NUISANCE

- *According to Halsey, in nuisance we must strike a "balance between the right of the ptf… to the undisturbed enjoyment of his property and the right of the dft…. to use his property for his own lawful enjoyment." Private nuisance defines this limit on a person's ability use land in his or her own possession to the extent that it adversely affects another landholder.*
- *The law must decide whether or not the dfts. actions were reasonable or not. This is not a simple test – it required in-depth consideration of the facts and context of the case.*

CAUSE OF ACTION:

1. Who has a standing to sue?

a. *Hunter* (majority, Lord Goff) - Possessory interest, "right to exclusive possession of land, or even a license with exclusive possession
   i. (includes tenant in possession, freehold or licensee with exclusive possession)

b. *Hunter* (minority, Lord Cooke) extend to wider groups – "occupier"
   i. Those with rights to utilities and amenities, continuing use, length of time occupying
   ii. Children and spouses; lodgers and au pairs
   iii. Policy implications of this – work place?

*Would the person exercise their standing to sue?

Arguments for lesser rights (*Hunter* majority Lord Goff & co.)	Arguments for greater rights (*Hunter* dissenting Lord Cooke)
- Tort is about land, not people so if you allow people to sue who don't have an interest in the land it is potentially distorting the tort into something else - Floodgates – wide definition of occupiers creates new groups (e.g. butlers) too far? - Remedies awarded too easily - Disproportionate punishment – strict liability? (liability not depending on negligence or intentional harm) - Uncertain outcomes – dfts. don't know who they are liable for - Complained nuisance goes to personal injury → negligence or ACC, surely this is enough as it covers impt. health - Unreasonably impede social progress if group is widened - Home owner will just sue on the behalf of others anyway?	- Human rights approach - Question of use and enjoyment of land – reason for complaint by occupier would be about the use of the land (tort is not about land in sense of ownership rather how the land is USED - Employers responsible for employees wellbeing – mitigates floodgates arguments - Floodgates is only bad if it leads to random liability - Intl. treaties e.g. rights of a child - Discrimination to spouses & children no logical underlying reason they are not on the license - home owner can't/ won't sue?? - Law should change with social times – we have a more conception idea of the household today and the law should reflect this - Line drawing in future cases – just because it is difficult doesn't mean we should not do it
Middle ground: - Case sensitive – look at the nature of the claimants/ household - Specific test perhaps – certain level of connection to the land? (BUT CA tried to do this and were too vague?) - Majority approach, but extend to spouses and children	

c. Co-Ownership
- If property is owned in common, each co-owner is entitled to be on the land and make normal use of it and neither can sue the other for trespass unless one co-owner expels the other from the land *(Wu v Body Corporate)*
- A property owner has the right to gain access to and from a public highway as a legal incident of his or her ownership of the adjacent land *(Wu v Body Corporate)*

2. Has there been an unreasonable interference with the rights of the ptf?

a. Was the alleged nuisance (x), substantial enough to be a nuisance?
   i. Was the 'nuisance' an ordinary part of life? *St Helens*
   ii. Nuisance "regarded as excessive and unreasonable" *Guant v Feeney* in *Christie*

b. Note: *Blakesfield* does not discuss specific categories; *Antrim* (SC Canada) moves away from type A, B, C distinctions – asks whether the nuisance was reasonable for all (even A)

To decide whether the alleged interference with the rights of the ptf. have been breached we will ask whether the actions/ consequences have fallen under type a, b or c damage categories…

NOTE: Although the ptf. does not need to show a deliberate act or act of negligence – some degree of personal responsibility must be sheeted to the dft. Delaware Mansions (HL, UK, 2011)

