled permanence.[50] That strategy, Sugarman claims, was motivated by a nascent disciplinary goal of establishing law as a subject worthy of university study, against the backdrop of an intellectual climate in which the common law was apt to be treated as *too* changeable, even chaotic, to merit scholarly attention. Whilst Brenner's concern is with the politics of industrialisation rather than the politics of university legal education, the emphasis on what he calls nuisance law's 'semantic continuity' as between pre-industrial and industrial periods closely corresponds with, and reinforces, Sugarman's 'tradition'.

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[44] *Hunter* 705.

[45] On the influence of the aristocracy in remedying industrial scale pollution in the countryside, see Pontin, above n 11.

[46] R Epstein, 'Social Consequences of Common Law Rules' (1982) Harvard L R 1717, 1719.

[47] L Davidoff and C Hall, 'The Architecture of Public and Private Life: English Middle Class Society in a Provincial Town', in D Fraser and A Sutcliffe (eds*), The Pursuit of Urban History* (London: Edward Arnold, 1983) p 327, p 331. On the emergence of suburbia and its links to the bourgeoisie, see D Cannadine, *Lords and Landlords: The Aristocracy and the Towns 1774-1967* (Leicester: Leicester University Pres, 1980); K Theodore Hoppen, *The Mid Victorian Generation: 1846-1886* (Oxford: Oxford University Press 2000)= 334-336; and G Davidson, 'The Suburban Idea and its Enemies' (2013) 39 *Journal of Urban History* 829.

[48] Davison (ibid p 835).

[49] Brenner, 409.

[50] Above n 4.

Sugarman's thesis is not wholly shared by William Twining,[51] who singles out the work of Dicey, together with professor of common law Frederick Pollock,[52] to highlight a more dynamic scholarly conception of common law doctrine that engaged openly with common law modernisation. Dicey wrote of 'judicial legislation' in terms that merit rather extensive quotation, with Brenner's analysis in mind:

> Nor let anyone imagine that judicial legislation is a kind of law making which belongs wholly to the past…New combinations of circumstances—that is, new cases—constantly call for the application, which means in truth the extension of old principles; or, it may be, even for the thinking out of some new principle, in harmony with the general spirit of the law, fitted to meet the novel requirements of the time. Hence whole branches not of ancient but of very modern law have been built up, developed, or created by the action of the Courts.[53]

However, Dicey did not elaborate on this in relation to tort generally, or nuisance law in particular.

Pollock, in the preface to *Law of Torts*, explicitly adopted the 'living law' paradigm similar to that popularised across the Atlantic by Holmes (and Dicey).[54] He applauded the work of a selection of modernising English judges, highlighting the contributions of Lords Blackburn and Bramwell and Mr Justice Willes.[55] Yet there is a noticeable gap between Pollock's rhetoric of living law in the context of tort as a whole and his dry and banal exposition of the nuts and bolts of particular areas, including nuisance law.[56] For example, Pollock's definition of actionable nuisance relies heavily on Knight Bruce VC's judgment in *Walter v Selfe*.[57] As is discussed further below, Knight Bruce confined actionable nuisance to interferences with the enjoyment of property of a physical nature – impairing the 'physical comfort of human existence'[58] That implied continuity with the restrictive position of the early modern law described in the previous section. Yet Pollock addressed cases neither before nor after *Walter*, offering nothing more than a snapshot of a particular moment, represented by a specific judgment. This overlooked the possibility explored below that the law was changing to recognise actionable injury of a non-physical character, dealing with injury to modern sensibility.

Other general tort scholars writing at this time interpreted the law a little less restrictively. For example, John Salmond asserted that for an interference with the enjoyment of land to be actionable in nuisance the key criterion was that the interference is substantial;[59]

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[51] *Blackstone's Tower*, above n 4, and W Twining, 'Two Works of Karl Llewellyn' (1967) 30 *Modern Law Review* 514.
[52] *Blackstone's Tower*, ibid p 186.
[53] A V Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (London: Macmillan, 2nd edn, 1905) p 258.
[54] F Pollock, *The Law of Torts* (London: Stevens and Sons, 4th edn, 1895). For an assessment of Professor Pollock's multifaceted contribution to legal scholarship, see N Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford: Oxford University Press, 2004).
[55] Ibid, vii. Pollock does not mention modernisers addressed in my analysis below, namely, Mr Justice Byles, Lord Westbury and grandfather Chief Baron Pollock.
[56] *Law of Torts*, Ch 10.
[57] Above n 8 (Pollock cites this case in *Law of Torts*, p 366).
[58] *Walter*, ibid, cited in Pollock, ibid.
[59] J Salmond, *The Law of Torts: A Treatise on the English Law of Civil Liability for Civil Injuries* (London: Stevens and Hayes, 1907) p 185.

he did not insist that it have a physical component. He further acknowledged that the standard of comfort differed according to the character of the locality. Whilst Salmond acquired a reputation for nuance in tort scholarship,[60] there is no hint of the 'living law' character of nuisance, and this is fodder for Sugarman's thesis. Like Pollock, Salmond portrays the law on the topic of the definition of nuisance as somewhat permanent, rather than being altered to suit urbanisation and suburbanisation discussed later in this section.

Moving on to an example of a nuisance treatise, Sugarman's 'tradition' also finds expression in the leading text written by Garrett and Garrett.[61] Whilst recognising that nuisance remedies both physical injury and non-physical injury (qua sensible discomfort), the authors offered no contextualisation of this in terms of the development of the law in response to societal change. Thus it is perhaps inevitable that when the authors addressed the topic of injury to a pleasing view, they cited the dicta of Wray in *Bland* and Coke in *Aldred* as an enduringly accurate encapsulation of the current law.[62] The analysis below explores an alternative understanding of the law. It identifies what is argued to be modernisation in the law on this point that is hidden within the tradition of which these and other authors are part. The focus is on a trilogy of brickworks nuisance cases beginning with *Walter*, in which the judiciary could not agree on whether to keep with the established definition of nuisance or embrace a revised one. Out of this divergence of opinion emerged Lord Westbury's modern formulation of nuisance in *Tipping*, which represented a break from the law of Wray and Coke.

