ENCROACHMENT AND PUBLIC INTEREST

CRAIG ANDERSON[1]

INTRODUCTION

Suppose that I am owner of a plot of land. The owner of neighbouring land, whether knowingly or otherwise, builds a structure that crosses the boundary between our plots. Perhaps a wall, intended to be built entirely on my neighbour's land, in fact straddles the boundary. Alternatively, it may be that the neighbour has run a water pipe or an electrical cable through my land. The possibilities are many and varied.

Unless my neighbour has some form of right to act in this way, such as a servitude or a contractual right, then my neighbour has committed a wrong by encroaching on my land. In principle, I was entitled to prevent this encroachment if I had caught it in time, and ought to be able to insist on its removal. However, it has been accepted since at least 1875[2] that the court has a discretion to refuse to order the removal of the encroachment, and instead award an alternative remedy, most commonly the payment of damages.

How this discretion works is clear enough in broad terms.[3] The court will consider whether, in all the circumstances, an order to remove the encroachment is appropriate. The court will pay particular attention to the proportionality of removal and whether the encroacher was in good faith or bad. A very minor encroachment, made in good faith, is very likely to be allowed to remain. This is particularly the case if its removal would be disproportionate, as for example where the removal of a wall encroaching by a matter of a few inches would mean demolishing the whole building of which the wall forms part.

One point that has attracted relatively little attention, however, is the role of the public interest in encroachment decisions. In the majority of cases, no such question arises, and the matter can be viewed simply in terms of a clash of the private interests of the parties to the dispute. However, there can equally be a public interest element, and it is the aim of this

---

[1] Senior Lecturer in Law, University of Stirling. A version of this article was presented at a research seminar at Edinburgh Law School on 6 March 2024, and I gratefully acknowledge the benefit gained from discussion at that event in finalising the article. I am particularly grateful to Dr John MacLeod of Edinburgh Law School for inviting me to speak and for giving me the benefit of his thoughts. I am, of course, solely responsible for the contents of the article. I am also grateful to Malcolm Combe, University of Strathclyde, for helpful comments on a draft of this article.

[2] *Jack v Begg* (1875) 3 R 35 appears to be the earliest case in which the existence of this discretion is explicitly asserted by the court.

[3] For general discussion of the manner in which this discretion will be exercised, see K G C Reid, *The Law of Property in Scotland* (Law Society of Scotland/Butterworths 1996) para 178.

article to examine to what extent the public interest is relevant when a case of encroachment comes before the court. Such a case might arise, for example, where the encroachment forms part of some public service infrastructure, such as sewage pipes or power lines. Alternatively, it could be that the encroachment impedes some use that is in the public interest. This article will focus primarily on the former of those, the case where the public interest is argued to be on the encroacher's side. However, it may be that similar considerations arise in both situations.

However, before considering this issue, it seems necessary to establish what is actually meant by the term "public interest". We will then be in a better position to consider the potential application of the concept to encroachment cases.

There is, though, one final point to mention about the scope of this article before continuing. It may be thought that there is a potential human rights aspect to this matter. After all, article 1 of protocol 1 to the European Convention on Human Rights provides that "No one shall be deprived of his possessions except in the public interest", and encroachment is a *de facto* deprivation of property. Detailed consideration of human rights issues must, however, await another day. In part, this is because of limitations of space. It is also, though, because it seems necessary to establish what the existing domestic law is, before it can be determined to what extent that law complies with the Convention.

WHAT IS PUBLIC INTEREST?

The immediate problem with considering the meaning of "public interest" is that the term is difficult to define with anything approaching precision. No doubt we all agree in general terms that the public interest should be the overriding consideration in political decision-making, for example, but it is not straightforward to devise a universally agreed upon definition, at least not in a way that is useful in guiding that decision-making process.[4] As for the law, it has been said that "lawyers can be seen as having contributed surprisingly little to the development of such models [of public interest], despite the concept being used routinely in legal argument."[5] Even a statute as obviously concerned with the public interest as the Public Interest Disclosure Act 1998 has no general definition of public interest. Instead, it

[4] See *e.g.* G Schubert, "Is There a Public Interest Theory?" (1962) 5 NOMOS: American Society for Political and Legal Philosophy 162.
[5] M Feintuck, *'The Public Interest' in Regulation* (Oxford University Press 2004) 9-10.

identifies six specific categories of "protected disclosures".[6] There is no general, catch-all provision.[7]

If we are going to talk about the public interest, however, it seems reasonable to look for at least a working definition. The quest is not assisted by the fact that different aspects of the public interest will be relevant in different contexts, and may even mean different things in those varying contexts. Certainly, public interest justifications for particular legal rules or doctrines may vary depending on context. For example, the existence of copyright protection is justified, at least in part, by the encouragement it gives to economic activity and to the advancement of learning.[8] There is a fairly obvious, but quite different, public interest justification for the criminal law, namely the protection of the public from crime and its effects. Public funding of education may be seen as being in the public interest because of its economic importance, and also because it is to the public benefit in a representative democracy to have a more educated electorate. As was graphically illustrated in 2020, with the Coronavirus pandemic, public health considerations may override private interests. Other examples could readily be given.

What is it that unites all of these cases, and to which we give the name "public interest"? One element is certainly that the idea of public interest in a particular dispute points to the interests of people other than the immediate parties to that dispute. As Lee puts it, the public interest comprises "interests that transcend any individual or narrow group ('narrow' being itself context-specific) and...are formally external to the parties or the dispute."[9] Again, "public interest perspectives may be distinguishable from others because they seek to vindicate causes other than the property or financial interests of their advocates."[10]

This, then, provides the germ of an idea of how we define the public interest. To say that the public interest is engaged is to say that there is an interest of the public at large, beyond the private interests of parties directly involved with a dispute. For example, in public law, we may see a public interest in access to information, both for general reasons of open

