

## TORTS LAW TEXTBOOK NOTES

### CLASS 1B: PRIVATE NUISANCE

#### ACTION ON THE CASE VS. TRESPASS

- Action on the case is indirect vs. Trespass is direct interference
- Action on the case needs to establish proof of damage and injury vs. Trespass need not establish proof of damage because it is rights-based.

#### INTRODUCTION OF PRIVATE NUISANCE

- **Definition:**
  - Private nuisance protects a person's right to the use and enjoyment of the land.
    - Nuisance: [St. Helen's Smelting v Tipping 1865]
      - Conduct caused material injury to property.
      - OR conduct has caused "sensible personal discomfort".
    - Enjoyment → Ordinary use of the land.
- It is an action on the case, so the nuisance can be caused by indirect interference to the land.
  - Indirect interferences include both tangible and intangible interferences:
    - **Tangible:**
      - Fire, leaves, tree roots, flood, dust
    - **Intangible:**
      - Noise, smell, offensive sights
- Interference with a persons' right to leave and enter their land [Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia 1986]

TO ESTABLISH PRIVATE NUISANCE, PLAINTIFF MUST ESTABLISH: (Must satisfy every element to be successful in this action, no order) [Stockwell v Victoria 2001]

1. Plaintiff has the title to sue.
2. Defendant has the requisite knowledge of the nuisance: (Actual or presumed knowledge)
  - a. Depending on whether defendant is creator, authorizer or continuer of nuisance.
3. Nuisance was substantial or unreasonable interference with the plaintiff's rights to enjoy the land.
  - a. Court will decide whether an interference is substantial or unreasonable by balancing the competing interests of both parties: [Munro v Southern Dairies 1955]
    - i. Nature and circumstances of defendant's activity
    - ii. Character of the resulting interference against plaintiff's interest.
      1. Test of reasonableness
      2. Test of locality

### ELEMENT 1: TITLE TO SUE (Who has the legal standing to sue?)

- Have title to sue: [Oldham v Lawson 1976]
  - Must have possessory interest: Person has rights in or over property, in actual possession of the property and has rights to exclusive possession of the property.
    - Could be owner or tenant of property.
  - Owner who has only has reversionary interest in the land but nuisance is of sufficiently permanent character so as to damage his or her reversion.
- Does not have title to sue:
  - Owner of property who only has reversionary interest in the land.
  - Immediate family members or anybody residing in the land who do not have rights to exclusive possession of the land. [Oldham v Lawson 1976]
    - Facts:
      - Husband and wife want to sue someone else but:
    - Ratio Decidendi:
      - Husband who is a licensee of land does not have rights to sue, Wife who is the owner of the land has rights to sue.
      - Damages paid only to the wife, not to husband.

### ELEMENT 2: WHO CAN BE SUED? (People who have requisite knowledge of the nuisance)

- Creator of the Nuisance:
  - Two key principles:
    - Not necessary that the defendant be the occupier of land to be liable for a nuisance. [Animal liberation (Vic) Inc v Gasser 1991]
    - Creator of nuisance is strictly liable for the nuisance he creates, even if this person no longer in occupation of the land from which the nuisance emanates, provided that they have created it. [Roswell v Prior 1701]
- Authorising the Nuisance:
  - If an occupier permits others to undertake activities that constitute a nuisance, then the occupier is also liable for the nuisance created by that individual.
  - Ratio Decidendi: Liability is imposed upon the basis that if one hires out property for a particular purpose, which involves the danger of nuisance, one is liable for the nuisance created by the hirer. [De Jager v Payneham & Magill Lodges Hall Inc 1984]
    - Compared to Peden Pty Ltd v Bortolazzo 2006, landlord was not liable for nuisance created by tenants because she did not authorize it and the tenancy agreement had terms expressly prohibiting tenant from creating nuisance.
- Continuing or adopting the nuisance
  - A defendant who does not create the nuisance, but continue or adopts the nuisance can be liable for that nuisance.
  - Ratio Decidendi:
    - Where a nuisance has been created by the actions or omissions of a trespasser, without actions, omissions, authority or permission of the

occupier of the land, the occupier is still 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. [Leaky v National Trust for Places of Historic Interest 1980] [Stockwell v Victoria 2001]