Injured Sensibility in London's Victorian Suburbs – the Brickworks Trilogy

A distinctively modern feature of the cases concerning brickworks under scrutiny, leading up to *Tipping,* is that they were each brought by a claimant from London's new suburbs, in respect of odours that were unpleasant without being harmful to health or otherwise 'physically' damaging.[63] The suburban character of the claim in *Walter* is gleaned from the reference in the report to the claimant owning a property in Surbiton, on which had been 'spen[t] considerable sums of money…on the garden, lawn and pleasure ground [in] rendering the same habitable and fit for residence by a respectable tenant'.[64] The claimant in *Hole* occupied a property in an unspecified West London suburb.[65] The claimant in *Bamford v Turnley* owned a 'splendid' villa within the 'beautiful' Beulah Spa estate, recently constructed on enclosed common land in Norwood, south of the city.[66]

The central legal issue in *Walter v Selfe* was whether common law nuisance remedied injury to a proprietor's sensibility. The defendant said not, asserting that it is 'not mere

[60] A W B Simpson, 'The Salmond Lecture' (2007) 38 VUULR 669, 670.
[61] E Garrett and H Garrett, *The Law of Nuisances* (London: Butterworths, 3rd edn, 1908)
[62] Ibid p 173.
[63] On the growth of London suburbia in the nineteenth century, see D A Reeder, 'A Theatre of Suburbs: Some Patterns of Development in West London 1808-1911', in H J Dyos (ed), *The Study of Urban History* (London: Edward Arnold, 1968) p 253.
[64] Ibid, 316. Surbiton, in Surrey, is described by one social historian as 'the classic Victorian suburb' (C French, 'Who Lived in Suburbia? Surbiton in the Second Half of the Nineteenth Century' (2007) 10 *Family and Community History* 93).
[65] Counsel stated that the 'circumstances' were similar to those in *Walter* (*Hole* 1116).
[66] *Bamford* 26. On the suburban context, see J Coulter, 'Norwood: Common Land to City Commuters', August 2002 (Ideal Homes: A History of South East London Suburbs - http://www.ideal-homes.org.uk/case-studies/norwood).

offensiveness of a smell that will entitle a neighbour to an injunction'.[67] Rather, the smell must be 'injurious to health', or at least 'unwholesome'.[68] Though Knight Bruce VC found for the claimant, his reasoning is hard to follow, because it frames the actionability of an odour in unconvincing terms of physicality:

> ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience *materially* interfering with the ordinary comfort *physically* of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?[69]

As mentioned above, in *Law of Torts*, Pollock endorsed this passage as an accurate encapsulation of the definition of actionable nuisance.[70] He added that this precluded a claim based on 'mere loss of amenity'.[71]

Pollock's analysis is difficult to sustain. This is principally because it ignores the difficulty of reconciling Knight Bruce's statement in this case with Lord Westbury's speech in *Tipping*, which provided for actionable *non-physical* injury, now generally known as 'amenity nuisance'.[72] It cannot be ruled out that Pollock was exercising a censorial role here, to the effect that he was championing Knight Bruce's approach as correct, and discouraging adherence to Lord Westbury's incautiously expansive remarks about the possibility of remedy for injury to sensibility independent of physicality. Pollock's censorial aims are discussed in Neil Duxbury's in-depth treatment of his work.[73] Alternatively, the mismatch between exposition and positive law in this instance may be a further illustration of the 'over-simplication' noted by Stephen Waddams in relation to Pollock's contract writing.[74] Either way, the pertinent point is that Pollock did not accurately expound on the law of the day regarding actionable injury.[75]

The beginning of the end of the requirement of physicality, which I suggest is central to an understanding of the shift away from the dictum of Wray in *Bland*, is *Hole.* This case is best known today for Byles' ruling that nuisance occasioned by a suitably located trade, conducted

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[67] *Walter*, n 10, 319.
[68] Ibid.
[69] Ibid 322 [emphasis added].
[70] Pollock, above n 48, 366.
[71] Ibid.
[72] As one leading present day commentator write, 'The classic private nuisance case focuses on interference with the amenity of property' (M Lee, 'What is Private Nuisance?' (2003) 109 LQR 298).
[73] On the censorial function of some of Pollock's writing, see Duxbury, above n 54, and Twining, *Blackstone's Tower* (above n 4) p 136. Fernandez and Dubber (n 5 above) make the point that the authors of treatises mixed descriptive and normative exposition, sometimes without awareness of doing so.
[74] S Waddams, 'Nineteenth-Century Treatises on Contract Law', in Fernandez and Dubber (eds), n 5 p 127, p 144.
[75] Though *Walter* continues to be cited with approval, quotations from Knight Bruce's judgment omit any mention of injury being limited in terms of materiality and physicality. For instance, as well as the point made by Lee above (ibid), the requirement of physicality is omitted from Carnwath LJ's précis of Knight Bruce VC's speech in *Barr v Biffa Waste Services Ltd* [2012] 3 WLR 795, 805, as requiring 'real interference with the comfort or convenience of living, according to the standards of the average man'. On Pollock's mixed record of anticipating the future development of the common law, see Duxbury, n 54, p 249 ('Odd though it may seem, it is because [The Law of] Torts is so unswervingly focused upon principles that it has little legal relevance today; the law of tort has changed so much…'). This part of the article addresses *contemporary* inaccuracies in Pollock's exposition.

in a reasonable manner, is not actionable. Present day commentary is largely critical of this, and in particular, what is said to be the unduly industry-sympathetic policy behind the locality test, namely, to avoid 'great injury of the manufacturing and social interests of the community'.[76] However, this policy is surely sound when situated in the context of a claim for injury to sensibility, as indeed it must be because of the facts of the case.[77] The defendant had argued, as per *Walter*, that an unpleasant smell was not actionable absent materiality or physicality. Byles dispensed with this requirement, ruling that 'it is enough if it [the nuisance] renders the enjoyment of life and property uncomfortable'.[78] He reigned in the potentially broad scope of this ruling through the pragmatic remark that the actionability of discomfort is relative to the character of the neighbourhood.