[6] Employment Rights Act 1996, s. 43B, inserted by Public Interest Disclosure Act 1998, s. 1.
[7] C Hobby, *Whistleblowing and the Public Interest Disclosure Act 1998* (Institute of Employment Rights 2001) 15. Indeed, other than in the short and long titles, the words "public interest" do not themselves appear at all in the 1998 Act.
[8] G Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002) especially chapter 2.
[9] M Lee, "The public interest in private nuisance: collectives and communities in tort" (2015) 74 CLJ 329, 331.
[10] D Robinson & J Dunkley, "Introduction" in D Robinson & J Dunkley eds *Public Interest Perspectives in Environmental Law* (Wiley Chancery 1995) p. x.

government and also for the exposure of specific wrongdoing.[11] Decisions by planning authorities are intended to take account of the public interest, rather than simply the individual interests of parties immediately affected by a proposed development or change of use.[12] In judicial proceedings, relevant evidence may be excluded on the ground that it would be contrary to public interest for it to be disclosed.[13]

When we turn to private law, we find in the areas of defamation and privacy that resort is had to a public interest in the availability of information and in free discussion.[14] Thus, in defamation proceedings, a defence is available for statements made about matters of public interest.[15] As has been pointed out, where the public interest is relied on a defence in such a case, this is permitted "to protect the interests of the public in receiving information" rather than to protect the interests of the person who is formally relying on the defence.[16] For example, when a person's wrongdoing is exposed, the reason why the truth of the allegation is a defence is not that any special interest of the defender is engaged. Indeed, the defender may be simply an officious bystander, with no direct involvement in the matter at all.[17] Rather, as the Roman jurist Paul said, it is because "it is proper that the faults of the guilty be known".[18] In other words, the disclosure is not protected on the basis of any interest of the person making the disclosure. That person may have no such interest in a legally recognisable sense. Instead, the disclosure is protected as being in the public interest, and the person making the disclosure represents, in a sense, that interest.

We see, then, that there are certainly situations in which the public interest is considered relevant to how a dispute is to be resolved. Further, we may define matters of public interest, as matters in which the general public has a stake, separate from and transcending each individual's own interests. There are some obvious candidates for this. Thus, for example, it seems reasonable to say that, as everyone living in a state is potentially

---

[11] M Dahlberg & D Wyatt, "Is there a public interest in knowing what is going on in society? A comparative study of the European Courts" (2019) 26 Maastricht Journal of European and Comparative Law 691.
[12] Thus, see the Town and Country Planning (Scotland) Act 1997, s. 15 for the matters to be included in a planning authority's local development plan, to which the authority is to have regard in determining planning applications (1997 Act, s. 37(2)).
[13] *Stair Memorial Encyclopaedia, Evidence (Reissue)* para 210.
[14] See *e.g.* B Pillans, *Delict: Law and Policy* 5th edn (W Green 2014) para 9-15.
[15] Defamation and Malicious Publication (Scotland) Act 2021, s. 6.
[16] See *e.g.* E Carolan, "Protecting Public Interest Reporting: What is the Future of Journalistic Privilege in Irish Law?" (2017) 57 Irish Jurist (NS) 187, 192, discussing journalistic claims to privilege in the anonymity of their sources. See also *British Steel Corpn v Granada Television Ltd* [1981] AC 1096, in which a television company was held not to be entitled to keep its source anonymous, and especially the discussion at 1168 (Lord Wilberforce).
[17] Thus, as Shakespeare has Iago say in *Othello*, Act 3 Scene 3, "he that filches from me my good name/ Robs me of that which not enriches him/ And makes me poor indeed."
[18] D.47.10.18pr.

affected by the economic prosperity of that estate, there is a public interest in the management of that state's economy and in economic development within that state. Similar things could be said about public health and the suppression of crime. Both of these things are matters of shared public interest. To take the final example, public prosecutions happen, not in the interests of the specific victim (who indeed may not even desire the prosecution),[19] but in the interests of the public generally, members of which are potential future victims.

In defining the public interest in this way, there are two dangers to avoid. One of these arises from the fact that the term "interest" has more than one meaning. Two meanings are relevant here. If one is "interested" in something, one may simply find it interesting. It is a thing that sparks curiosity and attention. Alternatively, one may be interested in something in the sense of having a stake in it. This is the same as the distinction between the words "uninterested" (*i.e.* not caring about the matter) and "disinterested" (*i.e.* having no personal stake in the matter.) Thus, for example, a judge should be *disinterested* in the case before him or her, but should certainly not be *uninterested*. Again, when we talk of a pursuer having "interest to sue" in a particular case, this is obviously not intended to convey that the pursuer would like to see what the outcome will be (that much is obvious, or else the action would not have been raised.) Rather, we mean of course that the pursuer stands to gain "some benefit from asserting the right with which the action is concerned or from preventing its infringement".[20]

It seems clear enough that, when the courts talk about the public interest, they mean "interest" in the sense of a stake in the outcome. This is interest in a similar sense to that of interest to sue. A benefit is to be obtained by the public. To take two examples from English cases, many members of the public may be very interested in "the most vapid title-tattle about the activities of footballers' wives and girlfriends"[21] or in the alleged sexual proclivities of prominent figures,[22] in the sense of desiring to know about these things, but it is quite clear that there is no public interest in the relevant sense here.[23] Nobody other than the parties

[19] On this point, see *e.g.* A Rogers, "Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify" (1998) 8 Columbia Journal of Gender and Law 67. Indeed, in some cases there will not even be a specific, identifiable victim, as for example with many breaches of the peace or with many criminal attempts or conspiracies.
[20] Hon Lord Macphail, *Sheriff Court Practice* 4th edn, A M Cubie ed (W Green 2022) para 4.35.
[21] *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359 para 147 (Baroness Hale of Richmond).
[22] *Mosley v News Group Newspapers Ltd* [2008] EMLR 20.
[23] D M Walker, *The Law of Delict in Scotland* 2nd edn (SULI/W Green 1981) 842 appears to be making a similar distinction where he says, "Broadly speaking, anything which merits report in responsible newspapers might be said to be matter of public interest." However matters stood in 1981, though, that may now be excessively optimistic about the ability of even "quality" newspapers nowadays to resist publishing celebrity gossip of interest only to the prying and the prurient.

involved has any personal or patrimonial stake, whether as an individual or as a member of the community, in such gossip. This is not to say that it is always easy to make the distinction between that which is truly public in the relevant sense and that which is truly private. These categories are "contested, dynamic, and context-specific, as well as overlapping and difficult to separate".[24] Nonetheless, that there is such a distinction to be drawn seems clear enough.

