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THE LOCALITY PRINCIPLE IN PRIVATE NUISANCE

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ABSTRACT. *This article considers the principle in the tort of private nuisance that the level of protection to which one is entitled from certain kinds of interference is sensitive to one's locality. It argues that the principle can be partly justified by the different costs of avoiding an interference which different localities create. However, it shows that, if the principle is to be justified in its entirety, a further justification is necessary. The article considers further justifications based on social rules, autonomy, cost minimisation, the idea of a system of equal right and an analogy to the rules on hypersensitive claimants. It largely rejects these explanations and concludes that, to the extent the locality principle requires individuals to bear substantial burdens that they would not have to bear were collective interests set aside, without compensation, it is difficult to justify.*

KEYWORDS: *nuisance, locality principle, property, rights, private law theory.*

I. INTRODUCTION

In determining whether, or which, remedy should be granted in private law in respect of an interference with land, a number of legal systems consider the nature of the locality in which the interference occurs. In German law, a person may have to tolerate a substantial interference with their land, if the interference is typical to the place (*ortsüblich*).[1] In the tort of private nuisance, one must put up with greater interference with the amenity of one's land in some localities than in others. This is a consequence of the "locality principle". This principle states that whether an interference with the amenity of land is wrongful in private nuisance depends upon the character of the locality in which the interference occurs. A person may have to tolerate a greater level of noise or smell in industrial areas than in sparsely populated rural areas.

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[1] §906 II 1 BGB. This is relevant, however, only to the existence of a duty to tolerate the interference (*Duldungspflicht*). If this is made out, then an injunction is excluded, but not damages: ibid.

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This article considers whether English law's locality principle can be justified.[2] The principle calls for justification for at least three reasons. First, while the relevance of locality is relatively easy to explain in other torts, it is less clearly so in private nuisance. For instance, the conduct that will amount to a breach of a duty of care in the tort of negligence clearly varies from place to place: a reasonable driver drives differently on motorways and country roads. Here locality matters because risk matters to whether one's conduct is unreasonable, and the risk one's conduct imposes varies from place to place. But why is an interference that has the same effect on the claimant's use and enjoyment of their land reasonable in one area but not another?[3]

Second, a consequence of the locality principle is that the permissible level of interference with a person's land may vary from locality to locality; this gives rise to a concern that people may enjoy *unequal* rights.[4]

Third, it seems to be a consequence of the locality principle that an interference may be impermissible, not solely by virtue of how a defendant's use of their land relates to the claimant's use of theirs, but also by virtue of how it relates to the land uses of *nearby others*. Some prominent normative theories of tort law seem to rule out the justificatory relevance of such facts: one version of corrective justice theory holds that liability-grounding considerations must be strictly "relational", concerning only the putative right-holder and duty-bearer. The locality principle may therefore fall foul of a prominent normative theory of tort law.[5]

An exploration of the principle's justification is also timely in light of its recent development by the UK Supreme Court in *Lawrence v Fen Tigers Ltd.*, a development which raises several questions about the scope of the principle.[6]

Two main arguments are made. First, I argue that considerations of locality are relevant to whether an interference is unreasonable in virtue of the fact that the cost (or difficulty) of avoiding certain interferences is partly dependent upon the nature of one's surroundings, and what claimants can reasonably expect depends, in part, on such costs. Second, it will also be shown that this argument from cost does not explain the locality principle in its entirety. Other explanations will be considered and, in the main, rejected. It is concluded that, to the extent the locality principle requires individuals to bear significant burdens, without compensation,

[2] Some of its arguments may, however, carry across to the similar principles in German and French law.
[3] The reasonableness of the claimant's expectation of privacy can depend upon location in the tort of misuse of private information. Only in private nuisance, however, is there a relatively distinct "locality principle".
[4] Beever raises this concern in relation to the locality principle. See A. Beever, *The Law of Private Nuisance* (Oxford 2014), 31–33.
[5] The version proposed by Ernest Weinrib. See E. Weinrib, *Corrective Justice* (Oxford 2012). See, however, E. Weinrib, "Private Law and Public Right" (2011) 61 University of Toronto Law Journal 191, 200–211.
[6] *Lawrence v Fen Tigers Ltd.* [2014] UKSC 13. See below, Section IV.

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beyond those they would have to bear were a direct comparison made between their use of land and the defendant's, it cannot be justified.

The article is in five sections. Section II provides a descriptive overview of the role of locality in private nuisance. Section III explains how locality considerations can be normatively relevant to the issue of unreasonable interference by virtue of the different costs of non-interference in different areas, and the limits of this explanation. It then examines other justifications for the locality principle and concludes that they are largely unsuccessful. Section IV explores a number of controversial doctrinal questions in light of the conclusions drawn.

II. The Locality Principle Stated

The locality principle states that whether an interference with the amenity of the claimant's land amounts to a nuisance depends upon the nature of the locality in which the interference occurs.[7] The principle is first formulated in England in *St. Helens Smelting Company v Tipping*.[8] The trees and herbage on Tipping's country estate were damaged by exposure to sulphuric acid, which blew across from the defendant's copper-smelting plant. The plant was situated about half a mile from the edge of Tipping's estate, in St. Helen's Junction, near to six other copper-smelting plants in St. Helens itself, the latter by all accounts a "dirty industrial town" at that time.[9] Tipping sued the company in private nuisance. His claim was successful at every level: the jury awarded him around £361 in damages,[10] the verdict was upheld by the Court of Queen's Bench and the Exchequer Chamber and, finally, unanimously by the House of Lords.

In the House of Lords, Lord Westbury said that a distinction should be drawn between interferences with land which produce "material injury to the property" and those which are "productive of sensible personal discomfort".[11] In relation to the latter, the question of whether the interference constitutes a nuisance should depend "on the circumstances of the place where the thing complained of actually occurs".[12] Not so the former,

[7] See generally J. Murphy, *The Law of Nuisance* (Oxford 2010), at [2.33], [2.38]–[2.41].

[8] *St. Helens Smelting Company v Tipping* (1865) 11 E.R. 1483, 1486–87, per Lord Westbury L.C. The principle is not mentioned in Blackstone's treatment of nuisance in W. Blackstone, *Commentaries on the Laws of England*, vol. III. The principle, or an early variant, is mentioned by Lord Kames in a comment appended to *Kinloch v Robertson* (1756) Mor. 13163: "The connection of close neighbourhood in a burgh introduces new duties among the inhabitants. Neighbours in town must submit to ordinary inconveniences from each other; but they must be protected against extraordinary disturbances, such as may render their property useless to them, or at least uncomfortable. Close neighbourhood introduces this temperament in equity, but not in such a manner as to deprive his neighbour of the use of his property." The idea that a nuisance depends upon all the circumstances is already present in *Walter v Selfe* (1851) 4 De G. & S. 315. The case perhaps most often cited for the locality principle is however *Sturges v Bridgman* (1879) 11 Ch. D. 852.

