

# *The Public Interest in Private Law: Re-Calibrating the Law of Tort*

Juana De Leon<sup>\*</sup>

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**Abstract**—The growing relevance of the public interest in the law of tort, particularly in the law of defamation and of nuisance, has led to the neglect of the private rights that it is charged to protect. This article argues that the law has in some instances too readily embraced the prioritisation of public over private interests without adequate scrutiny and without proper account of the fact that, in some areas, the private-public divide may not be as easily delineated. Tort law must be re-calibrated to reflect a more nuanced dynamic between these spheres: the law should emphasise private interests, ensuring that their true thrust is not curtailed by references to the public interest, without undermining the legitimacy of public interests altogether.

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<sup>\*</sup> University College London. I am grateful to the Editorial Board of the OUULJ for their generous feedback on earlier drafts of this article. All errors are my own.

## *Introduction*

The conflict between private and public interests, as well as their appropriate balance, has always been a contentious issue in the way the law of tort is understood and justified. This article will explore this conflict by focusing on the law of defamation and the law of nuisance, highlighting the different ways in which they demonstrate the private-public relationship. The substance of the private interests they are charged with protecting are distinct: defamation is a tort involving the *individual* and their reputation interest, whereas nuisance is a tort involving *land* and any interests that lie therein. There is generally thought to be a singular public interest that competes for recognition in the law of defamation (namely, freedom of speech); the interplay between private and public interests is therefore adversarial, with two interests in opposition to one another. This conflict is not as evident in the law of nuisance, given that the public interests in this area can vary, and are often plural and dynamic (including, for example, environmental protection or regional development). There is a degree of compromise and flexibility between these interests, in part because there is no pre-defined list of protected property rights, and also because of the concept of ‘reciprocity’, closely linked to the ‘reasonable user’ test,<sup>1</sup> which means that there is a ‘give and take’<sup>2</sup> between neighbouring parties that helps to draw the contours of their private interests.

Before investigating these relationships, a preliminary question ought to be asked: what is the aim of tort law? The ambition is not to rehearse the intricacies of each strand of scholarship, but simply to examine how some relate to the present discussion. Here, the inquiry is a normative one, seeking to

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<sup>1</sup> *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299.

<sup>2</sup> *ibid.*

resolve the conflict between tort as a mechanism of wider social justice, versus tort as a method of balancing private law rights. The former approach views the law of tort as a ‘social institution which exists not for its own sake but for the achievement of human goals and the performance of social functions’<sup>3</sup> (the social aims approach). As Cane writes, ‘tort law rightly does not treat individuals as “islands unto themselves”, but as social creatures’.<sup>4</sup> On this view, that tort law is a human enterprise, the law is ‘infected with the same tendency to pursue multifarious and potentially conflicting goals as are other forms of human purposive activity’.<sup>5</sup> This means that courts almost *inevitably* consider broader interests extending beyond the parties to the litigation, thus characterising the courts as seekers of social aims rather than mere arbitrators of legal disputes.

By contrast, the school of ‘essentialism’ justifies the existence of tort law with the principle that people should not wrong others by their actions. As such, proponents of this view assert the oft-quoted slogan that ‘the purpose of private law is to be private law’.<sup>6</sup> The claim made here is that the consideration of public interests in private law is ‘mistaken’<sup>7</sup> and illegitimate; it is the individual, rather than any external factor(s), that acts as the principal moral agent. All responsibility, therefore, must flow from individual action. Weinrib presents challenges to the assumptions that underpin some variants of the social aims approach, in essence asserting that ‘recourse to independently valid goals implies the nonexistence of a distinctively legal mode of justification’.<sup>8</sup> In other words, he argues that the social aims

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<sup>3</sup> Peter Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 205.

<sup>4</sup> *ibid* 38.

<sup>5</sup> *ibid* 224.

<sup>6</sup> Ernest Weinrib, *The Idea of Private Law* (OUP 2013) 5.

<sup>7</sup> *ibid*.

<sup>8</sup> *ibid* 7.

approach only stands if it is accepted that tort law is insufficient to justify itself *internally* and cannot be understood from within. In opposition, he argues that, ‘far from being surrogates for the operation of independently justifiable collective purposes, [the fundamental concepts of private law] are the juridical markers of the immediate connection between the parties’.<sup>9</sup>

The view developed throughout this article lies between these approaches. Tort law, more specifically the law of defamation and the law of nuisance, currently aspires to the social aims approach and thus has increasingly carved out space for the accommodation of public interests. This is not a welcome development. The law, both in the form of legislation and in case law, has, in some instances, too readily accepted the prioritisation of public over private interests without adequate scrutiny and without proper account of the fact that, in some areas, the private-public divide may not be as easily delineated. In its attempt to implement the social aims approach, the law has diluted the private interests it was primarily tasked with protecting. This does not mean, however, that the pendulum ought to swing towards an entirely essentialist approach. An inherent difficulty with both approaches lies in the way they dichotomise private and public interests, characterising them as irreconcilable. This dichotomy can be seen in the Defamation Act 2013, which will be discussed in section 1, and in planning permission in private nuisance (particularly following the decision in *Coventry v Lawrence*<sup>10</sup> (*Coventry*)), which will be discussed in section 2. On this basis, the view taken here focuses on *re-calibrating* the law of tort to reflect a more nuanced dynamic between private and public interests: the law should emphasise private interests, taking care to ensure that their true thrust is not stunted by references to the public interest

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<sup>9</sup> *ibid* 8.

