

**T O R T S**  
**SHORT NOTES**

**Semester One 2017**

# NUISANCE

An **unreasonable** but indirect or intangible **interference** with a person's **use and enjoyment of land** (see meaning of land) or some right in connection with or over it (*Hargrave v Goldman*), in respect of **material injury** to property or **damage to sensibilities**

## **(1) Standing to Sue**

Plaintiff must have an exclusive *proprietary* interest in, and constructive possession of, the land including, for instance, strata title

- Owner
- Tenant
- Licensee with exclusive possession
- Landlord whose reversionary interest is affected  
(*Hunter v Canary Wharf*)

### **Cannot be:**

- Licensee without exclusive possession
- Family member of actual owner:  
E.g. husband (spouse) (*Oldham v Lawson*) or daughter (child) of the owner (*Hunter v Canary Wharf*)

## **(2) Unreasonable Interference with Land**

D must have suffered material injury to their property or damage to sensibilities and the enjoyment of their land

### **A. Material Injury to Land**

Physical damage that is not trivial (low threshold) will satisfy the interference with land as being unreasonable (e.g. tree damage from noxious gas)

(*St Helen's Smelting Co*; *Halsey v Esso*)

- Locality is irrelevant (*Munro*)

### **B. Interference with Enjoyment/Damage to Sensibilities**

- Where there is no material injury to the land, liability will depend on the conflicting interests of users of the land:
- Must decide whether the nuisance is unreasonable or merely part and parcel of life – the 'give and take, live and let live rule' – for every nuisance complained of creates a reciprocal nuisance  
(*Bamford v Turley*)
- Not trivial: more than 'fanciful', i.e. substantial (low threshold) – "not merely according to elegant and dainty habits... but... plain and sober notions..."
- Must effect land per se and be non-consequential  
(*Walter v Selfe* (1851))
- *Question of fact and reasonableness dependent on a multitude of factors*

### **i) Extent**

Time / Duration / Frequency: e.g. at night, on weekends etc.

- "residents should have respite from the noise levels...on at least one whole day each weekend and one whole day each week; and... commercial occupants and residents should not be subject...during weekdays and evenings"
- There was no means or way by which the claimants could become accustomed to the noise  
(*Seidler v Luna Park Reserve Trust*)

Cf.

- "A landlord who lets a portion of a building for the accommodation of university students can only reasonably expect that such students will keep late hours and in the course of doing so will make such noises" – application of 'give and take rule'  
(*Clarey v The Principal and Council of the Women's College*)

- Interference in the middle of the night (i.e. especially past midnight) will almost always be unreasonable) - the loss of a single night's sleep was found to be non-trivial in *Munro v Southern Dairies*

#### Character

"The noises made only amounted to those that are incidental to the occupation of premises as a dwelling – walking about, scraping chairs along the floor, having baths, talking and laughing, preparing for bed"  
(*Clarey v The Principal and Council of the Women's College*)

#### **ii) Locality**

- What is a nuisance in one area may not necessarily be in another; yet, in certain areas the interference may exceed what must be tolerated  
(*Feiner v Domachuk*)
- It is irrelevant that the nuisance had been occurring in the locality in the past (coming to the nuisance not a defence)  
(*Sturges v Bridgman*)
- "If a man chooses to make his home in the heart of a coalfield or in a manufacturing district, he can expect no more freedom from the discomfort usually associated with such a place"

#### However

"One must judge a question of nuisance in the social and local setting in which it is complained of, change in the organization of industry must necessarily follow changes in social conditions"  
(*Munro v Southern Dairies Ltd*)

#### Consider:

- Rural v Urban
- Noisy or quiet
- Under- or over-populated
- Locality not relevant to material injury
- Suitability of locality now depends heavily on compliance with planning legislation

#### **iii) Abnormal Sensitivities (of the plaintiff)**

- An activity is not a nuisance if it affects the P merely because she/he puts the land to a particular sensitive use (and where the conduct does not interfere with the ordinary use and enjoyment of the land)  
(*Robinson v Kilvert (1889)*)
- "Where it is as much the advantage of one owner as of another, for the very nuisance one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own – 'reciprocal nuisances'"  
(*Bamford v Turnley (1862)*)

#### *However:*

#### **iv) Improper Motive**

- A claim may succeed even where there would otherwise be no actionable nuisance if 'malice' is present:  
(*Hollywood Silver Fox Farm Ltd v Emmet*)
- But cannot be nuisance if no infringement of rights has occurred  
(*Fraser v Booth*)

#### **v) Social Utility**

- A private property owner should not have to put up with a nuisance merely because it benefits the general public
- "I am satisfied... that horse delivery is still... the most suitable and economical method of retail milk delivery in the particular conditions of the Melbourne industry"  
However –
- "I am not satisfied that the stables are an essential and unavoidable incident of the conduct of the defendant's business on that locality"  
(*Munro v Southern Dairies*)

#### **(3) Scope of Protection (if relevant)**

A) Freedom of Observation

- An action in nuisance cannot be brought against someone overlooking someone's land (*ABC v Lenah Game Meats*; *Victoria Park Racing*)
- The profitable conduct of business is not a protected interest (*Victoria Park Racing v Taylor*)

