Private Nuisance

Background reading:
Books
NJ McBride and R Bagshaw, *Tort Law* (London: Pearson, 2018) ch 13 (general principles)
R Golofcheski, *Tort Law in Hong Kong* (Sweet and Maxwell, 2018) (specific cases)
J Murphy, *The Law of Nuisance* (Oxford: OUP, 2010) chs 1-6 (in depth analysis)

Articles
C Gearty, "The Place of Nuisance in a Modern Law of Torts" [1989] CLJ 48
FH Newark, "The Boundaries of Nuisance" (1949) 65 LQR 480

I Private Nuisance: Scope of the Tort

A. Definition

- A causing interferences/nuisance to neighbour B, or to B's property
- Not confined to neighbours
- Material that what/how/what for the interference is taking: facts are important

The Court of Final Appeal in Hong Kong has offered the following **definition of private nuisance.**

***Leung Tsang Hung v Incorporated Owners of Kwok Wing House* (2007) 10 HKCFAR 480**, at 491:

> Private nuisance is a tort protecting property rights. It is concerned with the activities of the owner or occupier of property within the boundaries of his own land which may harm the interests of the owner or occupier of other land.

- Murphy: definition not wrong but not adequate

I have defined **private nuisance**, I hope more accurately, as "**A substantial and unreasonable interference with a person's land or the use or enjoyment of that land**". (See J Murphy, *The Law of Nuisance* (Oxford: OUP, 2010) p 1).

- Not just concerned the physical integrity or property (despite it could be one of the aspects)
- Affect the faculty to peaceful enjoyment on one's land
- Involving a second interest e.g., enjoyment of that interest
- Not just about activities of the owner, but substantial and unreasonable interference

- Private? (check) e.g., military flight practice
- The interference must be unreasonable, but not just the act itself
- Here, **the outcome** (interference caused) is the focus

My definition is intended to be an accurate reflection of the true ambit of the tort. It is drawn from precise dicta in the case law, and as such aims to be a summary of the understanding of this tort that can be deduced from that body of case law.

Each of the elements in my definition helps elucidate the contents and contours of this tort.

Before doing so, it is helpful to give a few examples of the things that can constitute a nuisance: *viz*: Noise, smoke, fumes/bad smells, root encroachments, removal of supports and intrusive viewing.

B. Background

Notwithstanding the above examples, in HK, many of the cases on this tort—probably unsurprisingly—apply to water leakage rather than noisy neighbours.

But bear in mind, disputes between domestic neighbours are not all of what nuisance is about. For one's neighbour could well be a factory, a bar or a sports ground.
NB Flat owners might prefer the contract action under the Deed of Mutual Covenant.

C. "Substantial Interference"

To sue, a nuisance must be *substantial*. In other words, the principle of *de minimis non curat lex* (the law does not govern trifles: law ignores insignificant details) pplies.

Walter v Selfe (1851) 4 De G & Sm 315

> [O]ught this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience **materially interfering** with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and simple notions among the English people? (Knight Bruce VC)

- Attended to the facts that they need to be substantial;

- not merely according to elegant or dainty modes and habits of living: distinguish habit and interference e.g., hearing neighbours from time to time; cannot say every act is a nuisance

Fearn v Board of Trustees of Tate Gallery [2023] UKSC 4

> [T]he first question which the court must ask is whether the defendant's use of land has caused a ***substantial*** **interference**" (Lord Leggatt) (Reed & Lloyd-Jones agreed)

Facts	Tate Museum in London; viewing platform in close vicinity to another property; claimed that people visited could look into the property and take picture, which interfere with their enjoyment of the flat and cause nuisance

To answer the question of **whether there has been a substantial interference**, the courts have highlighted a **few factors** that help identify when one has occurred.

- "substantial interference" does not specifically tell what it means; factors to consider to determine so > context dependence & P relevant > take an objective approach

Factors to identify substantial interference:

1 Unusual Sensitivity of Plaintiff

If a plaintiff is abnormally sensitive, this may be an indication that, although P is greatly irritated or affected, this may still **not** amount to a material interference.

- Sth that appears to be substantial interference, or P claim so, but might due to sensitivity of P > Court takes an objective view to determine so

Robinson v Kilvert **(1889) 41 Ch D 88** (the English case in which the principle was minted)

> It would, in my opinion, be wrong to say that the doing something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life. (Cotton LJ).

Facts	D let out a room to P above D; d kept tempt hot and heat rose and passed through D's ceiling > damaged sensitive paper kept by P > P claimed nuisance > interference with his commercial purposes

Held	Court rejects so; simply warm air, the only reason why P think so as the paper he got he is sensitive about it; does not affect ordinary people from enjoying life

Hunter v Canary Wharf **[1997] 2 All ER 426** (the principle stands on highest possible authority)

Facts	Construction of tower: generate dust that caused interference to those who live; interfere with tv reception; Resident complaint nuisance and lose
Held	Tv viewing: unprepared to say this is nuisance; as it is a luxury amenity of land but not an ordinary amenity > P are abnormally > complaining on subjective mind

Fearn v Board of Trustees of Tate Gallery (above).

> The particular sensitivities or idiosyncrasies of those individuals are therefore not relevant, and the law measures the extent of the interference by reference to the sensibilities of an average or ordinary person. (Lord Leggatt)

Capital Prosperous Ltd v Sheen Cho Kwong **[1999] 1 HKLRD 633** (the principle at work in HK)

> I do not see that it is unreasonable for the <u>average Hong Hong person</u> … to take pump-assisted showers between 11pm and midnight. I do not see that a reasonable person living below can object to it (Muttrie J).

Facts	P who likes to go to bed early; claimed loud noise of neighbour taking shower at 7 pm
Held	Referable to the ordinary people live in HK; recognised that this is disturbing P but does not mean this would disturb other ordinary people in HK > P's own abnormally sensitive contribute his feelings of being interfered

NB Different Approach for Sensitive *Buildings*

- Sensitivity building: the building itself could confer more interference to people > court will tolerate this claim
- Counter argument being that is the characteristic of the building & ppl having the freedom to build any kind of building in their own land > basic right of entitlement to enjoy their land
- Does not operate the same way as abnormal sensitive people

e.g., building with high visibility due to design of the window (that viewing from the balcony could be more intrusive compared to other types of building > D cannot argue on this point that it is the sensitivity of P's building causing the interference

***Fearn v Board of Trustees for the Tate Gallery* (above)**

> it is the **utility of the actual land**, including the buildings actually constructed on it, for which **the law of private nuisance provides protection** - not for some hypothetical building of "average" or "ordinary" construction and design. **This reflects the basic right of a person at common law, discussed earlier, to occupy and build on their land as they choose**. (Lord Leggatt).