<sup>10</sup> [2014] UKSC 13.

(as has been the case in the adoption of the social aims approach) without invalidating the existence of public interests altogether (as under the essentialist approach).

## *1. Defamation*

The Defamation Act 2013 (the Act) was passed to address the concern that the common law definition of defamation had a ‘chilling effect’<sup>11</sup> on freedom of expression. Section 1 (the serious harm requirement) has succeeded in protecting freedom of expression, but it has done so at the expense of a robust protection of reputation. The introduction of the requirement poses difficulties for corporate claimants (now needing to demonstrate financial loss for this threshold) and overlooks the value of corporate reputation by failing to account for the idea that the neglect of private interests may sacrifice the protection of public interests that are closely interlinked with them. Contrary to the notion that freedom of speech is the only public interest at play, the discussion will show that, although corporate reputation is a private interest, it *also* contains elements of the public interest (namely in economic mobility), and in failing to protect corporate reputation, the law fails to adequately protect both the private and the public interest. Private and public interests cannot simply be disaggregated from one another, and thus they cannot be deemed to exist in a see-saw relationship whereby stronger protection of the former necessarily means lesser protection of the latter, and

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<sup>11</sup> Anthony Lester, ‘These Disgraceful Libel Laws Must Be Torn Up’ *The Times* (London, 15 March 2011) <<https://www.thetimes.co.uk/article/these-disgraceful-libel-laws-must-be-torn-up-698t8zpdk9w>> accessed 28 September 2020.

vice versa. Public interests can be plural and dynamic: safeguarding one set of interests does not automatically ensure holistic protection of all public interests.

### *A. Serious Harm and Financial Loss*

One of the Act's first priorities was 'to ensure that the law is reformed so that trivial and unfounded actions for defamation do not succeed'.<sup>12</sup> As such, section 1(1) of the Act 'raises the bar for a statement to be defamatory by [requiring] that it must have caused or be likely to cause serious harm'.<sup>13</sup> It was confirmed in *Lachaux v Independent Print Ltd*<sup>14</sup> (*Lachaux*) that this new threshold not only superseded its common law predecessors, but also requires reference to the actual or likely impact of the words as opposed merely to their inherent meaning. The need to consider the actual or likely impact of an alleged defamatory statement means that the previous common law presumption of damage to the claimant's reputation is no longer tenable.<sup>15</sup> This presumption meant that a claimant could establish the defamatory nature of a statement by reference solely to the words used and could therefore recover damages without establishing actual or likely harm to their reputation. It was thought to be irrebuttable in practice,<sup>16</sup> thus enhancing the protection afforded to reputation. Although counsel for the claimant tried to argue that the phrase 'likely to cause' in section 1 meant that the presumption survived the Act, the court in *Lachaux* made clear that this provision

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<sup>12</sup> HL Deb 9 October 2012, vol 739, col 934.

<sup>13</sup> *ibid.*

<sup>14</sup> [2019] UKSC 27.

<sup>15</sup> *ibid* [17].

<sup>16</sup> *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 28; *Jameel (Yousef) v Dow Jones Co Inc* [2005] QB 946.

‘introduce[d] a new threshold of serious harm which did not previously exist’.<sup>17</sup>

This is a significant change in the balance struck between private and public law considerations. Section 1(1), by removing the presumption and substantively raising the threshold for a statement to be defamatory, ensures stronger protection for the public interest in freedom of expression. For the purposes of this threshold, for-profit bodies under subsection (2) must now show actual or likely ‘financial loss’. Below it is argued that this requirement, particularly when read with the newly established substantive threshold, makes it difficult for corporate claimants wishing to vindicate their reputations under the Act. As will be discussed in Section B, the financial loss requirement reflects an incomplete picture of the nature of corporate reputation (only capturing reputation as property) and does not account for pecuniary losses that may flow from damage to reputation as honour. These protracted losses for companies in turn trigger concerns about the interests of communities that depend on the financial success of these corporations. Section C canvasses an alternative model to corporate defamation claims wherein financial loss is removed as a substantive qualifier in the finding a defamatory statement, and instead, a multi-factor version of the *Lachaux* paradigm is introduced.

### *B. The Nature of Corporate Reputation*

Post has argued that there are three manifestations of reputation in the law of defamation: property, honour, and dignity.<sup>18</sup> Lord Hoffmann has emphasised that a company’s standing to sue in defamation is rooted in its reputation as property, as ‘a

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<sup>17</sup> *Lachaux* (n 14) [13].

<sup>18</sup> Robert Post, ‘The Social Foundations of Defamation Law: Reputation and the Constitution’ (1986) 74 Calif L Rev 691, 693.

commercial company has no soul and its reputation is no more than a commercial asset, something attached to its trading name which brings in customers'.<sup>19</sup> The introduction of the financial loss requirement was intended to reflect this sentiment, while addressing the longstanding concern that 'Large corporations can and do use their financial muscle to stifle legitimate debate by threatening to sue their financially weaker critics.'<sup>20</sup> That financial loss must now be evidenced is reflective of the *harm*-orientation of reputation as property: any damage done to reputation can be shown through loss that flows as a *consequence* of defamation.