[9] A.W.B. Simpson, "Victorian Judges and the Problem of Social Cost: Tipping v St Helens' Smelting Company (1865)" in A.W.B. Simpson (ed.), *Leading Cases in the Common Law* (Oxford 1995), 183.

[10] Roughly £40,000 today.

[11] *St. Helens Smelting Company* (1865) 11 E.R. 1483, 1486.

[12] Ibid., at p. 1486.

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Lord Westbury implies: whether material injury to the property constitutes a nuisance does not vary with location. The generally accepted view is that "material injury" means physical damage to the land; interferences "productive of sensible personal discomfort" are those which interfere with the amenity (usefulness) of the land.[13]

How is "locality" defined for the purposes of this principle? There are no firm rules here, but four matters are relatively clear.[14] First, the focus is upon the "immediate locality" of the claimant's land.[15] It seems that a set of two or three adjoining streets can amount to a "locality"[16]; it may even be that different ends of one street could be different "localities".[17]

Second, localities are differentiated according to "established patterns of use" in a geographical location.[18] A locality, then, is a physical area in which there are certain established uses of the land (in this way a "locality" is more than a physical "location"). As such, localities may be classified as "industrial", "residential" or "commercial", with differing standards applying to each.[19] There is also recognition of the concept of a "mixed" area – one which is partly, say, residential and partly industrial.[20] Sometimes, descriptions that implicitly group together a number of these land uses are also used, such as "town" or "country".[21]

Third, a locality may apparently be defined by reference to a *particular* use or set of uses of land in the area, where that locality cannot be said to be *characterised* by that use or uses.[22] As Lord Neuberger has explained, the concept of the "character" of the locality may be too "monolithic".[23] For example, under certain circumstances, the established existence and use of a football stadium in an area have been said to be relevant to the question of whether noise from the stadium is a nuisance under the locality principle in that area.[24] This may be so even though we might still describe the area simply as a "residential" area.

[13] See e.g. D. Nolan, "Nuisance" in K. Oliphant (ed.), *Butterworths Common Law Series: The Law of Tort* (London 2015), at [22.42].

[14] See *Lawrence* [2014] UKSC 13, at [59], per Lord Neuberger P.: "any attempt to give general guidance on such issues risks being unhelpful or worse."

[15] The phrase "immediate locality" comes from Lord Westbury's judgment in *St. Helens Smelting Company* (1865) 11 E.R. 1483, 1486.

[16] See *Laws v Florinplace* [1981] 1 All E.R. 659, where two or three streets of houses amounted to a "residential area" in Pimlico.

[17] *Adams v Ursell* [1913] 1 Ch. D. 169.

[18] *Lawrence* [2014] UKSC 13, at [59]–[60].

[19] See Nolan, "Nuisance", at [22.47]: "Usually, the courts applying the locality principle are concerned with the dominant land use: is the area primarily residential, commercial, industrial or agricultural?"

[20] *Murdoch v Glacier Metal Company Ltd.* [1998] Env.L.R. 732, 733.

[21] The courts have also sometimes drawn distinctions within residential areas based upon the "class" of the area.

[22] For criticism of this, see below, at Section IV.A.

[23] *Lawrence* [2014] UKSC 13, at [60]. See also Lord Carnwath in *Lawrence*, at [181]: "the character of any locality may not conform to a single homogeneous identity, but rather may consist of a varied pattern of uses all of which need to coexist in a modern society." See also the more fine-grained description of the area as "light industrial" in *Hirose Electrical UK Ltd. v Peak Ingredients Ltd.* [2011] EWCA Civ 987, at [40].

[24] *Lawrence* [2014] UKSC 13, at [185].

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Fourth, the nature of the locality is not defined simply by reference to the actually existing uses of land in an area.[25] In *Sturges v Bridgman*, Thesiger L.J. explained that

> . . . where a locality is devoted to a particular trade or manufacture carried on by traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong.[26]

The existing uses cannot be taken into account, under the locality principle, then, so far as they constitute a public nuisance.[27] More generally, in applying the principle, the existing uses may be hypothetically removed from the locality to the extent that they are unlawful.[28]

Three further points about the application of the principle are of importance. First, it must presumably be the case that the permissible standard of interference in a locality will not be defined by reference to a set of *unreasonable* uses.[29] Suppose that *C* buys a plot of land in an industrial area, where factories *D* to *G* are in operation. Each factory uses an extremely inefficient waste-disposal procedure, such that the concentration of smell in the locality is very significant, but could cheaply be reduced with a very minor precaution. The locality principle would be impossible to justify if it held that *C* could be required to put up with interferences which are readily avoidable by others in the locality without significantly altering their use of their land. What the locality principle permits, then, is for a variation in permissible levels of interference because of the *inevitable* or *reasonably unavoidable* interferences concomitant with particular (otherwise) lawful uses of land. This necessary limitation on the locality principle is reflected in German law: injunctive relief for an interference is only ruled out there if a substantial interference is both typical to the place *and* cannot be avoided with reasonable cost.[30]

Second, the principle not only permits variance in the *level* of permissible interference, but also the *kind* of permissible interference. Suppose that a person installs a small stable, with horses and pigs, in the back garden of their city town house.[31] Even if the absolute level of these horses and pigs is not above that of crying children or equally nearby busy roads, it

[25] Ibid., at paras. [63]–[65].
[26] *Sturges* (1879) 11 Ch. D. 852, 865.
[27] On the potential worry of circularity here where the unlawfulness in question is alleged to be a private nuisance, see below, Section IV.A.
[28] See further, below, Section IV.A.
[29] Even if these do not amount together to a public nuisance, so as to come within the immediately preceding point. For evidence of a restriction of this kind, see *Lawrence* [2014] UKSC 13, at [76].
[30] §906 II 1 BGB. This is perhaps the meaning of the idea that locality is just one factor in the overall "unreasonableness" question.
[31] See e.g. *Drysdale v Dugas* (1896) 20 S.C.R. 20.

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may be that the neighbours do not have to put up with the stable noise, by virtue of the locality principle.[32] A nuisance may be a pig in the parlour, even if the parlour already has pig-levels of noise.[33] It can be misleading, then, to say, without qualification, that the level which must be tolerated in town is greater than country: country residents may have to put up with noisy farm animals or tractors which city-dwellers do not.