These differences in the formulation of actionable injury in *Walter* and *Hole* are reflected in the divided Court of Exchequer in *Bamford v Turnley*, where opinion differed as to which of the approaches of Knight Bruce and Byles was correct. The majority of the Court (Pollock CB dissenting) favoured Knight Bruce, thus the court departed from Byles' ruling in *Hole*. Williams J (on behalf of Erle and Keating JJ, and Wilde B)[79] denied that the character of the neighbourhood ever had anything to do with actionability in nuisance. The correct position was simple and well established: i.e. an 'annoyance' is either 'sufficiently great' to be actionable universally (i.e. regardless of locality), or it is not actionable at all.[80] The sense of continuity with the early modern case law noted in the previous section is apparent in the statement that:

> a man may, without being liable to an action, exercise a lawful trade…notwithstanding it be carried on so near the house of another as to be an annoyance to him, in rendering his residence there *less delectable or agreeable*.[81]

This is the approach of Wray, Coke and Blackstone.

By contrast, the Court of Exchequer's chief judge, Pollock,[82] broadly favoured the approach taken by Byles in *Hole*. He propounded a flexible definition of actionable nuisance that moved beyond the necessity-pleasure dichotomy of an earlier, simpler society:

> The question so entirely depends on the surrounding circumstances,—the place where, the time when, the alleged nuisance, what, the mode of committing it, how, and the duration of it, whether temporary or permanent, occasional or continual,—as to make it impossible to lay down any rule of law applicable to every case, and which will also be useful in assisting a jury to come to a satisfactory conclusion:—it must at all times be a question of fact with reference to all the circumstances of the case.[83]

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[76] *Hole* 1113. For criticism see Brenner (above n 11, 411), and McLaren (above n 11, 172).
[77] Pontin, above n 11.
[78] *Hole* 1114.
[79] Bramwell B delivered a separate concurring speech alongside that of Williams J (*Bamford,* 32-33).
[80] Ibid 31.
[81] *Bamford* 30 [emphasis added].
[82] Sir Frederick Pollock (1783-1870) was the grandfather of Sir Frederick Pollock the common law scholar.
[83] *Bamford* 31.

The explicit modernity of this is captured by Pollock's reference to 'actions which nobody in Westminster Hall dreamed of [being brought within nuisance law] as we become more familiar with the exigencies of society'.[84]

Tipping and the Emergence of 'Sensible Personal Discomfort'

Despite Professor Pollock's ambivalence towards the case, *Tipping* has come to be understood as *the* leading authority on nuisance, laying the foundations of the law today. As explained by Brian Simpson,[85] *Tipping* was a painstakingly and expensively constructed test case brought by wealthy parties aimed at resolving the confusion arising from the *Hole* and *Bamford* rulings. Of the various speeches of their Lordships, attention has centred on that of Lord Westbury, the Lord Chancellor within Viscount Palmerston's cabinet. *Tipping* was the final judgment of his career – his 'swansong'[86] – but Simpson's analysis is critical. The problem (so Simpson suggested) is that Lord Westbury's distinction between physical and non-physical injury is 'sloppy', in two ways.[87] First, it fails to define material or physical injury (actionable absolutely). Second, it resurrects the 'ghost' of *Hole*, in making so-called 'sensible personal discomfort' actionable subject to the character of the neighbourhood.[88]

This misses the point that the central issue in *Hole* (and indeed all the brickworks cases) was the actionability of injured sensibility, independent of physicality. It also neglects the care that Lord Westbury took to define actionable 'sensible personal discomfort'. It is defined as 'anything that discomposes or injuriously affects the senses or the nerves'.[89] At face value, the reference to 'anything' encompasses the senses of smell, hearing, taste and sight (and, with less obvious application) touch. On this reading, Lord Westbury's judgment in *Tipping* is an ingenious stroke of modernity, which recognises that the time has arrived for liberalisation in the scope of actionable injury to encompass injured sensibility, and to do so on a locality-specific, rather than universal, basis. This is a break from the old architecture in regard to both the nuisances covered (a range of non-physical ones) and the structure of coverage (relative rather than universal).

Shortly after *Tipping*, the judgment in *Crump v Lambert*[90] dispelled any sense that the novel heading of sensible personal discomfort might evolve into a 'second class' form of actionable nuisance. The case concerned noise from a blast furnace on the outskirts of a midlands industrial centre, which the defendant submitted ought in equity be treated differently from a case involving physical injury; an injunction should not be granted for mere discomfort. The court rejected this, ruling that sensible personal discomfort, where out of character with the neighbourhood, was no less substantial by virtue of its lack of physicality, and merited the

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[84] *Bamford*, 28). On Pollock's modern style of legal reasoning, in response to social exigency, see J M Rigg, 'Sir (Jonathan) Frederick Pollock', *Oxford Dictionary of National Biography* (2004). Pollock was 'more concerned to achieve substantive justice in the instant case than to knit the strands of common law into a coherent pattern'.
[85] A W B Simpson, *Leading Cases in the Common Law* (Oxford\: Oxford University Press, 1995) pp 187-189
[86] R Cocks, 'Richard Bethell: first Baron Westbury (1800-1873), Lord Chancellor' (2004) Oxford Dictionary of National Biography (http://dx.doi.org/10.1093/ref:odnb/2305).
[87] *Leading Cases* p 189.
[88] Ibid.
[89] *Tipping* 650.
[90] (1867) LR 3 Eq 409.

award of an injunction. This was the first in a long line of injunctions awarded under Lord Westbury's sensible personal discomfort heading.

