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Private Nuisance

Elements

1	Does the plaintiff have title to sue?
2	Is there interference with the enjoyment of land? Is the interference tangible or intangible?
3	Can the defendant be sued? Did the defendant create, authorise, adopt or continue the nuisance?

Element 1: What is required for a person to have title to sue?

- The plaintiff must have the right to exclusive possession or actual exclusive possession.

Oldham v Lawson (No 1) [1976] VR 654

- Wife owned the house so the husband was a mere licensee. **Held:** only the wife could sue in nuisance.
- Exception: damage is of sufficiently permanent character.

Element 2: Is there interference with the enjoyment of land? Is the interference tangible or intangible?

Tangible and intangible interference

Interference		Tests
Tangible	Indirect physical injury to property such as: fire, tree roots, flood, and dust.	<ul style="list-style-type: none"> • Indirect physical injury • Not trivial • Locality doesn't matter
Intangible	Aka 'sensible personal discomfort' e.g: noise, smell, and offensive sights.	<ul style="list-style-type: none"> • Damage is substantial and unreasonable • Locality matters

Interests protected

Protected	<ul style="list-style-type: none"> • Easements • Right to support the land • Right to leave and enter land
Not protected	<ul style="list-style-type: none"> • Natural light • Views • One looking into another's property (<i>Victoria Park Racing</i> but cf <i>Fearns v Tate Gallery</i> in the UK)

How do courts approach the assessment of whether interference is substantial or unreasonable?

- Against the standard of the ordinary person “not merely according to elegant or dainty modes and habits of living” (*Walter v Selfe*) and can’t be abnormally sensitive (*Clarey v Women’s College*).

<i>Munro v Southern Dairies [1955] VLR 332</i>	
Significance	The interference must be ‘material’ or ‘substantial’ to constitute a nuisance.
Material facts	<ul style="list-style-type: none"> • The plaintiff claimed that his quiet enjoyment of his premises has been interfered with by the noise, smell and flies from the horses kept on the defendant’s property. • The plaintiff sued the defendant for an injunction and/or damages.
Legal reasoning	<p>Sholl</p> <ul style="list-style-type: none"> • The interference was substantial and unreasonable. <ul style="list-style-type: none"> ◦ Locality – retail milk required horses and was common in the neighbourhood, however, it was suggested that horses would not be needed in the future. ◦ Plaintiff’s sensitivity – P was not abnormally sensitive.

	<ul style="list-style-type: none"> ○ Public utility – Not enough to negative nuisance. ○ Use of premises to accepted standards – not enough to negative nuisance.
Outcome	Judgment for the plaintiff

<p><i>Hollywood Silver Fox Farm v Emmett</i> [1936] 2 KB 468</p>	
Significance	<p>Noise can constitute a private nuisance if it is excessive and unreasonable.</p>
Material facts	<ul style="list-style-type: none"> ● The plaintiff bred silver foxes on land adjoining that of the defendant. ● The plaintiff erected a prominent advertising sign which the defendant requested be removed because he feared it would be detrimental to his building estate. ● When the plaintiff refused to remove it, the defendant shot guns on his own land as near as possible to the breeding pens. ● The sound greatly alarmed the vixens, thereby reducing the number of cubs reared.
Legal reasoning	<p>Macnaghten J</p> <ul style="list-style-type: none"> ● Noise can be considered excessive and unreasonable if the purpose is to ‘vex or annoy the plaintiffs of the occupiers...’ ● Citing <i>Gaunt v Fynney</i> (1872) (Lord Selborne): ‘If what has taken place had occurred between two sets of persons both perfectly innocent, I should have taken an entirely different view of the case. But I am persuaded that what was done by the defendant was done only for the purpose of annoyance, and in my opinion it was not a legitimate use of the defendant’s house to use it for the purpose of vexing and annoying his neighbours.’ ● Citing <i>Allen v Flood</i> (Lord Watson): ‘No proprietor has the absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public.’

Outcome	Judgment for the plaintiffs
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Element 3: Can the defendant be sued?

The defendant can be sued if he or she:

1. Creates a nuisance
2. Authorised a nuisance
3. Adopts a nuisance

(1) Creates a nuisance

- A nuisance can be created regardless of whether the defendant occupies or owns the premises from which the nuisance emanates (strict liability).

(2) Authorises a nuisance

- A nuisance is authorised if an occupier permits others to undertake activities that constitute a nuisance.

(3) Adopts a nuisance

A nuisance is continued or adopted (by a person who did not create the nuisance) if:

1. An occupier is aware of the nuisance; and
2. Fails to take reasonable steps to abate it.

CASE: *Stockwell v Victoria* [2001] VSC 497

Significance	The defendant adopts the nuisance if they are aware of the nuisance or could reasonably have foreseen the occurrence of the nuisance, and failed to take reasonable steps to abate it. ← actual or constructive knowledge.
Material facts	<ul style="list-style-type: none"> • Wild dogs which occupied the area surrounding Crown land left said areas into the plaintiff's paddocks, killing and severely injuring his sheep. • The plaintiff alleged that the State ought to have been aware of this happening, and failed to take reasonable steps to abate the nuisance.
Legal issue(s)	Whether the State, as owner and occupier of the surrounding land, was under obligation to protect the plaintiff's property (sheep) from the wild dogs, which caused the plaintiff damage.
Judge reasoning	<p>Gillard J</p> <ul style="list-style-type: none"> • 'Where a nuisance has been created by the actions or omissions of a trespasser, or by some other means, without the actions, omissions, authority or permission of the occupier of land, the

	<p>occupier is liable if he has knowledge or ought to know of the existence of the nuisance, it is foreseeable that damage could occur, and he fails to comply with a measured duty of care to abate the nuisance.'</p> <ul style="list-style-type: none"> • 'The plaintiff knew of the extent of the risk, could reasonably foresee the likelihood of damage to the plaintiff's stock, but... failed to take reasonable steps to prevent or minimise the happening of the damage...' such as laying traps or increasing the poison bait in the area.
Outcome	Judgment for the plaintiff

Defences

1. Consent
2. Statutory authorisation

(1) Consent

- Tolerating a nuisance is not consent.
- 'Coming to the nuisance' is not a defence (*Sturges v Bridgman*), i.e. moving into the area.

CASE: <i>Sturges v Bridgman</i> (1879)	
Significance	<p>(1) It is no defence to state that the plaintiff 'came to the nuisance' and therefore the plaintiff cannot complain;</p> <p>(2) nor that by the act of coming to the nuisance the plaintiff has impliedly consented to it.</p>
Notes	<ul style="list-style-type: none"> • The plaintiff occupied the adjoining property to the defendant's store. • The premises were separated by a common wall. The noise from the mortars seriously inconvenienced the plaintiff's use of his new consulting room.

(2) Statutory authorisation

- Statutory authorisation is a defence if the nuisance is authorised by legislation.