According to Post, although dignity and honour are generally thought to be synonymous, they serve analytically distinct purposes in the understanding of defamation law. Reputation as dignity is concerned with the individual's interest in being included within their community (infringement upon such an interest would lead that individual to be stigmatised and ostracised).<sup>21</sup> This interest is rooted *within* the individual and is therefore inapplicable to companies. Conversely, reputation as honour is concerned with the normative characteristics of a particular social status and the corresponding 'regard and estimation that society accords to that role'.<sup>22</sup> In contrast to the *harm*-orientation of reputation as property, reputation as honour is *wrong*-oriented. The wrong perpetrated is socially rooted, leading to a disruption of 'shared social perceptions that transcend the behavior of particular persons'.<sup>23</sup> This manifestation of reputation was reflected in the common law presumption of damage, which focused on a

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<sup>19</sup> *Jameel v Wall Street Journal Sprl* [2007] 1 AC 359 [91].

<sup>20</sup> HL Deb, 9 October 2012, vol 739, col 966.

<sup>21</sup> Post (n 18) 711.

<sup>22</sup> *ibid* 700.

<sup>23</sup> *ibid* 702.

“noncompensatory” end<sup>24</sup> of vindicating and reaffirming the claimant’s social status even in the absence of evidence indicating harm. Unlike reputation as dignity, reputation as honour is *externally* and *relationally* determined. It can serve as an analytical tool to show a more holistic picture of the losses that can be suffered by companies when their reputation is damaged, particularly in light of contemporary business practices. As Chan highlights when discussing reputation as honour, ‘Such reputation may not be ‘earned’ in the ‘marketplace’ proper for the purposes of attracting customers, but the good name of the organisation (as an advocate for social justice and compassion for the disadvantaged people, for instance) might have been built upon the work and efforts of the founders, employees or officers within the organisation.’<sup>25</sup> These efforts are now commonplace given the growing importance that many companies place on corporate social responsibility (CSR) practices.<sup>26</sup> This will often involve not-for-profit activities, the aims of which are to establish a positive image or brand for a company. For example, Apple has a reputation as regards the quality of its products (reputation as property) but also has, through its CSR activities, established itself as an active supporter of LGBTQ+ rights<sup>27</sup> (reputation as honour). Similarly, Ben & Jerry’s has a reputation as regards its ice cream (reputation as property) but has also cemented itself as

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<sup>24</sup> *ibid* 706.

<sup>25</sup> Gary Chan, ‘Corporate Defamation: Reputation, Rights and Remedies’ (2013) 33 *Legal Studies* 264, 268.

<sup>26</sup> Peter Coe, ‘The Value of Corporate Reputation and the Defamation Act 2013: a Brave New World or Road to Ruin?’ (2013) 18(4) *Comms L* 113, 114.

<sup>27</sup> David Graham, ‘The Business Backlash to North Carolina’s LGBT Law’ (*The Atlantic*, 25 March 2016) <<https://www.theatlantic.com/politics/archive/2016/03/the-backlash-to-north-carolinas-lgbt-non-discrimination-ban/475500/>> accessed 16 December 2020.

committed to social, environmental, and political issues through its continued track record of corporate activism (reputation as honour).<sup>28</sup> This manifestation is particularly apparent in instances where company reputation is tightly bound up in the image of their founders, such that ‘poor judgment and unethical behavior on the part of company founders directly impacts positive perception of a company’.<sup>29</sup> A paradigmatic illustration of this is the calls to boycott In-N-Out Burgers’ following their donation to the Republican party, pursuant to the personal political beliefs of its founder and executives.<sup>30</sup> Again, such reputational damage disrupts ‘shared social perceptions’ of the company, which can likely lead not only to a decline in consumer support, but perhaps also in the ability to recruit employees or secure lucrative partnerships for the company.

There is a common objection to this characterisation of corporate reputation, namely that companies, although they are *legal* persons, are not imbued with the same substantive rights inherent in *natural* persons and are therefore undeserving of the same protection endowed by the courts. Connected to this is the

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<sup>28</sup> Tal Donohue and Georgia Rhodes-Bell, ‘A Rocky Road for Brands: What Ben & Jerry’s Teaches Us About Corporate Activism, Purpose and Reputation’ (*Infinite Global*, 20 August 2020) <<https://infiniteglobal.com/infinite-brief/a-rocky-road-for-brands-what-ben-jerrys-teaches-us-about-corporate-activism-purpose-and-reputation-2/>> accessed 16 December 2020.

<sup>29</sup> Peter Daisyme, ‘Consider How Your Actions As A Founder Impact Your Brand And Business Reputation’ (*Forbes*, 13 November 2018) <<https://www.forbes.com/sites/theyec/2018/11/13/consider-how-your-actions-as-a-founder-impact-your-brand-and-business-reputation/?sh=6c9b37e3680b>> accessed 15 April 2021.