What, though, of any cases in which explicit recognition is given to *Tipping* as a case that modernised the law, by departing from the necessity-delight dichotomy of old? In an easement-focused case, *Angus v Dalton*,[91] Lord Blackburn impugned the rule in *Bland* as out-dated:

> The distinction between a right to light and a right to prospect, on the grounds that one is a matter of necessity whereas the other of delight, is to my mind more quaint than satisfactory.[92]

Blackburn is singled out by Pollock as a preeminent moderniser.[93] What exactly is out-dated here is not specified, and to imply that it is a reference to *Tipping* and its wider legal and social context would be pure guesswork. But that does not lessen the significance of this negative treatment of *Bland* by a distinguished Law Lord in which (for Pollock) the 'fire' of modernity burned. Surprisingly, *Angus* is portrayed as supportive of the permanence of *Bland*.[94]

4. Reasons for the Permanence of the 'Rule in *Bland*'?

This section identifies and evaluates the reasons given for the enduring validity of Wray's analysis, as per the consensus. As noted at the outset, the veracity of the consensus is largely considered self evident – it is clear or obvious, and reasons beyond this do not much come into the picture. Nevertheless, drawing on fragments of scholarly and judicial material –including within the wider common law world – it is possible to identify six purported rationales:

(i) 'Sensible personal discomfort' does not engage the sense of sight;
(ii) Discomfort is not an aesthetic criterion;
(iii) An injured view is not an emanation from land;
(iv) A proprietor wishing to protect a pleasing view can adequately do so through agreeing a restrictive covenant with their neighbour;
(v) The protection of pleasing views over and above covenants is better secured through planning regulation;
(vi) Excluding injured views is necessary to control the floodgates of litigation.

These are examined in turn.

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[91] (1880 – 81) L.R. 6 App. Cas. 740, HL.
[92] *Angus*, 820.
[93] *Law of Torts*, n 54.
[94] Lord Blackburn stated that a right to a view or prospect could not be acquired prescriptively. The reason is that a right to a view acquired through long user would 'impose a burden on a very large and indefinite area' (*Angus* 824). This is cited in *Hunter* as a reason for excluding such injury from sounding in nuisance. However, it is respectfully submitted that the courts in a nuisance context have not shied away from enjoining defendants located many miles from the claimant (e.g. over a mile in *Tipping*, and eight miles in *Attorney General v Birmingham* (1858) 4 K & J 528). See further the references to large scale 'inter-neighbourhood' nuisances, above n 11, 1012.

'Sensible Personal Discomfort' Does Not Engage the Sense of Sight

This was addressed by the Court of Appeal in *Thompson Schwab*.[95] The discomforting sight at the centre of this case was a Mayfair brothel, which the claimant considered offensive. One of the defence arguments was to challenge the suggestion that 'sensible personal discomfort' encompassed indecent *sights*. Finding for the claimant, Lord Evershed said of the defendant's activities:

> It does not, to my mind, follow at all that their [the defendant] activities should be regarded as free from the risk or possibility that they cause a nuisance in the proper sense of that term to a neighbour merely because they do not impinge upon the senses – for example the nose or the ear – as would the emanation of a smell or a noise.[96]

This was strongly supported, with helpful elaboration, by the author of the case note in the *Law Quarterly Review*: 'As it is clear that *anything* which is obnoxious to the senses of hearing and smelling may constitute a nuisance, it would be astonishing if the sense of seeing should be regarded as excluded'.[97]

Thompson Schwab is an important case that is returned to below in connection with a further rationale for the consensus (in regard to the 'requirement' of an emanation from land). Staying with the point at hand, it is pertinent to acknowledge two other English claims in which injuries to the sense of sight have been held actionable in principle, namely, *Cook v South West Water Services*,[98] and *Hughes v South West Water*.[99] Each concerns pollution of rivers by sewage, which spoilt the visual appearance of the 'land' in aesthetic terms (rather than in terms of public morality/indecency). In *Cook*, the judge found (on the basis of photographic evidence) that foam and algae caused by the nutrient rich sewage 'defac[ed] the beauty of the river in its progress through delightful countryside.'[100] The claim succeeded on this basis. Similarly, in *Hughes*, sewage pollution amounted to nuisance by virtue of 'the visual effect of the algal blooms, the unpleasantness of bringing in tackle with green slime on it'.[101] These county court cases are persuasive in principle, if not of course binding.

Discomfort is not an 'aesthetic criterion'

Writing in the 1940s, Cecil Fifoot asserted that 'a householder cannot in nuisance complain if his outlook is spoilt [because]…comfort, and not aesthetics, offer[s] the criterion'.[102] The

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[95] *Thompson Schwab v Costaki* [1956] 1 WLR 335. This was followed in *Laws and others v Florinplace Ltd* (1981) 1 All ER 659

[96] *Thompson Schwab* 338.

[97] Anon, (1956) 72 LQR 315 [emphasis added].

[98] Exeter County Court, 15 April, 1992 (transcript on file with author). The claimant, Ian Cook, was an angler who was awarded by the court (per Cox J) £2500 damages for nuisance of a partly visual character.

