Nuisance arising on the plaintiff's land: the Clearlite case

Rosemary Martyn*

Nuisance has traditionally been thought of as the interference by one person with his neighbour's enjoyment of land. In the Clearlite *case the court was faced with the issue whether a nuisance could occur on the plaintiff's own land and held that it could. In this paper Rosemary Martyn examines the reasoning behind that decision.*

In the Supreme Court in 1976 Mahon J. considered whether the plaintiff in an action for private nuisance could succeed if the damage for which he sought compensation resulted from an act on his own land. The facts giving rise to this, the main issue in *Clearlite Holdings Ltd.* v. *Auckland City Corporation and Another*[1], were as follows.

The second defendant was contracted by the first defendant, the Auckland City Corporation to lay drainage pipes. During these operations, the contractor drove a tunnel between two streets, going underneath the plaintiff's factory. As a result, the factory floor subsided two inches and cracked.

The learned judge held that neither defendant had been negligent, but the plaintiff succeeded in nuisance in its claims of $8,738.66 for remedial work and $1,305.00 for consulting engineers' fees.[2]

I. LOCATION OF THE ACTIVITY: THE GENERAL RULE

Although the contractor's tunnelling began in the street, the act which gave rise to the damage clearly took place on the plaintiff's land, or more precisely, under its factory. It was argued that this fact was a bar to the success of a

* This article is based on a research paper presented as part of the LL.B.(Hons) programme.

1 [1976] 2 N.Z.L.R. 729.

2 A further claim of $9,780.25 for consequential loss, based on additional facts, gave rise to the issue of remoteness of damage. This issue, the issues of strict liability and liability as between the two defendants are not discussed in this article. See [1977] 3 N.Z. Recent Law 3 and I. D. Johnston "The Boundaries of Nuisance Redrawn?" (1977) 7 N.Z.U.L.R. 364.

claim in nuisance. Mahon J. quotes the following statement from *Salmond on Torts*[3]:

> As nuisance is a tort arising out of the duties owed by neighbouring occupiers, the plaintiff cannot succeed if the act or omission complained of is on premises in his occupation. The nuisance must have arisen elsewhere than in or on the plaintiff's premises.

A large portion of his Honour's judgment involves his reasons for disagreeing with that statement.

First Mahon J. says that the probable origin of the rule expressed by Salmond is the historical distinction between trespass and case. An action for damages occurring on the plaintiff's land was an action for trespass. It was clearly distinguished from situations where the damage was caused by an act occurring outside the plaintiff's land, where the appropriate remedy was action on the case. For this reason nuisance came to be limited to acts committed elsewhere than on the plaintiff's land.

However, if the argument is centred on the basic principle of nuisance then perhaps a different rule is reached. Mahon J. says " . . . in essence [nuisance] consists in unlawful damage either to the land of another or to the proper use and enjoyment of that land".[4] This is similar to a statement at the end of his discussion of the location of the activity: "The gist of a claim for private nuisance lies in the damage which has been caused. The nature of the conduct causing that damage is subsidiary to the major concept."[5] If this is taken as the basic principle of nuisance, it justifies Mahon J.'s finding that the location of the activity is unimportant.

Winfield and Jolowicz on Tort formulates the same principle: "Private nuisance may be described as *unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it.*"[6]

This expression of the principle is also supported by the distinction drawn in *St. Helen's Smelting Co.* v. *Tipping*[7] between damage to land and indirect interference by intangibles. It is well accepted that the reasonableness of the defendant's conduct and the location of the activity are relevant where it is the enjoyment of rights in land that is interferred with, but not where there is actual damage to the land.

It can, however, be argued that the activity which caused the damage is relevant to any discussion of the essence of nuisance. A nuisance problem is seen as a conflict between two landowners, which must be resolved by "weighing up" their respective interests. One case illustrating this approach is *Sedleigh-Denfield* v. *O'Callaghan*[8], which will be discussed later. But Mahon J. is saying that there will be cases, like *Clearlite,* where there is unintentional indirect damage to land where the parties involved are not adjoining landowners; such

3 (16 ed., London, 1973) 52. The same passage appears in the 17th edition (1977) at 51-52.
4 Supra n.1, 732. 5 Ibid., 739.
6 (10th ed., London, 1975) 318.
7 (1865) 11 H.L. Cas. 642; 11 E.R. 1483. 8 [1940] A.C. 880.

cases should come under the heading of nuisance. Instead of labelling these cases as "certain anomalous exceptions"[9], Mahon J. says that they come under the basic principle of interference with rights in land.