The distinction indeed has not always been perfectly observed. Let us consider a well-known English case, *Miller v Jackson*.[25] In this case, the plaintiffs sought an injunction against the defendant cricket club, which occupied land neighbouring their property, and from whose land cricket balls would on occasion stray and land in the plaintiffs' garden or strike their house. The majority, and particularly Lord Denning, founded strongly on an alleged public interest in the cricket club's activities. However, it is not at all clear that it is justified to describe this as a public interest. No doubt very many members of the public are interested in cricket, at least in the sense of finding it interesting. Again, it is unquestionably true that public authorities take an active role in promoting participation in sport and other leisure activities, for example by maintaining public parks and other leisure facilities. That, though, is still a long way from justifying a view that there is a public interest in the activities of a private club, on private land, to which that club is entitled to restrict access and which is managed for the benefit of the club and its members.[26] The proposition that there is a public interest there must, at the very least, be seen as doubtful.

There is perhaps a superficial similarity to *Webster v Lord Advocate*,[27] in which the continuance of the Edinburgh Military Tattoo was said to be in the public interest. However, in *Webster*, this was said, not simply because it was a popular spectacle, but because it was a considerable economic asset to the city of Edinburgh. Again, in *Forbes v Inverurie Picture House Ltd*,[28] in which the defenders' cinema building encroached on land belonging to the pursuer, there was no suggestion that the presence of the cinema was a matter of public interest, even though it was no doubt a popular addition to the entertainments available to residents of Inverurie.

---

[24] M Lee, "The public interest in private nuisance: collectives and communities in tort" (2015) 74 CLJ 329, 331.
[25] [1977] QB 966, [1977] 3 All ER 338. Compare *Kennaway v Thompson* [1981] QB 88, [1980] 3 All ER 329, *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] 2 WLR 433, in which public interest arguments were unsuccessful, where use for sporting purposes was also in issue.
[26] The same confusion may be found in scholarly literature. See *e.g.* the fascinating study by S R Moody & J Tombs, *Prosecution in the Public Interest* (Scottish Academic Press 1982) 88, where the authors appear to consider "local feeling" on prosecution decisions to be a guide to "public policy".
[27] 1985 SC 173, 1985 SLT 361.
[28] (1936) 53 Sh Ct Rep 43.

The second danger to avoid arises from the fact that, in principle, the public interest is separate and distinct from the private interests of individual members of the public. Thus, a private interest does not become a public interest just because it is shared by a large number of people. As it has been put in a different context, we may doubt that there is any "point when the aggregate of the individual inconvenience experienced by some five hundred people becomes so great as to outweigh the hardship to" an individual,[29] or, at least, it does not do so by becoming a public interest. Even where a claim is made that the public interest is engaged in a particular matter, this may in fact arise from "thinly veiled self-interest groups flying the public interest banner".[30] The point is that whether there is a public interest in something happening or not happening is not determined simply by counting the number of people interested on either side of the question. It is only accurate to describe the public interest as containing within it "the notion that, in certain circumstances, the needs of the majority override those of the individual",[31] if very heavy emphasis is placed on the word "needs". The majority represents the public interest, not because it is a majority – in the typical case there would be no public interest in the sex life of a celebrity, even if a majority wanted to know about it – but because the majority represents the interests of the community. This is a subtle distinction but, I hope, one that can be accepted in principle.

It must be accepted then that the matter will not always be straightforward. For one thing, it will not always be easy to distinguish between a genuine matter of public interest and something that is merely a matter of a large number of private interests. Let us take *Macnair v Cathcart*,[32] for example. This was a case of encroachment by substantial urban development in Greenock, in reliance on a conveyance that was then reduced a number of years later. Restoration of the land to its original state was not possible without "great injury and devastation" to the town.[33] Is this to be considered simply a matter of the private interest of the individual occupiers of the houses that had been built, or is it better characterised as a question of public interest, because of the adverse effect on the town as a whole? Either view could plausibly be taken. The case itself sheds no light on the matter, as the decision did not

[29] 1956 SLT (Sh Ct) 95. The context was an application for extension of a lease under the Tenancy of Shops (Scotland) Act 1949.
[30] But see D Robinson, "Public Interest Environmental Law – Commentary and Analysis" in D Robinson & J Dunkley eds, *Public Interest Perspectives in Environmental Law* (Wiley Chancery 1995) 321.
[31] G Davies, *Copyright and the Public Interest* (Sweet & Maxwell 2002) para 1-001.
[32] (1802) Mor 12832.
[33] (1802) Mor 12832, 12833.

turn on this point.[34] Such difficulty is particularly likely when case law from one area of law is considered in relation to another area, with quite different issues.

Again, different public interests may conflict. For instance, the example was mentioned above of the withholding of evidence on public interest grounds. There is a fairly obvious tension between this and the public interest in the court's ability to do its job properly. The same arises if public interest allows a journalist to protect a source, with the result of frustrating the public interest in the successful prosecution of crime. Resolving such a tension is not necessarily straightforward. Again, an encroaching road may be beneficial to road users and to economic development more generally, but also have an adverse environmental impact on the local community. Similarly, there might be a conflict between a local public interest and a national public interest.[35]

Moreover, what counts as the public interest may change, as the role of the state changes. The role of the state is not, of course, necessarily co-extensive with the public interest. There may be matters of public interest with which the state does not directly concern itself. However, state involvement does at least imply an assertion that a public interest is present. Paton, writing in the middle of the last century, talks of the development in his time of "the increasing growth of collectivism which regards it as the duty of the State to ensure minimum standards of life for its members"[36] The extent to which it is the state's business to ensure that we have access to the basic necessities of life, and the extent to which it is our own individual business to secure access to them, is a matter of ongoing debate and the position cannot be said to be stable. For example, moves towards privatisation of public services in the latter part of last century arguably point away from the trend Paton identifies. Moreover, precisely what counts as a basic necessity of life will vary with cultural and technological development. Even as little as two decades ago, access to the internet could hardly have been argued to be a basic necessity, but so much has that technology insinuated itself into everyday life that that position has arguably now changed.