Third, although, for example, residential users of land may have to put up with greater noise interference in industrial areas than in purely residential areas, there are limits to the permissible levels of interference by industrial uses even in industrial areas. If the defendant's activity makes a "substantial addition" to the pre-existing noise affecting the claimant's property, then "it is no answer to say that the neighbourhood is noisy".[34] Suppose that the dominant activities in the area are *extremely* noisy, such that residential use of nearby land would be intolerable. Is the defendant permitted to impose this level of noise, so long as it adds no greater amount? In other words, is there some threshold beyond which the normality of the activity in the locality does not justify the interference? The cases do not establish such a threshold. It seems plausible, however, that one exists. The reason is that extremely high levels of noise amount to an almost total deprivation of the ability to use the property for anything other than a select few purposes. In this way, the interference begins to approximate physical injury, which cannot be legitimated by the locality principle.

It follows, then, that any account of the locality principle will need explain – or explain away – the following propositions:

(1) Permissible interference with the physical land itself does not vary by locality.
(2) Permissible amenity interference can vary in level and kind by locality, but there is likely an upper threshold upon this variability.
(3) Localities are defined by reference to the established pattern of uses in a physical location.
(4) The definition of a locality is partly a normative matter in that certain existing uses will be excluded if they are unlawful for reasons independent of their being a private nuisance, or if they are unreasonable in the sense that they cause interferences which are easily avoidable without altering significantly the interferer's activity.

[32] *Ball v Ray* (1873) 8 Ch. App. 467, 471, per Mellish L.J.: "[if] in a street like Green Street the ground floor of a neighbouring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbour's house, or the noise of a neighbour's children in their nursery, which are noises we must reasonably expect, and must to a considerable extent put up with."

[33] "A nuisance may merely be a right thing in the wrong place, – like a pig in the parlor instead of the barnyard": *Euclid v Ambler Realty Co.*, 272 U.S. 365, 388, per Sutherland J.

[34] *Rushmer v Polsue & Alfieri Ltd.* [1906] Ch. D. 234, 251, per Cozens-Hardy L.J.

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III. Explaining the Principle

This section first sets out a cost-based explanation why locality considerations can be normatively relevant to the issue of unreasonable interference and explains the limited scope of that explanation. It then examines, and largely rejects, a variety of further explanations of the locality principle: individual consent, community consent, social rules and autonomy, efficiency and hypersensitivity.

A. Locality and Costs of Avoidance

Allan Beever has convincingly argued that considerations of locality can be relevant to whether the defendant's interference is unreasonable because different localities impose different costs of avoiding an interference upon defendants.[35] In essence, the argument is that it may be a very minor incursion on the defendant's liberty in a sparsely populated rural area not to cause noise of *X* dB at the point of interference, but a very significant one in a densely populated city area, with considerable background noise already lawfully in existence. For instance, suppose that the level of permissible interference were notionally set at 30 dB at the point of interference in both city areas and sparsely populated rural areas. Given the distance between neighbouring properties, this would allow defendants in rural areas to create enormous amounts of noise on their land, while being potentially very restrictive to city-dwellers. A differential level of permissible interference, by contrast, would reflect the different costs of non-interference for defendants.

Consider cities – in cities, there will be a very large number of acts which, considered individually, do not amount to a private nuisance. The occasional use of a car or walking down a street talking could not normally be considered wrongs. However, when there is a great multitude of such individually lawful acts, there can exist a large amount of lawful background noise. In view of this, it might be reasonable for the defendant to argue that the parties' rights have to be determined against the background lawful noise created by multiple people, such that each person is entitled to slightly greater leeway vis-à-vis the other, so that their liberty to do ordinary valuable activities on their land is not overly curbed. In essence, the defendant's argument is that, given the nature of their surroundings, everyone needs more leeway in order to allow them to do ordinary valuable activities on their land.[36]

[35] Beever, *The Law of Private Nuisance*, pp. 31–33, though he does not put the matter in terms of "costs". My account here simply develops his to explain how the lawful background activities of multiple people might affect the costs for defendants. It is important to note that this argument can be disaggregated from Beever's more controversial general theory of unreasonableness in private nuisance, which centres around the relative "fundamentality" of each party's use of their land.

[36] It might be objected, in relation to the point about background lawful noise, that a number of lawful acts can jointly become unlawful. If so, the defendant cannot reasonably claim to be entitled to take advantage of this unlawful background state of affairs. We know that one person's conduct can become a nuisance as a result of another's independent action, even though each action alone would be insufficient to

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It might be objected that this argument problematically focuses on the defendant's liberty at the expense of the claimant's security: what concern is it of the claimant's that it is more difficult for the defendant to reduce its level of interference in some situations? But the point is rather that, in order to secure the basic goods which property rights serve for *both* claimant and defendant, each needs to be given some elbow room – some degree to which it is permissible to interfere with the other's amenity. Unless each party is given leeway in the level of mutual permissible interference, each will be *much* worse off than if no degree of interference were permitted. In this, reciprocal, way, the cost to the defendant of not being able to do certain things is relevant to the issue of reasonableness in so far as this is objectively, mutually, beneficial to the parties. Moreover, the degree of necessary normative elbow room in the use of one's property will plausibly vary depending upon the physical closeness of adjacent properties and the degree to which they are insulated from each other. If we live 300 yards apart, and I am faced with a recurrent 40 dB of noise from your property, this must be because you are creating an enormous amount of noise. You could hardly claim that the permission to create this level of noise is necessary so that each of us is secured a minimal liberty to use our property.[37] Or suppose *C* and *D* live very close together and have thin joining walls whose soundproofing cannot be improved except at exorbitant cost. Each is exposed to substantial levels of noise by the other's doing everyday, ordinary, tasks, such as washing up or watching TV. *C* and *D* should not be held to be committing a nuisance against each other.[38]

This argument has the following two main virtues as an explanation of the law. First, it can explain why the locality principle does not apply to physical damage to the land cases (or rather, why the considerations behind that principle lead to the conclusion to that physical damage to the land is wrongful independent of locality).[39] This is because it is unlikely to be mutually beneficial for both parties, in terms of the basic goods which their property rights ought to serve, to be permitted to inflict physical injuries of any kind upon each other.[40] Second, on this account, although there

constitute a legal wrong: *Lambton v Mellish* [1894] 3 Ch. 163. This is true, but the argument still holds in so far as each individual contribution to the total state of noise is so minimal as to fall below *de minimis*. In these circumstances, it is unlikely that any individual could be justly held responsible for the total state of affairs, and so the total state of affairs can be considered as lawfully created. It can then legitimately act as a background against which the parties' entitlements should be considered.