II. THE CASES

The rule Mahon J. had to consider stated that a plaintiff would not be given a remedy for nuisance comitted on his own land. The one modern case which clearly supports this rule is *Titus* v. *Duke*.[10] In that case the defendants were the plaintiff's landlords. The branch of an ant-infested tree growing on the property (about which the plaintiff had previously complained) fell on the garage and damaged the plaintiff's car. The tortious conduct had not, therefore, emanated from outside the plaintiff's land. In the Court of Appeal of Trinidad and Tobago, Wooding C. J., with whom Phillips J. A. agrees, says[11]:

> The essence of a private nuisance . . . is that there has been some wrongful interference with the use or enjoyment of land or premises by the continuance of a state of things . . . upon other premises in the occupation or, it may be in some cases, in the ownership of the person to whom it is sought to attach liability.

The court stated that support for this principle is to be found in *Sedleigh-Denfield* v. *O'Callaghan*.[12] There are two passages in *Sedleigh-Denfield* v. *O'Callaghan* to which the court was referring. Lord Wright[13]:

> The ground of responsibility is the possession and control of the land from which the nuisance proceeds. The principle has been expressed in the maxim 'Sic utere tuo ut alienum non laedas'.

Lord Atkin[14]:

> For the purpose of ascertaining whether as here the plaintiff can establish a private nuisance I think that nuisance is sufficiently defined as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by oneself.

According to Mahon J., Lord Wright and Lord Atkin could not have been stating an exclusive definition. He says the dicta relate only to the adjoining occupier situation.

In *Sedleigh-Denfield* v. *O'Callaghan* drainage pipes were installed in the defendants' property without their knowledge. When the defendants discovered the drainage system, they adopted it. However, a defect in the system resulted in the flooding of the plaintiff's land. The defendants were not successful in arguing that the nuisance had been created by a trespasser. The House of Lords held that the defendants' adoption of the nuisance made them liable.

The question of who owned the ditch in which the drainage system was installed was not, in fact, fully argued but all the courts proceeded on the basis that it was the defendants' property.

9 Ibid., 903 per Lord Wright. 10 (1963) 6 W.I.R. 135 (T).
11 Ibid., 136. The minority judge, McShine J.A., was in agreement with the majority on this issue.
12 Supra n.8. 13 Ibid., 903. 14 Ibid., 896-897.

It is easy to say that what their Lordships state in *Sedleigh-Denfield* v. *O'Callaghan* should have limited application, but this is not the way other cases have interpreted those statements. It is suggested that a statement of Lord Denning in the Court of Appeal in *Southport Corporation* v. *Esso Petroleum Co. Ltd.*[15] should be considered:

> *Private Nuisance.* In order to support an action on the case for a private nusance the defendant must have used his own land or some other land in such a way as injuriously to affect the enjoyment of the plaintiff's land.

Lord Radcliffe in the House of Lords was in agreement with Lord Denning on this point.[16] Mahon J.'s reasons for rejecting the dicta from *Sedleigh-Denfield* v. *O'Callaghan* as support for the decision in *Titus* v. *Duke* do not, it is submitted, apply to this statement of Lord Denning's. Lord Wright and Lord Atkin have been confining their discussion to cases which concern adjoining landowners, but Lord Denning expressly puts Lord Wright's statement in a wider context, and is clearly discussing general principles of nuisance. It should be noted, however, that Lord Denning's statement does refer to the defendant using his own land or some other land. Possibly it is not too wide an interpretation to include the plaintiff's land in that latter phrase.

On what basis do Lord Wright and Lord Atkin make the statements referred to above? Lord Wright says that "[w]ith possibly certain anomalous exceptions" (a phrase mentioned in various judgments but never expanded or explained) possession or occupation is the test.[17] He refers to *Cunard* v. *Antifyre*[18] but it is submitted that Talbot J. in that case was concerned only with the principle that the plaintiff must be an owner or occupier. The passage Lord Wright refers to is[19]:

> Private nuisances, at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of neighbouring property;

but Talbot J. imediately goes on to say:

> and it would manifestly be inconvenient and unreasonable if the right to complain of such interference extended beyond the occupier, or (in case of injury to the reversion) the owner, of such neighbouring property.