TYPE A – Material injury, actual damage, tangible

a. There must be a link between the dfts. activities and the damage occurred *Halsey, St Helens*

b. Unreasonable

→ Question of degree – was it **sufficiently serious** interference with comfort or convenience

i. More than trivial *Halsey* (sheets)
ii. The ordinary comforts of human existence – not according to "dainty modes of living" *Halsey*
iii. Frequency, Intensity, nature is relevant *Halsey;* can be intermittent *Matheson, BNZ v Greenwood;* arise from a one-off event *Sedleigh & Rylands* (even if you have done nothing that amounts to lack of RC)
iv. Presence of planning permission *Fen Tigers*; planning controls *Hunter;* resource consent *St Helens* → does not create a defence

Notes: Could be judged on by reasonableness? *Delaware*; *Physical damage not **necessary** → type B & C Halsey……*

TYPE B – Personal comfort, sensory damage

a. Did the dfts. activities interfere to a considerable and **unreasonable** extent the ptfs. use and enjoyment of land (causation)? *Kennaway*

b. There must have been emanation from the dft. to ptfs. property *Hunter*

i. Mere presence of an (e.g. building) cannot create a nuisance *Hunter;* transposition of nuisance from the dft. to ptfs. land *Wu*

Exceptions

ii. Seeing an offensive activity (e.g. prostitution *Thompson-Shawb)*
iii. It not a prerequisite that the nuisance emanates from neighbouring land – can arise on their own land if equal control is clear between ptf. and dft. *Clearlite Holdings Ltd*
iv. SC NZ 2010 *Outtrim* – emanation required usually (unless there is malice? Or highly offensive activity?)

c. Was it unreasonable in the circumstances? (Relative assessment (e.g. banging pots, fine to a degree) *Halsey – Blakesfield* asks similar questions.)

i. **Locality** What may be a nuisance in one area is by no means necessarily so in another *Halsey & Sturges;*
ii. Dft. could rely on his own activities as constituting part of 'locality' but where it is a clear nuisance, this is irrelevant *Fen Tiger;* were the dfts. conducting business in a fair and reasonable way? *St Helens*
iii. **Threshold** frequency, time, intensity, degree *Halsey;* can be intermittent *Matheson, BNZ v Greenwood;* can arise from one-off events *Sedleigh*
iv. **Ordinary person** Personal discomfort must be 'more than fanciful, more than one of mere delicacy or fastidiousness' & individual reactions? *Halsey;* Did damage ensue because of **super sensibilities**? *Hollywood*;
v. **Malice** can turn a reasonable interference into an unreasonable one *(Hollywood Silver Fox, Christie)*
vi. Did it effect the "**objects of living**?" (e.g. noise vs. sleep) – is it unreasonable? *Halsey*
vii. Not about physical harm, but question knock-on effects? *Health, quality of life, pollution* *St Helens*

Defences?
A. **Coming to the Nuisance:** **No defence** *Fen Tiger, Sturges, Miller, Kennaway* B. **Legitimacy to the action;** resource consent? *St Helens;* compliance with planning controls is not in itself a defence *Hunter;* planning permission cannot give rise to the presumption that there should not be an injunction *Fen Tigers*
TYPE C – Natural rights over land Interference with use and enjoyment of the land through preventing access ➔ Rights of access (interference must be substantial and unreasonable *Wu obiter* ➔ Foundations of land (emanation does not have to come from the dfts. land, it can arise from the ptfs. land – but this will usually only happen where there are communal areas *Wu* a. 2014 Total blockage "reasonable substantial interference" *Wu & 2017 BEMA Property* b. 2013 Partial blockage? Just inconvenient access (substantial and unreasonable?) *Antrim* (Canada) c. 2016 Cf Australia – *Shogunn* – blocked access must cause greater interference than just economic loss, it must effect possessory interests (more in line with *Wu)*

Was the interference unreasonable!?

