contraceptive to avoid sexually transmitted disease, but also to avoid pregnancy: the latter being the reason for V's pre-condition in *Lawrance*.

This frankly shocking outcome resulted from the court not treating the issue simply as one of fact, as the 2003 Act provides and as was accepted in *Assange* and in *R(F)*; but seeking to control the jury's assessment of whether the victim had indeed consented by imposing rules of *law* limiting the types of deception that could be taken into account by the jury when considering that question. And unfortunately the only rules of law that came to hand were the rules adopted in *Clarence*. The Court of Appeal sought to support its position by expressing concern, at [34], echoing Wills J. in *Clarence*, at the potentially broad reach of a law based fully on consent in cases where for instance the man lies about his political opinions or his wealth, or is the non-paying client of a sex-worker, or an undisclosed bigamist. As already noted in relation to the facts in *Monica*, in such a case, where the importance that the woman attaches to various matters at the time of intercourse may have to be a matter of inference or assumption, it may be difficult simply as a matter of evidence to bring the case within the 2003 Act. And there may be cases where that condition appears to the outside observer to be trivial, so that there is reluctance to find that it was in seriously meant. That may have been in the mind of Sir Brian Leveson P. when he said in *McNally* [2013] EWCA Crim 1051, [2014] Q.B. 593, at [25]: "*In reality,* some deceptions (such as, for example, in relation to wealth) will obviously not be sufficient to vitiate consent" (emphasis supplied). But if a woman's pre-conditions to intercourse are clear, as they were in *Assange*, *R(F)* and *Lawrance*, the man disregards those conditions at his peril. Any condition whatsoever, if found to have been seriously intended as a precondition to intercourse, should vitiate consent if deception is practised by the defendant to create the false impression that the precondition is fulfilled. And that is as it should be.

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NUISANCE, PLANNING AND HUMAN RIGHTS: THROWING AWAY THE EMERGENCY PARACHUTE

THE idea that forms of legal control should not overlap has a considerable history. In the tort of negligence, for example, judges have long been fond of saying that the duty of care should not extend to situations covered by, for example, contract law, procedural law, financial regulation and human rights. Similar issues arise in the tort of nuisance, particularly potential overlaps with environmental regulation, especially planning controls.

The problem the idea raises is a difficult one: overlapping liability adds to the complexity of the law and risks public and professional incomprehension; but it can also help to prevent deserving cases slipping through the net by adding an element of what engineers call "redundancy".

The issue of whether to allow overlap in relation to the tort of nuisance came again to the Court of Appeal in *Fearn v Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104. Two tall buildings were erected next to one another at around the same time on the south bank of the Thames in central London. One was a tall glass and steel block of flats, part of a set of four, the other a 10-level extension to the Tate Modern. The trouble was that the Tate Modern extension included an open 360° viewing gallery on its top floor, giving spectacular views of London but also views straight into several of the flats, via their glazed-in balconies or "winter gardens". For reasons that are not entirely clear, this conflict, what planners call "overlooking", was not picked up in the planning process and so the routine solution of dealing with it by requiring a re-design (developers are often compelled to install fixed frosted windows, for example) never happened. The gallery became very popular, attracting 500,000 visitors a year, a surprising proportion of whom took a great interest in the flats, frequently photographing and videoing them, much to the annoyance and distress of the occupants. Four leaseholders of the most affected flats sought an injunction against the Tate, alleging nuisance (together with a direct claim under the Human Rights Act 1998, which failed because the Tate is not a public authority for the purposes of the Act).

At first instance ([2019] EWHC 246 (Ch)), Mann J. found for the defendants. He reasoned that, in light of Article 8 of the ECHR, and despite much apparent authority, nuisance does protect against overlooking, as a form of intrusion on privacy. But he also found, on the basis of a rule of give and take, that the intrusion was reasonable because of the urban nature of the locality, the defendants' attempts to mitigate the intrusion by reducing the gallery's opening hours, the additional sensitivity of the claimants resulting from the glass-intensive design of their flats and the possibility that the claimants could take countermeasures, for example using blinds or growing plants.

On appeal, the Court of Appeal (Sir Terence Etherton M.R., Lewison L. J. and Rose L.J.) affirmed, but on very different grounds. The Court of Appeal decided that, as the prior case law suggested (*Chandler v Thompson* (1811) 170 E.R. 1312; *Turner v Spooner* (1861) 30 L.J. Ch. 80), overlooking was not actionable in nuisance at all. Human rights law could not justify distorting nuisance, which is a tort that protects property rights, not privacy interests. The tort of misuse of private information, which arose from a desire to protect Article 8 rights, did not apply either, since nothing in the decisions of the European Court of Human Rights requires UK courts to find that overlooking was actionable.

