PRIVATE NUISANCE

- The essence of all forms of trespass is a direct violation of a legally protected right
- Trespass to land and private nuisance are mutually exclusive cause of actions. Either D goes onto the P’s land which constitutes a trespass, or the D does something outside the P’s land that has the consequences of interfering with the P’s use and enjoys own property
- Private nuisance deals with conduct that does not occur on the P’s land, but the D’s conduct OUTSIDE the P’s land has the effect of interfering with the P’s use and enjoyment of their land
- Private nuisance: any substantial and unreasonable interference with the use and enjoyment of land
  - Private nuisance, unlike trespass, is derived from the use and enjoyment of land (i.e. D’s may engage in lawful conduct that would interfere with this interest)
  - Private nuisance protects against substantial and unreasonable interference with use and enjoyment of land. It is not just any interference, it has to be substantial and unreasonable

Public nuisance compared

<table>
<thead>
<tr>
<th>Walsh v Ervin [1952] VLR 361</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Facts</strong></td>
</tr>
<tr>
<td><strong>Principle</strong></td>
</tr>
<tr>
<td><strong>Reasoning</strong></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

Concept of private nuisance

Private nuisance is an action on the case for unlawful interference with the use or enjoyment of land. Such unlawful interference may take many forms e.g. noise, vibration, pollutants, fire, water, and sex waters emanating from adjoining premises. Liability is strict if the nuisance arises out of “misfeasance” (wrongful activity) but negligence-based if it arises out of non-feasance or an omission to remedy an existing nuisance

**Title to sue**

- Common law protects possession, not ownership
- Private nuisance protects the P’s possessory interest of their land
- In order to have title to sue, you need to show that you have a possessory interest in the land where the D’s conduct effects your possession

| Oldham v Lawson [1976] VR 654 |
| Facts | Mr and Mrs Oldham brought proceedings against their neighbour Mr Lawson. D liked to play music at very late hours. Here P complains that the noise emanating from D’s property constitutes a private nuisance. Mrs Oldham was the owner of the property. Mr Oldham did not have title and was living in the house |
| Principle | For plaintiff to be able to sue, plaintiff must be in legal possession of the land. Those who occupy property merely as licensees (e.g. family members of a lessee of land who are not themselves to the lease – staying in the property) does not confer title to sue as licensees do not have a possessory interest |
| Reasoning | Issue: Did both P's have title to sue in private nuisance? |
| | - Only wife and sue as she had possession to the house |
| | - Husband was mere licensee. Wife allowed him to live in the house and he did not have a recognised possessory interest and therefore he did not have title to sue |
| Hunter v Canary Wharf [1997] AC 655 | Facts | D built Canary Wharf Tower which blocked and interfered with P's television signals |
| Principle | ‘More is required than the mere presence of a neighbouring building to give rise to an actionable private nuisance’. Title to sue is actual and exclusive possession of the land affected. A mere licensee does not have title to sue |
| Reasoning | For an action in private nuisance to lie in respect of interference with P’s enjoyment of his land, it will arise from something emanating from the D’s land e.g. noise, dirt, fumes etc |
| | - No action lie in private nuisance for interference with television caused by the mere presence of building |
| | - Fundamental interest protected: tort directed against the P’s enjoyment of rights over land: interest of liberty to exercise rights over land in the amplest manner (Professor Newark) |
| | - Action in private nuisance will be brought by the person in actual possession of the land affected, either as freeholder or tenant of the land in question, or even as a licensee with exclusive possession of the land |
| | - Though a reversioner may sue in respect of a nuisance of a sufficiently permanent character to damage his reversion |
| | - A person who is in exclusive possession of land may sue even though he cannot prove title to it |
| | - An action in private nuisance will only lie at the suit of a person who has a right to the land affected. Such a person can only sue if he has the right to exclusive possession of the land, such as a freeholder or tenant in possession, or licensee with exclusive possession |
| | o Exception where this category may include a person in actual possession who has no right to be there; in any event a reversioner can sue insofar his reversionary interest is affected. But a mere licensee on the land has no right to sue |

**Interests in the use or enjoyment of land protected by private nuisance**

- It is not every right or incident of the actual possession of land that is necessarily protected by private nuisance
- **Threshold question:** is the D interfering with a recognised right or incident attached to the possession of land
- Interests protected: you cannot be subjected to undue noise, subjected to dust
- Whether the D’s conduct interferes with a legally recognised right or incidence attached to the possession of land that is protected by the tort of private nuisance
  - If you have title to sue and if the right or incidence of land has been interfered with as being a recognised actionable private nuisance, the question then becomes what is the test to be applied
- Draw distinction between: conduct by the D that causes material damage and conduct by the D that simply causes sensible discomfort or inconvenience