2 Location of Plaintiff's Premises

The relevance of P's neighbourhood is that **P's legitimate expectations in terms of comfort, peace and quiet will vary according to where he lives.**

- E.g., ppl living in Lamma island would expect higher level of tranquillity compared to those who live in Central;
- Court takes into the locality of P's premise & what people would expect to put up with

***Sturges v Bridgman* (1879) 11 Ch D 852** (the classic English case)

> What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey" (Thesiger LJ).

***Thompson-Schwab v Costaki* [1956] 1 All ER 652**

> the test as it seems to me … is that which I have stated, namely, whether what is being done interferes with the plaintiffs in the comfortable and convenient enjoyment of their land, regard being had … to the character, as proved, of the neighbourhood (Evershed MR).

Facts	Residential street; D invites prostitute into his premise where P complained so

The neighbourhood principle has received support in HK.

Tam Seen Mann Estefania v Chan Norman and Another (Unreported HCA 627/2010)

> A useful test which balances the interest between neighbours as to their respective use of their properties is what is reasonable according to ordinary usages of mankind living in **a particular society**. In assessing the question of nuisance in the context of Hong Kong, the court should take into account the particular habits of Hong Kong people, in particular later bedtimes.

- Noise generated by neighbours above at night

NB Locality is not relevant in cases of property damage.

***St Helens Smelting Co v Tipping* (1865) 11 HL 642**

Facts	Property damaged by poisonous smoke; D argued it's an industrial area which p would have expected
Held	Any damages to property are always substantial, location of the premise is nor relevant

***ACL Electronics (HK) Ltd v Bulmer* Ltd [1992] 1 HKC 133**

Held	Focus only on material physical question but not the locality of premise > principle adopted in HK

D. "Unreasonable Interference"

Case law has long established that this is **a description of the nature of the effect on P** (rather than a characterisation of the way that D behaves).

- Discretion on the way of which D is performing, producing unreasonable interference
- By reference of the thing suffered by P, only interested in the nature of the interference
- True as long as this tort remained as strict liability
- Concerned only whether the interreference described is a reasonable one

NB Strict liability means liability regardless of personal fault, and not liability without fault.

Certain factors shine some light on what is entailed by an unreasonable interference.

1 Seriousness of the Interference

- meeting the threshold of seriousness > unreasonableness

(a) Duration

The longer an interference, the more serious it is. And more serious = more unreasonable.

***Matania v National Provincial Bank* [1936] 2 All ER 633**

> The law, in judging hat constitutes a nuisance, does take into consideration … [the] duration of the [interference]

Facts	Temporary construction work on D's premises, noise and dust which p complained;
Held	Recognised the necessity of work; but the duration of the nuisance is a relevant consideration

(b) Character of the Harm

It is generally more difficult to justify physical damage to P's land than amenity nuisance (*ie*, interferences with either the use or the enjoyment of that land).

***St Helens Smelting Co v Tipping* (*supra*):**
locality has no exculpatory value in property damage cases.

2 Character of the Defendant's User

- "User": D's conduct or use of land
- A relevant factor to consider (vs above the Q being whether the nature of the inference is the only thing to consider)
- Unreasonableness of one's behaviour provides a way to determine the consequences of the act and interference; But not itself determine the reasonableness of the tort

***Fearn* (above)**
This is now the leading authority on **what a reasonable user entails**.

> The two conditions of [reasonable user are whether] … the acts complained of were **(i) necessary for the common and ordinary use and occupation of land,** and (**ii) "conveniently done"** - that is to say, done with proper consideration for the interests of neighbouring occupiers.

- Act that is an ordinary thing to do & can be conveniently done (done in a way that people usually would do it and expect others to do the same)
- E.g., use of washing machine in daytime in summer (which is ordinary and convenient to do) vs at midnight

- If you make an unnecessary/abnormal use of your property, you will fail at limb (1) to show a reasonable user.
- But even if you don't fail at limb (1), you may still fail at limb (2).
- Ultimately, it was because D (an art gallery) was providing the public with the chance to intrusively view the Ps that its user was considered unreasonable.

- **It was not "necessary for the ordinary occupation land".**

> Inviting several hundred thousand visitors a year to look out at the view from your building **cannot** by any stretch of the imagination be regarded as a **common or ordinary use of land** (Lord Leggatt).

Several well-established factors help illuminate further this aspect of nuisance law.

(a) D's malicious activities

Though liability in nuisance is technically strict, **the malice in D's user can be a material consideration** since if D's user is malicious, he can never justify the interference thereby caused.

- Even if the act itself is a reasonable thing to do, but if D does it maliciously, can be an inference to draw to unreasonableness

Hollywood Silver Fox v Emmett **[1936] 2 KB 468**

Facts	D owns a farm, firing his gun to cause disturbance and economic harm to the farm next to it (so that the foxes won't breed, out of the motive to end the operation to protect animal rights)
Issue	whether the act itself is necessary to keep predators away; whether action capable of constituting a private nuisance considering the unusual sensitivity of the foxes
Held	• The way D use the gun is malicious: D intentionally attempted to frighten the foxes through the firing of his gun on his own land. • Claim successful, injunction granted

Pong Seong Teresa v Chan Norman **[2014] 6 HKC 515**

> Where noise is **created deliberately and maliciously for the purposes of causing annoyance**, its ***mala fides*** **character** alone would **render it an actionable nuisance** even if it would otherwise have been legitimate. (Linda Chan SC.)

(b) Locality in which D's activities occur

Just as P's location is relevant to the question "what can we reasonably expect P to put up with?" so, too, is D's location relevant to the issue of "what is it acceptable for D to do?"

- There could be situation where P and D do not locate at the same location
- The location would impact the reasonableness of D's conduct e.g., carrying a gun in different areas

***Ball v Ray* (1873) 8 Ch App 467**

Facts	Keeping horse in a residential area, discomfort to neighbours during night by the noise of horses which was converted into a stable
Held	held as nuisance

(c) Fault on D's Part?

In his famous speech in ***The Wagon Mound (No 2)* [1967] 1 AC 617** Lord Reid stated that:

> Nuisance is a term used to cover a wide variety of tortious acts or omissions and in many negligence in the narrow sense is not essential. An occupier may incur liability for the [e]mission of noxious fumes or noise although he has used the utmost care in building and using his premises ... [And yet] although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability.

