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Friday 22 June 2012 – Morning

A2 GCE LAW

G158/01/RM Law of Torts Special Study

SPECIAL STUDY MATERIAL

G13214061 2

Duration: 1 hour 30 minutes

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G158 LAW OF TORTS

SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

Extract adapted from the judgment of Lord Goff in *Hunter and Others v Canary Wharf Ltd and Hunter and Others v London Docklands Corporation* (1997) AC 655.

LORD GOFF OF CHIEVELEY:

The decision in *Malone v Laskey* [1907] 2 KB 141 on nuisance has since been followed in many cases. ... Recently, however, the Court of Appeal departed from this line of authority in *Khorasandjian v Bush* [1993] Q.B. 727, a case which I must examine with some care.

The plaintiff, a young girl who at the time of the appeal was 18, had formed a friendship with the defendant, then a man of 28. After a time the friendship broke down and the plaintiff decided that she would have no more to do with the defendant, but the defendant found this impossible to accept. There followed a catalogue of complaints against the defendant, including assaults, threats of violence, and pestering the plaintiff at her parents' home where she lived. As a result of the defendant's threats and abusive behaviour he spent some time in prison. An injunction was granted restraining the defendant from various forms of activity directed at the plaintiff, and this included an order restraining him from "harassing, pestering or communicating with" the plaintiff. The question before the Court of Appeal was whether the judge had jurisdiction to grant such an injunction, in relation to telephone calls made to the plaintiff at her parents' home. The home was the property of the plaintiff's mother, and it was recognised that her mother could complain of persistent and unwanted telephone calls made to her; but it was submitted that the plaintiff, as a mere licensee in her mother's house, could not invoke the tort of private nuisance to complain of unwanted and harassing telephone calls made to her in her mother's home. The majority of the Court of Appeal ... rejected this submission ...[but] Peter Gibson J. dissented on the ground that it was wrong in principle that a mere licensee or someone without any interest in, or right to occupy, the relevant land should be able to sue in private nuisance. ...

If a plaintiff, such as the daughter of the householder in *Khorasandjian v Bush*, is harassed by abusive telephone calls, the [essence] of the complaint lies in the harassment which is just as much an abuse, or indeed an invasion of her privacy, whether she is pestered in this way in her mother's or her husband's house, or she is staying with a friend, or is at her place of work, or even in her car with a mobile phone. In truth, what the Court of Appeal appears to have been doing was to exploit the law of private nuisance in order to create by the back door a tort of harassment which was only partially effective in that it was artificially limited to harassment which takes place in her home. I myself do not consider that this is a satisfactory manner in which to develop the law, especially when, as in the case in question, the step so taken was inconsistent with another decision of the Court of Appeal (*Malone v Laskey*), by which the court was bound. In any event, a tort of harassment has now received statutory recognition: see the Protection from Harassment Act 1997. We are therefore no longer troubled with the question whether the common law should be developed to provide such a remedy. For these reasons, I do not consider that any assistance can be derived from *Khorasandjian v Bush* by the plaintiffs in the present appeals.

It follows that, on the authorities as they stand, an action in private nuisance will only lie at the suit of a person who has a right to the land affected. Ordinarily, such a person can only sue if he has the right to exclusive possession of the land, such as a freeholder or tenant in possession, or even a licensee with exclusive possession.

SOURCE 2

Extract adapted from the judgment of Lord Phillips in *Network Rail Infrastructure Ltd (formerly Railtrack PLC) v CJ Morris (trading as Soundstar Studio)* [2004] EWCA Civ 172.

LORD PHILLIPS, MR:

Th[e] nuisance in question consisted of electromagnetic interference caused by a section of Railtrack's signalling system to the music created by electric guitars played in Mr Morris' recording studio some 80 metres away.

The evidence reflects the fact that it may be more satisfactory that the potential problem of one neighbour causing electronic interference to another should be addressed by regulation than that it should be left to be resolved by the law of private nuisance. We express no concluded view on this. If the authorities to which we have referred in paragraphs 13 to 15 above remain good law, they would lead us to the conclusion that the amplified guitars which were affected by the magnetic field created by Railtrack's installations fell into the category of extraordinarily sensitive equipment which did not attract the protection of the law of nuisance. The evidence to which we are about to turn indicates that the interference suffered by Mr Morris as a result of the use of the TI 21 track circuits was a very rare occurrence indeed. As Buxton LJ's judgment demonstrates, however, the law of nuisance has moved on. If resort must be had to it in order to resolve the competing claims of users of electrical or electronic equipment, the balance may fall to be struck by considering what is reasonable. One thing seems clear, however. Foreseeability is a vital ingredient in the tort of negligence. It was, in this case, common ground that Railtrack could only be liable in nuisance if they should reasonably have foreseen that, by installing the TI 21 track circuits they would cause damage to someone in the position of Mr Morris.