B) Uninterrupted Views

- There will be no claim in relation to a view being spoiled as a result of the physical presence of a nearby building (*Hunter v Canary Warf Ltd*)

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## DUTY OF CARE

*P must establish that D owed him/her a duty of care*

**(1) Establish Relationship** on the facts (e.g. tree-lopper and passer-by; statutory authority and general public)

**(2) Established Duty?** – *it is settled law that there is a duty of care owed by [] to []*.

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*Where there is no established duty of care relationship, the court will adopt an incremental approach based on reasonable foreseeability and salient features*

**(3) Reasonable Foreseeability**

It must be reasonably foreseeable to a reasonable person in D's position that careless conduct of any kind may result in damage of some kind to a class of person to which P belongs

(*Minister v San Sebastian*; *Donoghue v Stevenson*)

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**(4) Salient Features**

*The court will consider salient features to examine the “totality of the relationship” (*Graham Barclay*) —*

<u>Pro-Duty</u> (dependent of presence or absence of these features)	<u>Neutral</u>	<u>Anti-Duty</u>
<b>Vulnerability</b> ( <i>CAL v MAIB</i> ): P is vulnerable if unable to take reasonable steps to protect themselves from the negligent act	Interference with <b>legitimate business activities</b>	<b>Indeterminate Liability</b> : will ordinarily defeat a claim for a duty of care, where liability cannot be realistically calculated
<b>Reliance and Assumption of Responsibility</b> ( <i>CAL v MAIB</i> ): Where D has assumed responsibility and P has relied on this assumption	Consideration of <b>precedent</b> ( <i>CAL v MAIB</i> ; <i>Adeels Palace</i> )	<b>Burden on Autonomy</b> ( <i>CAL v MAIB</i> – to impose a duty of care would have impinged on Scott's autonomy)
<b>Control</b> : If D exercised a high degree of control over the situation, they are more likely to have owed a duty of care to the P if that control was exercised carelessly (consider	<b>Coherence or Conflict with Statute/Laws</b> ( <i>Adeels</i> – the duty of care owed towards patrons in respect violent conduct by third parties was consistent with the duty imposed by statute on the licensee; <i>CAL v MAIB</i> – conflict with duty of liquor licensees; <i>Sullivan v Moody</i> – The defendants owed a statutory duty to both victims and family members	<b>Floodgates</b> ( <i>Sullivan v Moody</i> ): the establishment will initiate a floodgate of litigation

<p>whether this control was fragmented by a complication of a sequence of events or other action) (<i>Adeels Palace</i>)</p> <p><b>Constructive or Actual Knowledge of Risk</b></p>	<p>responsible for conduct, but owed a paramount duty to the child)</p> <p><b>Coherence or Conflict with Torts</b> (<i>CAL v MAIB</i> – to impose a duty under negligence would have led to a conflict with the torts of false imprisonment and battery; <i>Sullivan v Moody</i>)</p>	<p><b>Illegality:</b> Where P was involved in illegal behaviour at the time of negligent action</p> <p><b>Conflict of Duty</b> (<i>Sullivan v Moody</i> – no duty of care to take care of parent’s interests where such a duty would conflict with duty to investigate child abuse)</p>
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## **BREACH**

### **(1) Particularise Breach**

*D must have committed either act or omission that falls short of the expected standard of care. Whether D has breached his/her standard of care is determined by use of an objective test based on the reasonable person. (Blyth v Birmingham)*

*Having established a duty of care, P may be entitled at common law to a claim in negligence. However, P must also satisfy the statutory requirements set out in s 48 Wrongs Act.*

### **(2) Standard of Care**

*P must establish that D has fallen below the standard of care expected of them. The standard care expected of D is that of a reasonable person, child, or person possessing similar special knowledge/skill.*

- D is not negligent in failing to take precautions against a risk of harm unless a reasonable person (prudent person: *Vaughan v Menlove*) in P’s position would have taken those precautions (s 48(1)(c))
- As assessed according to the time and date of the alleged conduct and not the date of judgement (*Roe v Minister of Health*)

Unless:

**Minor:** Standard expected of a reasonable child of the same age, intelligence and experience (*McHale v Watson*)

**Mentally Incapacitated/Intoxicated:** Standard expected of a reasonably competent person (*Carrier v Bonham*)

**Inexperienced:** Standard expected of an experienced person  
e.g. Medicine graduates will be assessed in accordance with experienced healthcare professionals (*Imbree v McNeilly* overturned *Cook v Cook*)

**Expert with special knowledge:**

Standard expected of a person possessing similar special knowledge/skill

OR

Person holding themselves or alleging to possess those special skills (high threshold) –

(s 58(a))

(*Phillips v Whiteley*)

\* See Common Practice

As assessed according to the time and date of the alleged conduct and not the date of judgement (s 58(1)(b))

### **(3) Foreseeability**

*P is required to establish that the risk of harm to the class of persons to which she belongs was foreseeable (s 48(1)(a)) and not insignificant (s 48(1)(b))*

- A person is not negligent in failing to take precaution against a risk of harm unless the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known) (s 48(1)(a))
- Does not require probability  
(*Wyong Shire Council v Shirt*)

*P may argue that a reasonable person would...*