- Negligence is not essential > fault is not required > strict liability tort

Breaking down:
Negligence in the narrow sense:

- tort of negligence in board sense involves recoverable types of harm, duties of care, breaches, and causation, remoteness
- narrow sense: relevant component; did D behave negligently, felling below the standard of reasonable person> but if harm is not done then there is no tort (e.g., driving carelessly owning many duties of care but no one is hurt)

An occupier may incur liability for the [e]mission of noxious fumes or noise although he has used the utmost care: (following the first sentence, the same idea)

Although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability

- remoteness case of Wagon Mound
- e.g., driver driving in terrible weather, taking foreseeable risk despite taking upmost care > no negligence in a narrow sense (as the driver takes extra care and there is no negligence);
- but if there is accident, it would be the driver's negligence (another kind of fault, not that the fault driving in normal circumstances)
- always have fault of some kind (here the driver still has fault of some kind)

but cannot be explained by ordianary notion of negligence here, only fault of some kind that he should not drive in this terrible weather even excersing utmost care

even if D has exercised reasonable care and skill to prevent the nuisance
(no negligence in a narrow sense /fault here), but nonetheless nuisance still occurs > this is no defence to the nuisance casued to P

Lau Chun Wing Rod v Incorporated Owners of Po On Building [2006] HKCU 1364

> It is settled law that **the exercise of care and skill by a competent contractor** or every effort made by the Defendant to prevent a nuisance **afford no defence** to an action on nuisance. (Wong J.)

Q If nuisance is a strict liability tort, why do the courts in **water leakage cases** routinely seek to identify whether D knew of the leakage problem and whether he had acted reasonably quickly to resolve the problem?

Tin Kin Ka Clara v Chan Koon Cheong [2015] HKCU 1029

> in order to prove nuisance in a seepage case … a plaintiff must show, besides the seepage itself and the issue of causation, that (i) the defendants actually or constructively knew that the water originated from their premises; and (ii) remedial action was not taken within a reasonable time (Li J).

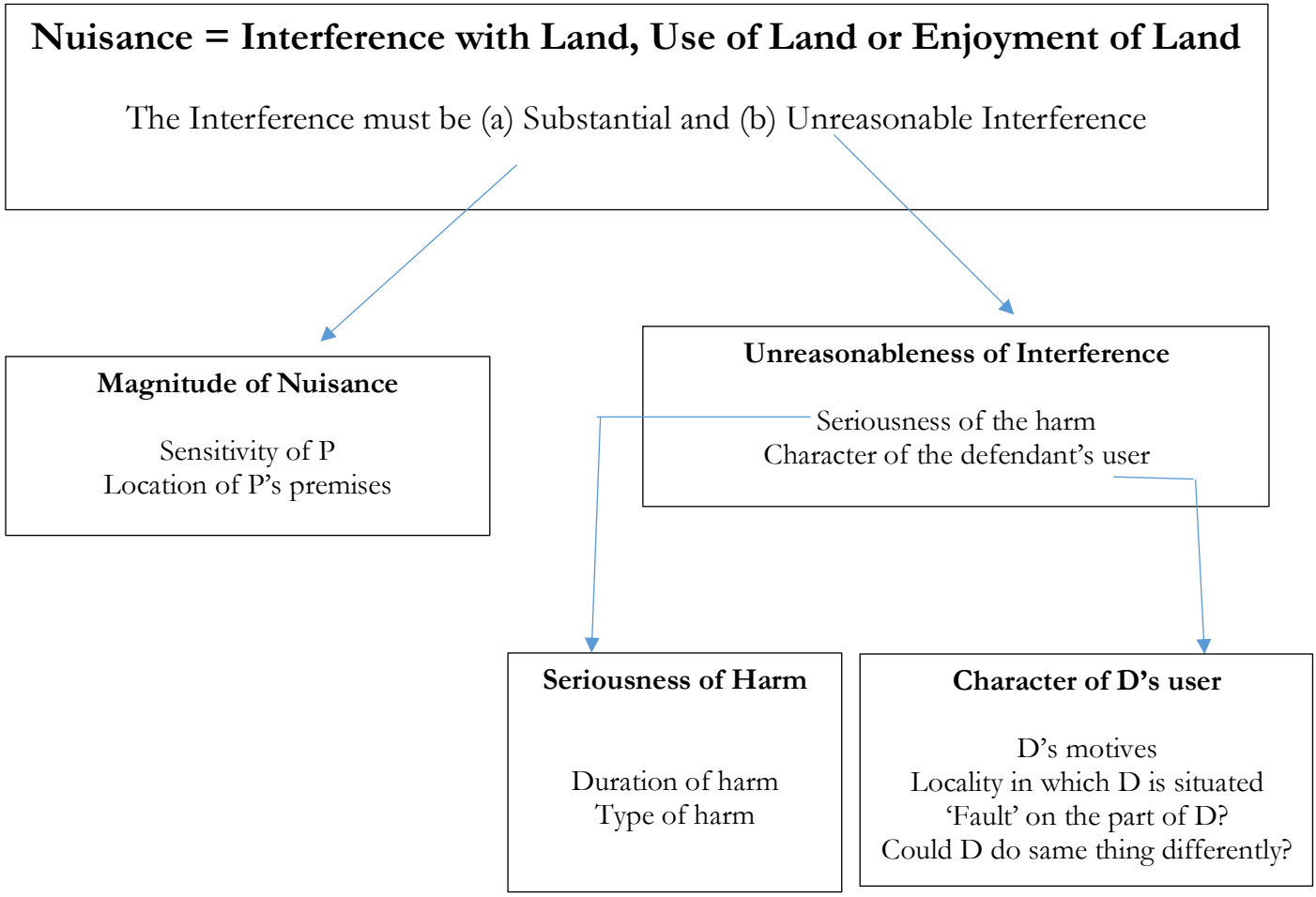
(d) The practicability of avoiding an interference

If D could have taken simple steps to avoid causing disturbance, the fact that **he or she does not take those steps** may be taken by the courts to support a finding of **unreasonable interference.**

Leeman v Montagu [1936] 2 All ER 1677

Facts	D putting his chicken on his neighbour's land

Diagram of the Elements of a Nuisance



III Who Can Sue in Private Nuisance?

The House of Lords, in a landmark decision, set firmly in place the rule that in order to sue in private nuisance **P must have a proprietary interest** in the land affected.

- Rationale: tort is not against individual, but tort against land, interest or right associated with the land; or the interest in the use or enjoyment of the land

***Hunter v Canary Wharf* [1997] 2 All ER 426**

> [A]n action in private nuisance will only lie at the suit of a person who has the right to the land affected ... **a mere licensee on the land has no right to sue** (Lord Goff).

This principle has been applied locally.

***Ng Hoi Sze v Yuen Sha Sha* [1999] 3 HKLRD 890**

> [T]he action is not one for causing discomfort to the person but is one which arises because the utility of the land has been diminished by reason of the existence of the nuisance. It is for that reason that mere presence on the land of the Plaintiff is not sufficient. For a Plaintiff to have a cause of action in nuisance, he must have a right to the land. (Rogers JA.)

- Rental resident has no proprietary interest to sue

IV Recognised Heads of Loss in Private Nuisance

- **Physical damage** is well recognised: eg, the *St Helens* case (above).
- **Amenity nuisances** so too recognised: annoyances like noise, bad smells etc
- Even intrusive viewing of a person in their home can be a nuisance.