[37] This is a version of Baron Bramwell's live-and-let-live argument in *Bamford v Turnley* (1860) 3 B. & S. 62. See also R. Epstein, "Nuisance Law: Corrective Justice and its Utilitarian Constraints" (1979) 8 J. L.S. 49, at 89; E. Mack, "Elbow Room for Rights" in D. Sobel, P. Vallentyne and S. Wall (eds.), *Oxford Studies in Political Philosophy: Volume One* (Oxford 2015).

[38] *Southwark LBC v Tanner* [2001] 1 A.C. 1.

[39] See above, Section II.

[40] Even if we can imagine such cases, the benefits of a clear general rule against infliction of property damage regardless of locality may outweigh the rare injustice this might cause. It may also simply be that being permitted to physically damage another's land is fundamentally at odds with the right to *exclude* which arguably forms the core of any conception of property right.

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is a variance in the level of permissible interference from locality to locality, this is a reflection of the same normative principle being applied to different factual situations – each person is entitled to the same balance of their interest against the defendant's interest, but how this balance is struck *in concreto* varies depending on the factual circumstances; to this extent, the concern of *unequal* rights is assuaged.

The cost explanation is of limited scope, however. It explains why permissible levels of interference with amenity can legitimately vary from sparsely populated areas compared to densely populated (difficult-to-insulate) areas where people live in very close proximity. But this does not explain why the standard varies between two equally densely populated areas, where one is an industrial area, while the other is residential. In short, the relevant costs of avoidance may be the same in two areas, yet, by virtue of their different "characters", landowners receive differential protections in private nuisance. The cost explanation also seems inapt to explain why the fact that the defendant's activity is not *ordinary* in a particular area, even if it creates the same level of noise as other activities in the area, could be impermissible under the locality principle.[41] We must, therefore, turn to consider other possible explanations if the principle is to be justified in its current form.

B. Individual Consent

If *A* buys land next door to *B, C, D, E* and *F*'s factories, it might be said that *A consents* to a greater level of "normal" noise than if *A* had bought land in a quiet rural village. Thus, in assessing whether an interference constitutes a nuisance against *A*, it is assumed that a greater level of noise is non-wrongful than if *A* had bought the land in a village.

This explanation fails. First, it can happen that a locality changes incrementally over time, with the result that an initially rural area becomes industrialised; residential users can then become bound by the new standard, even if there is no specific indication of consent. Second, even if *A* broadcasts her non-consent to the noise produced by the factories, the locality will still be defined to take into account the normal operating noise of the factories. Or, if *A* builds a factory in a rural village, *A*'s activities will be assessed by the standards of a rural village, even if *A* clearly refuses to accept those standards. We could say that *A* will be "taken" to consent in these cases, but fictional consent is hardly an explanation. We then want to know *why* we should "take" *A* to have consented. Third, consent alone is an incomplete explanation: even if *A*'s consent removes *A*'s objection to the enforcement of a local standard, we still need a positive reason for doing so.

We can, however, imagine a world in which individual consent, or something close to individual consent, plays a normative role in justifying the

[41] See above, Section II.

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locality principle. If people had adequate opportunities to avoid becoming bound by local standards, and those local standards were reasonable, then they could not reasonably object to being bound by them, when they move to that area or remain in the area. However, it is not the case that, as a general matter, and particularly in the case of residential uses of land, individuals have reasonably adequate opportunities to locate in particular areas, or that their moving away would be not be very costly.

C. Community Consent

Individual consent will not do as, quite simply, an individual can be held to the locality's standards even without their actual consent. But perhaps the locality principle can be justified by reference to the consent of the community as a whole.[42]

Suppose we understand community consent in broadly majoritarian terms as "general acceptance" within a locale, expressed implicitly through actual uses. Ultimately, this view is subject to the same problem as the individual consent explanation. The problem is that *anyone's* (be it one individual's, or a majority of individuals') actual consent seems superfluous to the justification of the principle, since even express communication of the lack of consent by the majority will not prevent their being held to the principle. Imagine that every property owner in central London sent emails to each other explaining that they no longer consent to the general level of background noise in the city. Intuitively, it is difficult to believe that this should have any effect on the permissible levels of noise interference with land use in the city. If people are bound even where no one consents, then consent cannot be the full explanation of the principle. Compare one's reaction to a situation where everyone who used motorways said they no longer consent to the background risk of injury due to a faultless malfunction of another's car. Each such person must be *taken* to have consented to this risk, regardless of his or her actual consent; we then just postpone the question of why that is the case.

More generally, the idea of consent is a mismatch with the idea of an established pattern of use. The mere fact that most people *agree* on the appropriateness of some use of land does not itself make it an *established* pattern of *use*. If the locality principle were just about *consent*, why would it matter whether this consent were manifested in a *practice*?

It could be objected that this matters because *tacit* consent is only manifested by people's conduct. This would imply, however, that express manifestation of consent should suffice to alter the character of the locality. We would then expect that an inquiry into the character of the locality would

[42] A version of this explanation seems to be endorsed by Lord Carnwath in *Lawrence* [2014] UKSC 13, at [183].

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take into account the proceedings of residents' committees or the discussions in local council meetings concerning land developments in the area, but this does not appear to be the case. It would also suggest that, in so far as local planning authorities act as elected representatives of local communities, planning permissions would have a significant effect on the character of the locality. But this has been rejected.[43]

D. Social Rules and Autonomy

Nicholas McBride and Roderick Bagshaw suggest that "the reason the courts attempt to characterise different localities is because different social rules of 'give and take' . . . are likely to have evolved in different places".[44] This view has at least two virtues. First, it explains why the courts focus upon the actual practices (rather than, say, the future use of the area as stated in a planning permission) in a particular location in applying the locality principle. This is because social rules exist only to the extent that they are *practised*. It thus avoids the objection made in relation to community consent theory that it focuses on what people have agreed, rather than what they are doing. Second, it seems more equipped to explain the idea that it counts against an activity that it is *not the done thing around here* – that is, that the activity is excluded by kind, rather than by its level of interference; this simply depends upon the content of the social rule at issue.

There are, however, significant problems with this account. First, not all social rules of give and take will be enforced by the courts: if the industrial users of a certain vicinity have developed wholly unreasonable practices of needlessly causing large levels of noise, this rule will not be enforced.[45] Second, even if the account could insist that its concern is only with "reasonable" social rules, there still remains the question of why the courts should give effect to social rules at all in private nuisance. Sometimes, of course, the courts do rely upon external (sometimes, customary) standards in determining the contours of reasonableness in other torts, such as the tort of negligence.[46] But the main justification for deferring to customary (or other) professional standards seems to be epistemic: the courts are rightly sceptical of their competence in formulating or assessing rules of conduct in domains requiring specialist knowledge. This type of justification does not apply here. Third, it is not clear why one would attribute normative significance to local standards of give and take as they exist in social

[43] *Lawrence* [2014] UKSC 13 [77]–[99]. See also J.E. Penner, "Nuisance and the Character of the Neighbourhood" (1993) 5 Journal of Environmental Law 1, at 24, on why the fact that an activity has statutory authority should not itself support the conclusion that the activity has altered the character of the neighbourhood. See more generally on the locality principle and planning permission M. Lee, "Tort Law and Regulation: Planning and Nuisance" (2011) 8 Journal of Planning and Environmental Law 986.