[99] Llangefni County Court, 21 June 1995 (transcript on file with author). The claimant, Huw Hughes, was Secretary of Seiont Gwyfai (an anglers' society with riparian rights over Lyn Padarn). The claim alleged injury of a visual nature, but failed because the nuisance was held (per Daniel J) to be authorised by statute.

[100] Above n 98.

[101] Above n 99.

[102] C J Fifoot, *History and Sources of the Common Law: Tort and Contract* (London: Stevens and Sons, 1947) p 95.

pollution cases above are a challenge to that analysis, but some support for this can be found in the United States case law. Though not binding in England and Wales, US case law offers an interesting comparative perspective. For example, in the Missouri case of *Ness*,[103] the plaintiff complained of unsightly rubbish (rusted metal, broken concrete, old sinks and stoves) dumped in the neighbouring yard. The Missouri Court of Appeals denied the claim:

> Aesthetic considerations are fraught with subjectivity…beauty is in the eye of the beholder. Judicial forage into such a nebulous area would be chaotic. Any imaginary good from doing so is far outweighed by the lurking danger of unduly circumscribing inherent rights of ownership of property and grossly intimidating their lawful exercise. This court has no inclination to knowingly infuse the law with such rampant uncertainty.[104]

Perhaps the most recent illustration of this approach is the Vermont Supreme Court's refusal this year, in the case of *Myrick*, to overturn late nineteenth century state authority to the effect that an unsightly use of land is not actionable in the absence of malice.[105] One of the reasons given for the outcome of *Myrick* was that visual aesthetic nuisance is 'unquantifiable'.

This is not however the consensus position across the US federation, for there is significant variation on this point between the various US states. Some states go as far as to remedy an ugly land use when accompanied by more established actionable discomforts (e.g. noise or smell). Thus in *Sowers*, the defendant's plans for a wind turbine were injuncted on the basis of ugliness *and* noise; pure ugliness would not have been sufficient.[106] Sometimes state judges have gone further in recognising the soundness of a claim where the unpleasant sight of the defendant's activities is the claim's sole basis. An early and oft-noted example is Virginian case of *Parkersburg Builders Material Company v Barrack* (another case concerning nuisance unsightly scrap in a residential area).[107] Judge Maxwell stated that:

> Happily, the day has arrived when persons may entertain appreciation of the aesthetic and be heard in equity [and common law] in vindication of their love of the beautiful…Basically, this is because a thing visually offensive may seriously affect the residents of a community in the reasonable enjoyment of their homes.[108]

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[103] *Ness v Albert* 665 S.W.2d 1 (1983).
[104] Ibid.
[105] *Myrick v. Peck Elec. Co.*, 2017 VT 4 (in respect of *Woodstock Burying Ground Assoc'n v Hager* 68 Vt 488, 35 A 431 (1896)).
[106] *Sowers v Forest Hills Subdivision* 129 Nev Advance Opinion 9 (2013). The injunction was granted on the basis of a combination of noise nuisance, 'flicker', and aesthetic injury, but it was made clear that the latter alone would have been insufficient (('aesthetics alone cannot form the basis of a private nuisance action').
[107] 118 W. Va. 608, 191 S.E. 368 (1937). See similarly *State ex rel Carter v Harper* (1923) 182 Wis. 148, 159, 196 N.W. 451, 455 ('As a race, our sensibilities are becoming more refined and that which formerly did not offend cannot now be endured … nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities'.)
[108] Ibid.

This approach was taken in the Colorado case of *Allison v Smith* – another scrap case.[109] Judge Metzger stated that the unsightly waste could amount to a nuisance, insofar as it amounted to an unreasonable and substantial interference with the enjoyment of land. It did not matter that the scrap was not smelly or noisy. Being a source of discomfort was enough. In this respect, the judge rightly described the scope of actionable discomfort as 'inclusive'.[110] That approach appears to have academic support.[111]

However, it is in the South African case of *Waterhouse Properties*[112] that Lord Westbury's dictum in *Tipping* finds some of its clearest expression. The complaint concerned obstruction of a view of a 'pretty river' by the raising of the defendant's roof. It was argued by the claimant that the injury was actionable because the view was integral to the enjoyment of their property, which was located in a 'pretty' and 'exclusive' neighbourhood. The court agreed (per Justice Rampai):

> If we accept and I believe we should, that we are here dealing with an extraordinary situation of two neighbouring properties with unique attributes, developed in a highly exclusive area on the pretty bank of a splendid river which is the soul of everything in the rich men's playground – then we must appreciate, and acknowledge that to a reasonable and neutral property owner in that particular society a view of the river in question is much more than a pure aesthetic matter. It is an asset with unquestionable proprietary significance.[113]

Whilst the judge rejected the actionability of 'pure aesthetic loss', he accepted that the loss of aesthetic value was discomforting, whereby it derived its proprietary significance.

Returning to Fifoot's point in the context of English and wider common law world case law, the difficulty is that it is precisely because comfort is the criterion that aesthetic-based loss *is* in principle actionable. In plenty of cases comfort and aesthetics are closely intertwined. The cases noted in the previous sections illustrate this, perhaps above all *Bamford v Turnley*, in which there were multiple layers of aesthetic consideration at play – the pleasing look of the property, the unpleasant (but not unhealthy) smell in particular.[114] Yet the parties in this dispute did not (as Fifoot in the quote above does) seek to distinguish between aesthetics and comfort.