Other considerations:

Malice

- Originally *Bradford* – motive is immaterial if the act is legal
- BUT Malice can transform something into nuisance if actions were vexatious towards neighbours - tip the balance for the ptf. / dft. *Christie*
- Evidence of malice lowers the standards of reasonableness regarding the dfts. actions *Hollywood* (rights can be conditional if malice is shown)
- → Malice negates super sensitivity and gives rise to liability *Hollywood*

Causation & abatement:

- *Halsey* – Can the dfts. activities be sheeted home to their employees? Must be something done in the course of their employment – frolicking on their own.
- *Rylands* – Plaintiff, though free from blame, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible.
- *Sedleigh* – Where the dft. knew the nuisance was operating offensively, and he is able to prevent it, he is permitting the nuisance to be caused OR continue = is liable.
    - Did the dft. have reasonable opportunity to abate the nuisance?
    - Known or ought to have known?
- *Delaware* – Liability can be sheeted home to the dft. where they had knowledge - Self-help remedy available?

  → potential to lose what you have spent???
- *Wandsworth London Borough Council v Railtrack plc*

  → Where there is a public nuisance on the defendant's land it does not matter whether it was created by the defendant or some third party, or by natural causes

  → If the defendant is aware of the nuisance, has had reasonable opportunity to abate it, has the means to abate it, and has chosen not to do so, then he is liable

Vicarious liability (& remoteness/directness)

- Usually used in employment situations *Halsey*
- *Matheson* (NZ) – Ask whether what the ptfs. complain of regarding the dft. was a natural and probable consequence of an (employers, guards etc.) action.

DEFENCES?!

Coming to the nuisance (TYPE B DAMAGES)

i. *Sturges* (1897, UK) no defence

→ if you have caused a nuisance, you have caused a nuisance – those who buy a property can complain where previous owners/ they did not otherwise it would infringe on their property rights and use of their land.

ii. *Miller v Jackson* (1977, CA)

Denning (dissenting)	Defence: ***Social utility****; Public interest vs. private individual*
Geoffrey-Lane	Not a defence *Sturges:* balanced maintained between rights of individual and enjoyment of property vs. rights of public
Cumming-Bruce	Not a defence *Sturges:* agrees

iii. *Kennaway* (1981, CA, UK): no defence - emanation made by dfts. should not be treated as nuisance insofar as it was the **same level as when the ptf. came to the land. Subsequent substantial increase in levels/ frequency of activity will constitute a nuisance**.

iv. *Fen Tigers* (2014, SC, UK) no defence –

→ h/e note: **POST-ACQUISITION CHANGE** where the dft. comes to the land and changes the nature of their premises which alters the impacts of the dfts. activities **(only applies to type B, not type A)**

REMEDIES:

(Judge's have discretion to award different remedies – no strict rule, it is case sensitive)

Injunction? (total OR precisely framed)

- E.g. for type B damages which are not quantifiable like type A?
- Intervention by injunction is only justified when the irritating noise (x) causes inconvenience beyond what other occupiers in the neighbourhood can be expected to bear. *(Kennaway* – partial injunction is granted)
  - Consider Social Utility, Planning Permission/Permits, Potential Economic Loss

Damages in lieu of an injunction?

Lord Cairns' Act 1858 provided the ability to award damages where it had jurisdiction to award an injunction →(s 13 Senior Courts Act 2016 – allows NZ to grant damages in lieu of injunction but rarely does)

(1) *Shelfer* rule: gives damages where (1) injury to ptf. rights are small (2) capable of being estimated in money (3) adequately compensated (4) would be oppressive to grant an injunction

(2) *Miller v Jackson* (1977, CA, UK)

Denning (dissenting)	No injunction (public interest)	Damages is sufficient
Geoffrey-Lane	Injunction after a year *Allowing them to find other grounds*	If injury will occur they must be protected – damages not sufficient
Cumming-Bruce	No injunction Courts will not without special necessity interfere by giving an injunction where they will materially injure the rights of a third person	Damage in lieu of injunction Past and future damages set a 400pounds

(3) *Kennaway* (1981, CA, UK): Orthodox view at the time of *Kennaway* was that damages in lieu would not normally be granted unless you could satisfy all the criteria from *Shelfer* (limited injunction given) (Not bound by *Miller; Shelfer* rule is binding)