Talbot J. is not really addressing himself to the question of who the defendant is. He is concerned with the identity of the plaintiff. The action was dismissed because the plaintiff was not an occupier or owner — thus there was no need to go any further.

Whatever way the judgments in *Sedleigh-Denfield* v. *O'Callaghan* are interpreted, there remains the fact that their Lordships were concerned to emphasise that the occupier was responsible for the nuisance merely by being the occupier. Occupation was important in this case precisely because the defendants were liable as adoptors rather than creators. It seems that a person who is deemed

15 [1854] 2 Q.B. 182, 196.
16 *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218, 242.
17 Supra n.8, 902-903. 18 [1933] 1 K.B. 551. 19 Ibid., 557.

to have adopted a nuisance must be an occupier. Therefore in any case where the creator of the nuisance is not involved, discussion can relate only to occupiers. Thus one can agree with Mahon J. that the application of *Sedleigh-Denfield* v. *O'Callaghan* should be limited.

During his discussion of the location of the activity, Mahon J. refers to *Hooper* v. *Rogers*,[20] a case which is of interest because Scarman L. J. considered the passage from *Salmond on Torts*[21] which was quoted above.

In *Hooper* v. *Rogers* both the possible nuisance criteria were fulfilled: the defendant was acting as a landowner in committing the tortious conduct, and he was damaging the land of the plaintiff. The plaintiff and defendant jointly owned the land, but the defendant's activity was threatening a house owned solely by the plaintiff. Although the plaintiff succeeded, there is no doubt that Scarman L. J. supported Salmond's rule. He says[22]:

> [The plaintiff] has only to show that the land of which he is the occupier is damaged, or threatened, by a wrongful act *done upon land of which the defendant is an occupier,* and either created, continued or adopted by the defendant, to establish his cause of action.

This clarifies the rule as expressed by Salmond. The rule is not so much a prohibition relating to the plaintiff's land as a description relating to the defendant's conduct.

The judicial statement which is most supportive of the approach taken by Mahon J. is a statement made by Devlin J. in the court of first instance in *Southport Corporation* v. *Esso Petroleum Co. Ltd.*[23]

> It is clear . . . that the nuisance must affect the property of the plaintiff, and it is true that in the vast majority of cases it is likely to emanate from the neighbouring property of the defendant. But no statement of principle has been cited to me to show that the latter is a prerequisite to a cause of action . . . .

Mahon J. refers to two Australian cases which support this statement, the Full Court of the Supreme Court of Tasmania in *Kraemers* v. *Attorney-General*[24] and Windeer J. in the High Court of Australia in *Hargrave* v. *Goldman*.[25]

Another part of Mahon J.'s argument on the location of the activity relates to an early line of cases involving land over which shooting rights had been given. Generally in these cases, the plaintiff occupier was alleging that the defendant with shooting rights was responsible for damage caused to the land (namely, his crops) by animals. Thus Mahon J. sees this plaintiff and defendant as two people with rights over the same piece of land, rather than as adjoining occupiers. Although the cases obviously involve a special relationship, they can be classed as nuisance cases because the essential feature is indirect damage to land.

20 [1975] Ch. 43.
21 Supra n.3.
22 Ibid., 51. Empasis added.
23 [1953] 2 All E.R. 1204, 1207.
24 [1966] Tas. S.R. 113.
25 (1963) 110 C.L.R. 40.

Two of the cases are *Farrer* v. *Nelson*[26] and *Seligman* v. *Docker*.[27] Mahon J. says[28]:

> It is instructive to notice the way in which *Farrer* v. *Nelson* and *Seligman* v. *Docker* are treated in *Clerk & Lindsell on Torts* (13th ed.) para. 1403. It seems to have been assumed by the learned editors that in each case the cause of complaint was the conduct of the defendant in overstocking his own land, with the result that the pheasants went on to the plaintiff's land and thereby caused damage. But as I read the two cases the cause of action involved the introduction of pheasants on to the land of the plaintiff by a positive act on the part of the defendant, not that the defendants allowed the game to trespass.

With respect, it is submitted that a different interpretation could be placed on the facts. In *Farrer* v. *Nelson*, although the pheasants were introduced on to land of the plaintiff by "a positive act on the part of the defendant", that was not the basis of the cause of action. In that case, the pheasants were placed on the plaintiff's farm in an area reserved to the landlord. If nothing more had happened, there would have been no action. It was the damage caused when some of these pheasants strayed out of the reserved area which was the subject of the claim.