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[109] *Allison v Smith* 695 P.2d, 791, 794 (1984)
[110] Ibid
[111] Beginning with D Noel, 'Unaesthetic Sights as Nuisances (1939) 25 *Cornell Law Quarterly* 1, and including more recently R Coletta, 'Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes (1987) 48 Ohio St L J 141,G Smith and G Fernandez, 'The Price of Beauty: An Economic Approach to Aesthetic Nuisance' (1991) 15 *Harvard Environmental Law Review* 53; R Dodson, 'Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium' (2002) 10 *South Carolina Environmental Law Journal* 1.
[112] Above n 13.
[113] Ibid 34
[114] Note further the allusions to aesthetic considerations in Pollock speech in this case:

> That may be a nuisance in Grosvenor Square which would be none in Smithfield Market, that may be a nuisance at midday which would not be so at midnight, that may be a nuisance which is permanent and continual which would be no nuisance if temporary or occasional only. A clock striking the hour, or a bell ringing for some domestic purpose, may be a nuisance, if unreasonably loud and *discordant*...

Emanation from land

It is said that normally a nuisance will take the form of an 'emanation' from the land of the defendant, which 'invades' the land of the neighbour. Lord Goff in *Hunter* mentioned that:

> more is required than the mere presence of a neighbouring building to give rise to an actionable private nuisance. Indeed, for an action in private nuisance to lie in respect of interference with the plaintiff's enjoyment of his land, it will generally arise from something emanating from the defendant's land.[115]

This is a *general* requirement, but there are exceptions. As Lord Lloyd pointed out in this case, a nuisance can take the form of state of affairs.[116] That is the form in which seemingly most of the successful impaired view cases from around the common law world have been presented. For example, in *Sowers*, the injunction prohibited 'a significant imposition' on the plaintiffs (taking the form of a 75ft wind turbine).[117] The turbine risked imposing a 'sizeable obstacle overshadowing' the plaintiffs' land, which could have an 'impact on views'. The terms 'impact', 'imposition' and 'overshadowing' are not the same as 'emanation'. The nuisance here takes the form of a state of affairs.[118]

On the other hand, it is unclear that it is indeed necessary to depart from the rhetoric of emanation to cater for the actionability of an offensive sight. In *Thompson Schwab v Costaki*[119] Lord Evershed used the language of emanation in stating that the defendant and their clientele 'force[d] themselves on the sense of sight' of the neighbouring claimant and his family.[120] It has been suggested by one commentator that 'emanation' is in this context being used metaphorically.[121] But as light travels, a bad view can emanate literally, no less than a bad noise or smell. Yet pedantry aside, the state of affairs paradigm is advantageous, because it reinforces the non-physical nature of an injured view, and indeed of injured sensibilities more generally.

Alternative Private Law Remedies

An 'unreasonably...discordant' sound is palpably 'aesthetic'. More subtle is the Dickensian juxtaposition of the picturesque and relatively modern residential development (Grosvenor Square), and the insalubrious medieval market district (Smithfield). See C Dickens, *Oliver Twist* (Richard Bentley 1838), chapter 21 (of Smithfield it is written that a 'hideous and discordant dim… resounded from every corner of the market; and the unwashed, unshaven, squalid, and dirty figures constantly running to and fro, and bursting in and out of the throng; rendered it a stunning and bewildering scene, which quite confounded the senses.)

[115] *Hunter* 686.

[116] *Hunter* 700.

[117] *Sowers,* above n 95, 10.

[118] For a leading English case of this form, see *Bolton v Stone* [1950] 1 KB 201, 208 (per Jenkins LJ), and earliest of all *Bamford* (66).

[119] Above n 85.

[120] Ibid 339.

[121] W V H Rodgers, *Winfield and Jolowicz, Tort* (London: Sweet and Maxwell, 18th edn, 2010) p 713.

Lord Lloyd in *Hunter* considered that a principal objection to nuisance law remedying an injured view is that a neighbour wishing to protect a pleasing view can adequately do so by means of a restrictive covenant:

> The house-owner who has a fine view of the South Downs may find that his neighbour has built so as to obscure his view. But there is no redress, unless, perchance, the neighbour's land was subject to a restrictive covenant in the house-owner's favour.[122]

A case that highlights the potential of this land law/contractual approach is *Dennis v Davies.*[123] On facts similar to *Waterhouse Properties* (obstruction of a view over a pretty river, in this case the Thames), the claimant established that they suffered an 'annoyance' contrary to a covenant prohibiting a 'nuisance or an annoyance'.

Such wording in covenants is fairly standard practice, and thus *Dennis* may come to the aid of a considerable number of proprietors who, constrained by the consensus, are advised that an injured view does not sound in nuisance. But that begs the central question: what is the basis for treating a loss of view as at most an annoyance? Covenants and nuisances engage discrete areas of law, which converge from time to time without ever limiting one another. Nuisance law has an entirely distinctive normative basis. As explained well by Lord Millett, with nuisance the 'governing principle is good neighbourliness…A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him'.[124] Covenants deal with obligations that arise under contract.

The Impact of Regulation

Lord Hoffmann in *Hunter* stated that planning regulation was a more suitable forum within which to protect cherished views than a nuisance action:

> the planning system is, I think, a far more appropriate form of control, from the point of view of both the developer and the public, than enlarging the right to bring actions for nuisance at common law. It enables the issues to be debated before an expert forum at a planning inquiry and gives the developer the advantage of certainty as to what he is entitled to build.[125]

Once again, the reference to 'enlargement' of actionable injury begs the central question at issue in this article (in which it is suggested that nuisance law might already protect against private injury to a pleasing view). But there are three further difficulties with Lord Hoffmann's reasoning.