[44] N.J. McBride and R. Bagshaw, *Tort Law*, 5th edn (London, 2015), 442.

[45] See above, Section II.

[46] E.g. *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 572, limited by *Bolitho v City and Hackney Health Authority* [1998] A.C. 232.

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rules and yet attribute so little significance to planning decisions, at least where local land owners have had a reasonable opportunity to participate in the planning process.

At best, then, the social rules account, as formulated, is incomplete: it awaits a justification of *why* the courts should defer (to some extent) to local standards in determining what is a reasonable interference. In the next section, I consider whether an efficiency-based explanation could play this role. Here, I will raise another possibility. It seems to be a desirable feature of a system of property rules that it allows, within the boundaries of reasonableness, for the formation of different kinds of community. It is good to be able to choose to locate to different kinds of areas; it enhances one's autonomy to have different forms of social life available to one. It might be that different rules of give and take are necessary in order to preserve and support different kinds of (valuable) community. If it is true that it is good to have different kinds of social existence available to one, and that different rules of give and take in land use are necessary to secure these different kinds of social existence, then there is an autonomy-based case for the locality principle.[47]

There is a further connection between the locality principle and autonomy interests. By creating the locality principle, the law allows those living in areas where a particular use predominates the possibility of planning around the fact that one person is (normally) not going to be able to disrupt the predominant land uses in the locality. In this way, they are afforded a degree of stability that would not be accorded to them if the character of *each* person's use individually determined the appropriate standard of interference. This benefits both residential localities and industrial localities: the former can rely to some extent on the incentives provided by the locality principle for industries not to move to their area; the latter are not held ransom to an individual who changes their use in a departure from the nature of the locality.[48]

These autonomy-based arguments may help to justify the locality principle, but their role seems limited. First, even if there is an autonomy-based value in being able to choose between different kinds of locality, this needs to be weighed against the autonomy-diminishing effect the locality principle can have on individual uses of land. If your home is afflicted with substantial levels of noise from nearby industrial works, it is small comfort that, at a global level, the property system serves your autonomy interest. Further, it seems to me that, given the costs of relocation, and the relative permanence of several forms of land use, one generally has greater reason to value autonomy protection in relation to one's enjoyment of acquired land than to value having different localities wherein to locate. Moreover,

[47] This autonomy-based rationale could be decoupled from the social rules account.
[48] See further on the role of private nuisance in this regard, below, Section III.E.

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for many people, the existence of several different kinds of locality has no practical value, because they do not have the resources to relocate. Second, it seems somewhat doubtful whether some applications of the locality principle really concern valuable forms of social existence. This somewhat romanticises the value of having industrial areas.

E. Cost Minimisation

Some activities cause more harm in some locations than in others. An industrial plant may cause more harm in a residential area than in an industrial area. In the interests of minimising harm, therefore, it may be desirable that some activities be located in particular areas.[49] It can be argued that the locality principle, by making liability partly contingent on the nature of the area, provides some incentive for people to locate their activities in suitable locations.[50]

There is a question about whether harm minimisation is a desirable goal, and then a question about the role of private nuisance in achieving it. As to the former, an obvious concern is that a harm-minimising distribution of land uses could be an unfair one. For instance, suppose that *A* occupies property on a small island devoted to residential uses. Unforeseeably, *A*'s property breaks away from the island and accretes to another island, devoted to very noisy industrial activities.[51] It may be that locating all such uses on this island minimises harm, but unfair that *A* bear such a substantial cost without compensation.

This objection seems particularly apt in light of the majority's reasoning in *Lawrence v Fen Tigers*. According to Lord Mance, "The general public interest may have led to a particular private interest being overlooked or overridden. If it is to be acceptable to permit this, then it should at least be permitted on a basis that affords compensation".[52] If the locality principle is based upon the public interest consideration of harm minimisation, is it not a logical consequence of this reasoning that it should be banished

[49] Similarly, locating extra-sensitive activities together may minimise the overall constraints such activities impose upon others' freedom while providing essential goods to certain individuals. If 10,000 people who suffer from extreme sensitivity to car-exhaust fumes, prolonged exposure to which causes them paralysis, buy a small deserted island on which to live, it does not seem unreasonable that the law might give them extra-protection from car fumes on their island, so that they can avoid these extreme harms. So far as I am aware, the locality principle has never been invoked to justify protection of extra-sensitive individuals.

[50] The idea that the tort of private nuisance can function as a means of locating certain uses to particular areas – a "zoning", or more generally, a planning function – is not new. See e.g. J.H. Beuscher and J.W. Morrison, "Judicial Zoning through Recent Nuisance Cases" (1955) Wisconsin Law Review 440, at 442; "Comment – Zoning and the Law of Nuisance" (1961) 29 Fordham Law Review 749, at 750: "The basic philosophy behind both nuisance and zoning is the same." For a different cost-minimisation view, which focuses more on minimisation of information costs in determining efficient standards of neighbourly conduct, see R.C. Ellickson, "Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls" (1973) 40 U.Chi.L.Rev. 681, at 728–33. His proposal is effectively criticised in Penner, "Nuisance and the Character of the Neighbourhood", pp. 14–18.

[51] The example is designed to rule out the normative force (if any) of *A*'s coming to the nuisance.

[52] *Lawrence* [2014] UKSC 13, at [165].

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from the issue of whether the defendant has legally wronged the claimant?[53] If the locality principle is based upon the public interest concern of cost minimisation, it should perhaps, therefore, be removed from the realm of liability to being at most a relevant consideration in relation to remedies.