In *Seligman* v. *Docker* the cause of complaint was "that an inordinate number of pheasants were congregated in the defendant's coverts . . . , that the defendant did not shoot them fast enough, and that they seriously damaged his crops in their quest for food."[29] That cause of action is more concerned with overstocking than with a positive act on the part of the defendant.

Despite the possible variations in interpretation of the facts in these cases, it is clear that all the land involved did belong to the plaintiffs, even though someone else had been granted rights over the whole of it.

III. CONTROL

Control, although not often referred to in the cases under discussion, is an important element in the reasoning. An owner or occupier is liable for nuisance emanating from his land precisely because "an owner of private property can prevent people from coming on to his land and committing a nuisance there."[30] If the tortious act is emanating from land, the owner presumably has some control over it. This may be one reason why the rule that nuisance cannot emanate from the plaintiff's land has lingered on so long. If a nuisance is emanating from the plaintiff's land, should he not have used the control he has as owner or occupier to prevent its creation or continuance?

Because of the importance of control as a factor to be taken into account in nuisance cases, it is submitted that the decision in *Titus* v. *Duke* is reconcilable with that of Mahon J. in *Clearlite*. It is interesting to note that Mahon J. concludes his discussion of *Titus* v. *Duke* by simply saying: "The result is, in

26 (1865) 15 Q.B.D. 258.
27 [1949] Ch. 53.
28 Supra n.1, 738.
29 Supra n.27, 55.
30 Finnemore J. in *Hall* v. *Beckenham Corporation* [1949] 1 K.B. 716, 724.

my opinion, that if there is any support for the basis of the finding against nuisance in *Titus* v. *Duke* it is not to be found in *Sedleigh-Denfield* v. *O'Callaghan*.[31]

A question which relates very much to control is: What could the plaintiff have done to avoid the damage or interference suffered? In *Titus* v. *Duke* the plaintiff's complaints were met with the reply that if he did not like the tree, he could move somewhere else. An important fact in that case was that the plaintiff did not have to go to that absurd length in order to prevent the nuisance from affecting him. He was at liberty to make the tree safe in some way. Wooding C. J. discusses this under the negligence head[32]:

> Throughout the subsistence of the tenancy, the respondent [tenant] was in full possession and control of the premises and the appellants [landlords] could not effectively prevent him from doing whatever may have been necessary or proper to make the tree safe.

This statement is made despite the complication of the fact that the landlords told the tenant that the tree should be left as it was.

In a sense, therefore, there was fault on the part of the plaintiff. Damage was caused because he had not made the tree safe. Looking at the entire situation in *Titus* v. *Duke*, the plaintiff is in a very different position from that of the plaintiff in *Clearlite*. The tenant plaintiff does not appear as simply a passive victim of damage. He himself had put up the shed under the tree for use as a garage. Under his contractual relationship with the defendant, he was the one who had the power, and presumably the means, to prevent the damage occurring. This is in contrast to the facts in *Clearlite*. The Auckland City Corporation has statutory power to construct drains.[33] The only power the factory had was to make an objection.[34]

Although the decision in *Titus* v. *Duke* appears to be based on the rule that nuisance cannot emanate from the plaintiff's land, the policy reason for that decision may be the fact that the plaintiff had sufficient control over the land to allow him to prevent any damage.

There are three different situations where the defendant could be creating a nuisance to the plaintiff on the plaintiff's own land: the defendant and the plaintiff could be joint owners (as in *Hooper* v. *Rogers*[35]), or their relationship could be that of landlord and tenant (*Titus* v. *Duke*[36]), or of licensee and licensor *(Clearlite)*.

The *Clearlite* case has at least said that where the relationship is that of licensee and licensor, it does not matter where the action took place. Should Mahon J.'s decision be extended to the other categories above? Possibly all that can be said is that generally a tenant will not get a remedy as against his landlord because that relationship implies some degree of control, as illustrated in *Titus* v. *Duke*.

Variations in facts may warrant different results even within one of the categories. If, for example, the plaintiff tenant in *Titus* v. *Duke* had been

31 Supra n.1, 735.
32 Supra n.10, 137.
33 Municipal Corporations Act 1954, s.218.
34 Ibid., Sch. 10.
35 Supra n.20.
36 Supra n.10.

powerless to remove the offending branch because the tree was planted for ornamental purposes, the case may well have been decided differently.