IS THE PUBLIC INTEREST RELEVANT TO ENCROACHMENT?

[34] Instead, the case seems to have been decided on the basis of acquiescence.
[35] M Lee, "The public interest in private nuisance: collectives and communities in tort" (2015) 74 CLJ 329, 338-339, discussing *Hunter v Canary Wharf* [1997] AC 655.
[36] G W Paton, *A Text-Book of Jurisprudence* (Oxford 1946) 466.

For the purposes of this article, "public interest" has been defined as arising where members of the community have an interest in something happening or not happening, not as individuals, but as members of the community. It is quite possible to take the view that the public interest ought to be irrelevant to private law disputes.[37] There is a certain logic to that position. After all, any definition of public interest brings into account the interests of individuals other than the parties to the litigation, and it is with the rights and obligations of the parties to the litigation that the court is concerned.

Such a purist position, though, is perhaps unrealistic in practical terms. Indeed, as we have seen, there are situations in which the public interest is quite explicitly made relevant. In a case where more than one conclusion might reasonably be reached according to established legal rules, but one outcome is more consistent with the public interest, it is hardly ground for surprise if appeal is made to that public interest. No party to a private law dispute can properly be seen as a mere avatar of the public interest, but equally it is not reasonable to expect the public interest to be disregarded altogether. Indeed, this is what we often see, for example in the law of delict where the bounds of liability are not considered solely with reference to the relationship between wrongdoer and victim. Instead, issues of public interest or public policy are frequently considered. As Lord Steyn put it in *McFarlane v Tayside Health Board*,[38] the court must not simply consider justice as between the parties to the dispute, but also "the just distribution of burdens and losses among members of society", viewing delict as "a mosaic in which principles of corrective and distributive justice are interwoven." Again, rules rendering void a contract that is immoral[39] or in restraint of trade[40] fall into this category. In both cases, the parties' own intentions are trumped by the public interest in, respectively, morality and the economy. Similarly, a condition attached to a legacy

[37] For a brief discussion of this view and of its opposite, the idea that the "sole purpose of tort [is] the pursuit of efficiency", see M Lee, "The public interest in private nuisance: collectives and communities in tort" (2015) 74 CLJ 329, 332. For a more extended defence of the view referred to in the text, see E J Weinrib, *The Idea of Private Law* (Harvard University Press 1995). Here Weinrib, drawing among other things on Aristotle's distinction between distributive and corrective justice, argues that it is literally impossible to have a coherent account of private law that includes considerations external to the relationship between the particular parties to a dispute. Thus, at 74: "Admixing distributive considerations into the corrective framework of private law precludes the relationship from attaining the coherence of either corrective or distributive justice. It precludes the former because it introduces considerations that are alien to the immediate interaction of doer and sufferer. It precludes the latter because the bipolarity of private law institutions and concepts truncates the natural reach of distributive principles. And it precludes a coherent mixture of the two because no such mixture is possible within a single legal relationship."

[38] 2000 SC (HL) 1, 16-17.

[39] See *e.g.* H MacQueen & J Thomson, *MacQueen and Thomson on Contract Law in Scotland* 5th edn (Bloomsbury 2020) para 8.9.

[40] H MacQueen & J Thomson, *MacQueen and Thomson on Contract Law in Scotland* 5th edn (Bloomsbury 2020) paras 8.27-8.43.

will sometimes be held void for public interest reasons, for example because the condition is immoral, with the testator's will being made as a result to say something the testator did not intend it to say.[41] The term often used is "public policy". While public policy may be an "unruly horse",[42] it is probably less dangerous to orderly legal development if its presence is frankly acknowledged.[43] In relation to land, Bell tells us that the "exclusive right of a land-owner yields wherever public interest or necessity requires that it should yield",[44] though this has been interpreted as referring only to situations "which require an instant response and there is no opportunity to observe the requirements of permission."[45]

In itself, none of this is surprising, for the function of private law goes beyond the two parties to a specific dispute. If this were not so, it is not clear why states would invest so much in the way of public resources in the maintenance of the machinery of the legal system.[46] If private law was purely private, private law disputes could be managed through arbitration or some other form of private dispute resolution, and the state could save a great deal of money. It is, though, implicit in the existence of a system of public courts to consider such disputes that there is a perceived public interest in the matter. To return to a point made above, we all have at a minimum an interest that justice should be done, however justice is conceived. What is less clear is precisely how and to what extent the public interest is and should be considered in a private law dispute, and this has been the subject of significant scholarly debate.[47]

To say that the public interest is sometimes a relevant factor in private-law decision-making only takes us so far, however. We need for the purposes of this article to determine whether and to what extent it is relevant in the specific case of encroachment. A quote from Erskine seems promising in this regard. Speaking of restrictions on an owner using property "wantonly to his neighbour's prejudice", he says that such limitations are introduced in the

[41] See *e.g. Fraser v Rose* (1849) 11 D 1466.
[42] See *e.g. Richardson v Mellish* (1824) 130 ER 294, 303 (Burrough J).
[43] G W Paton, *A Text-Book of Jurisprudence* (Oxford 1946) 26. In *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591, 606, Lord Denning did not perceive the risk, as long as "a good man" is in the saddle of the unruly horse. Presumably Lord Denning means to include himself in the category of good men here, but equally it is presumably meant to be a broader category than merely Denning himself.
[44] Bell, *Principles* s. 956.
[45] *Mowi Scotland Ltd v Staniford* [2024] SAC (Civ) 8, para. [21]. The examples given by Bell (*Principles* s. 957) are "extinguishing a fire", "pursuing a criminal" and "destroying dangerous or noxious animals".
[46] For discussion of some of the issues, see B Christman & M Combe, "Funding civil justice in Scotland: full recovery, at what cost to justice?" (2020) 24 Edin LR 49.
[47] In addition to Lee (n. 9), see *e.g.* H Collins, "The Voice of the Community in Private Law Discourse" (1997) 3 European Law Journal 407, P Cane, "Distributive Justice and Tort Law" (2001) NZ L Rev 401. For an interesting historical sketch of these issues in English law, see P H Winfield, "Public Policy in the English Common Law" (1928) 42 Harvard LR 76.

