Munro - NOTES

Usa Contracts Law (La Trobe University)

MUNRO *v.* SOUTHERN DAIRIES LTD.

SHOLL J. MARCH 31, APRIL 1, 4-6, 14, 15, 18, 1955.

Nuisance—Horses kept on dairy premises without proper stabling—Interference with use and enjoyment of neighbouring premises—Loss of sleep by neighbouring occupier as a result thereof—Whether reasonable use of the premises or public benefit are defences—Whether a trade essential to the locality can be complained of—Extent to which evidence of economic necessity for delivery of milk by horse-drawn vehicles is relevant—Jurisdiction to refuse injunction on undertaking by defendant to erect proper stables.

The plaintiff was the owner and occupier of a house and land which was next to portion of land occupied by the defendant. The defendant was a company and one of its undertakings was the carrying on of a dairy. The principal method of delivery of milk for retail sale from the dairy was by horse-drawn vehicles, which method of delivery was the most suitable and economical method in the particular conditions of the industry in Melbourne, where suburban horse stables for dairy horses were quite common. The defendant's stables were erected on portion of the defendant's land which was next to the plaintiff's land. By the defendant's keeping of horses in the stables a substantial nuisance of noise, of smell of manure and urine, and of flies had affected the plaintiff. The defendant company was prepared to give an undertaking to the Court to erect new stables and properly manage them.

Held, an injunction should be granted to restrain the defendant from causing or committing such nuisance to the plaintiff by keeping horses on its premises.

The loss of one night's sleep may amount to such a substantial interference with personal comfort as to constitute a nuisance.

Dicta of Sir Wilfrid Greene M.R. in *Andreae* v. *Selfridge & Co. Ltd.,* [1937] 3 All E.R. 255, at p. 261, followed.

Reasonable use of premises or carrying on a business useful to the public or for the public benefit is insufficient to justify what would otherwise be a nuisance.

Per Sholl J.: There is some authority for the view that the operations of a trade in a locality where it is essential cannot be complained of as constituting a nuisance. Even if that proposition can be maintained to its full extent, which is very doubtful, it can extend only to what can be shown to be essential and unavoidable in the particular locality.

TRIAL OF ACTION.

The plaintiff, Edwin Wallace Munro, at all material times was the owner and occupier of a house and land situate at and known as No. 23 Willis Street, Hampton. The defendant was an incorporated company carrying on the business of a milk distributor and occupied premises part of which abutted on Willis Street next to the plaintiff's premises. The plaintiff, in his statement of claim, alleged that since in or about the year 1952 his quiet enjoyment of his premises had been interfered with by reason of noise, smell and flies occasioned by the keeping of horses on that part of the defendant's premises which abutted on Willis Street. The defendant admitted that the company and its predecessors in title had been stabling horses in their present position on the said premises since approximately the year 1934, but denied the allegations of nuisance.

Jacobs, for the plaintiff.

Frederico, for the defendant.

SHOLL J.: In this case, the plaintiff, who has at all material times been the owner and occupier of a house and land at 23 Willis Street, Hampton, sues the defendant, which is an incorporated company carrying on the business of a milk distributor, for an injunction and/or