<sup>30</sup> Jeff Daniels, ‘In-N-Out Burger’s \$25,000 donation to California GOP brings call for boycott from Democrats’ (*CNBC*, 30 August 2018) <<https://www.cnn.com/2018/08/30/in-n-out-burger-faces-boycott-for-california-gop-donation.html>> accessed 15 April 2021.

concern that these CSR practices are merely ancillary to a company's identity or otherwise form part of a greater profit-making strategy that ultimately links back to their reputation as property. Although these concerns are not without merit, particularly given the growing concerns of companies wielding too much power, there is evidence to show that modern business practices are beginning to prioritise reputation best conceived as honour, in some instances above reputation as property, thus warranting protection in its own right. As explained by Post, the individual 'claims a right to [honour] by virtue of the status with which society endows his social role.'<sup>31</sup> In turn, 'society expects him to aspire to "personify" these attributes and to make them part of his personal honour.'<sup>32</sup> Social status in this sense sets the expectations *by* and *through* which the individual can navigate and elect their membership or non-membership to that status. This idea of social status is being prioritised by a new breed of businesses called 'B corporations'. B corporation status requires certification, which involves an assessment of a company's ability to 'create value for non-shareholding stakeholders, such as their employees, the local community, and the environment.'<sup>33</sup> They are *legally* required to consider these factors, and must therefore ensure that their organisational structure is not exclusively focused on profit maximisation.<sup>34</sup> Electing to undergo certification, or aspiring towards certification, 'is a way to publicly claim an identity as an organization interested in both shareholder

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<sup>31</sup> Post (n 18) 700.

<sup>32</sup> *ibid.*

<sup>33</sup> Suntae Kim et al., 'Why Companies Are Becoming B Corporations' (*Harvard Business Review*, 17 June 2016) <<https://hbr.org/2016/06/why-companies-are-becoming-b-corporations>> accessed 27 March 2021.

<sup>34</sup> Isabella Fox, 'A guide to the UK B Corporation movement' (*PwC*) <<https://www.pwc.co.uk/industries/retail-consumer/insights/b-corp.html>> accessed 27 March 2021.

and stakeholder success'.<sup>35</sup> In fact, there is evidence to suggest that companies choose to become B corporations in order to distinguish themselves from profit-driven CSR practices 'in the midst of a "greenwash" revolution'<sup>36</sup> (whereby companies make unsubstantiated claims to deceive consumers into believing the ethicality and sustainability of their products or practices<sup>37</sup>), which in turn allows individuals to differentiate between traditional firms and 'genuine, authentic advocates of stakeholder benefits'.<sup>38</sup> This demonstrates a somewhat reflexive relationship, similar to the process described by Post whereby companies behave in a way that responds to, as well as claims an identity that aligns with, the normative expectations set by consumers to establish and maintain a particular social status. Companies are now empowered to act in a way that cannot fully be accounted for by reference to profitability (reputation as property), instead better viewed as a commitment to the society in which they operate (reputation as honour).

When the social status garnered from this commitment is tarnished, the damage done to the company will not always *immediately* translate to financial loss. Such honour-damage can lead to an inability to recruit talented employees, to obtain property and facilities, or in the case of journalism, to gain access to individuals and sources for the delivery of timely and accurate news articles. These non-financial losses go to the heart of a company's ability to run their business, 'impair the purpose and

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<sup>35</sup> Kim et al. (n 33).

<sup>36</sup> *ibid.*

<sup>37</sup> Leyla Acaroglu, 'What is Greenwashing? How to Spot It and Stop it' (*Disruptive Design*, 8 July 2019) <<https://medium.com/disruptive-design/what-is-greenwashing-how-to-spot-it-and-stop-it-c44f3d130d5>> accessed 15 April 2021.

<sup>38</sup> Kim et al. (n 33).

object of its establishment and maintenance’,<sup>39</sup> and can therefore be more protracted than, for example, a drop in share price immediately following a defamatory statement about the quality of a company’s products (reputation as property). Admittedly, these honour-losses may *ultimately* lead to financial losses. However, there is no guarantee that such losses, now further down the causation chain, can be linked back to the defamatory statement. The point to be stressed is that using financial loss as a prerequisite to the finding of whether a statement is defamatory only reflects reputation as property and does not capture the different *types* of losses that can be sustained by damage to reputation as honour. Again, the former is *harm*-oriented while the latter is *wrong*-oriented. To use financial loss as a qualifier to a company’s defamation claim is to collapse these orientations, which leads to the conclusion that ‘defamation does not protect reputation but the ‘temporal’ consequences of its violation, that is, those which can be valued in money’.<sup>40</sup>

### *C. Corporate Reputation and Community Interests*

Though deemed a private entitlement, corporate reputation has wider implications for the social interests and economic mobility of communities. As expressed in *Steel and Morris v United Kingdom*, ‘Although large public companies laid themselves open to close scrutiny of their acts and the limits of acceptable criticism were wider in the case of such companies ... there was a competing public interest in protecting the commercial success and viability of companies, not only for the benefit of shareholders and

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<sup>39</sup> Chan (n 25) 270.

<sup>40</sup> Erik Descheemaeker, ‘Three Errors in the Defamation Act 2013’ (2015) 6(1) *JETL* 24, 30.

employees but also for the wider economic good'.<sup>41</sup> This is not to say that corporations always *act* in the public interest, but it nevertheless acknowledges that their reputations have *ramifications* for the public interest in terms of economic mobility. This proposition is supported by the fallout of the Volkswagen emissions scandal; although the scandal did not involve a claim of defamation, it nevertheless illustrates the impact of damage to corporate—as well as collective—reputation on the economy.

Volkswagen is one of Germany's largest employers, creating more than 270,000 jobs in the country and even more working for suppliers.<sup>42</sup> In 2014, approximately 775,000 people worked in the automobile sector, constituting almost two percent of the entire national workforce.<sup>43</sup> Moreover, the car industry is Germany's biggest exporter—an industry whose reputation relies heavily on the 'Made in Germany' brand to gain competitive edge in the market.<sup>44</sup> Volkswagen commercials reinforce this brand by ending with the slogan 'Das Auto' ('The Car'), subliminally messaging to consumers that their cars embody the model standard of the automobile industry. The emissions scandal, however, turned this brand into a liability, not only for Volkswagen, but also for German car companies.<sup>45</sup> Other German car companies, those who similarly relied on the 'Made

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<sup>41</sup> [2005] 41 EHRR 22 [94].