The importance of control in the cases already discussed is evident. In *Hooper* v. *Rogers* Scarman L. J. says[37]:

> Whatever may be the rights and duties inter se of co-occupiers of land, neither can prevent the other from coming on to the land; and the plaintiff would have needed instant and extraordinary legal skill . . . to have prevented the excavations complained of by the exercise of his authority as co-occupier.

Control was absent, so the plaintiff succeeded. In *Kraemers* v. *Attorney-General* Burbury C. J. emphasises the element of control[38]:

> I am content to say that . . . the extent of control over the land which the respondent was authorised to exercise and did exercise as licensee constituted sufficient management and control of the land to found liability for nuisance emanating from it.

The Chief Justice is not, of course, contemplating a situation like *Clearlite*, but the element of control is at least one basis on which a defendant can be found liable for nuisance.

Another type of situation where the defendant could be creating a nuisance on the plaintiff's land is illustrated by the cases involving shooting rights. In those cases, the damage was caused by straying animals which were supposed to be under the control of the defendant, not the plaintiff. Although the plaintiff, as occupier, had control over the land, he did not have control over the thing which was causing the nuisance.

Perhaps the solution to the problems found in these cases is to say that there is no hard and fast rule about the location of the activity. If the nuisance took place on the plaintiff's land it is presumed that he could have abated it or controlled it in some way, and accordingly he will be denied a remedy, but if the element of control is justifiably absent, he will have a remedy.

Up to this point the main consideration has been the extent of the plaintiff's control of the land. If control is viewed from the defendant's standpoint, then it can be seen that in *Clearlite* it was the defendant who had control. This is what R. S. Chambers says on the *Clearlite* case[39]:

> . . . the defendant in this case did have control over the area of soil occupied by the pipes; that area was outside the control of the plaintiff. If the plaintiff had dug up the pipes, he would have been liable in trespass.

He concludes:

> Thus, the Auckland City Corporation could have been found liable on the ground that its actions in that part of the sub-soil under its control caused harm to the plaintiff's land. In the final analysis, this is not a case where "the nuisance was committed on the plaintiff's land" because the part of the land from which the harm emanated had ceased to be within the plaintiff's control.

It is submitted with respect that Mahon J.'s approach, abolishing a rule which was difficult to justify, was more satisfactory than that suggested in this article.

37 Supra n.20, 51. 38 Supra n.24, 118.
39 "Nuisance — Judicial Attack on Orthodoxy" [1978] N.Z.L.J. 172, 177.

The Chambers approach demands very fine distinctions, even subdivisions of ownership of the sub-soil. The tortious activity may have been taking place in the sub-soil, but it was the plaintiff's factory, not the pipes, that was damaged.

IV. CONCLUSION

The final reason Mahon J. gives for refusing to follow the rule about the location of the activity is a policy one. Anomalies result from the application of a rule which is no longer necessary and cannot be justified. Therefore the rule should be abandoned.

The rule seems to be based on the assumption that the boundary is always relevant in tort cases involving land. Historically this was so, as Mahon J.'s discussion of the distinction between trespass and case indicates. The first step was to decide where the boundary lay — the answer would determine which writ was appropriate. But now negligence is a separate tort, with no limitations relating to where the negligent conduct took place. Thus the boundary is not relevant where there is negligence. Is it now possible to say that the boundary is only relevant in some nuisance cases?

The boundary of the property was highly important in *Titus* v. *Duke*.[40] If the branch had fallen from outside the plaintiff's property, the whole picture would have been changed. Any control that the plaintiff might have had would have disappeared. There is in this case, therefore, a good reason for maintaining the distinction between the plaintiff's land and other land. But in the *Clearlite* situation, the boundary is really just an artificial irrelevancy. If it is regarded as a vital factor, anomalies result. For example, if the contractor in *Clearlite* had driven the tunnel parallel to the plaintiff's boundary, causing subsidence and damage, the plaintiff would be able to recover damages for private nuisance. It seems absurd that the plaintiff should be denied a remedy because of a fact which is otherwise irelevant.

What should be done when a rule causes anomalies? Modification of the rule is one possibility. Chambers suggests that the rule, in referring to the plaintiff's land, really relates to land within the plaintiff's control.[41] As suggested above, such a refinement would render the rule imprecise and unwieldly. Perhaps this is one of the policy reasons why Mahon J. chose to abolish the rule. The weight given to facts relating to boundaries and control now remains with the judge.

40 Supra n.10.

41 Supra n.39.