The Court of Appeal also disapproved of Mann J.'s method of assessing whether the defendant's use was reasonable, commenting that "private nuisance does not turn on some overriding and free-ranging assessment by the court of the respective reasonableness of each party in the light of all the facts and circumstances" (at [38]). The rule of give and take was a specific exercise that only applied where the form of interference was actionable in principle and the degree of interference was material. The exercise involves asking, after Bramwell B. in *Bamford v Turnley* (1862) 122 E.R. 27, whether the interference was both "necessary for the common and ordinary use and occupation of land and houses" and done "conveniently", subsequently interpreted to mean "in a way that is reasonable, having regard to the neighbour's interests" (at [40]). In this case, even if overlooking were actionable in nuisance, the gallery would have fallen at *Bamford*'s first hurdle, because it was not "necessary".

The court's reasons for holding that overlooking is not actionable in nuisance are worth looking at in more detail. In terms of authority, the court was not bound by *Chandler* or *Turner*, and it conceded that remarks along similar lines in the House of Lords in *Tapling v Jones* (1865) 11 E. R. 1344 were obiter dicta. Similarly, it was not bound by cases from other jurisdictions, such as the celebrated Australian case *Victoria Park Racing and Recreation Grounds Co. Ltd. v Taylor* (1937) 58 C.L.R. 479. Respect for the settled expectations of the legal profession is a proper ground for not departing from a line of cases themselves not binding on the court, but if the Court of Appeal had wanted to depart from them, it was at liberty to do so. The Court of Appeal gave several reasons for its refusal to go down that path, but they boil down to two points.

The first point is that the law has long recognised that no one has a property interest in a view or prospect, because, in the words of Lord Hardwicke L.C. in *Attorney-General v Doughty* (1752) 28 E.R. 290: "Was that the case, there could be no great towns; and I must grant injunctions to all the new buildings in this town." But, with respect, that reason does not reach overlooking. It is perfectly possible to build in a way that inevitably blocks someone else's pleasant view without allowing an unreasonable degree of intrusion. That is what planning conditions about design and glazing are intended to achieve.

The second point is therefore the important one. Preventing overlooking, the court said, was a matter for planning law. The fact that planning law regulates overlooking (and, one might add, distinguishes between, on the one hand, overlooking and visual amenity, which are both "material considerations" for the purposes of the Town and Country Planning Act 1990, s. 70(2)(c), and, on the other, private views and prospects which are not) is a reason for the courts to refuse to attempt the same thing. The court gives two explanations. First, planning law might determine that the overlooking concerned was acceptable and so a rule recognising overlooking as

a form of nuisance might result in a conflict between the common law and the planning system. This is not, however, particularly convincing. It ignores the general rule that planning permission is normally irrelevant in nuisance (*Coventry v Lawrence* [2014] UKSC 13, [2014] A.C. 822, at [89]–[90], [155]–[156], [165]–[166], [169]), a rule that envisages situations in which a defendant holding planning permission is nevertheless found liable in nuisance. The second explanation is more significant: "whether, as a matter of policy, planning laws and regulations would be a better medium for controlling inappropriate overlooking than the uncertainty and lack of sophistication of an extension of the common law cause of action for nuisance" (at [89]). The issue is one of institutional competence and experience. The court draws a distinction between nuisances such as "noise, dirt, fumes, noxious smells and vibrations" in which the court can apply "objective" criteria and the issue of overlooking in which it is "difficult to envisage any clear legal guidance as to where the line would be drawn" (at [81]). It would be better, where there are "complex issues about reconciling the different interests – public and private" (at [83]) to leave the matter to the expert and policy-informed fora of the planning system.

One might complain that the "objectivity" aspect of the court's analysis ignores recognised types of nuisance the objective measurement of which is somewhat challenging, for example the thought of prostitution or the presence of undesirable people flocking to sex shops (*Thompson-Schwab v Costaki* [1956] 1 W.L.R. 335; *Laws v Florinplace Ltd.* [1981] 1 All E.R. 659), but "the uncertainty and lack of sophistication" point remains. A danger does exist that judges who are less informed than planning officers about the harms caused by and the solutions to overlooking and less experienced than local councillors in policy-making might produce poor decisions that will constrain the actions of better qualified decision-makers, a danger only increased if judges couch their decisions in terms of human rights.

And yet, as *Fearn* itself shows, the planning system is far from perfect. Issues are missed or imperfectly understood. In some circumstances it is better to have a crude back-up device than no back-up at all. Better to have a reserve parachute than no parachute. The problem is how to keep the reserve parachute from deploying when the main parachute is still working. The law has not yet solved that problem.

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