<sup>42</sup> Carson Jones, 'Volkswagen and Its Effect on the Global Economy' (*globalEDGE*, 2 October 2015) <<https://globaledge.msu.edu/blog/post/31014/volkswagen-and-its-effect-on-the-german-economy>> accessed 16 December 2020.

<sup>43</sup> *ibid.*

<sup>44</sup> Dimitrije Ruzic, 'How the Volkswagen Scandal Turned "Made in Germany" Into a Liability' (*Insead Knowledge*, 16 August 2019) <<https://knowledge.insead.edu/economics-finance/how-the-volkswagen-scandal-turned-made-in-germany-into-a-liability-12196>> accessed 16 December 2020.

<sup>45</sup> *ibid.*

in Germany' brand, suffered from the scandal; this shift was described as a 'spillover effect as arising from collective reputation'.<sup>46</sup> The losses totalled approximately \$26.5 billion, following a decline in sales across the sector<sup>47</sup> and created well-founded concerns about the consequences on the German economy.<sup>48</sup>

Admittedly, this is an extreme example and perhaps its gravity will not always feature in defamation claims. Nevertheless, it demonstrates a clear link between corporate reputation and economic mobility: companies and their reputations do *not* exist in a vacuum. They cannot always be disentangled from one another, nor can they be completely divorced from the public interest. Indeed, a company structure is not monolithic. Damage done to its reputation, even for those that are not corporate juggernauts, will have a negative impact upon its employees, its suppliers, and the wider community within which it operates.<sup>49</sup> As such, 'Locating reputation in a purely property-based dimension would signal that companies need not seriously treat externalities of their decisions as corporate obligations, since their corresponding reputational rights are not seriously protected.'<sup>50</sup>

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<sup>46</sup> Ruediger Bachmann et al., 'Firms and Collective Reputation: A Study of the Volkswagen Emissions Scandal' (2019) National Bureau of Economic Research Working Paper 26117, 30 <<https://www.nber.org/papers/w26117>> accessed 16 December 2020.

<sup>47</sup> *ibid* 3.

<sup>48</sup> 'Emissions Scandal is a Risk to Germany Economy: MInistry' (*Reuters*, 20 August 2017) <<https://www.reuters.com/article/us-germany-economy-idUSKCN1B00U5>> accessed 16 December 2020.

<sup>49</sup> Alastair Mullis and Andrew Scott, 'Lord Lester's Defamation Bill 2010: a distorted view of the public interest?' (2011) 16(1) *Comms L* 6, 14-5.

<sup>50</sup> Cara Gao, 'Serious Harm to Corporate Reputation – More Than Just Money' (2018) 7 *OUULJ* 10, 27.

The issue highlighted here is the Act's misplaced binarization of private and public interests through the financial loss requirement. This is not to diminish the importance of the public interest in freedom of expression, but to demonstrate that casting this area as a stark conflict of private and public interests is misguided: private entitlements can be closely bound up with, and may therefore necessarily effect, public interests.

In light of the lack of clarity surrounding the private-public divide in this area, the law of defamation should re-centralise its emphasis on reputation. This could be done by removing the financial loss requirement *as a prerequisite* for the purposes of finding whether a statement is defamatory. As has been discussed above, corporations may suffer damage to reputation from defamatory statements in a way that does not manifest in just direct financial loss and 'private interest' damage. As such, the financial loss prerequisite should be replaced with a multi-factorial enquiry. In doing so, it is not suggested that financial loss should be removed entirely from consideration, but merely that it should stop operating as the sole yardstick against which all harm is quantified. Financial loss may be incorporated as a *factor*, and indeed a strong one, but other factors may include evidence of: a decline in job applications submitted to the company (as compared to previous years); an increased inability to obtain facilities, suppliers, permits or other instruments required to promote the efficacy of the business; a decrease in advertising opportunities etc. This is by no means an exhaustive list, but is indicative of the manifestations of reputational damage that ought not to be neglected by the law of defamation. Any issues of causation arising out of the difficulties in proving financial consequences occurring further down the causation chain would be alleviated, at least in part, as claimants would no longer need to prove that a statement caused actual or likely financial harm, but rather can paint a more holistic image of the

nature and extent of damage suffered. If it can be shown, for example, that a longstanding advertising partnership has been lost due to a defamatory statement, this can contribute to the picture of loss suffered by the for-profit body. These factors should have cumulative effect, but the relative weight attached to each factor may be decided on a case-by-case basis. For those concerned about barring trivial claims, ‘That trivial injuries ought not to get their day in court is naturally an ancient idea that is not necessarily objectionable ... but this is normally dealt with through the operation of rules that are *external* to the cause of action being found, for instance, in the rules of civil procedure.’<sup>51</sup> Finally, all of these suggested changes should not undermine the efforts made to secure freedom of expression under the Act given that, post-*Lachaux*, the common law presumption of damage has not survived, and harm must still meet the new substantive threshold of seriousness under section 1(1).