Then there is the question of the tort's role in achieving efficient location of uses. Private nuisance is inept as a general tool for this purpose. One major reason for this is that the tort is only concerned with one type of harm – namely interference with the use and enjoyment of private land. Therefore, even if efficient location of uses were a desirable goal, private nuisance alone would not be an apt means of achieving it.[54] This leaves open whether the tort has a subsidiary role to play or at least whether it should be designed in such a way as not to undermine the operation of the planning system. Whatever the merits of this position, the majority of the Supreme Court in *Lawrence* seems to endorse the view that private nuisance and planning law are, so far as the issue of whether a right is infringed, two separate domains, answering different questions.[55] It may, finally, be noted in this connection that, if the locality principle were in the service of cost minimisation, it is odd that the Supreme Court in *Lawrence* would seek to downplay so greatly the role of planning permission in constructing the character of the locality, when this might be the best available evidence of the efficiency of a use.[56]

F. Equal Right

Gregory Keating offers an interesting argument for the locality principle:

> . . . [the] argument asserts: (1) that the only justifiable right to reasonable use is an equal right to reasonable use; and (2) that normal use is a natural focal point for a regime of equal right. Because similar uses tend to be compatible, the obvious way to make rights of use equal is to make them rights to engage in similar activities. When equal right is connected to normal use in this way, the plaintiff whose use of her property is harmed because her use is incompatible with the character of her locality has not had her right violated. She does not have a right to use her property in a way which exposes it to harm from everyone else's use of their property. The right which she

[53] I assume that harm minimisation comes within Lord Mance's concept of the "general public interest". It is a general "public" interest in that no one individual has an entitlement against another to overall harm being minimised.

[54] See also *Lawrence* [2014] UKSC 13, at [95], per Lord Neuberger and, more generally, P. Bishop and V. Jenkins, "Planning and Nuisance: Revisiting the Balance of Public and Private Interests in Land-Use Development" (2011) 23 Journal of Environmental Law 285, at 298ff.

[55] *Lawrence* [2014] UKSC 13, e.g. at [156], per Lord Sumption: ". . . the question whether a neighbouring landowner has a right of action in nuisance in respect of some use of land has to be decided by the courts regardless of any public interest engaged."

[56] See below, Section IV.B.

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> would have to have in order for her claim to prevail is a right which could not be generalized into a regime of equal right.[57]

The argument for the idea that "normal use is a natural focal point for a regime of equal right" is problematic. It is not clear why, in order for our rights to be equal, they must be rights to engage in similar activities to those immediately around us. We could conceivably each have a right not to suffer a uniform level of interference in relation to certain specified valuable activities on land, whatever our location. Keating may reply that such rights would not be "compatible" with each other. It may be that such a system would lead to more instances of rights violations, but that is not, without more, an argument against it.

G. Hypersensitive Claimants

Keating also points to a connection between the rules on hypersensitive claimants and the locality principle. A hypersensitive claimant cannot generally recover because whether an interference is substantial is normally judged from the perspective of an *ordinary*, reasonable, person.[58] The fact that one person finds the smell of roses in others' gardens physically sickening, with the result that they cannot use their own garden, does not mean, at least within the bounds of malice, that the others' uses of their property are wrongful. As Keating observes, under both principles, there is a normative privileging of what is normal.[59]

The relationship between the two principles is not entirely clear. It might be argued that the objective test of substantial interference is locality-independent: it asks whether an ordinary, reasonable person would find the interference substantial, *regardless of their locality.* On this view, the hypersensitivity rule asks whether the claimant is particularly sensitive to interferences that are typical *in any locality*. If that is true, it might be thought that the justification of the principle does not apply to uses which are sensitive to the particular locality, rather than "universally" sensitive. But this seems to me more a difference of degree than kind. The fact that a person is sensitive to ordinary uses in any locality means that, if interfering with that person were wrongful, *everyone's* ordinary use of their property is potentially wrongful. By contrast, if interference with a *locally* sensitive use were wrongful, then only *local* uses would potentially become wrongful. But the difference is just one of numbers of people affected. Presumably, a person who finds the smell of roses physically sickening would still be counted as abnormally sensitive in England, even if it turned out that the 100,000-strong population of a small Pacific island were

[57] G. Keating, "Nuisance as a Strict Liability Wrong" (2012) 4 Journal of Tort Law 2, at 26.
[58] The classic authority is *Robinson v Kilvert* (1889) 41 Ch. D. 88.
[59] Keating, "Nuisance as a Strict Liability Wrong", p. 26.

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similarly disposed. If the numbers increase, then the position could change. This shows that the difference is one of degree.

H. Conclusion to Section III

This part has argued that the locality principle can partly be explained by considerations of the costs, for defendants, of avoiding an interference. It has entirely rejected individual consent and community consent as explanations, largely on the basis of lack of descriptive fit with the law. It also rejected Keating's claim that the locality principle is a requirement of system of equal right.

A tentative scepticism was expressed in relation to the cost minimisation and autonomy arguments. These arguments, and possibly also the hypersensitive claimant argument, are in one important respect similar. They suggest that the justification of the content of the primary right in private nuisance depends upon social goods, and not merely the interests of the claimant and defendant. Although this is probably not in itself problematic,[60] the concern remains, on the one hand, that, under the locality principle, the collective interest impinges too greatly upon what an individual's interest alone would entitle them to in relation to others, without compensation, and, on the other, that the burdens of securing collective goods are borne unequally. These problems would be less pressing if we could be confident that private nuisance secures to everyone the basic minimum of protection which their *individual* interest justifies, but allowed for that level of protection to be intensified by locality principle; so long as everyone's basic individual interests are equally protected, there is less of a concern about inequality beyond that level of protection. Insisting that the locality principle does not concern purely conventional standards, but requires some limits on the level of permissible interference, regardless of local practices, would assist here.

So long as property owners' security interests receive this basic protection, there may be room to ask some to bear very small burdens for collective gains.[61] Just as some have to put up with their neighbours' crying children, some have to put with a slightly greater degree of noise than others, depending on the locality.[62] But to the extent that the locality principle requires some individuals to bear very substantial interferences, which they would not be required to bear were their individual interest considered

[60] For a (persuasive) argument that most property rights are justified, if at all, by collective interests, see R. Cruft, "Against Individualist Justifications of Property Rights" (2006) 18 Utilitas 154.

[61] Compare Lord Westbury's assertion that the principle could entail that a person would have to tolerate "much discomfort": *St. Helens Smelting Company* (1865) 11 E.R. 1483, 1486.

[62] For a view of the locality principle that emphasises the contribution of collective considerations to its justification, see M. Lee, "Private Nuisance in the Supreme Court: Coventry v Lawrence" (2014) 7 Journal of Planning and Environmental Law 705, at 711–12.

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alone in determining the duties owed to them, the principle cannot be justified.

IV. Doctrinal Questions

In this part, I consider two important doctrinal questions surrounding the locality principle. The first concerns the role of the parties' own activities in constructing the character of the locality. A party may seek to include or exclude another's activity because this will make a constitutive difference to the nature of the locality. The second concerns the role of planning permission.