Fearn (above)

> Contrary to what is said by the Court of Appeal, however, the claimants' complaint is indeed one of damage to interests in property. The concepts of invasion of privacy and damage to interests in property are not mutually exclusive. An important aspect of the **amenity value of real property** is the **freedom to conduct your life** in your own home without being constantly watched and photographed by strangers (Lord Leggatt).

- No tort for invasion of privacy; But here in this case making t**he invasion of privacy as a property right** that is **relevant to amenity value of property**

A. Personal Injury

Hunter (above)

> The injury to the amenity of land consists in the fact that persons on it are liable to suffer inconvenience, annoyance or illness (Lord Hoffmann)

AND

> In the case of nuisances "productive of sensible personal discomfort", the action is not for causing discomfort to the person **but ... for causing injury to the land.**

Many years ago, FH Newark, in a famous article (entitled 'The Boundaries of Nuisance') stated that:

> [a] sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them taking their ease in their gardens.

***Fearn v Board of Trustees of Tate Gallery* (above)**

> the harm from which the law protects a claimant is **diminution in the utility and amenity value of the claimant's land**, and **not personal discomfort to the persons who are occupying it.** (Lord Leggatt).

This same reasoning was adopted also in the *Yuen Sha Sha* case (above) by Godfrey JA.

- Formerly cannot sue on personal injury, as this is tort of land; but can be taken into account: as it is **relevant to the capacity of enjoying the land** without suffering from personal injury > **affecting the amenity value of the land** (e.g., land worth less as people might choose the other land without acidic smell to enjoy better the environment to avoid personal injury)
- The illness is not the ground to sue for, but **the diminished value of land**

B. Damage to Chattels

if damaged chattel can be replaced, then not regarded as diminishment of amenity value

Damage to chattels also recoverable … *with a twist*.

- Recoverable under the same manipulation of facts as above
- E.g., parking the car safely in one's land > relevant to the amenity value of the land; damage of the chattel can point to the fact that the amenity value has bene diminished

***Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd* [2001] BLR 173**

> [I]it is possible to regard the interruption to the supply of gas as an interference with the use of gas appliances rather than with a use of land [since replacement electrical appliances can be obtained]. (Stanley Burnton J).

Facts	Disruptive gas supply caused by water leakage; water flood and P cannot use the gas appliance safely
Held	Losing the use of chattel > gas appliances not fixed in the land > cannot sue for damages in chattel as this tort only protects land > **cannot sue for mere property**

C. Economic Loss

Consequential economic loss ***so long as* it derives from interference with land's amenity** is recognised as recoverable: *Hunter*.

Andrae v Selfridge [1938] Ch38

Facts	P owns a hotel (profits with customers' stay); but hotel inflicted with horrible smell; P claimed interference generated caused loss of customers, which is consequential economic loss, which is tort of land in the first place
Held	Consequential economic loss is claimable

V Who Can be Sued?

A. Creators of the Nuisance

The action in private nuisance will not necessarily always be against the owner of neighbouring land.

- The law states that **he who has created the nuisance will be liable**. (Does not need to be the owner of the land, but someone who cause the nuisance)

***Southwark LBC v Mills* [2001] AC 1** (No liability, on facts)

> Nuisance involves doing something on adjoining or nearby land which constitutes an unreasonable interference with the utility of the plaintiff's land. The primary defendant is the person who causes the nuisance.

Facts	P would hear tenants on a flat of the same floor
Issue	Q of who to sue (the landlord or the tenants)
Held	Primary D is the person who cause the nuisance, which is the tenant in this case; implying that there could be a second D, the tenant potentially to be sued
Note	Definition: Owner of the occupier of the land

***Loke Yuen Jean Tak Alice v Wong Kit Ying* [2019] HKCU 2916**

> The person to be sued for nuisance is the one who has possession and control of the land from which the nuisance emanated … If a nuisance arises prior to a letting, the owner/landlord does not cease to be liable by virtue of parting with possession. If he knew of the potentially harmful condition of the property before letting, or ought to have known of it, he remains liable for harm accruing after the letting… If the nuisance arises after the tenancy is granted, Lord Neuberger PSC in *Lawrence & anor v Fen Tigers Ltd & ors (No 2)* said as follows: "Lord Millett explained in *Southwark London Borough Council v Mills* [2001] 1 AC 1, 22, that, where activities constitute a nuisance, the general principle is that 'the … persons directly responsible for the activities in question are liable; but s**o too is anyone who authorised them**'". (Ng J.)

- Q of who to be sued, tenant or landlord, or both

B. Occupiers

A fuller picture of occupiers' potential liability can be put as follows.

Occupier may be liable, even though they did not themselves create the nuisance where:

- They have **adopted or continued** the nuisance created by another,
- They have **adopted or continued** a nuisance created by natural processes,
- They have **control over the creator of the nuisance** (as the *Loke Yuen Jean* dictum, above)
  - adopted or continued: allowing the activity to continue carrying on where the occupier knows or ought to know the need to do sth about it/make some changes

NB 1 **One adopts a nuisance when one makes use of the state of affairs comprising the nuisance.** [*Sedleigh Denfield* = authority.]

NB 2 One continues a nuisance where one **fails to abate a nuisance** where one has **actual or constructive knowledge of the nuisance**. [*Sedleigh Denfield* = authority.]

- ***Sedleigh-Denfield v O'Callaghan*** [1940] AC 880 (owner/occupier liable for nuisance created by another if he adopts/continues it.

  - D's land was a ditch, a trespasser laid a pipe to keep out leaves; a heavy thunderstorm, an accumulation of leaves blocked the pipe > caused C's land to be flooded; but before the flooding, D's servant was responsible for clearing the ditch and was aware of the risk of flooding
  - An occupier of land "continues" a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take reasonable means to bring it to an end when he has ample time to do so
  - Can be held liable even if personally not responsible for it

- ***Leakey v National Trust*** [1980] QB 485 (liability for adopting/continuing nuisances **caused by nature**: very dry bank of earth liable to result in landslide after heavy rain).
  - Bank of earth dried out; adopting the nuisance caused by the contractor; occupiers could be liable if he authorise a 3rd party (a contractor) causing the event

- ***Matania v National Provincial Bank*** [1936] 2 All ER 633 (liability for acts done by those over whom owner/occupier had control: independent contractors in this case)

***Leung Tsang Hung v Incorporated Owners of Kwok Wing House* (2007) 10 HKCFAR 480**

Court of Final Appeal expressly accepted the general principles set out above.

> [An owner-occupier] can plainly be expected to have effective control, both physically and legally, over the property in question. Such an owner-occupier is subject to **a duty to nullify the hazard if he knows or ought to know of its existence, even though he has done nothing to create it.** The hazard may have been created by a trespasser or a by "a secret and unobservable operation of nature" but **his omission to neutralize the hazard within a reasonable time after acquiring the requisite knowledge or presumed knowledge is actionable** (Li CJ).

VI Defences

Several defences, both **partial** and **absolute**, exist to an action framed in private nuisance.

