TORTS

LAW1113

Notes

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Nuisance

Private Nuisance

Private nuisance: An unreasonable interference with the plaintiff's use and enjoyment of land.

- *cf* Public nuisance – activities affecting general public at large, as opposed to private nuisance affecting individuals

Forms of Interference

The interference with the P's use and enjoyment of the land can take the form of:

- Physical damage to land; or
- Interference with the comfort or sensibilities of the occupants of the land

Comparison with Related Torts

Comparison with Trespass to Land:

- Involves injury – though that may be in the form of damage to sensibilities
- Does not require direct physical intrusion with the land
- Sometimes deciding which is appropriate is difficult:
  - e.g. Tennis balls from neighbouring court – issue may be whether the interference emanates from an ongoing state of affairs
- Tend to be mutually exclusive – same set of facts will not constitute both torts

Comparison with Negligence:

- Protect different interests:
  - Nuisance – protects use and enjoyment of land
  - Negligence – protects a much wider range of interests related to the person and their property
- Not mutually exclusive – same set of facts may be both

Standing to Sue

- Exclusive right to possession of land:
  - Owner
  - Lessee
  - Flowing from fact of actual possession (freeholder, tenant)

→ Mere licensees do not have sufficient interest

➢ *Oldham v Lawson (No 1) (1976)*; *Hunter v Canary Wharf (1997)*

Reversionary interest: Where damage to land is material and thus "enures to the reversioner".

- Damage will continue to affect the land when it reverts lack to original owner

Who Can Be Sued?

- Creator of the nuisance:
  - May emanate from someone else's land – *Fennell v Robson Excavations Pty Ltd (1977)*
  - Need not emanate from private property
- Adopter or continuer of the nuisance, if:
  - The defendant knew, or ought to have known, of the nuisance; and
  - failed to take reasonable steps to bring the nuisance to an end

➢ *Sedleigh-Denfield v O'Callaghan (1940)*; *Hargrave v Goldman (1967)*

Unreasonable Interference

Physical Damage:

- As long as the physical damage is not trivial, then the interference with P's use and enjoyment will be unreasonable (*St Helens Smelting Co v Tipping (1865)*)

Damage to Sensibilities:

- Live and let live – *Bamford v Turnley (1862)*
  - When living in close proximity with each other, we have to allow some leeway with them if we expect the same back to us
- Locality – *Munro v Southern Dairies (1955)*
  - For nuisance to exist, the locality must be such that the nuisance is not to be expected in the area
- Intensity of discomfort
  - e.g. Bad smells in a rural area – smells themselves may have been expected, but have gone beyond a reasonable intensity of discomfort
- Time/duration/frequency – *Seidler v Luna Park (1995)*

        - Whether nuisance has occurred or not may depend on time, duration and/or frequency of the nuisance

    - Practicality of avoiding interference (ordinary use) – *Clarey v Principal & Council of Women's College (1953)*

    - Malice – *Hollywood Silver Fox Farm v Emmett (1936)*
        - With malice, an interference that would otherwise be deemed reasonable may be deemed unreasonable

    - Social utility – *Munro v Southern Dairies (1955)*; *Kennaway v Thompson (1981)*
        - A private property owner should not have to put up with a nuisance just because it benefits the general public

Hypersensitivity:

- *Robinson v Kilvert (1889)*:

    - An abnormally sensitive plaintiff is not entitled to relief simply because s/he is especially sensitive

    - The same principle applies where the P undertakes a hypersensitive activity on his/her land

    - However, there may be an exception to this rule if D was motivated by malice

Unprotected Interests

- Aesthetic values

- Freedom from view (privacy) – being observed in the use of one's premises – *Victoria Park v Taylor (1937)*

- Freedom to view – interference related to obstruction of view, light (right to light), television reception caused by building on D's land – *Hunter v Canary Wharf (1997)*

    - Limits shouldn't be placed on building rights of a private individual

Is There A Fault Requirement?

- No fault requirement per se but something like it present when considering:

    - Whether the interference was unreasonable;
    - Whether D is liable for adopting or continuing a nuisance; and
    - Whether the defence of a statutory authorisation is available

Defences

Coming to the Nuisance

- Coming to the nuisance is not a defence in itself, but may impact upon the remedy that the P receives (in the form of public interest) – *Miller v Jackson (1977)*

Statutory Authorisation

➢ *Lester-Travers v City of Frankston (1970)*:

- Applies where:
  - The legislation has imposed a duty on the defendant to do a particular act; and
  - The nuisance was an inevitable consequence of the doing of that act

Remedies

Abatement (Self-Help)

- An occupier whose land is subjected to a nuisance, or threatened nuisance, can take steps to abate it, without going onto the neighbour's land
  - Exception – In an emergency, the occupier may enter the neighbour's property without notice for the purpose of abating the nuisance