A. What Role May the Parties' Activities Play in Constructing the Locality?[63]

In many cases, the claimant and defendant's own conduct will make no difference to the character of the locality: the locality will still be of the same kind, regardless of their uses. One person's activities do not normally define a locality.[64] This is the reason having a bigger pig farm than you did before does not alter the character of the locality.[65] As Lord Mance stated in *Lawrence*: "... the character of an area may be susceptible over time to gradual change and development. *Each step in the process may be said by itself to fit with the existing character and be largely imperceptible*, though, ultimately, the difference resulting from the totality of all the steps may be considerable."[66]

In many cases, then, it will make no difference to set aside the *individual* uses of the two parties before the court.

However, this is not universally so. We ought to distinguish between two types of case:

(a) Where the party or parties' conduct is so significant in its alteration of the vicinity that it may plausibly have changed the locality, with the result that pre-existing uses would, if unreasonable interference were determined by reference to the altered character of the locality, be classified as nuisances by reference to the new locality, but would not have been such by reference to the prior locality standard.
(b) Where the party or parties' conduct is so significant in its alteration of the vicinity it may plausibly have changed the locality, with the result that pre-existing uses would, if unreasonable interference were determined by reference to the altered character of the locality, have to

[63] Ibid., at p. 712.
[64] Ibid., at p. 712.
[65] *Wheeler v JJ Saunders Ltd.* [1995] 2 All E.R. 697.
[66] *Lawrence* [2014] UKSC 13, at [164] (emphasis added).

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tolerate interferences that they would not have had to tolerate under the prior locality standard.

Consider type (a) ('claimant-change' cases). The facts of the Arizona case *Spur v Del Webb Industries* are illustrative.[67] The defendant operated a cattle feedlot on and around property that had been used for farming since around 1911. The claimant developer, in the 1950s, bought 20,000 acres of farmland to develop into residential plots. The claimant alleged that the defendant's activities amounted to a public nuisance because of the odour and flies that drifted towards the southern part of the land, making that part unsuitable for residential occupation.[68] The Arizona Supreme Court upheld the injunction, shutting down the feedlot, but ordered the claimant to pay the defendant's relocation costs because it had come to, or brought people to, the nuisance. A presupposition of the Court's reasoning is that the locality by reference to which one assesses the interference is a predominantly residential one: only if the locality had changed would the interference count as a nuisance in respect of which an injunction could be upheld.

Consider now type (b) ('defendant-change' cases). Suppose that a very large shopping development is built and operated by *D* on the edges of a rural village. Suppose that, by reference to a "rural village" standard, the noise from lorries delivering goods to units in the shopping centre at 5 a.m. would amount to a private nuisance. Finally, suppose that *D* argues that the interference should not be judged by reference to a purely rural village standard, but by something closer to a "small town" standard.

How should English law's locality principle apply in these situations? A first point is that it seems difficult to justify treating these situations differently. That is, if claimant changes (do not) alter the permissible standard in the locality, then defendant changes should also (not) alter the permissible standard. Beyond this, a number of solutions can be envisaged:

(1) no immediate change to the locality, but change after a period;
(2) immediate change to the locality;
(3) no change to the locality;
(4) the party's use is relevant to the determination of the locality except to the extent that it is a private nuisance.

Lord Neuberger proposed (4) in the context of type (b) situations in *Lawrence*.[69] The difficulty with this formulation is that, in order to know whether the defendant's activity can be taken into account in defining the character of the locality, we already need to know whether the defendant's

[67] *Spur v Del Webb Industries* (1972) 108 Ariz. 178.
[68] The interference would also have been a private nuisance vis-à-vis each resident, though an injunction may not have been granted: see ibid.
[69] *Lawrence* [2014] UKSC 13, at [65].

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activity forms part of the character of the locality, since the defendant's interference is only a nuisance by reference to a specified locality. With respect, this logical problem is the death knell for this analysis.[70] It is intolerable on rule-of-law grounds for the test of whether an element of a cause of action is satisfied to require us already to know whether the cause of action is satisfied by reference to unarticulated criteria.

In relation to one kind of type (a) situation, where the claimant alters the use of their land in such a way as to render the defendant's pre-existing use a private nuisance (to the amenity of the claimant's land), Lord Neuberger stated, obiter, that this could sometimes be a "defence".[71] Further, the preclusion of the claim in this circumstance "could and should normally be resolved by treating any pre-existing activity on the defendant's land … as part of the character of the neighbourhood".[72] Lord Neuberger is here addressing the question of how the permissibility of *one* pre-existing use should be affected by the arrival of *one* novel use. It is not clear that his remarks touch upon the *Spur* situation where the novel use(s) can plausibly be said to be so significant in character that it has altered the nature of the locality. Regardless of this, as a matter of consistency, it is not clear why this type of situation should be treated differently to the type (b) situation, such that the claimant's activity has a *partial* relevance to the character of the locality. Lord Neuberger seems to adopt option (3) for type (a) situations, but option (4) for type (b) situations.

A new start is needed. First, consider situations where only the claimant and defendant's use exist in the area. Suppose that *D* runs a garage in a relatively isolated area. *C* then later builds a residential use nearby. There are no other properties in the vicinity. It is not clear that the locality principle should have much, if any, application in these situations. Neither party can claim to be more in conformity to the predominant land use in the area. Although connected, the essence of *D*'s argument is more "I was here first" than "this is the way most people use their land in this area". In this type of case, the courts ought directly to consider whether *D*'s interference is unreasonable by reference to the relative weighting to be given to *C* and *D*'s uses. There might be a case for giving *D*'s interests an extra weight given the temporal priority of *D*'s use, but this does not seem best expressed through the locality principle.

It might be objected that the locality principle is itself justified by the absence of a general defence of coming to the nuisance. On this view, the principle is a way of providing some protection to existing uses from

[70] Lord Neuberger does recognise the problem (at [71]), but considers that it can be avoided by taking an "iterative" approach, without explaining this in detail (see *Lawrence* [2014] UKSC 13, at [72]). Such an approach will have to determine the locality for the first "iteration", however. If so, it seems to be subject to the same logical problem. See also Lee, "Private Nuisance", p. 712, describing this part of Lord Neuberger's judgment as the "most difficult to explain to students, and to apply".

[71] *Lawrence* [2014] UKSC 13, at [55].

[72] Ibid., at para. [55].

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novel uses. If so, then Lord Neuberger's proposal to treat a defendant's pre-existing use as "part of the character of the neighbourhood" is a logical development of the principle. This objection succeeds if the normative point of the locality principle is simply to protect pre-existing uses. But this is difficult to reconcile with the focus of the principle on a *pattern* of *uses*, and with the traditional focus on the "character" of the locality, which also suggests a concern with a multiplicity of uses. It is true, however, that the bald statement that the tort of private nuisance recognises no defence of coming to the nuisance needed qualification even prior to *Lawrence*: the locality principle has the consequence that novel uses are to some extent bound by pre-existing standards.