public interest.[48] Commenting on this passage, in the specific context of nuisance but in words that seem of more general application, Whitty suggests that:

> "it would seem to follow that conduct which promotes the public interest and has social utility is more likely to be held reasonable. Up to a certain point, therefore, the courts will take account of the public interest and the social utility of the defender's conduct."[49]

This consideration of public interest in the nuisance context is, though, very limited. As Whitty goes on to say:

> "It cannot be stated as a general rule, however, that in Scots law activities which produce a direct public benefit have more weight than those carried on for the benefit of a private individual. A person cannot justify in law the infliction of serious harm on his neighbour on the ground that the benefit to the local community, or the national interest, or even the human race, arising from the continuance of the defender's activity far outweighs any benefit to the pursuer which would accrue from its cessation...The reason is that nuisance concerns the resolution of conflicts between competing and private rights. All that the court can do when an immediate interdict would cause great public inconvenience is to make a declaratory finding of nuisance and suspend the operation of the finding pending the progress of remedial measures."[50]

The initial point, therefore, is a very limited one. The fact of a nuisance-causing activity being of public benefit will, at best, buy the wrongdoer time to mitigate the impact of the activity. It is not carte blanche to externalise the costs of doing business onto the neighbours. In principle, a neighbour is entitled to restrain a nuisance, regardless of the economic or social impact that will have. Thus, for example, in *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*,[51] a case concerning damage caused by the collapse of a sewer,

---

[48] Erskine, *Inst.* 2.1.2.
[49] Stair Memorial Encyclopaedia, *Nuisance (Reissue)* para 72.
[50] Stair Memorial Encyclopaedia, *Nuisance (Reissue)* para 73. See *e.g. Ben Nevis Distillery (Fort William) Ltd v North British Aluminium Co Ltd* 1948 SC 592, 1948 SLT 450, cited by Whitty as authority for this proposition. See also *e.g. Webster v Lord Advocate* 1985 SC 173, 1985 SLT 361.
[51] 1985 SC (HL) 17.

there was no suggestion that the undoubted public utility of a sewer system protected the defenders, who were responsible for it, from liability.[52] Similarly, I am not obliged to submit to an encroachment just to suit the convenience of a greater number of people.[53]

In this connection, it is interesting to note the Supreme Court's decision in a recent English case, *Fearn v Board of Trustees of the Tate Gallery*.[54] In this case, it was held that, while the public interest was irrelevant to whether a nuisance had occurred, it was however relevant to the remedy to be given.[55] It does, though, seem doubtful whether the claimed public interest in this case[56] is a genuine public interest in the sense in which it has been defined in this article.

Closer to the area of encroachment, in that it involved a party building where that was unlawful, is *Wrotham Park Estates v Parkside Homes*.[57] In this case, houses were built in breach of a restrictive covenant.[58] In refusing to order demolition of the houses, Brightman J explicitly founded upon the public interest, holding that it would be "an unpardonable waste of much needed houses to direct that they now be pulled down".[59] However, the party building the houses had done so on their own land, albeit in breach of the restrictive covenant, so this case gives limited support for any more general claim about the role of public interest. It is of interest to see that, in the USA, it has been suggested that the public interest is relevant to support a claim for removal of an encroachment.[60] That, though, is a far cry from the public interest being used as a basis for resisting removal of the encroachment.

In the Scots literature, the matter has been given little, if any, consideration. For example, in Rankine's account of encroachment, the only exception stated to a landowner's right to resist encroachment is that landowner's own acquiescence.[61] Similarly, neither Reid's

[52] The pursuers' case did, however, fail for other reasons.
[53] For an illustration of this, see *Lowrie v Drysdale* 13 May 1812, FC.
[54] [2023] UKSC 4, [2024] AC 1.
[55] *Fearn*, paras 114-129 (Lord Leggatt). This is arguably a shift in the law: see C Sara, *Boundaries and Easements* (Sweet & Maxwell 1996) 421.
[56] This was the ability of visitors to the defendants' gallery to use a viewing platform which had a panoramic view of London, but which also allowed them to see into the claimants' homes.
[57] [1974] 2 All ER 321.
[58] In this context, a restrictive covenant is a species of freehold covenant, which is a creature of English law that is broadly analogous to real burdens: M Dixon, *Modern Land Law* 8th edn (Routledge 2012) chapter 8.
[59] At p. 337.
[60] M O Cogburn, "Equity – Easement – Mandatory Injunction to Remove Encroachment (1949) 27 North Carolina Law Review 548, discussing a case in which an encroaching structure interfered with power lines maintained for the public benefit.
[61] J Rankine, *The Law of Land-Ownership in Scotland: A Treatise on the Rights and Burdens Incident to the Ownership of Lands and Other Heritages in Scotland* 4th edn (W Green 1909) 134.

account[62] nor Gordon and Wortley's[63] makes any reference to the idea of the public interest being relevant.

Cases where public interest might have been mentioned and is not

The first group of cases is made up of those in which there might have been considered some cause to appeal to the public interest, but in which in fact no such appeal was made. For example, in *Anderson v Brattisanni's*[64] and in *Compugraphics International Ltd v Nikolic*,[65] no reference was made to public interest concerns, even though removal of the encroachment would interfere with the running of a business. It seems reasonable to say that there is a public interest in the health of the economy. However, regardless of this, in the former case, the court indicated that the focus should be on the question of whether removal of the encroachment "would cause to the encroacher a loss wholly disproportionate to the advantage which it would confer upon the proprietor."[66] Thus, the focus is on the parties themselves, not any wider economic impact. This does not mean that the outcome would not have been different if the defenders' shop in *Anderson* had been in a rural area with fewer alternative sources of fish and chips, or if the business carried on at the encroaching structure more unambiguously engaged the public interest. However, the decision gives no support to any such argument. It is interesting to note that, while the role of the local authority was mentioned, this was only in relation to public law controls of land use. There appears to be nothing in the decision to indicate that this had any particular bearing on the private law question.