- Due to varying degree of “reasonableness”, measured duty of care takes into account the resources of the land owner, gravity of the nuisance and the ability of the land owner to eradicate it. [Leaky v National Trust for Places of Historic Interest 1980] [Owners Strata Plan 4085 v Mallone 2006]
- This general principle relating to continuing and adopting a nuisance apply whether the hazard is natural or man-made, including the actions of a trespasser. [Stockwell v Victoria 2001]
  - Flowing of water to a lower land as a nuisance is debatable. [Elston v Dore 1983; not liable] vs. [Leakey v National Trust for Places of Historic Interest 1980; liable]
  - There is no liability if the defendant is not the creator of the nuisance, is not aware of it, nor had the means to know about the nuisance. [Montana Hotels Pty Ltd v Fasson Pty Ltd 1986]
- Misfeasance vs. Non-feasance
  - Traditionally:
    - A person who created a nuisance by an act of misfeasance (Wrongful exercise of lawful authority) is strictly liable.
    - A person who created a nuisance by an act of non-feasance (Failure to perform an act required by the law) depended upon proof of fault on the part of the occupier.
  - Now:
    - In almost all cases, proof of fault is required.
- Public authority’s immunity in nuisance (Misfeasance or non-feasance):
  - Generally, a public authority is not liable for a nuisance for the exercise or failure to exercise its statutory powers unless it has been negligent.

### ELEMENT 3: WHETHER INTERFERENCE CONSTITUTES SUBSTANTIAL AND UNREASONABLE INTERFERENCE:

#### PRIVATE NUISANCE TYPE 1: MATERIAL PHYSICAL DAMAGE Cont’d

- Tangible:
  - Indirect physical injury to the land
  - Examples: Fire flooding, tree roots encroaching, dust.
- Authority: **Halsey v Esso Petroleum Co Ltd [1961]** (Refer to slide)
  - Facts:

- Esso operated an oil distribution depot that manufactured, stored and transported oil across the road from P. This created pollution
- **Outcome**
- **St. Helen's Smelting Co v Tipping 1865 (Authority)**
  - **Facts:**
    - Defendant's smelting property was quite close to the plaintiff's, who complained that the fumes from the smelting was dropping on and damaging trees and shrubs on plaintiff's land.
    - Cattles were made unhealthy because of the fumes.
  - Legal issue
  - **Outcome:**
    - **Ratio Decidendi:** Even though the plaintiff live in an industrial area, it doesn't mean defendant can go ahead and do his industrial stuff because **damage caused to plaintiff was a real and sensible injury to the plaintiff.**
      - "Sensible" → Something you can sense and feel.
    - **Physical damage is very easy to establish that the interference is substantial, material and unreasonable.** (90% of the time)
      - But not always, because there is a defence that is the reasonable use of the land.

## PRIVATE NUISANCE TYPE 2: SUBSTANTIAL INTERFERENCE WITH USE AND ENJOYMENT OF PROPERTIES (INTANGIBLE)

- **Intangible:**
  - Sensible personal discomfort
  - Examples: Smell, noise and offensive sights.
  - Smell is subjective to people's tolerance or liking as well.

## REASONABLENESS: 4 FACTORS IN DETERMINING WHETHER INTERFERENCE IS REASONABLE OR UNREASONABLE: (Factors are things to consider, not necessary to establish)

- **Duration, time, frequency, extent of the interference**
  - **Harris v Carnegie's Pty Ltd 1917**
    - Noise & dust during D's renovations; precautions were taken
    - Interference does not have to be of long duration, if interference is serious.
  - **Water v Selfe 1851**
    - Even losing a single night's sleep can be a nuisance, confirmed in Munro v Southern Dairies 1955.
  - **McKenzie v Powley 1916**
    - Time of the day is important in assessing reasonable interference.
      - 7am on Sunday mornings probably easier to qualify as nuisance.
- **Locality of interference:**
  - **[Sturges v Bridgman 1879]**