(4) *Fen Tigers* – *Shelfer* no longer good law; *Damages awarded in lieu of an injunction involves a classic exercise of discretion which should not be fettered*. Take into account other factors – public interest; planning permission (damages were given – huge stadium)

→ *Injunction is only justified when the irritating emanation causes inconvenience beyond what other occupiers in the neighbourhood can expect.*

→ *Entitled to an injunction because where you do not get one, the problem (unlawful interference) will continue – issue of being allowed to buy the right to nuisance with damages in liue?*

Considerations for remedies:

→ "If a man creates a nuisance, he cannot say that he is acting reasonably" – it is their responsibility to eliminate that nuisance *BNZ*

Financial loss/ gain:

- Irrelevant? But also could be relevant where it interferes with your use in terms of ability to on-sell? Halsey
- Mander J Blakesfield issued, in effect injunctions (declarations) requiring neighbours to prune garden to remove nuisance from claimant – increase the value of the developer's sections?

Legitimacy of the action:

i. Existence of resource consent could sway Courts towards damages? *St Helens*
ii. Although presence of planning permission cannot give rise to the presumption that there should not be an injunction BUT *Fen Tigers (Lord Sumption) – if dft. activities granted PP, points towards damages*
iii. Compliance with planning controls is not in itself a defence *Hunter*

Public interest/ social utility should be considered where remedies are decided:

i. Kennaway & *Fen Tigers* – social utility, injunction not appropriate?
ii. Public utility; what did the 'nuisance' provide the community – is imposing liability faltering development? *St Helens*
iii. Denning (dissenting) *Miller* – should consider public interest when deciding what is reasonable - weighing interests of public vs. land owners

iv. Giving an injunction might be an extreme action – damages better?
→ *Miller* looked at the social utility/public interest/policy of keeping young boys out of trouble
→ *BNZ* argument that if you come down too hard on architects they will stop designing nice buildings
BUT:

i. *Fen Tigers* – must be cautious – does not tell us where costs lie; use in discussion of injunctions
ii. Not a complete justification to withhold an injunction or excuse liability *Kennaway*
iii. *Note that this is note expressly relevant where a ptf. is complaining of e.g. an airport – injunctions are unworkable*

Coming to the nuisance

Although not a good defence, whether the ptf. came to the nuisance can be analysed in terms of granting an injunction or damages.

i. Length of time it has been there; who was there first? *St Helens*
ii. BUT regardless of how long an activity has been occurring – owners cannot be deprived of property rights/ to be free from interference *Sturges*
iii. *Miller* – Denning – shows what is reasonable; GL – long established activities, **uneasy feeling to end**; CB – length of time and no problems?
iv. *Kennaway* – influenced by fact that the ptf. came to this area, knowing of the motor boats

See above

TRESPASS	NUISANCE
Direct nuisance, physical intrusions by tangible objects/ persons/ things →	Consequential from acts (usually continuing wrong) → *Matheson*
Contrast of pointing of a water hose unto neighbouring land (trespass) →	constructing a rainspout from which the water eventually flows upon it *Matheson*
Every trespasser intrusion is tortious unless privileged…	…while a nuisance is never actionable unless it is reasonable

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PUBLIC NUISANCE:

Nuisance so widespread in its range that it would not be reasonable to only have 1 person take proceedings against it and put a stop to it – it should be an action taken by the community at large.

1. Is there a nuisance?
2. Does it affect the public at large?
3. Who has a standing to sue? –must prove that you have suffered particular & special harm
4. Must arise on the dfts land?
5. Must the dft. have been the original cause of the nuisance?
6. Remoteness of damage?
7. Remedies

Essay structure:

1. Intro (what is the issue, what is the tort, what rights are at stake/ why is it important, what stances could be taken by NZ)
2. Thesis statement – how you will conclude? (I think NZ are more likely to adopt (x) approach which is… rather than (x) which is… (explain what the different stances are)
3. Paragraphs
    a. Compare the arguments from the cases; Your own views
4. Conclusion – which is better view and why? Middle ground?