A. Prescription [Feb 21 recording 05:39]

The idea here is that **if one uses land in a particular way for 20 years without complaint**, then one acquires what is called a **prescriptive right to continue to use the land in that way**.

- With some commonalities with land law (easement)
- As a defence D alleges might have caused substantial and unreasonable interference, but said to have a prescriptive right to doing it > but later causes interference that is an ordinary ground as a nuisance undisturbed and complained of for 20 years
- The effect of doing it, **enough to constitute a nuisance** (e.g., sth happen during time of elapses, activity suddenly become a nuisance where it was not ordinary a nuisance)

***Sturges v Bridgman* (1879) 11 Ch D 852**

Facts	Doctor and confectioner; the confection have been doing his business for more than 20 years, has machines making sweets fixed to the wall, generates vibration and noises; doctor occupies next door (at first not a problem for the doctor); noise level never changes but since the doctor now does consultation close to the confectioner; noise now is more profoundly affecting him; doctor claimed nuisance, D argued prescriptive right
Held	No prescriptive right; although 20 years, only reach the point of being a substantial and unreasonable interference when the consultation room was built; **question is not about how long D have been doing the activity, but Q of when it starts to be a substantial and unreasonable interference**; this is **no defence**

***Coventry v Lawrence* [2014] UKSC 13**

Facts	Car race, going on for almost 20 years; engines development with more noise released over the years;
Held	court intolerant to the claim of prescription: that the noise was heard was sufficient to raise claim of nuisance despite it was never complained, but the **interference has changed**, always capable of being a nuisance but **now is of greater nuisance**; **when circumstances changes** (magnitude of the noise increases), **clock resets** when greater noise is generated

prescriptive right only as to the same situation as before (e.g., certain level of noise acceptable before), but when circumstances change (e.g., the noise level increases) > there will be no prescriptive right as to the change (the higher level of noise now)

B. Statutory Authority

- If D is authorised by statute to do a thing, then D is immune from suit for any disturbance caused.
- However, awkward questions about **interpretation of what exactly is permitted** can arise.
  - Look at the specifics to work out whether the person is genuinely authorised
  - One aspect: How the authority is granted (e.g., may do sth vs must do sth)
  - E.g., 'must' vs 'may', some statue may just grant permission, one can make a choice; or some grant permission of how one do X (no room for discretion); or general permission with general terms only, but not specific and exact, where one could have some choice to do X, (e.g,. way to do sth)

Allen v Gulf Oil Refining Ltd [1981] AC 1001

Facts	D was given statutory authority to construct an oil refinery next to a village, P who lived in the village alleged nuisance by noxious odours, vibrations and offensive noise levels
Issue	Whether D could claim statutory protection
Held	D did have a defence, statue has express direction or by necessary implication has authorised the construction and authorised with immunity from any action based on nuisance. - But pointed out D **only had the defence to the extent the interference was unavoidable**; - also recognised that, even have the permission to run oil refining, but only under appropriate interpretation of the statue **in a way as much as possible to limit interference/least intrusive to the neighbours**
Note	Where it can be a defence requires a closer looking into the statue

Lam Yuk Fong v A-G [1987] HKLR 263

> The evidence on behalf of the defendants has satisfied me that collection of refuse in Wellington Street by means of an on-street RCP was essential. But in order to dismiss this action I have further to be satisfied that there was no other way of doing this work and in that regard the onus is on the defendants … [to show] the necessity of the consequence. [But] **the nuisance** which existed at the material time … **was not the inevitable consequence of what the legislature had authorised**. (Saied J.)

even if statue expressly authorise D to do certain thing:
- if the effect of nuisance is evitable, D still need to do the thing in a manner that minimise the interference to others
- vs. if the effect of nuisance is inevitable > D might have available defence on ground of authorisation of the legislature

Facts	Urban council placed refuse collection point adjacent to P's premise; claimed D does not need to do this at that particular location, Interfering other's interest sufficient to be nuisance
Held	Statue requires D to establish a refuse, but not that it is required to establish at one specific location; D still required to do it in a way that minimise interference to the neighbour

Cf **Planning Permission**

- Permission to construct thing

Coventry v Lawrence (supra)

> it seems wrong in principle that, through the grant of a planning permission, a planning authority should be able to deprive a property owner of a right to object to what would otherwise be a nuisance … [But] there will be occasions when the terms of a planning permission could be of some relevance in a nuisance case. Thus, the fact that the planning authority takes the view that noisy activity is acceptable after 8.30 am, or if it is limited to a certain decibel level, in a particular locality, may be of real value, at least as a starting point … While the decision whether the activity causes a nuisance to the claimant is not for the planning authority but for the court, the existence and terms of the permission are not irrelevant as a matter of law. (Lord Neuberger.)

Held	Supreme court: Not to confuse the planning permission with statutory defence • Planning permission: - from public authority, not lawmakers, not right takers and cannot authorise the loss of other private law right, no legal power to grant such right - **Planning permission can never deny any private law rights**; right to sue in respect of nuisance and enjoyment of land; retain the right to sue in private law nuisance - Planning permission not a defence here consider the source of right • Vs statutory permission: from legislator
	But does not mean it is irrelevant, it is nevertheless **a relevant consideration**: - Before granting it, authority will look at what is proposed - e.g., assessment of what an area it is before granting the permission; have considered what is permissible in the area > can be a relevant consideration to see whether there is nuisance in the first place - Court taken account the location of the permission, to see the if it is substantial and unreasonable interference - Not as a defence but merely a relevant consideration

decision/permission by public authority as one aspect to determine if nuisance is reasonable & permissible

no actual or constructive knowledge of D in it > otherwise it would be duty of D to prevent such from happening (in this sense D is adopting or continuing the act)

C. Acts of God/Strangers

Inevitable accidents of nature and nuisances **created by third parties** which are **neither adopted nor continued by D** (in the senses discussed above) will not support an action in nuisance against D.

- Reason that one is complaining, which is not caused by D but some other 3rd party or some act of nature (not that of the continuous nuisance, test of D knew of ought ot have known the occurrence of the land)
- But here **it entirely attributes to a 3rd party where D plays no part in**, not continued by D

if interference is minor/not substantial > no injunction granted

***Sedleigh-Denfield v O'Callaghan* (*supra*)**

If you don't know, and **you don't have *constructive knowledge*** of the problem, then you won't be liable.

VII Remedies

Nuisance law supports **two main remedies: damages and injunctions**.

- Default damages in tort: damages, that put parties in the position they occupied before the wrong is done (e.g., negligence cases causing damages)
- Different in nuisance: ongoing interference, not one-off incident, damages have less effect here has it can still continue; injunction to stop it from happening again
- Negative: not to do sth; vs positive (to do sth, e.g, to cut the tree)
- Court would regard injunction as the appropriate remedy (as default damage in nuisance case)

A. Injunctions

It is injunctions that are most commonly sought as the remedy of choice. Indeed, it is fair to say that **the presumption in nuisance cases is that an injunction will be granted**.

***Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287**

> Where the injury to the plaintiff's legal rights is (i) **small**; (ii) **capable of being estimated in money**; (iii) **can be adequately compensated by a small money**

payment, and (iv) **where the case is one in which it would be <u>oppressive to the defendant to grant an injunction</u>**. (Smith LJ.)

Held	Only exceptionally no injunction granted (injunction not as a right despite close to that); only grant damages instead of injunction in 4 conditions where satisfied - Not remedy as right but close to it
Note	Redundancy in language? They are rather overlapping?

Occasionally, courts refuse injunctions. **Gravity of interference** and **public interest** are salient, here.

- Not the persistent type of interference, only occasional, but might still meet the substantial and unreasonable interference threshold

<u>Gravity of interference</u> if interference is minor/not substantial > no injunction granted

***Cooke v Forbes* (1867) LR 5 Eq 166**

Facts	Smell from a factory
Held	The damage was **accidental and occasional**, that careful precautions were taken and that there was no exceptional risk, **an injunction was refused**; Not overwhelming large smell to make it substantial; Not feasible to order closure of the factory

<u>Public Interest</u>

***Wheeler v JJ Saunders Ltd* [1995] 2 All ER 697**

Facts	D runs pig farm
Held	Relevant consideration: **how this injunction would play out in public interest**; <u>admit interference</u> but not to the extent to close the farm (e.g., if shut down the pig farm, would deprive everyone's right to enjoy from it)
Note	Public interest only relevant to the question of which type of remedies is appropriate

***Fearn* (above)**

> I do not suggest that it is wrong to take account of the public interest. What is wrong is to treat it as relevant to the question of liability for nuisance rather than only, where liability is established, to the **question of what remedy to grant** (Lord Leggatt).

public interest is not the factor to decide whether there is nuisance (public interest is not a factor justifying nuisance, but only relevant as to question of what remedy to get)

prescriptive right only as to the same situation as before (e.g., certain level of noise acceptable before), but when circumstances change (e.g., the noise level increases) > there will be no prescriptive right as to the change (the higher level of noise now)

- Once reach the threshold of being a substantial and unreasonable interference (still the ingredient to satisfy, public interest is not a factor here) > (consider public interest) ask what remedy to grant

pay damage instead

NB Even if an injunction is refused, D may still have to **pay damages in lieu**.

***Coventry v Lawrence* (*supra*)**

reason for ordering payment of damage might due to consideration of public resources

> [T]he court might well be impressed [in deciding whether to grant damages in lieu of an injunction] by a defendant's argument that an injunction would involve a loss to the public or a waste of resources on account of what may be a single claimant (*per* Lord Neuberger).

***Lo Yu Chu v Kam Fu Lai Development Co Ltd* [1994] 3 KKC 18**

> What has caused me some concern is the question of the likely effect on the shop-owners… There has been no evidence as to whether or not the air-conditioner can be relocated, although the judge below clearly considered that it may be difficult. If [they] … consider that the effect on them of an injunction will be so damaging that it should not be granted, there is nothing to prevent them coming to the court to seek to have the injunction set aside. (Penlington JA.)

Facts	P have a residential flat, in commercial area, owner of the flat has an aircon system for commercial shops, generating noise, P complains
Held	Injunction granted, but also concerned the effect on the shop owner
Note	Principle may varies in diff situation: - can be interpreted in the Shelfer (iv) where the case is one in which it would be oppressive to the defendant to grant an injunction - or simply concern of public interest

B. Damages

As regards damages, the idea is to **pay to P the difference between the value of the protected interest before and after the nuisance.**

- Can be damages in lieu, even if P did not ask for damages

***Andreae v Selfridge & Co* [1938] Ch 1**

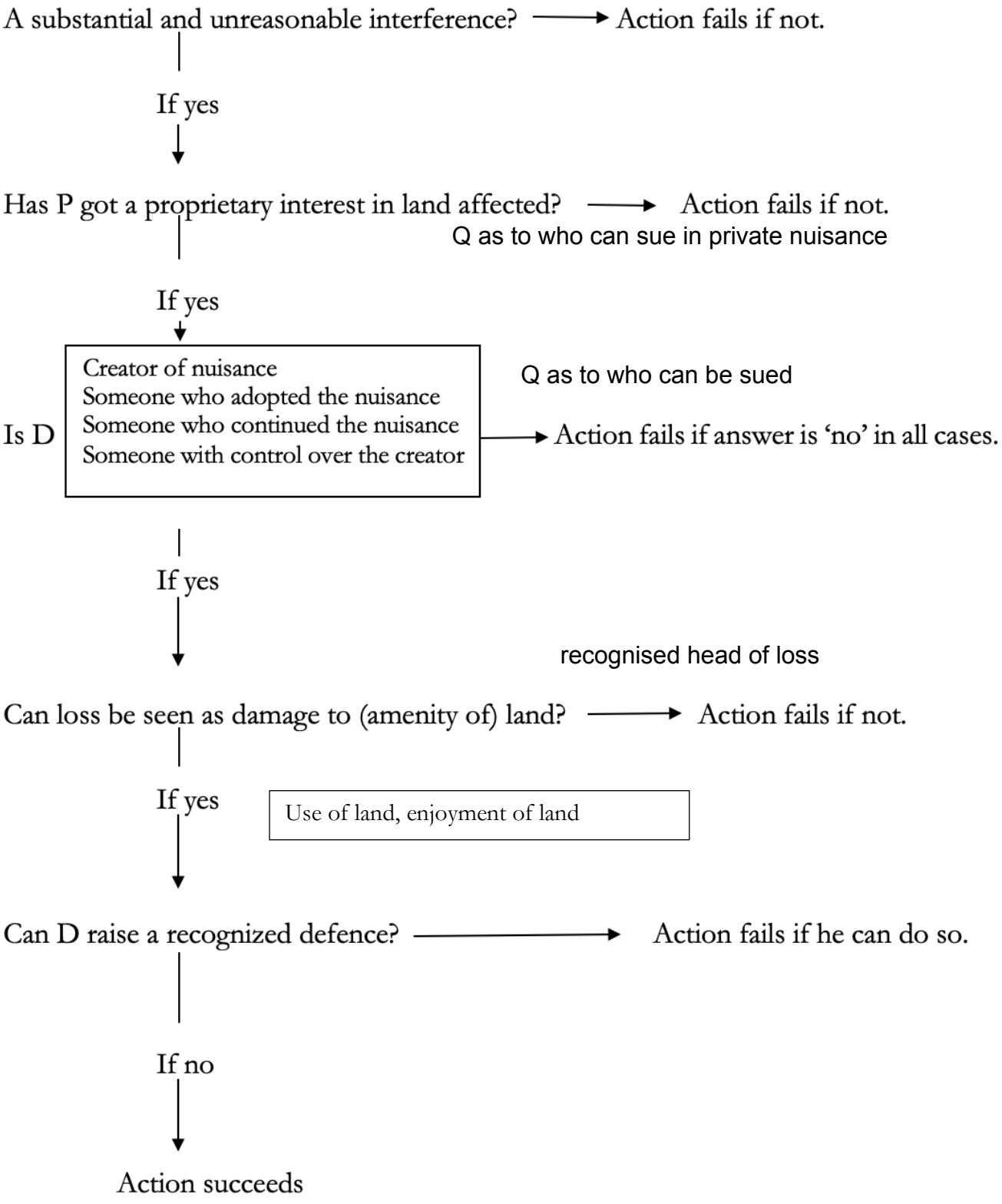
Facts	P owns a hotel, D generates smell and noise, affect the business of the hotel; nuisance cause loss of customers