SOURCE 3

Extract adapted from the judgment of Veale J in *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683.

VEALE J:

So far as the present case is concerned, liability for nuisance by harmful deposits could be established by proving damage by the deposits to the property in question, provided of course that the injury was not merely trivial. Negligence is not an ingredient of the cause of action and the character of the neighbourhood is not a matter to be taken into consideration. On the other hand, nuisance by smell or noise is something to which no absolute standard can be applied. It is always a question of degree, whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The character of the neighbourhood is very relevant and all the relevant circumstances have to be taken into account. What might be a nuisance in one area is by no means necessarily so in another. In an urban area, everyone must put up with a certain amount of discomfort and annoyance from the activities of neighbours, and the law must strike a fair and reasonable balance between the right of the plaintiff on the one hand to the undisturbed enjoyment of his property, and the right of the defendant on the other hand to use his property for his own lawful enjoyment. That is how I approach this case.

SOURCE 4

Extract adapted from *Tort Law*. Elliott and Quinn. 7th Edition. Pearson Longman. P296-297.

The failure to protect recreational facilities such as views can be criticised. The outcome of the case of *Hunter v Canary Wharf Ltd and London Docklands Development Corporation (1997)* seems particularly unsatisfactory. The reliance on the old authorities refusing liability for the obstruction of a view is unrealistic. Television forms an important part of many people's lives and it seems extremely unjust to remove that leisure activity without providing any compensation. The reality is that such interference is likely to affect the very value of those people's homes. The type of buildings that are likely to cause this interference are tower blocks, the builders of which are likely to be able to afford to pay compensation. The law as it currently stands seems to provide a green light for large property developers to completely ignore the interests of local residents in the areas under development.

[Furthermore, the] decision in *Hunter v Canary Wharf* regarding who can sue for nuisance has been regarded as a backward step by some. In his powerful dissenting judgment, Lord Cooke pointed out that there was no logical reason why those who were actually enjoying the amenities of a home should not be able to sue someone who unreasonably interfered with the enjoyment. The decision was essentially based on policy, and since that was the case, he would have preferred it to uphold justice rather than tidiness.

Certainly some of the arguments of his colleagues seem overstated. There is every reason why people should enjoy special protection when they are inside their homes, whether they own or rent those homes. Cases involving lodgers and *au pairs* may make for tricky decisions, but not impossible ones: time habitually spent on the land would be one useful criteria by which such cases could sensibly be decided. This problem may in time be overcome by the increasing use of the Human Rights Act to deal with nuisance-type problems.

SOURCE 5

Extract adapted from *'The Place of Private Nuisance in a Modern Law of Torts'*. Conor Gearty. [1989]. Cambridge Law Journal 215.

As things stand at present, no clear distinction is drawn between physical and non-physical damage to the land of a neighbour: both may be, and usually are, described as private nuisances. The textbook writers, taking their cue from the judges, have rarely probed this divide. There are important differences between them. The latter head, non-physical damage, epitomises the classic nuisance action: smell, noise, smoke, etc. interfering with the enjoyment of our land but not destroying, uprooting or otherwise tangibly affecting it. The majority of straightforward cases in nuisance are concerned with this head. The first head, however, (D doing something on his land which causes P's house to burn down or his crops to be destroyed, for example) more closely resembles negligence as we understand that tort today. It involves analysis of the conduct of the defendant to see whether he knew or ought to have known what was happening. There are examples in the law reports of its being treated solely as a negligence question. Where nuisance is invoked, it is usually in the form of an odd version of that tort with special rules and novel departures clearly indicating a drift away from the mainstream. Nuisance may be the theoretical basis of liability, but negligence is its driving force.

The argument here will be that this occasional categorisation of physical harm as private nuisance is anomalous. The breadth of negligence was not fully understood in the nineteenth century or even in the first half of the twentieth, and nuisance provided a superficially attractive receptacle for cases that were otherwise hard to classify. This has done serious damage to nuisance by introducing an emphasis on the conduct of the defendant which is foreign to the action and subversive of its doctrines. In this paper, our task is to establish that indirectly causing physical damage to land once properly belonged to the tort of negligence (albeit then a very junior creature indeed). We will argue that the bits and pieces of this part of negligence should now be returned to their proper home… .