- **Ratio Decidendi:**
  - You need to consider the type of area that the alleged nuisance has occurred, whether it is bearable to the people in that area, thus determining whether the interference is reasonable.
  - Concept of “coming to the nuisance” is not a defence:
    - It doesn’t matter whether plaintiff moved to the nuisance, more recently than the defendant, it is still a nuisance.
- Whether P is unduly sensitive:
  - [Water v Selfe 1851]
    - By the standard of the ordinary person and “not merely according to elegant or dainty modes and habits of living, but according to plain, sober and simple notions of English”
  - Munro v Southern Dairies 1955
    - “The test the law applies is not the test of an abnormal sensitiveness”
- Whether D has a malicious intent.
  - Hollywood Silver Fox Farm Ltd v Emmett 1936
    - While shooting might not have disturbed animals other than P’s silver foxes, this was outweighed by D’s apparent malice in shooting to affect their breeding.

### **Munro v Southern Dairies 1955**

- **Facts:**
  - The plaintiff sues the defendant (Milk distributor) for injunction and/or damages founded on nuisance, since 1952, that his quiet enjoyment of his premises had been interfered with noise, smell and flies, due to the horses kept on defendant’s premises next to Willis Street, where the plaintiff lives as the owner and occupier of a house on Willis Street.
- **Legal issue**
  - Whose rights
- **Outcome:**
  - Sholl JJ:
    - **Judgment for plaintiff:**
      - There has been serious nuisance which has gone on too long in disregard of the defendant’s neighbours, and their comfort and convenience.
        - Nuisance is continuous in that plaintiff must be getting smell and noise more often than not.
    - **Remedy:**
      - Defendant is ordered by injunction to stop causing any nuisance (smell, noise, flies) to the plaintiff.
      - Damages unclear.
    - **Considerations for judgments:**
      - Winfield on Torts (2<sup>nd</sup> ed):
        - Interference must be so substantial as to cause damage to plaintiff.

- Reasonable noise, smell, vibration is something everyone must endure.
  - The whole law on nuisance really represents balancing of conflicting interests.
  - Not necessary to establish injury to health
- Standards adopted in evaluating 'substantial interference'
  - The test of reasonableness:
    - Enough that there is material interference with physical comfort of human existence, according to the standards of a plain, sober and simple notion of a human, not someone who is particularly sensitive to noise and smell. [Walter v Selfe 1851]
  - The importance of locality:
    - Locality matters because degree of interference varies with the distance of the plaintiff's premises from the source of interference.
    - If the horses are situated that it materially disturbs the comfort, use and enjoyment of the plaintiff's dwelling-house, it is considered nuisance. [Broder v Saillard 1876]
    - Locality also matters because if plaintiff "come to a nuisance" such that he choose to make his home at a place that noise pollution is common and endured by others in the neighbourhood, he cannot expect to be free of discomfort and succeed in an action in nuisance. [Shelfer v City of London Electric Lighting Co 1895]
- In consideration of defendant's perspective:
  - Economic necessity for the use of horses for milk delivery in the city. Horse delivery as the most suitable and economical method to deliver milk in Melbourne industry but delivery by electric and motor vehicles is already a viable and a wiser option in that social setting and local setting.
  - Even though defendant had reasonable use of his land, it is not sufficient to negative nuisance, interfering with the ordinary use and enjoyment of plaintiff's dwelling-house.

## PROTECT OF CERTAIN RIGHTS RELATING TO THE LAND

- Nuisance also protects rights relating to land:
  - Easements
  - Rights to support of land in its natural state (???)
    - If defendant excavates the land that result in the neighbour's land collapsing.

- If a building is on top of the land and the land collapses, it is not considered nuisance.
- Interference with a person's rights to leave/enter their land is a right of enjoyment in the land gives rise to an action in nuisance. [Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia 1986]

## INTERESTS NOT PROTECTED

- **Interests not protected includes:**
  - Landowner does not have a right to natural light [Tapling v Jones 1854]
  - Landowner does not have a right to a view from his property [Kent v Johnson 1973]
  - Landowner does not have a right to unhindered television reception. [Hunter v Canary Wharf 1997]
  - Interference whereby others can see into another's property. [Victoria Park Racing v Taylor 1937].
- **Why the above interests are not protected?**
  - Interferences with view, light and air occurred as a result of building a structure upon land and the common law does not prevent someone from building upon their own land.
- **Interest protected:**
  - Interference that emanates from a neighbour's land: [Thompson-Schwab v Costaki 1956]
    - Causes sensible personal discomfort.
    - Moral discomfort? Obscenity?