A very striking example of a case in which public interest concerns might have been thought relevant, but in which they were not mentioned, is the Sheriff Court decision in *Dunsmuir & Jackson v Glasgow District Subway Co*.[67] This case arose from the building of an underground railway in Glasgow. In accordance with an agreement between the parties, the defenders had built a railway tunnel beneath the pursuers' land. Subsequently, and without permission, the defenders inserted a beam in the pursuers' land to shore up a building belonging to a third party, whose stability was apparently affected by the tunnelling. It was

[62] K G C Reid, *The Law of Property in Scotland* (Butterworths/The Law Society of Scotland 1996) para 178.
[63] W M Gordon & S Wortley, *Scottish Land Law* 3rd edn, vol 1 (W Green 2009) para 13-06.
[64] 1978 SLT (Notes) 42.
[65] [2011] CSIH 34, 2011 SC 744.
[66] 1978 SLT (Notes) 42, 43.
[67] (1894) 11 Sh Ct Rep 297.

held that the pursuers were entitled to insist on the removal of the beam. This was the case, even though the removal of the beam might have threatened the stability of the neighbouring building. The Sheriff-substitute directly addressed the point:

> "It may be said that the possible effect of the defenders carrying out this order might be to bring down the house. I do not think that this matter can affect the order to be given."[68]

This is no merely abstract or theoretical impact on third parties. Quite to the contrary, as far as we can gather from the case, there is a real and genuine threat to third party property and, quite possibly, to life and limb. Nonetheless, the court is quite explicit that third-party concerns are irrelevant to the dispute.

Of course, it would be wrong to place too much stress on a single decision at Sheriff Court level. If it turns out that there is contrary authority, particularly contrary authority at a higher level, it will be possible to dismiss *Dunsmuir & Jackson* as a rogue case. Let us now turn, therefore, to cases in which public interest arguments were raised.

Cases where public interest features in argument but is not a ground of decision

A category of cases can be identified in which public interest considerations were mentioned in argument by at least one party, but in which those considerations form no clear part of the court's reasoning in reaching its decision. For example, in *Stockton Park (Leisure) Ltd v Border Oats Ltd*,[69] in which there was an encroachment by commercial premises, part of the defenders' case was the loss of jobs dependent on the premises. The court, however, made no comment on that point. In *Munro v Finlayson*,[70] in which the defenders had built a driveway on the pursuer's land,[71] the sheriff principal's summary of the pursuer's submissions referred to the "public expediency" of avoiding "ruinous expense". However, in the sheriff principal's useful summary of the law governing how the court's discretion will be exercised, reference

[68] (1894) 11 Sh Ct Rep 297, 298.
[69] 1991 SLT 333.
[70] 2015 SLT (Sh Ct) 123.
[71] In fact, the pursuer did not seek the removal of the driveway. As Reid and Gretton point out (K G C Reid & G L Gretton, *Conveyancing 2015* (Avizandum 2016) 161), the case was "about the exclusion of people rather than the demolition of buildings." Nonetheless, the matter was approached from the perspective of encroachment.

is made only to the actual or potential losses of the parties themselves, not to any wider public interest in avoiding those losses.

The most prominent of the cases falling into this category is *Duke of Buccleuch v Edinburgh Magistrates*.[72] This case concerned the Assembly Rooms in George Street, Edinburgh. In 1817, the existing building was extended in such a way that it encroached on the public street, on neighbouring land belonging to the Edinburgh Magistrates. The Magistrates had, at the time, acquiesced in the encroachment. When alterations were subsequently proposed, which were said to affect the encroaching part of the building, the Magistrates sought interdict against this. On their behalf, counsel explained that no objection had been made to the original encroachment because "the erection was thought to improve the appearance of the street, and the pillars did not materially interfere with the public use of the pavement..."[73] This appears to be an appeal to the public interest, and in particular to a public interest in the aesthetics of public streets. It is not particularly surprising that the court did not take up the opportunity to adopt the role of arbiters of taste.[74] What is more surprising is that, in the Inner House, only one of the judges commented on the point, the Lord Justice-Clerk merely noting that, while this view of things made intelligible the original acquiescence in the encroachment, the court has "nothing to do with" questions of taste.[75] The other judges ignored this argument altogether.

Before moving on, it is necessary to note one further case, which is a little harder to categorise. In *Hay v Feuars*,[76] a burn formed the boundary between lands belonging to the pursuer and the defenders. The pursuer built a mill dam on the burn, encroaching on the defenders' land. The defenders destroyed the dam. The pursuer argued that this destruction was unlawful, in part on the basis that "it is a known and competent custom, that a going miln cannot be stopt summarily, being an instrument of service for common good." This is fairly obviously a public interest argument. It is not however clear that the public interest was entirely the basis for the decision, given that this was only the outcome because the mill had been in operation for at least 48 hours before the dam was destroyed. The decision may, therefore, be explicable on the basis of acquiescence. Thus, in Dirleton's report of the case,

[72] (1865) 3 M 528.
[73] (1865) 3 M 528, 530.
[74] For another example of a refusal to adjudge such matters, see *Brown v Richardson* 8 May 2007, Lands Tribunal. Compare *e.g. Sutherland's Tr v Verschoyle* 1968 SLT 43.
[75] (1865) 3 M 528, 533.
[76] (1667) Mor 1818.

the reasoning for the 48-hour period is "so that it might have come to his knowledge that it was a going miln."[77]

Cases with obiter reference to public interest

In *Sanderson v Geddes*,[78] the Inner House of the Court of Session adhered to the decision of the Lord Ordinary in refusing to order the removal of an encroaching structure (a gable wall). For present purposes, the interest of this case is in a passing comment by the Lord Ordinary that removal would be "against public expediency, and would cause ruinous expense".[79] While this appears promising at first sight as evidence of a role for the public interest, its significance is in fact limited. There is no analysis of any kind of this idea of "public expediency". The coupling of it with ruinous expense suggests perhaps that it is the wastefulness of demolition that the Lord Ordinary has in mind here, but more than that cannot readily be said. Moreover, the concept of public expediency does not appear to have been part of the reasoning of either the Lord Ordinary or of the Inner House, which instead founded on the acquiescence of the pursuer's author.[80] The reference to public expediency appears, therefore, to be *obiter*.