First, a proprietor with the benefit of a pleasing view which they wish to protect from harmful development may *not* be permitted to have their objections taken into account by the planning authority. This is because loss of a private view is not normally a material

[122] *Hunter* 699.
[123] [2009] EWCA Civ 1081.
[124] *Southwark LBC v Mills* [2001] AC 1, 20.
[125] *Hunter* 710 ('It would be wrong to 'create a new right of action' which involves 'changing the principles of nuisance law').

consideration for purposes of statutory development control.[126] Planning lawyers in this context tend to distinguish between a private interest in the pleasing view (not normally a material consideration) and the public interest in a pleasing 'landscape' (normally a material consideration). This is not the place to enter into a discussion of public law protection of landscapes. The point, rather, is that the planning system is not designed to resolve disputes between neighbours over private views, or indeed any other private law matter.[127]

A related difficulty is that *Hunter* was decided before *Coventry v Lawrence,*[128] in which the Supreme Court overturned earlier authority concerning the impact of planning on nuisance. It departed from the ruling in *Gillingham Borough Docks*[129] that planning permission alters the character of the neighbourhood within which the actionability of sensible personal discomfort falls to be assessed. The case law here (including *Hunter*) is part of a broader debate about the scope for public regulation of land use rendering overlapping areas of private law obsolescent.[130] The main significance of *Coventry* is the ruling that planning regulation and nuisance law are autonomous administrative and private law provisions, which co-exist in parallel (rather than the former cutting down or otherwise limiting the latter, or vice versa). Lord Hoffmann's notion that planning control is 'more appropriate' than nuisance law in regard to the remedying of injured views implies a functional substitutability did not anticipate the significant extent to which the two now operate in parallel as a consequence of *Coventry*.

Finally, the Supreme Court in *Coventry* ruled that public interest considerations of the kind that occupied Lord Hoffmann come into play not so much through the door of liability but through the exercise of discretion regarding the award of equitable remedies, notably an injunction.[131] Whilst planning permission no longer alters the character of the neighbourhood for purposes of nuisance liability, it may weigh in favour of a decision to award damages in lieu of an injunction.[132] *Ex hypothesi*, were a wind turbine operator, on facts broadly similar to *Sowers*, be found liable in nuisance on the basis of sensible personal discomfort visually (or in any other sense), it is open to them to argue that equitable damages are a more appropriate remedy (say because it is not in the public interest to halt renewable energy generation which promotes statutory carbon budgets on the basis of an individual's discomfort).

Floodgates

[126] *Stringer v MHLG* [1971] 1 All ER 65. See further S Crow 'What price a room with a view? Public interest, private interests and the Human Rights Act' [2001] JPEL 1349.

[127] S Tromans, 'Planning and Environmental Law: Uneasy Bedfellows' [2012] JPL OP73 ('The planning system, unlike the law of nuisance, is not there to adjudicate between the competing interests of neighbours').

[128] *Coventry v Lawrence* [2014] UKSC 13 [189].

[129] *Gillingham Borough Council v Medway Chatham Dock* (1993) QB 343.

[130] See eg G Williams, 'Aims of the Law of Tort' (1951) 4 Current Legal Problems 137; B Pontin, 'Tort Interacting with Regulatory Law' (2000) 51 Northern Ireland Legal Quarterly 597; M Lee, '*Hunter v Canary Wharf* (1997)', in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Tort* (Oxford: Hart Publishing, 2010) p 311.

[131] *Coventry* [124].

[132] Ibid.

Both Lords Lloyd and Hoffmann in *Hunter* refer approvingly to Lord Hardwicke's consequentialist reasoning in *Attorney General v Doughty*,[133] concerning the negative impact on urban development of a 'right to a view'. In this eighteenth century chancery appeal case the Lord Chancellor stated:

> I know no general rule of common law, which warrants that, or says, that building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns; and I must grant injunctions to all the new buildings in this town. [134]

This is cited by some of the judges in *Hunter* as a justification for an injured view *never* sounding in nuisance.[135] However, the passage above is more particularistic. It is to the effect that the 'stopping' of a view over another's land is not *generally* actionable in 'great towns'. As Lord Hardwicke says in this case: 'There *may* be such a right as this',[136] such that the development proceeded 'at its peril'.[137]

Lord Hardwicke's remarks open onto a deeper concern about the difficulty of defining an injured view with sufficient precision to avoid damaging uncertainty. Wray's bright line exclusion in *Bland* has certainty on its side. Yet nuisance law has a number of control devices that limit this uncertainty and guard against the risk of an unmanageable flood of litigation. One is the objectivity of the standard of sensible personal discomfort in terms of the 'reasonable neighbour'. Application of this standard may benefit from 'technical' expertise as it does with smells and noise, such of the wide variety of aesthetic, social, economic, cultural and ecological expertise that informs planning inquiries dealing with objections to development based on harm to landscape.[138] However, the difference is that nuisance is concerned with private relationships and private (in this case visual) perceptions of discomfort rather than public interest in regards to a landscape. And as Maria Lee points out, 'human responses may be more openly discussed in respect of visual impacts than landscapes'.[139] This inspire confidence in the scope for resolving nuisance claims involving interference with a pleasing view.