This strategic surrender will enable nuisance to turn its undivided attention to what it does best, protecting occupiers against non-physical interference with the enjoyment of their land.

SOURCE 6

Extract adapted from *Law of Tort*. John Cooke. 9th Edition. Pearson Longman. P336-339.

The modern law can be stated as being that an occupier is liable for nuisances caused by a trespasser or act of nature, where the occupier is or should be aware of the presence of the nuisance on their premises and has failed to take reasonable steps to get rid of the nuisance. The standard of reasonableness is a subjective one. However, the duty is limited by the occupier's ability (physical and financial) to get rid of the nuisance and by its foreseeable extent. In the case of a latent defect (like the coastal erosion that led to the landslide in Scarborough where an hotel 'fell' into the sea) the occupier is not liable for failure to make further investigations which would have revealed the defect.

It appears that the courts are careful about imposing unreasonable and unacceptable burdens on local authorities. This has occurred with [for example] encroaching tree roots and the possibility of imposing large bills for the underpinning of buildings affected by them. Usually the defendant is entitled to notice of the damage and the opportunity to deal with it by removing the tree before liability for repairing the building can be imposed.

The duty of affirmative action on landowners in the *Sedleigh Denfield* line of cases may be enhanced by the Human Rights Act 1998. The relevant provisions are Article 8 of the European Convention and Article 1 of the First Protocol. These were considered in *Marcic v Thames Water Utilities Ltd* [2002] 2 All ER 55 (CA); [2004] 1 All ER 135 (HL), where the nuisance was caused by water and sewerage overflows which initially did not constitute a nuisance but became one as a result of increased usage of the drainage system. The first question was whether the defendant's activities constituted a nuisance on the *Sedleigh Denfield* line of cases authority.

The Court of Appeal held the defendants (Thames Water) liable but the House of Lords disagreed. The House distinguished *Marcic* from cases where the courts deal with disputes between neighbouring land owners where a balance between competing interests has to be struck. Here, the defendants were a body bound by statutory duties to provide and maintain certain services and with statutory regulators in place to deal with customer complaints. The House thought it inappropriate for them to undermine the statutory provisions in place and Mr Marcic was treated as a dissatisfied customer complaining of a failure to drain his property rather than as a person harmed by positive interference for which Thames Water was responsible. What the claim boiled down to was a demand that Thames build more sewers. By the time of the appeal to the House of Lords the remedial work had actually been carried out, perhaps prompted by the court action.

The second question in the case, once the House of Lords had denied that a common law nuisance had been committed, was whether Mr Marcic's human rights had been infringed.

The flooding did amount to a *prima facie* (on the face of it – plain) breach of Mr Marcic's rights under the European Convention. However, these rights are subject to justifiable limitations requiring the defendant to show that a fair balance has been struck between individual and community interests. The lower courts found that Thames Water's system of priorities for remedial work (work done to put things right) did not strike a fair balance. The House of Lords felt that the fairness of such a scheme was not for the courts to assess, as the matter was not justiciable (within the court's power to decide) and Parliament had assigned their responsibility to the regulator. The scheme provided for a person to make a complaint to the regulator, who could then make an enforcement order against the utility company. This decision would be subject to judicial review. If the enforcement order was not complied with then compensation was payable. The scheme as a whole was felt to be Convention compliant. Mr Marcic should have taken advantage of the statutory scheme but did not. The case provides an interesting insight into the way the courts are interpreting the HRA 1998.

Expectations that Article 8 might provide an alternative action to common law nuisance would seem to be subject to the same kind of public policy decision-making as the traditional common law actions. The recent decision of the European Court of Human Rights, sitting as a Grand Chamber, in *Hatton v United Kingdom* Application No 36022/97, 8 July 2003, All ER 122 confirms how courts should approach questions such as these. In Hatton's case the applicants lived near Heathrow Airport. They claimed that the government's policy on night flights at Heathrow violated their rights under Article 8. The court emphasised 'the fundamentally subsidiary nature' of the Convention. National authorities have 'direct democratic legitimation' and are in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, 'the role of the domestic policy maker should be given special weight'. A fair balance must be struck between the interests of the individual and of the community as a whole.