Cases where public interest is discussed

As far as it has been possible to determine, other than the doubtful case of *Hay*, considered above, in only two Scottish cases has the court's reasoning taken express account of public interest considerations, one of greater importance than the other for its direct consideration of the issue.

To begin with the less important of these cases, in *Strathclyde RC v Persimmon Homes (Scotland) Ltd*,[81] the defenders were the developers of a housing development in Cambuslang. In ignorance of the true ownership position, they had built an access road for

[77] (1667) Mor 1818, 1819.
[78] (1874) 1 R 1198.
[79] (1874) 1 R 1198, 1200. See also *Wilson v Pottinger* 1908 SC 580, in which there was a comment by Lord McLaren (at p. 587) condemning the wastefulness of removing a gable and risking a whole building, but without suggesting that there was any public interest in the matter. Instead, the issue was treated as being entirely one of private right.
[80] For criticism of this ground of decision, see Anonymous, "Party-Walls" (1877) 21 Journal of Jurisprudence 14, 17.
[81] 1996 SLT 176.

the development over land belonging to the pursuers. The pursuers sought compensation for this undoubted encroachment on their land.

It seems reasonable enough to consider the public roads network as falling within the scope of public interest. After all, it is for the benefit of the public as a whole that public roads exist. A complication here was that the pursuers were themselves the local authority which had granted planning permission for the building of the road. Nonetheless, this was seen only as indicating that the pursuers had considered the building of the road to be "acceptable on planning grounds".[82] There is no indication in the case as reported that this acceptability on planning grounds was relevant to the encroachment question. Instead, the planning permission was only considered relevant as the basis for an argument that the pursuers were barred from the remedy they sought, on the ground that they had consented to the building of the road.[83] There was no suggestion in the arguments of counsel or in the opinion of the Lord Ordinary that the public interest in the encroachment made any difference. Equally, there is no suggestion that the pursuers' position was affected by the fact that, as a public body, they existed only to serve the public interest. Such an argument might have been made in favour of either side here: either in favour of leaving the road in place, as it served the public interest; or else on the side of the pursuers as being under an obligation to assert their rights in public assets. The point is that no such argument appears to have occurred to anyone involved, and the pursuers were treated in much the same way as any other victim of encroachment. The only reference in the Lord Ordinary's opinion to the pursuers' public role was to hold it to be irrelevant.

The more important case is *Grahame v Kirkcaldy Magistrates*,[84] a decision of the House of Lords. This case concerned the building of stables by the defenders on an area of ground called Volunteers' Green, that they held for the benefit of the community.[85] The pursuer, a member of the community, sought the demolition of the stables. In the event, this remedy was refused, on the basis of the defenders providing a suitable, substitute area of land for the use of the community.

---

[82] At p. 178.

[83] In the circumstances, this argument was rejected, as the pursuers had not consented in their capacity as owners.

[84] (1882) 9 R (HL) 91.

[85] This is therefore an unusual encroachment case, in that the encroacher actually owned the land on which the encroachment took place. As Lord Young pointed out in the Inner House ((1881) 8 R 395, 400), the defenders had undoubted title to build on or alienate the land, as long as no member of the community raised objection. However, the case has been repeatedly cited as an authority on encroachment in the more usual sense of a person building on land not belonging to them, without any right to do so. See most recently *Soulsby v Jones* [2021] CSIH 48, 2021 SLT 1259.

The importance of the case for present purposes lies in the reasoning by which that outcome was reached. Both in the Inner House and the House of Lords was explicit appeal to the public interest made. In the Inner House, for example, Lord Young was prepared to say that "the true consideration is...the interest of the community itself".[86] However, the decision should not be taken to justify an extensive role for the public interest in encroachment cases. Let us consider the following from Lord Watson in the House of Lords:

> "the community of the burgh, whose rights are at stake, has an interest on both sides of the present litigation... Were the appellant seeking to enforce a decree which he held in his own private right and interest, I do not think the considerations of inconvenience and pecuniary loss to the respondents arising from the position in which they had placed themselves, by their own acts, would have afforded a relevant answer to his demand in the present action. But these considerations assume a very different aspect when the necessary result of disregarding them will be to inflict that loss and inconvenience upon the community whose interest the appellant represents."[87]

Lord Watson is, here, quite clear that the pursuer would have been successful had this been a competition between the public interest and the pursuer's own "private right and interest". If, say, the stables had encroached upon the pursuer's own land, the implication is that considerations of the public interest would not have impeded the pursuer in having the stables demolished. The public interest only becomes relevant because it is the central concern on both sides of the argument. On the one side, there is the importance of Volunteers' Green as a facility of benefit to the public. On the other side, the buildings that encroach on the land are themselves of public benefit, and the cost of demolition would fall upon the public purse.

Given those facts, the approach taken in this case is entirely comprehensible. In effect, the dispute has become a pure matter of public law controls over the actions of a public authority. Where no private interest is involved, it is not unreasonable to assess the conduct of a public authority, in performing acts purportedly in the public interest, in the light of what that public interest demands. This gives no justification for relying on the public interest in a case where private interests are concerned. Indeed, in the passage quoted above, Lord Watson

[86] (1881) 8 R 395, 399.
[87] (1882) 9 R (HL) 91, 95.

(with whom the other judges concurred) seems to be implying clearly that the public interest will not take precedence over private interests in an encroachment case.

SHOULD PUBLIC INTEREST PLAY A ROLE?

There appears then to be, at best, very limited evidence that public interest considerations play a significant role in the courts' decisions in encroachment cases. Strikingly, this is the case even where parties have founded on the public interest in argument. This is not to say that the courts are necessarily excluded from all consideration of the public interest, merely that they have generally not found such arguments persuasive. It is conceivable that a case may arise in which an argument founding on some compelling matter of public interest does persuade the court that account should be taken of it. Nonetheless, it is arguable that the court should resist any such temptation. Such an argument might be based on several considerations.