Damages

- Interference must be a reasonably foreseeable consequence of the D's act for damages to be awarded – *Cambridge Water Co Ltd v Eastern Counties Leather plc (1994)*
- Equitable and Common Law Damages
- Damages may be awarded in regard to:
  - Cost of abatement
  - Property damage and interference with amenity – *Hunter v Canary Wharf (1997)*
  - Damages in lieu of an injunction – *Kennaway v Thompson (1981)*

Injunction

- *Quia timet* – injunction to restrain wrongful acts which are threatened or imminent but have not yet commenced

- Interlocutory and permanent

- D must satisfy the court as to why an injunction should not be granted – *Coventry v Lawrence (2014)*

Injunctions and Nuisance:

- *Miller v Jackson (1977)*; *Kennaway v Thompson (1981)*:
    - Award is discretionary, however there is a presumption in favour where nuisance is likely to continue
    - Factors that are considered include:
        - Damage to the P is small and capable of adequate remedy through compensation and impact upon D would be oppressive;
        - Behaviour of the parties;
            - Whether P came to the nuisance
            - Practicality of stopping the nuisance
        - Public interest (social utility) and the existence of a planning permit – *Coventry v Lawrence (2014)*

Full Case Summaries

A

Annetts v Australian Stations Pty Ltd (2002)

Facts

- Plaintiffs were parents of 16-year-old boy (parents lived in NSW, boy moved to WA to work as jackaroo at remote cattle station)
- Parents had entered arrangement with son's employer – employer agreed to supervise son's work
- After 7 weeks, the boy is sent out to work by himself at another cattle station
- After another 6 weeks, the boy and another jackeroo from a nearby cattle station disappear
- More than 4 months after boys' disappearance, bodies of boys are found, parents informed over phone, suffer psychiatric mental harm

→ Parents sue for mental harm

Issue/s

- Whether a duty of care was owed to the parents – see below Principle/s

Outcome/Holding

- Appeal allowed

Principle/s

- Assumption of responsibility – Evidenced by the assurances given by the D to the P
- No indeterminate liability – As the assumption of responsibility and pre-existing relationship demarcated to whom duty owed
- Vulnerable – The P were vulnerable to the risk of harm the D exposed them (and their son) to
- Control – The D controlled the circumstances giving rise to the risk to the P (and their son)
- Interference with legitimate business activity – It is not legitimate to expose employees to risk of harm
- No conflict of duties – The duty to the P would simply be co-extensive to the settled duty to the employee
- There is no duty of care for mental harm caused by the manner in which bad news is communicated (messenger)

Ashley v Chief Constable of Sussex Police (2008)

Facts

- Man at home (flat)
- Police raided flat (had warrant to search for drugs)
- Man shot and killed by police – was unarmed and naked at time of being shot

→ Police prosecuted – claimed self defence

Issue/s

- Whether the policeman's claim of self defence was valid – whether belief of threat of harm was valid

Outcome/Holding

- Defence not valid – belief of threat of harm was not valid

Principle/s

- Assailant must prove that the mistaken belief was not only honestly held but was reasonable
- Based on the honest and reasonable belief, Court must be satisfied that the action taken in response was reasonable

Attwells v Jackson Lalic Lawyers (2016)

Facts

- Defendants, law firm, acting on behalf of guarantors who guaranteed payment of debts, but could not pay debts
- Bank was pursuing guarantors for amount that they couldn't pay
- Bank and guarantors settled on day of trial, but guarantors couldn't meet settlement agreement, after lawyers negligently advised them

→ Guarantors sued lawyers

Issue/s

- Whether the negligent advice by lawyers was so intimately connected with the conduct of the case in court that it can fairly be said to

affect the way the case is conducted in court – whether lawyers had immunity

Outcome/Holding

- No – no immunity for lawyers (some judges dissented)

Principle/s

- In order to attract immunity, advice given out of court must affect the conduct of the case in court and the resolution of the case in court. The immunity does not extend to preclude the possibility of a successful claim against a lawyer in respect of negligent advice which contributes to the making of a voluntary agreement between parties merely because litigation is on foot at the time the agreement is made.

Australian Broadcasting Commission v Lenah Game Meats Pty Ltd (2001)

Facts

- Animal activist group trespassed on property of Lenah
- Group handed footage to Animal Liberation, who handed footage to ABC
- Lenah learns that ABC is planning to air footage

→ Lenah tries to file for injunction against ABC

Issue/s

- Whether Lenah has the right to file for injunction

Outcome/Holding

- No – Lenah fails to be granted injunction

Principle/s

- Injunction can only be granted for a wrong in a tort – ABC did not commit a tort – they only received the results of someone else's tort

B

Balmain New Ferry Co Ltd v Robertson (1904)