## UNREASONABLE INTERFERENCE:

### NUISANCE BASED ON PHYSICAL DAMAGE DIFFER FROM ASSESSING NUISANCE BASED ON SUBSTANTIAL AND UNREASONABLE INTERFERENCE

- If plaintiff's property has been proven to be physically damaged, this damage may be sufficient to constitute a nuisance if the physical damage is sufficiently serious.
  - Locality need not be taken into account because physical damage is sufficient to qualify as substantial and unreasonable interference without necessity of addressing these factors.

## ASSESSMENT OF THE DEFENDANT'S ACTIVITY

- Defendant's actions and the usefulness of defendant's conduct are considerations in assessing the give and take.
  - Sometimes, intention of defendant will be relevant, especially if it is not clear whether the interference is substantial enough.
    - Mild responses would not normally be considered unreasonable, but malice can alter this to unreasonable.

- Court will also consider whether steps could be taken by defendant to minimize nuisance, to determine if interference is unreasonable.

### **Hollywood Silver Fox Farm v Emmett 1936**

- **Facts:**
  - Plaintiff bred silver foxes and erected a prominent advertising sign which defendant asked to remove because he feared it would be detrimental to the development of his building estate.
  - Plaintiff refused and defendant intentionally shot guns upon his own land as near as possible to the breeding pens, alarming the female foxes and resulting in reduced number of cubs reared.
- **Legal issue:**
  - Should malicious intent be attributed to defendant's action being constituted as nuisance?
- **Outcome:**
  - MacNaghten J:
    - Judgement for the plaintiffs:
      - Decision in Bradford Corp v Pickles has no bearing on this case.
      - Malicious intent to cause noise and nuisance to plaintiff should be taken into consideration when deciding whether there was nuisance caused to the plaintiff.
      - Remedy: Injunction should be granted to restraint the defendant from committing a nuisance by discharge of firearms or the making of other loud noises near the plaintiffs during the breeding season.
    - Other considerations:
      - Defendant's two main arguments:
        - Defendant was entitled to shoot on his own land, even if conduct was malicious, he had not committed actionable wrong.
        - Plaintiff's use of land is not ordinary and shooting upon defendant's own land would not have startled animals ordinarily found on farms.
      - Precedents that takes the view that intent of defendant should matter in deciding nuisance:
        - **Keeble v Hickeringill 1706**
          - "Suppose the defendant had shot in his own ground, if he had occasion to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff is another thing and a wrong"
        - **Allen v Flood 1898**
          - "No proprietor has an 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, if he violates that condition he commits a legal wrong, and if he does so intentionally he is guilty of a malicious wrong.”

- **Gaunt v Fynney 1872**
  - “Supposing malice to be out of the question” indicate that the lordship thought that noise that were maliciously made would have different considerations applied.
- **Christie v Davey 1893**
  - “I am satisfied that they were made deliberately and malicious for the purpose of annoying the plaintiffs... 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.”
- **Ibottson v Peat 1865**
  - Bad plea that the defendant “was justified in letting off the rockets and bombs because of the improper conduct of the plaintiff”.
- Precedents that takes the view that intent of defendant SHOULD NOT matter in deciding nuisance:
  - **Bradford Corp v Pickles 1895**
    - “Motive of the defendant is immaterial.”

## DEFENCES TO PRIVATE NUISANCE

- (Maybe) Contributory negligence of plaintiff:
  - Only if nuisance created as a result of defendant’s negligent conduct
- Conduct or Consent of plaintiff
  - If plaintiff expressly consents, there is no nuisance.
- Statutory authorization:
  - Statutory authorization is a defence to an action in nuisance if the legislature authorized the commission of the nuisance.
    - Conduct which creates the nuisance must either be expressly or impliedly authorized or the nuisance must be necessary incident of the authorized activity. [Allen v Gulf Oil Refining Company 1981]
  - Defence will fail if defendant could reasonably have performed the activity without commission of nuisance. However, if unreasonable expense would be incurred to do that activity in the non-nuisance way, nuisance is still authorized and is thus still a defence. [Nalder v Commisioner for Railways 1982]