Held	Damages in relation to the loss of customers, financial loss accrued

Wong Shiu Hung v Lui Kuo **[2001] HKCU 551** Loss of rent, can be sued for

NB In cases of physical loss, damages are measured in two ways: (1) cost of repair or (2) drop in property value (whichever is lower).

Mechanics of a nuisance action: the various elements combined



Two tricky theoretical issues concerning private nuisance

[to be review, check out papers]

(a) Should physical injury cases be actionable in private nuisance?

> If D is engaged in an unreasonable user of his land, and physical injury – which negligence protects – is foreseeable, and if nuisance was historically about annoyances, then shouldn't physical injury cases be dealt with by negligence law?

See C Gearty, "The Place of Private Nuisance in a Modern Law of Torts" [1989] CLJ 214.

- No, nuisance (annoyances e.g., noises, smell) but not damage to land
- Nuisance = protection of land?
- Considering property damages, only claimable under negligence b

- Easier to sue in nuisance than negligence? but it would only be easy for one party (contrary to the idea that both parties are equal)

- Should it be separated from private nuisance but put it in negligence

- Physical injury as one-off result??? But the requirement for nuisance is persistent?
- Question of what remedy to grant?? Injunction in nuisance?

(b) Does the standing rule invert tort law's hierarchy of protected interests?

> Ordinarily, if this hierarchy is right, we'd prioritise physical integrity and liberty (and this is why the torts that protect them are often said to be (i) actionable *per se* and (ii) the kinds of things the invasion of which can lead to aggravated or exemplary damages.
>
> But if the fumes from a factory damage your parents' paintwork on their windows, and they also give you a chest condition, your parents can sue but you cannot if it is only your parents who own the home.
>
> But maybe the hierarchy doesn't hold firm!
>
> J Murphy, "Tort's Hierarchy of Protected Interests" [2022] *Cambridge Law Journal* 356.

.

- Why only protection of land e.g., ppl having no proprietary interest cannot sue

- If allowing all to sue it would significantly broaden the scope? Right of D can be sufficiently limited?
- Floodgate argument; court would be facing many small argument; also a 'ought' question

- Occupiers might still have the choice to move, unlike owners; but this is a 'ought' question,

Murphy:

- Specificity of tort
- Even if cannot sue under tort of land, does not mean one cannot sue under negligence (e.g., for personal injury)
- Not about the hierarchy of interest but about the specificity (as one can still sue under negligence
- Here, as land law, get the protection of land in the right order, protects land itself and the enjoyment of land

Public Nuisance

Background Reading

Books
J Murphy, *The Law of Nuisance* (Oxford: OUP, 2010) ch 7
NJ McBride and R Bagshaw, *Tort Law* (London: Pearson, 2018) ch 19.

Article
JR Spencer, "Public Nuisance – A Critical Examination" [1989] CLJ 55

I Introduction

Public nuisance is an odd branch of the law, as was captured beautifully by Spencer as follows:

> Why is making obscene telephone calls like laying manure in the street? Answer: in the same way as importing Irish cattle is like building a thatched house in the Borough of Blandford Forum; and as digging up the wall of a church is like helping a homicidal maniac to escape from Broadmoor; and as operating a joint stock company without a Royal charter is like being a common [s]cold; and as keeping a tiger in a pen adjoining the highway is like depositing a mutilated corpse on a doorstep.

For there to be a public nuisance, there must be **an infringement of a public right**. And this tallies with the fact that **public nuisances are, first and foremost, crimes**.

- Historically a crime
- but unlike the other crime: A crime not having conceptual utility like other crimes like murder and arson where something must have happened for it to be a crime;
- with a broad scope, could possibly anything constitute public nuisance

They occur where there has been **a *common injury*** to a broad class of Her Majesty's subjects elsewhere than on their premises.

- Point of unity here: affect right we share in common (i.e. affecting all users of the public)
- Injury of the common good; heart of it is public right; doing sth that infringes the public good

***R v Rimmington; R v Goldstein* [2008] 1 AC 459**

Facts	Rimmington: accused (criminal case) sent hundreds of racist packages to recipients
Held	Individually offensive to the recipient, all individual wrongs, but not infringing public rights (not affecting everyone); **Many individual private wrong does not equal to public rights**

Cf *A-G v PYA Quarries* [1957] 2 QB 169

Held	Lots of individual wrongs can be **added together** to make it **one public nuisance**

BUT this must now be treated as wrong in law. **Public nuisances** have at their heart **public rights**; private nuisances have at their heart, private rights.

- Formally a crime > infringement of public right
- Q of not being private law? As it involves public right, but long been said there are many instances **possible for it to be actionable under tort**

Most commonly, cases of public nuisance involve the **blockage of highways** and other thoroughfares which bears out the public rights observation.

***Rose v Miles* (1815) 4 M & S 101**

Facts	Blocking the canal, ship cannot sail
Held	even some individuals may be affected much greater than the other public members, **if show special and sufficient damages, can sue under tort as public nuisance** (actionable under tort as to damages)
Note	Nick's McBride disagrees with this

II But hang on….. Is Public Nuisance even part of Tort Law?

(a) Nick's McBride's view

Nick McBride says, it is "a strange sort of tort, if it is a tort at all".

> "the duty that someone breaches when they commit a public nuisance is a duty imposed for the benefit of the public as a whole". (ibid).

- The only one can sue is who hold the individual right
- But here it is not private right but public right

So the argument goes, public law – because it revolves around public duties/rights – is hard to accept as part of tort law.

(b) The orthodox view

The courts have always treated public nuisance as part of tort law.

(c) My view

- We must take what the courts say seriously when we create maps of the law. And there is nothing especially neat and tidy about tort law.
  - Reasons of put it in tort & the law says so as a tort
  - Despite being a strange tort, Law is not categories by simplicity; Tort law lacking common thread; not to expect the law to fit into your view or theory
  - Theory adapting the data, the law adapting the reality (not the other way round), but nonetheless cannot disregard what the court says

III Necessary Land Connection?

It follows from the many obstructed highway cases that there **need not necessarily be a proprietary interest on P's part**. Nor need there be one on D's part.