Facts

- Balmain owned a wharf – ferries dock at and leave wharf periodically
- Ferries operate between two wharfs
- To enter wharf area, one must pay a penny – other wharf requires no payment to leave – if travelling in other direction, then payment is required at end wharf only
- Mr Robinson pays penny to enter wharf, misses ferry, decides to leave to other ferry, but needs to pay another penny to leave
- Mr Robinson doesn't want to pay penny, eventually pushes his way out

→ Mr Robinson sues Balmain for false imprisonment

Issue/s

- Whether preventing Mr Robinson's exit unless he paid a penny constituted false imprisonment

Outcome/Holding

- No false imprisonment – there was a contractual agreement between Mr Robinson and Balmain that a penny must be paid to leave the ferry area

Principle/s

- There is no false imprisonment if there is a contractual obligation that must be satisfied before the plaintiff can leave the area

Bamford v Turnley (1862)

Facts

- Defendant burnt bricks in a kiln, sending noxious fumes to the surrounding country, affecting various neighbours
- Neighbours and servants fell ill

→ Plaintiff sued to prevent the nuisance

Issue/s

- If an act is determined to be a reasonable use of one's property, but it causes a nuisance to neighbours, where does the balance lay – with the individual, or the public?

Outcome/Holding

- Appeal allowed

Principle/s

- Live and let live – when living in close proximity with each other, we have to allow some leeway with them if we expect the same back to us
- Even if actions are for the public good they cannot go on causing harm to individuals without compensating them

Barnett v Chelsea & Kensington Hospital Management Committee (1969)

Facts

- Night watchmen came to hospital very early in morning, complained of vomiting and feeling very ill as consequence of drinking some tea
- Nurse called doctor, doctor told man to go home and see doctor later that day
- Night watchman went home, die almost immediately upon arriving home – found that he died of arsenic poisoning

→ Night watchman's estate sued hospital

Issue/s

- Whether the man would have died but for the hospital's breach of duty of care

Outcome/Holding

- Suit unsuccessful – there was a duty of care and it was breached, but it was determined that the man would have died anyway, even if the breach did not occur

Principle/s

- Would the plaintiff's specific injury have occurred *but for* the defendant's breach of duty of care?

Bazley v Curry (1999)

Facts

- Residential institution responsible for care of children
- Employee sexually assaulted children

Issue/s

- Whether employer could be vicariously liable for the sexual assaults

Outcome/Holding

- Yes

Principle/s

- The fundamental question is whether the wrongful act is sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires.
- Factors to consider includes:
  - the opportunity afforded to abuse power;
  - whether the wrongful act furthered the employer's aims;
  - the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
  - the extent of employee's power over the victim;
  - the vulnerability of potential victims to a wrongful exercise of the employee's power.

Beard v London General Omnibus Co (1900)

Facts

- Conductor of bus, in absence of bus driver, turns bus around in order to position bus to be ready for next journey
- Conductor negligently hits pedestrian

→ Plaintiff sues company in vicarious liability

Issue/s

- Whether the act was performed in the course of employment, are therefore the bus company vicariously liable

Outcome/Holding

- No – therefore company is not vicariously liable

Principle/s

- Importance of identifying tasks assigned to employee

Bernstein v Skyviews & General Ltd (1978)

Facts

- Skyviews took pictures of properties (aerially above them) in order to sell them to the homeowners

→ Bernstein sued Skyview for trespass to property

Issue/s

- Whether there was a trespass to land by Skyview
- How high above constitutes "land" owned by a person

Outcome/Holding

- No trespass to land

Principle/s

- Rights of the owner extend above their had to such heights as is necessary for the ordinary use and enjoyment of his land and the structures on it

Bird v Jones (1845)

Facts

- Entrepreneur set up seats on side of bridge, cordoned of one side of bridge as part of money-making enterprise – wanted to charge spectators to sit and watch boating regatta on river
- Mr Bird crossed the bridge – likes to walk on cordoned-off side of bridge cordoned off and refused to walk on other side of bridge
- Mr Bird prevented from leaving once he gets to other side of cordoned-off area
- Mr Bird pushes his way out 30 minutes after being preventing from leaving

→ Mr Bird charged for assault, sues for false imprisonment

Issue/s

- Whether preventing Mr Bird from leaving cordoned-off side constitutes false imprisonment

Outcome/Holding

- Not false imprisonment

Principle/s

- What is necessary for there to be imprisonment in the requisite sense is a "total restraint of the liberty of the person in question"
- There will be no imprisonment if, as here, a person "merely obstructs the passage of another in a particular direction", leaving the person obstructed "at liberty to stay where he is or to go in any other direction if he pleases"
- A prison, even a notional one, must have a "boundary" beyond which the person imprisoned is "prevented from passing"
- To be imprisoned in the relevant sense, a person must be prevented from leaving a place, "within which the person imprisoning would confine him"

Bolton v Stone (1951)

Facts

- Cricket club next to plaintiff's house
- Plaintiff standing outside field during cricket game