First, it is doubtful that the court is the correct forum for the resolution of questions of public interest. This is particularly so in cases where there are competing public interests. As Buckley J said in one English case, weighing up these competing public interests:

> "would be a task for which a court would be ill-equipped, involving as it would the need to consider the interests of the locality as a whole and the plaintiff's and county council's plans in respect of it. In some cases even the national interest would have to be considered. These are matters to be decided by the planning authority and, if necessary, the minister and should be subject only to judicial review."[88]

Second, as a related point, often the legislature will already have considered how private and public interests are to be balanced in a particular situation, for example in the growth of environmental legislation.[89] Alternatively, legislation may have empowered a body other than the courts to consider the public interest, as with the planning system. The courts

[88] *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343, 360-361. This was a case where use of neighbouring land (or, more precisely, vehicles taking access to the land for that use) for economically significant activity was alleged to be a nuisance.
[89] See *e.g. Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 305 (Lord Goff of Chievely).

should be cautious in treading where the legislature has not. This is particularly so where, as in the typical private law litigation, no party to the action represents the public interest.[90]

Third, given the existence of public law powers to intervene, any individual decision causing material harm to the public interest could be corrected using those powers. If necessary, the decision could be reversed by legislation. Thus, for example, as Beever pointed out, considering a case in which the use being made of an RAF base was argued to be a nuisance:

> "If we accept that the defendant's activity was crucial for the 'defence of the realm', then we can be sure that, had an injunction been issued, the MoD would have been able to apply to the relevant public bodies for statutory protection. That would have meant that the public bodies would have been able to assess the public policy arguments in a forum to which all interested parties could have been invited. And that would have been the appropriate response."[91]

If there are cases in which the public interest should trump private law rights, that should ideally be done through explicit exercise of appropriate public law powers.

As has been said in a different, though related, context, "the fact that [activities] create social benefits does not justify the assumption of the costs by random victims."[92] This is the problem with the outcome in an English case, *Marcic v Thames Water Utilities Ltd*,[93] albeit it was Parliament that had made the assessment of the public interest rather than the court. In that case it was held that the plaintiff had no private law remedy for repeated flooding of his garden with sewage from inadequate drainage pipes for which the defendants were responsible. No position is taken here on the correctness of the decision in *Marcic*,[94] but it is

---

[90] Of course, it is far from unknown for a third party representing the public interest to be allowed to intervene in an action. This, though, seems too inconsistent a practice to authorise wholesale recognition of the public interest as a relevant factor in private-law decision-making.

[91] A Beever, *The Law of Private Nuisance* (Oxford 2013) 149, discussing *Dennis v Ministry of Defence* [2003] EWHC 793, [2003] Env LR 34. See also R Stevens, *Torts and Rights* (Oxford 2007) 234, pointing out that consideration of public policy issues by the courts may involve an exercise in speculation: "There is little evidence that imposing liability upon public bodies causes them to overreact. Conversely, it may be speculated that imposing liability may encourage higher standards in the delivery of public services. Who knows?"

[92] M Paz Gatica, *Fault-based and Strict Liability in the Law of Neighbours* (Edinburgh Legal Education Trust 2023) para 7-69. The context is liability to neighbours for damage caused by abnormally dangerous conduct carried out on land.

[93] [2003] UKHL 66, [2004] 2 AC 42.

[94] Ultimately, it was held that Parliament had already weighed up the public interest in passing the Water Industry Act 1991, and that the statutory scheme enacted there governed the obligations of companies in the defendants' position. Insofar as the decision of the House of Lords depends on an assessment of public interest, it seems unconvincing. Although privatised water companies are constrained in what they can charge and are

difficult to accept an outcome that so far subordinates the interests of a private owner to the public good, as to oblige him to submit to having his garden periodically flooded with sewage. As has been said, "If the public be interested, let the public as such bear the loss".[95]

FINAL COMMENTS

However we understand the public interest, then – and the discussion above has shown that it is not easy to define precisely how it should be understood – there is very little evidence that it plays any role in judicial decision-making in encroachment disputes. Earlier in this article, an attempt was made to define the public interest in terms of such things as the community in general has a stake in, as distinct from merely a large number of members of that community having individually a stake in those things, and certainly as distinct from members of the community being interested in the sense of being curious about the matter or desiring a particular outcome. Whether or not that definition is satisfactory, though, it does not appear that the public interest is relevant in any sense in which that term is understood, except in the uncontroversial sense that the public good is served by the protection of property rights. Only one Scots case has been found in which there is unambiguous reliance on the public interest (*Grahame v Kirkcaldy Magistrates*), and that was a special case for reasons outlined above.

As has been further argued, that is as it should be. The court in a private law dispute is not the ideal forum for weighing up competing public interest considerations. The appropriate forum is the legislature or bodies exercising the delegated authority of the legislature. If they wish to intervene, they can do so explicitly, and in a manner in which the public interest considerations can be directly considered. Moreover, there is potentially grave injustice in throwing the cost of a public benefit onto a private individual, who may be little able to afford it, rather than on the public more generally who are taking that benefit.

This all raises a wider issue, though, which it has not been possible to do more than mention within the scope of this article. As has been observed above, there are areas of the law in which the courts *do* consider it relevant to take account of public interest

---

subject to a detailed statutory regime, they are nonetheless private companies which voluntarily undertook these obligations and restrictions, without any compulsion to do so. If private companies were not willing to undertake these obligations, the state would find itself obliged to renationalise sewerage provision or to offer better terms.

[95] Bohlen, *Studies in the Law of Torts* (Bobbs-Merrill Company (Indianapolis) 1926) 429, quoted in P Giliker, "Nuisance" in C Sappideen & P Vines eds, *Fleming's The Law of Torts* 10th edn (Lawbook Co 2011) para 21.110.

considerations. There is scope for a much wider consideration of whether, and in what circumstances, this is appropriate in private law disputes.