| **Facts** | P was a civil servant living in a terrace with his wife and son. Next door was the D who kept a house of ill-repute (brothel) and at all times of the night and day, women emanated from the property and went and solicited sex on the streets. This procured a lot of customers. There was street prostitution outside of P's home |
| **Principle** | If it interferes with the plaintiff’s domestic residence, this would constitute a private nuisance |
| **Reasoning** | **Test:** Does the presence of sex workers and on street intrude upon P’s comfortable enjoyment with land? Yes (despite no material loss)  
- Court found that it was actionable as a private nuisance  
- Locality is a consideration in determining nuisance  
- **NOTE:** Private nuisance and the types of conduct it regulates are not prescribed. The categories and the rights or incidences it attaches to the possession of land are not closed  
  - As the use and enjoyment of land develops historically, different rights or incidences of the land will be recognised  
  - You cannot exhaustively identify what amounts to a private nuisance |

**Thompson-Schwab v Costaki** [1956] 1 WLR 335

| **Facts** | The P owns and operates a racecourse. The D owns adjacent land and built a platform from which the proceedings of the racecourse can be viewed. The D describes the races over the telephone to a radio broadcaster. The P seeks to stop the broadcasting as it prevents people going to the race and paying for admission |
| **Principle** | The action in nuisance protects an occupier from unreasonable interference with certain legally recognised aspects or incidents of use and enjoyment of the land. Nuisance provides only limited protection to an occupier from being overlooked by others  
  - **NOTE:** Overlooking is not sufficient to found an actionable private nuisance |
| **Reasoning** | It is lawful on the part of those occupying premises in the vicinity to overlook the land from any natural vantage point, but artificial erections may be made which destroy the privacy existing under natural conditions  
- So far as freedom from view or inspection is a natural or acquired physical characteristic of the site, giving it value for the purpose of the business or pursuit which the plaintiff conducts, it is a characteristic which is not a legally protected interest  
- No legal right infringed → Over-viewing did **NOT** constitute nuisance  
- **However,** note that categories of nuisance are not closed  
- **NOTE:** Physical/material interference is not necessary |

**Victoria Park Racing and Recreation Grounds Co v Taylor** (1937) 58 CLR 479

| **Facts** | D’s installation of floodlights and camera’s with the purpose to record what happens in the P’s backyard. The P feels distressed as they cannot use their yard normally  
- Issue of 2 separate nuisances: (a) lights (b) recording |
| **Principle** | Illumination and surveillance of the P’s land may amount to an actionable nuisance |
| **Reasoning** | **Injunction granted**  
- The lights → nuisance if they materially interfere with the ordinary comfort of human existence  
- There is evidence that the P’s are suffering real health problems as a result of the continued illumination of their land  
- The surveillance and accompanying recording by video camera of what occurs in the P’s backyard gets sufficiently close to “watching and besetting” → actionable nuisance |

**Hunter v Canary Wharf** [1997] AC 655

### Facts
- Whilst constructing pool, water from D property when to P’s land

### Principle
- Water ingress is recognised as a type of conduct that amounts to rights or incidences associated with the protection with the possession of land that would be protected by the tort of private nuisance

### Reasoning
- NSWCA had little difficulty in finding that water ingress constituting private nuisance
- When the nuisance alleged is caused by water entering the land, the P can allege that the D’s act of altering the land
- The water flows have changed the water flow or watercourse onto the P’s land which causes material damage
- P entitled to damages for damage done to property and cost done to the retainer wall to minimise the damage done

### Unreasonable and substantial interference; locality and utility. Material damage and personal discomfort/inconvenience

- Vital consideration of circumstances= crucial; factors include (multi-factorial inquiry):
  - The **nature** of the act
  - The **locality** of the P’s land
  - The act’s **triviality**
  - The **time, frequency and duration** of the disturbance
  - The **motivation** of the D and activity
  - The **utility** of the conduct in which the defendant is engaged (rarely considered)
  - The **potential steps taken** (by the D) to minimise the interference

- **HOWEVER**, in case of material loss/damage, no person can be excused of nuisance

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### St Helen’s Smelting Co v Tipping (1865) 11 ER 1483

#### Facts
- P purchased house where there was manufacturing works. P was aware of this. Noxious vapours from the D’s factory, causing damage to trees and crops on P’s property

#### Principle
- Whether an interference with comfort and quiet enjoyment amounts to an actionable nuisance will depend on the locality. An interference which causes material damage will be an actionable nuisance
  - **NOTE**: The law will not protect trifling inconveniences

#### Reasoning
- Distinguish between action for nuisance based on ground that it produced material injury to property and action for nuisance on the ground of sensible, productive discomfort
  - Issue of locality and discomfort → the personal inconvenience and interference with one’s enjoyment and use of the land depends on the circumstances of the place where the thing complained of actually occurs
  - Where an occupation is carried on by one person in the neighbourhood of another, and the result of that occupation is a material injury to property, there is an action
  - Relevant circumstances → time and locality
  - **NOTE**: Where there is material damage, it is easier to demonstrate private nuisance