## 2. Nuisance

Private nuisance is a tort against land that hinges on the ‘principle of reasonable user’,<sup>52</sup> characterised as ‘the principle of give and take as between neighbouring occupiers of land’<sup>53</sup> and ‘the relevant control mechanism’<sup>54</sup> through which liability is determined. As mentioned in the introduction, this element of reciprocity means that, instead of a list of *pre-existing* rights sought to be protected, it is the relationship between the property rights

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<sup>51</sup> Descheemaeker (n 40) 27.

<sup>52</sup> *Cambridge Water* (n 1) 299.

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid* 300.

of neighbouring parties that helps to draw the contours of their private interests: it involves a balancing exercise of the interests held by both the claimant and defendant, consisting of several factors, such as the nature and the extent of the damage, the locality of the area,<sup>55</sup> the claimant's use of the land,<sup>56</sup> and the motive of the defendant.<sup>57</sup>

The following discussion focuses on planning permission and its role within this exercise. Planning permission has proven to be an inappropriate vehicle for the expression of the public interest and is therefore an inadequate justification for the curtailment of private property rights when carrying out this balancing act. The Supreme Court in *Coventry*, however, seems to have placed greater emphasis on this purported expression of the public interest, particularly by highlighting the role that planning permission plays when determining the grant of an injunction. This is once again demonstrative of the courts' adoption of the social aims approach. With respect, this increased emphasis not only mischaracterises the power that ought to be attributed to administrative decisions, but also signals a departure from how the tort of nuisance is doctrinally conceived and loses sight of proprietary rights that private nuisance is meant to protect.

### *A. Coventry v Lawrence*

The claimants in *Coventry*, who complained about the noise from the defendants' motor racing activities, were successful in establishing the defendants' liability in nuisance, despite the activities having the benefit of planning permission. The Supreme Court overturned the finding of the Court of Appeal that the grant of planning permission may change the character of locality,

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<sup>55</sup> *St Helen's Smelting Co v Tipping* [1865] 11 HL Cas 642.

<sup>56</sup> *Network Rail v Morris* [2004] EWCA 172.

<sup>57</sup> *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468.

holding that planning permission is ‘normally of no assistance to the defendant’<sup>58</sup> in the assessment of liability in private nuisance. It may provide a starting point for the assessment of reasonable use, but in many cases will be ‘of little, or even no, evidential value’.<sup>59</sup> However, the speeches in *Coventry* seem to share a common assumption, albeit of varying degrees, that the planning system is an adequate channel for the expression of the public interest. Planning permission may be indicative of an activity being of benefit to the public and, as such, may be relevant to the question of remedies (*how* the tort is to be redressed) as opposed to liability (*whether* a tort was committed).

The speeches in the judgment indicate a shift towards the liberalisation of damages in lieu of an award for an injunction. Perhaps most radically, Lord Sumption goes as far as to propose somewhat of a presumption against the grant of injunctions whenever an activity has the benefit of planning permission.<sup>60</sup> Lord Mance and Lord Carnwath disagreed with this proposition, with Lord Mance arguing that this afforded too much significance to planning permission and public benefit, particularly in light of the fact that the right to enjoy one’s home without disturbance is valued by many for reasons almost entirely independent of money.<sup>61</sup> Lord Clarke thought that the existence of planning permission may be relevant to the question of the appropriate remedy, but His Lordship declined to lay down any precise principles to be followed in the future.<sup>62</sup> Lord Carnwath acknowledged the tension between planning law and the law of nuisance, given that the former exists to promote the public interest, whereas the latter seeks to protect the private rights of

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<sup>58</sup> *Coventry* (n 10) [94].

<sup>59</sup> *ibid* [96].

<sup>60</sup> *ibid* [161].

<sup>61</sup> *ibid* [167]-[168] (Lord Mance), [246] (Lord Carnwath).

<sup>62</sup> *ibid* [171]-[173].

particular individuals.<sup>63</sup> His Lordship agreed that emphasis ought to be placed upon private law rights at the liability stage of the enquiry, but the public interest may be relevant to the remedial question.<sup>64</sup> He also expressed his approval of the view that the continued strength of private nuisance in a regulatory state ‘probably depends on a flexible approach to remedies’.<sup>65</sup>

Lord Neuberger, giving the leading judgment, attempted to homogenise the varying approaches, concluding that injunctions would generally remain the primary remedy while also providing a revision of the *Shelfer v City of London Electric Lighting Co*<sup>66</sup> (*Shelfer*) guidelines. *Shelfer* held that damages would be awarded only in the most limited circumstances, essentially amounting to a four-staged test that swung heavily in favour of injunctions: (1) if the injury to the claimant’s rights is small; and (2) is capable of being estimated in money; and (3) is adequately compensable by a small money payment; and (4) the case is one in which it would be oppressive to the defendant to grant an injunction.<sup>67</sup> There was a general sentiment within Their Lordships’ judgments that *Shelfer* was out of date and, throughout the years, was wielded far more often than the court deemed appropriate. Lord Neuberger clarified that fulfilling the *Shelfer* criteria will not automatically mean that an injunction should be granted, adding that their application should not be ‘a fetter on the exercise of the court’s discretion’.<sup>68</sup> The public interest, although never substantively defined in the judgment, was

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<sup>63</sup> *ibid* [193].

<sup>64</sup> *ibid* [222].

<sup>65</sup> Maria Lee, ‘Tort Law and Regulation: Planning and Nuisance’ (2011) 8 JPL 986, 990.