Second, consider now type (b) situations where there are a number of pre-existing land uses of a certain kind, but either a large-scale novel use (e.g. a football stadium) or a number of novel uses (e.g. a new set of shopping units) might be considered to have altered the locality. If the first, cost of avoidance, rationale were considered the sole normative justification for the locality principle, the correct approach would simply be to treat type (b) situations in the same way as situations in which only two persons inhabited the locality, by directly balancing the claimant's use against the defendant's use, bearing in mind the difficulty of avoiding the interference depends on the proximity (etc.) of the properties, without concern for how other people are using their land in the area. This is not best described as any of options (1)–(4), but would rather amount to a significant departure from the existing locality principle.

The justifications for the principle that focus more upon collective interests tend to support option (1) or (2). For instance, if the locality principle is connected to the idea behind the hypersensitivity rule – roughly the idea that the claimant's idiosyncratic use should not dictate the use to which most people put their property – then one would expect that the fact that the predominant land use in an area has changed should alter the entitlements of persons in that area. To the extent that the law remains committed to a version of the locality principle that is based on such considerations, this may be the most consistent approach. On this approach, then, the law will generally follow the changed factual circumstances in the area and departures from "the presumption of reality"[73] will be limited.[74] If this approach is applied to type (a) situations, the result may be that uses like the defendant's in *Spur* will become private nuisances and, subject to the possibility of damages being awarded in lieu of injunction, may be required to cease.

[73] Ibid., at para. [63].

[74] If the change of locality has been procured through conduct that is unlawful (for a reason other than that it constitutes a private nuisance) and seriously culpable, there may be a case for preventing the defendant from relying upon it.

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It might be objected that this is overly favourable to persons whose conduct changes the nature of the locality. If the defendant's own activity is always taken into account in full, then claimants will never succeed. The force of this objection can be blunted in three ways. First, it will most often be the case that one individual's conduct does not alter the nature of the locality, so the defendant's conduct can be effectively ignored. Second, even if the defendant's own activity is taken into account in full, it does not follow that the claimant must fail. Suppose that the defendant erects a football stadium near a residential area and that the football stadium is taken into account in constructing the locality.[75] It may still be that the activities amount to a nuisance. Even if the football stadium is permitted to create more noise than an ordinary residential user of land, it may not be permitted to create as much noise as a football stadium in an industrial area. Moreover, as suggested earlier, there ought to be limits on permissible interference even in amenity cases. Finally, it may be that a distinct principle should be recognised in private nuisance to the effect that an individual's reasonable pre-existing use should have greater weight (than it would if it were a novel use) in the unreasonable interference inquiry.[76]

B. The Relevance of Planning Permission

In *Gillingham Borough Council v Medway Dock Co. Ltd.*, Buckley J. held that, where planning permission had been lawfully obtained for a development of land, the character of the surrounding area had to be determined by taking into account the permitted development.[77] His reasoning rested upon an analogy with the defence of statutory authority. That defence, in his view, rested (at least in part) on the basis that Parliament had ranked the public interest in a particular development of land as outweighing the private interest(s). The statutory scheme for the conferral of planning permission similarly, in his view, rested upon Parliament's delegating power authoritatively to weigh the public interest against the private for particular developments. In short, planning permission provides authoritative evidence of where the public interest lies.

The majority of the Supreme Court in *Lawrence* has firmly rejected this reasoning and with it the idea that planning permission can play this sort of role in determining the character of the locality.[78] Planning permission can only function as *evidence* of the character of the locality, but it is not

[75] In such cases, the area may still be appropriately described as predominantly residential, so the introduction of the defendant's use may not make of a difference here.

[76] This could be done through the locality principle, but it is better achieved by a distinct principle for the reason given above, see earlier in Section IV.A.

[77] *Gillingham Borough Council v Medway Dock Co. Ltd.* [1993] Q.B. 343, 361.

[78] For a powerful critique of the *Gillingham* principle that reinforces the criticisms made by the majority in *Lawrence* itself, see D. Nolan, "Nuisance, Planning and Regulation: The Limits of Statutory Authority" in A. Dyson, J. Goudkamp and F. Wilmot-Smith (eds.), *Defences in Tort* (Oxford 2015).

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constitutive thereof.[79] The central strands of their reasoning were as follows. First, the *Gillingham* decision essentially created a public interest defence to private nuisance by the back door. This was inconsistent with the general role of the public interest in private nuisance. The effect was injustice: private rights were taken away or substantially weakened without compensation.[80] Second, the planning legislation authorising the conferral of planning permissions does not itself confer the power on planning authorities to authorise what would otherwise be a nuisance.[81] The analogy with statutory authority therefore fails. The second argument is correct, but the logic of the locality principle, if the argument of Section IV is correct, is that individual interests can receive significantly less protection by virtue of a substantial change in the nature of the locality in order to serve a collective interest. The logic of the majority's position is that the locality principle itself is problematic.

A remaining question is whether the *absence* of planning permission should affect the issue of whether the interference is unreasonable. Lord Neuberger suggests that the absence of permission (or the absence of the likelihood of such permission) should exclude the defendant's conduct from the characterisation of the locality.[82] This makes some sense in so far as the locality principle is based on the cost-minimisation idea that the defendant's activity is in a suitably placed area: without planning permission, there may not be much evidence of this. But there is a tension here. The main logic of the majority's reasoning implies that planning permission should be entirely irrelevant. If the reason why planning permission cannot authorise a nuisance is that the claimant's rights should not be cut back without compensation unless there is statutory authority, surely the defendant's private law rights should not be cut back without compensation either.

V. CONCLUSION

This article has primarily been concerned with the justificatory basis of the locality principle. It is possible to justify a narrow version of that principle by reference to the argument that the costs of avoiding an interference for a defendant vary depending on the nature of the locality. It has been shown that the current law recognises a broader version of the locality principle. It seems that the only plausible justification of this broader principle rests upon considerations that go beyond the interests of the individual parties. If this is correct, then it follows that, even

[79] *Lawrence* [2014] UKSC 13, at [96]. Except to the extent that planning law controls what uses enter the vicinity law and these actual uses then together constitute the locality.
[80] *Lawrence* [2014] UKSC 13, at [90].
[81] Ibid., at para. [90].
[82] Ibid., at para. [67].

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after *Lawrence v Fen Tigers*, at least one element of the unreasonable interference inquiry in private nuisance has its justificatory basis in considerations of the collective interest. It has been suggested that those considerations could only justify individuals bearing very minor burdens, without compensation, beyond those that they would have to bear were collective interests set aside.

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