Other control devices which limit exposure to liability include the absence of a thin skull rule of the kind that is applicable to negligence (a defendant in nuisance proceedings will *not* be obliged to accommodate a claimant's unconventional or otherwise idiosyncratic aesthetic sensibility). Another is the locality test, which means that different areas are subject to higher or lower standards of 'visual amenity'. Further 'limiting devices' to note include the de minimis damage rule, the bar to a remedy for economic loss, and the requirement of standing

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[133] (1752) 2 Ves Sen 453.
[134] Ibid, 453-454.
[135] By Lord Lloyd (699) and (in the Court of Appeal) Pill LJ (668).
[136] n 121 [emphasis added].
[137] Ibid. In another of Lord Hardwicke's judgments relevant to views, *Fishmongers' Company Ltd v East India Company Ltd* (1752) 21 ER 232, the claim was for prospective loss of commercial rental income as a consequence of the impact of the planned warehouse on light and prospect enjoyed by the claimant's commercial premises. The court accepted that the defendant's development might reduce to property's rental value, but that financial loss in these circumstances was not per se an actionable nuisance. For modern law on pure economic loss not being actionable in nuisance, see C Rodgers, 'Liability for the Release of GMOs into the Environment: Exploring the Boundaries of Nuisance' (2003) 62 CLJ 371, 382.
[138] On the different types of expertise, and the relationship between 'expertise' and 'knowledge', see Lee, above n 40, 8-11.
[139] Ibid.

to sue, which is confined to persons with proprietary interest. Finally, there is discretion to withhold an injunction and award equitable damages, mentioned above. This is not to deny that there will be many marginal cases in which it is difficult for the court to be satisfied that the interference is substantial, but some of the cases considered in this article - notably *Waterhouse Properties* - illustrate that this difficulty is surmountable.[140] A broken view *can be* more 'serious' than a broken window and that above all is what justifies judicial protection.[141]

5. Conclusions

The central argument in this article is that the consensus that an injured view is not in any circumstances remediable within the framework of nuisance law, following *Bland*, takes the idea of the permanence of the common law principles to an implausible extreme. Although this conclusion is supported by so-called contextual material, the overwhelming bulk of the analysis is classically formalistic, in its attention to doctrine. Thus *doctrinally speaking*, the consensus lacks *formal* credibility because: (1) *Bland* is an unreported authority, and the doctrine of precedent provides special rules relating to the handling of such cases;[142] (2) it is unclear that the exclusion of pleasing views is the ratio decidendi of *Bland*, insofar as Mr Bland may not have suffered, or indeed claimed to have suffered, loss to a pleasing view; (3) *Bland* has received a mixed judicial reception (e.g. it was criticised as old fashioned by Lord Blackburn in *Angus v Dalton*); (4) *Bland* is difficult to reconcile with subsequent English authority on the heads of actionable nuisance (notably *Tipping,* but also *Thompson Schwab*); (5) *Bland* has not been followed in case law on injured views in some legal systems elsewhere in the wider common law world.[143]

This, then, introduces a different slant on the familiar disciplinary issue of the divergence between 'law in books' and 'law in practice'. Without detracting from the literature which demonstrates that practice 'exceeds' doctrine,[144] it is also important to recognise those practical problems the 'other way', that stem from over-simplified expositions of doctrine in situations well characterised by Sugarman.[145] The superficial treatment of *Bland* and the topic of the definition of nuisance more generally is a legacy of the 'textbook tradition' which risks denying proprietors the benefits of modernisation in the law. The solution for the discipline is not to hasten the decline in the esteem of the textbook or treatise, but rather to encourage doctrinal analysis that embraces the essential corrigibility of statements about the content of the law. A flourishing modern law school will prioritise treatise writing and doctrinal work that is

[140] See also *Cook* (n 98), *Hughes* (n 99) and (in a US context) *Allison* (n 107).
[141] Cf above n 14.
[142] Above n 7 and associated text.
[143] Nor indeed within the civilian law tradition. A good recent illustration of a remedy for an injured view in French nuisance law is the case of *Chateau de Flers*, where the court found in favour of a neighbour who complained of the sight (and sound) of a wind farm. The turbines constituted what the court found to be a 'degradation of the environment, resulting from a rupture of a bucolic landscape and countryside' (*Owners of Le Château de Flers v La Compagnie du Vent* (Tribunal de Grande Instance, Montpellier, *Le Figaro*, 2 October 2013). For an historical perspective on the protection of an injured view in Roman law see Alan Rodger, *Owners and Neighbours in Roman Law* (Oxford: Clarendon Press, 1972).
[144] For a recent illustration based on an extensive empirical study of the tort of negligence, see R Lewis, 'Tort Tactics: An Empirical Study of Personal Injury Litigation Strategies (2017) 37 *Legal Studies* 162.
[145] See Fernandez and Dubber, above n 5, for the notion of *law books in action* to which my analysis seeks to add.

nuanced enough to command the respect of the judiciary.[146] Thus a textbook tradition broadly understood need not be at odds with current higher education research funding formulas.[147]

[146] Legal academics of the late nineteenth and early twentieth century are thought to have had some success in influencing the development of the common law, with (for example) Pollock's *Law of Torts* inspiring Lord Macmillan's judgment in *Donoghue v Stevenson* [1932] AC 562 (See Duxbury, n 54, pp 267-268). There are signs of a renewed (and more explicit) judicial engagement with academic tort law, notably in connection with nuisance. For example, Lord Carnwath's in *Coventry* referred to two monographs (A Beever, *The Law of Private Nuisance* (Hart 2013); B Pontin, *Nuisance Law and Environmental Protection* (Lawtext Publishing 2013)), four research articles (M Lee, 'Tort Law and Regulation: Planning and Nuisance' [2011] JPEL 988; and M Lee 'Nuisance Law and Regulation in the Court of Appeal' [2013] JPEL 277; C Rotherham, 'Gain-based Relief in Tort after A-G v Blake' (2013) 126 LQR 102; and M Wilde, 'Nuisance Law and Damages in Lieu of an Injunction', in S 7.Pitel et al (eds), *Tort Law: Challenging the Orthodoxy* (Hart 2013), a tort textbook (T Weir, *An Introduction to Tort Law*, 2nd ed (Oxford University Press 2006), as well as the 'practitioner text', *Clerk and Lindsell on Torts*, 20th ed (Sweet and Maxwell 2010).

[147] See further Cownie, above n 4.