<sup>66</sup> [1895] 1 Ch 287.

<sup>67</sup> *ibid* 322.

<sup>68</sup> *Coventry* (n 10) [120].

deemed as a matter of law ‘to be a relevant factor’<sup>69</sup> in this calculation. Despite the differing approaches taken by Their Lordships on this issue, what is nevertheless clear is a common accommodation of the public interest in the form of planning permission.

The readiness to incorporate planning permission into the question of remedies stems from a belief that this will strike the correct balance between private property rights and any public interest that may arise through the permission process. If the court were to consider planning permission at the liability stage, potentially allowing it to determine the finding of a nuisance, it would likely be vulnerable to the criticism that the public interest is being used to curtail the *assertion* of private property rights and thus the important recognition thereof. However, when local authority approval is shifted to the remedial question, this objection arguably loses its vigour; the claimant will have already had their property rights *recognised* and the question simply falls to be asked about how they are to be compensated. As will be explained, this distinction is artificial. Injunctions in private nuisance give meaning to the individual’s property rights, and the frequency with which they are awarded ought not to be limited by references to the (often unclear) public interests contained within planning permission.

### *B. The Relaxation of Shelfer and the Planning Process*

The primary remedy in nuisance is an injunction for the very reason that it reflects and protects one’s proprietary right to enjoy one’s land without interference. By reserving for the courts a sizeable discretion over the award of an injunction, and by

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<sup>69</sup> *ibid* [124].

effectively downgrading the *Shelfer* criteria, the judgment in *Coventry* overlooks the proprietary nature of the tort of nuisance. Admittedly, the concerns expressed by Their Lordships in *Coventry* are not unfounded, namely that previous courts have too readily accepted the grant of an injunction before adequately considering whether damages could be appropriate. Indeed, as highlighted by the court, the current landscape involves stronger market forces and higher degrees of regulatory control that reflect collective, but nevertheless legitimate, aspirations for development;<sup>70</sup> it is important that these aspirations are not undermined and therefore ought not to be neglected when drawing the boundaries of private rights. However, it should be remembered that nuisance is a tort involving *land*, governed by ‘property rules’, rather than ‘liability rules’.<sup>71</sup> The position in *Coventry* conflicts with the doctrinal orthodoxy that ‘a person by committing a wrongful act ... is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour’s rights’.<sup>72</sup> The very essence of property rights is that they are distinct from ‘mere expressions of a contractual bargain’,<sup>73</sup> under which a defendant can avoid liability by paying a suitable price. A hallmark of proprietary interests is their endurance: a person who possesses a property right should not be asked to diminish their right to enjoyment of land, particularly when the community interests for which their rights must be relaxed are vague and ill-defined. A shift to damages would alter the way in which the principle of reasonable user, characterised by ‘give and take’ between neighbours, is conceptualised. Injunctions generally

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<sup>70</sup> *ibid* [180].

<sup>71</sup> Paul Davies, ‘Injunctions in Tort and Contract’ in Sarah Worthington and Graham Virgo (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017) 128.

<sup>72</sup> *Shelfer* (n 66) 322.

<sup>73</sup> Martin Dixon, ‘The Sound of Silence’ [2014] Conv 79, 84.

return a claimant to their position pre-nuisance. If damages are deemed the appropriate remedy, the courts have established a conceptual paradox, one in which the defendant's actions may be found to constitute a nuisance (the defendant's behaviour is unlawful), but the balance of 'give and take' has nevertheless been permanently altered in their favour, effectively giving the defendant stronger rights than their neighbour.<sup>74</sup>

Even if public interests were defined, ranging in *Coventry* from 'the fact that a number of the defendant's employees would lose their livelihood',<sup>75</sup> to public use or enjoyment of the stadium,<sup>76</sup> planning permission does not weigh the strength of private rights against substantive public interests. A grant of planning permission 'should not be regarded as a manifestation of the wish of any authority'.<sup>77</sup> The permission is *negative* in nature in that 'the authority is clearly not *endorsing* the developments, but merely indicating that it *does not object to them*'<sup>78</sup>. There is no careful and considered merits-based balancing exercise undertaken as part of the planning permission process. As such, there is no guarantee that such interests are as adequately balanced against private entitlements within administrative decision-making, as Lord Neuberger suggests.<sup>79</sup> Third parties that are likely to be affected by the planning permission, although entitled to make

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<sup>74</sup> Emma Lees, 'Lawrence v Fen Tigers: Where Now For Nuisance?' [2014] Conv 449.

<sup>75</sup> *Coventry* (n 10) [124].

<sup>76</sup> *ibid* [239].

<sup>77</sup> JE Penner, 'Nuisance and the Character of the Neighbourhood' (1993) 5 *Journal of Environmental Law* 1, 24.

<sup>78</sup> Donal Nolan, 'Nuisance, Planning and Regulation: The Limits of Statutory Authority' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart Publishing 2015) 194 (emphasis in original).