- **No requirement of land ownership of land in public nuisance**, for both P and D

***Gillingham BC v Medway (Chatham) Dock* [1993] QB 343**

Facts	**Council brings action on behalf of the residents (entitled to do so)**, of the disturbance that is experienced by the residents due to a construction of a dock authorised by the statue, transporting the containers in large amount causing disturbance and congestion of the road
Issue	P & D have no ownership
Held	No liability for public nuisance as D was statutory authorized; Could conceivable a public nuisance, but **not actionable**, due to **statutory available defence**
Note	Case is not about private wrong doing. - P has no interest in the land that is concerned, the dock does not owe public role, outside any private premises, no defendant in land of issue

IV How Public is Public?

For a public nuisance to be actionable in tort, **it must affect a broad range of people** (a broad class of the citizenry).

***A-G v PYA Quarries* (*supra*)**

> public nuisance is a nuisance which is **so widespread in its range or so indiscriminate in its effect** that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the **responsibility of the community at large**. (Denning LJ.)

Facts	30 ppl affected
Held	Insisted not only not a public nuisance affecting a class of subjects Make reference to, **widespread effect, affecting the community at large**
Note	**No precise no. to answer the question there is an indication** No specific no. of ppl identified, but the community, as long as it is widespread e.g., affecting 1500 out of total of 5000 of people (50% ppl affected0=) - take the matter in context, **judge contextually**

***Shek Sze Ming v Yiu Yuet Sim* [2015] HKEC 1826**

Facts	Alleged public nuisance affected worshippers, more than 100
Held	Was sufficiently public affect, affected enough people but with absence of **special/particular damage**, Claim failed

V Particular Damage?

- Not only must **P show that s/he was a member of the relevant class**,
- s/he must also show that **the damage suffered went above and beyond that suffered by the other members of the class**.

  - Not identifying certain loss P suffers
  - **Referrable to the extent of the loss suffered by P** by comparison with others also affected by the nuisance **(a relative concept)**; **The loss P suffers must be** exceeding the extent of what other suffers
  - Not about the type of harm, but the extent of harm P particularly suffered
  - E.g., blocking the waterway; Suffered damaged or inconvenience on a boat, suffered by all others affected by the nuisance (the generality of the nuisance); ppl can each show the nuisance affecting them
  - But to raise claim: distancing your own suffering and the others'
  - Rationale: JR spencer Cambridge law (concern of floodgate issue, not everyone can sue in public nuisance)

***Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509**

Facts	D having caused river silting; Ability to use the tents with worn boats compromised for everyone including P, **P suffered more** (also have to clear some of the silting, **the extend** they hampered by the nuisance was more than the others); P suffered additional and different from what other suffer
Held	Public nuisance claim available

***Trevett v Lee* [1955] 1 WLR 113**

Facts	Blockage of road for a v short period of time, everyone experienced the inconvenience; P suffered more
Held	But bc his **suffering is still so low**, **cannot be said substantially more than others; Least of minimal threshold:** Mere fact that p suffer appreciably more does not suffice, need to be substantially more - Cannot claim for public nuisance
Note	Significant extent of suffering, even if P only suffer and minor inconvenience > not able to sue in public nuisance

NB *Wilkes v Hungerford Market* (1835) 2 Bing NC 281.

Facts	D blocks road, P has a shop on the blocked road, P bookshop suffers loss of customers who now can't get to the shop, P sued that blockage caused him particular damage
Held	Agrees with P's claim, P suffered beyond the inconvenience suffered by others; of a more substantial level
Note	Murphy: Reasonable? **Need to show as a road user that suffers a greater extent than the other road users**; **but the shop owner is not using the road**, - Public right is about infringement of a public right: blockage has nothing to do with his business, ppl can still get to his bookshop, he still as right to runs his business - Does not tie into the heart of this tort, does not have the public right to sue - Reasoning does not stack up in this case

VI Personal Injury?

Although the tort of private nuisance will not tolerate claims for personal injury *per se* (see *Hunter v Canary Wharf*, *supra*) **public nuisance will permit such claims**.

***In re Corby Group Litigation* [2009] 2 WLR 609.**

Facts	P are a bunch of children with deformities; due to development of contaminated land causing absorbance of toxic fumes of their mother during pregnancy; sued public council for public nuisance. Public council argued as a strike out case

	(obvious that the case will fail that the court need not to entertain every evidence, as the answer is clear), on ground that personal injury is not recoverable in nuisance.
Held	Court rejected the struck out argument > can sue for personal injury
Note	personal injury is recoverable in public nuisance

***Chung Man Yau v Sihon Co Ltd* [1996] 3 HKC 614**

Facts	Concrete balcony collapses, someone get injured
Held	Can sue for personal injury

VII Who is Liable for a Public Nuisance?

- If one creates the public nuisance one is liable.
- And even **if one does so inadvertently one can still be liable** if **one ought to have known (or did know)** that a public nuisance would result

***R v Goldstein* [2008] 1 AC 459**

Facts	Send envelop with salt to a business acquaintance (religious reason for a joke), at the post office some salt escaped, ppl escaped from the building;
Held	If D has foreseen or **ought to have foreseen** that the salt would slipped out; **even D does not deliberately do this,** it is still reasonably foreseeable and he is liable

***Wandsworth LBC v Railtrack* [2002] QB 756**

Facts	D takes over responsibility of a bridge, with pigeons roosting (not that D creating this nuisance)
Held	**Liable for continuing/adopting public nuisances** (does not deliberately creates one)

Questions for Class Discussion

1. Dave throws regular parties at his house in the countryside. He always ends the evening by entertaining his guests with a firework display in his back garden. Sometimes, the parties run quite late into the night. In warm weather, the smoke from the fireworks aggravates the bronchitis of his next-door neighbour, Edna, who leaves the windows open in her own house. The fireworks also cause distress to Edna's fiancé, Geoff, who is a very light sleeper and who is also currently off work with bad nerves.

   Another disgruntled neighbour is Hugh who keeps chickens. Hugh claims that the fireworks always have a detrimental effect on egg production. He has noticed that the number of eggs he can collect is always low the day after one of Dave's parties. Dave is not bothered. He tells Hugh that the chickens cause a dreadful stink whenever Hugh is on holiday and unable to clean out the chicken coop. Dave adds that, as Hugh is an accountant, he has no need to breed or keep chickens and that he should get rid of them.

   Relations have worsened between the various parties and each of them is considering bringing actions in nuisance.

   How would you advise them?

2. Is private nuisance fault-based or is it a strict liability tort? What are the arguments in favour of each of these interpretations?

3. Is it fair to say that so many people live so close together in Hong Kong that it is amazing that the law of nuisance exists here at all, and that this is especially so, if we take seriously the 'give and take principle' and the 'locality principle'?

4. Is public nuisance a tort? If 'yes', why is this so? If 'no', why is this so?