<sup>79</sup> *Coventry* (n 10) [91].

representations to the planning authority about a proposed development, have constricted standing in the process. Any challenge to a planning authority's decision must be brought by way of judicial review,<sup>80</sup> which in any case does not lead to a consideration of merits. Moreover, some public interests identified in the case law—such as the development of the Docklands in *Hunter v Canary Wharf*<sup>81</sup> or the provision of sewerage infrastructure in *Marcic v Thames Utility Council*<sup>82</sup>—are not always severable from private interests and are in fact sometimes intrinsically linked to private profit-making.<sup>83</sup> Allowing private law property rights to be relaxed by relying on the assumption that there is a guarantee of public interest protection, or indeed that any public interest can be easily isolated from competing private interests, is therefore misplaced. In the same vein, the administrative nature of decision-making should not, in any case, be a source of the curtailment of private law rights. Although, again, this is not a curtailment *per se* of an individual's rights, as planning permission is not relevant to the question of liability, it has been established that the content of an individual's proprietary interests is nevertheless diluted by the relaxation of *Shelfer*. Watering down private law rights in this way should only be done with an expression of *legislative*, as opposed to *administrative*, will in the form of statutory authority. As noted by Peter Gibson LJ in *Wheeler v Saunders*, the courts 'should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed and are difficult to challenge'.<sup>84</sup>

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<sup>80</sup> Town and Country Planning Act 1990 (UK), s 78.

<sup>81</sup> [1997] UKHL 14.

<sup>82</sup> [2003] UKHL 66.

<sup>83</sup> Lee (n 66) 986.

<sup>84</sup> [1996] Ch 19 (CA) 28, 35.

The increased role of planning permission in the determination of remedies has demonstrated a clear movement towards the prioritisation of the public interest. The new orthodoxy signalled by *Coventry* not only undermines the essence of the claimant's right to enjoyment of land, but through its liberalisation on the grant of damages, also threatens to re-appraise the nature of the tort of nuisance as a tort against *land* altogether. Regrettably, the Supreme Court was overly cautious, declining to fully clarify how cases involving public interest and planning permission may be decided in future, while at other times too readily embracing a new paradigm by reference to the public interest, without having first established a robust framework to ensure certainty, opting instead for a case-by-case approach. In order to restore balance, the law of private nuisance must return to its emphasis on the endurance of property interests, as opposed to relying on planning permission to determine the strength with which these interests can be asserted. A potential framework is suggested below to highlight how the courts may approach this issue in the future, accounting for the concerns that have been discussed above while ensuring that the integrity of the law of nuisance is maintained.

### *C. Scrutinising the Public Interest*

The courts' reluctance to challenge the *substance* of administrative decision-making is understandable given their lack of expertise to *substantively* evaluate competing public interests. As Lee highlights, 'most would agree that a public sewerage system is a good thing, for example, but precisely how effective it needs to be, who should pay, and how much, raises equally plausible claims and high economic stakes'.<sup>85</sup> It is unlikely that the institutional

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<sup>85</sup> Maria Lee, 'The Public Interest in Private Nuisance: Collectives and Communities in Tort' (2015) 74(2) CLJ 329, 347.

capacity of the courts extends to the determination of such issues. However, to concede to the purported public interest protection within planning permission without adequate scrutiny is to adopt an overly deferential attitude toward planning authorities, which in turn overlooks the courts' competence to scrutinise the *process* of such decision-making. It should not be forgotten that courts can and should employ their constitutional capacity to engage in a meaningful balancing exercise that gives due weight to private property rights. This exercise is not one which weighs the *substance* of these rights, but instead determines whether, on balance, the public interests professed to be taken into account were arrived at by the planning authority through a reasoned and justified *process*. Judges may 'consider the expertise and information available to and used by the decision-maker, and what the decision itself purported to do'<sup>86</sup>, or 'enquire whether a cost-benefit analysis (or in other cases, a general weighing of pros and cons) was in fact carried out, and whether the decision-maker engaged reasonably with the interests of most relevance to the litigation'.<sup>87</sup> This avoids undue interference with administrative decisions, while placing a check against the uncritical adoption of planning permission into the determination of the remedies to be awarded in nuisance. In light of the certainty and endurance of private property rights, the decision to grant damages in lieu of an injunction should depend on the clarity of the public interests sought to be incorporated and the justifiability of the confidence sought to be placed in the planning authority for reaching such conclusions.

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<sup>86</sup> *ibid* 352.

<sup>87</sup> *ibid* 353.

## *Conclusion*

The preceding discussion has revealed that tort law continues to carve out more space for the public interest at the expense of individual entitlement; the law continues to grapple with definitional problems because of the effort spent addressing the private and public domains as if they are immiscible interests. They need not be in diametrical opposition to one another. Even when the interests do conflict, the private interest must remain the starting point. For defamation this is the reputation interest, whereas in nuisance this is the property right. From there, the public interests at play within the specific facts of a case must be clearly *identified, enumerated, and defined*. The key here is to increase the transparency (ensuring comprehensiveness in identification) and precision (ensuring clarity in definition) with which the courts engage in their analysis. It is only from this vantage point that they can appropriately balance the relevant interests in a case, whether they are competing or complementing one another, or whether they overlap or are mutually exclusive.

This contextual approach stands in contrast to other methods, previously mentioned, that begin with the prioritisation of one *type* of interest over another: the social aims approach prioritises public interests while the essentialist approach *always* prioritises private interests. The approach suggested in this article is preferable because takes a rounded and nuanced account of the interests involved within a dispute, taking the private interest as the starting point, but being appropriate deferential when a significant public interest is at play. Reaffirming the importance of private rights means that any encroachment upon them ought to be fully justified by reference to precisely defined public interests. This will bring some much-needed clarity to the nature of the competing interests in all tortious disputes.