damages. The plaintiff's cause of action set out in his statement of claim is founded on nuisance, and in substance he alleges that since in or about the year 1952, his quiet enjoyment of his premises has been interfered with by reason of noise, smell and flies, occasioned by the keeping of horses on that part of the defendant's premises which abuts on Willis Street. One of the undertakings carried on by the defendant company is a dairy situated in Grenville Street, Hampton, and running through at its southern end to Willis Street. On that area, ever since the year 1902, some kind of dairying business has been conducted. In 1902, the parents of the present general manager of the defendant company, Mr. Patrick Hubbard, commenced a dairying business, and Mr. and Mrs. Hubbard senior, who are now very elderly, still reside on the premises in a residence fronting Grenville Street. At all material times, the principal method of delivery of milk for retail sale from that dairy has been by horse-drawn vehicles, and the plaintiff's present complaint arises from the circumstance that, at all events for some time past, horses have been kept permanently on the Willis Street frontage. The business which was originally carried on by Mr. Hubbard senior was later, as I understand the position, carried on by the next generation of the Hubbard family, or by a company in which they were interested, and in or about the year 1950 that business of the Hubbards' was acquired by the defendant company. That company is a large undertaking, a public company, and it conducts a number of other businesses besides that formerly carried on by the Hubbards at Grenville Street and Willis Street. I need not, I think, refer to one small dairy business which was excepted from the undertakings acquired by the defendant company, and retained by Mr. Hubbard senior. That, I think, is unimportant in the present case. The Hubbards have retained a substantial interest in the Grenville Street and Willis Street business, in that they are, as I understand the evidence, the principal shareholders in the defendant company. The plaintiff's case is that although horses were from time to time on the premises, and particularly on the Willis Street end of them, before the year 1952, it was only in about the middle of the year 1952, and not very long after the acquisition of the Hubbard business by the defendant company, that a nuisance was caused to him and his household by the extent to which horses were kept permanently on the Willis Street end of the property. He and his witnesses in effect say that since somewhere about the middle of 1952, and certainly from the end of 1952, from five to seven horses have been permanently kept on that end of the property next door to the plaintiff's house, which fronts Willis Street, and that a nuisance has resulted. It is common ground that prior to the time the plaintiff complains of, horses were from time to time on the Willis Street frontage, but the plaintiff and his witnesses say, in substance at all events, that horses were brought on to the property in the evening from other locations, for the purpose of being harnessed to the delivery carts, that they left the premises somewhere after midnight to do their rounds, that they were brought back to the premises in the early morning, unharnessed, and taken away, and that although there may have been an occasional horse kept on the premises for a substantial time prior to 1952, there was no general permanent keeping of a number of horses on those premises before that time. The defendant's account of the matter is quite different. The defendant, by its witnesses, in effect admits that horses are kept on the premises at Willis Street, but contends that horses have been stabled there, in the sense of being kept permanently there, though not necessarily in their present numbers, since somewhere about the year 1934. That is the date alleged in the defendant's defence, but in the evidence

of Mr. Patrick Hubbard it was said, I think, that that position went back to an earlier date, and that horses had been kept there from the early 1920's. The defendant by its defence denies that there is any nuisance to the plaintiff's premises, or that his use and enjoyment of the premises are interfered with. It concedes that it uses and intends to use its premises at Willis Street as stabling for horses, but says that no nuisance is occasioned to the plaintiff or will be occasioned to the plaintiff as a result. A great deal of evidence was given on behalf of the defendant as to the history of the use of the premises at Willis Street since the year 1902, and to that I shall refer shortly when I come to deal with the evidence of particular witnesses. Evidence was also given as to the intention of the defendant to construct brick stables at the Willis Street end of its property, and as to the probable effect of such stables in lessening any noise or smell or fly trouble which may at the present time be caused. The defendant does not deny that there is some smell from the horses, or that there is some noise. It does deny that there is any substantial quantity of flies, and it says that such smell or noise as is caused by the keeping of the horses on the premises is insufficient to amount to a nuisance—that is, insufficient to amount to a substantial interference with the comfort and convenience of the plaintiff as the occupier of his property, so as to constitute a nuisance in law. Before I proceed to refer to some legal principles which are applicable to the determination of this dispute, I should briefly mention the fact that in evidence a good deal of time was spent in references to the plaintiff's approaches to the Sandringham municipal council, to the Agriculture Department, and to the Royal Society for the Prevention of Cruelty to Animals. Those matters were referred to in cross-examination of the plaintiff, and it was suggested that the time spent by the plaintiff in such approaches was indicative of an absence of genuine complaint with regard to private nuisance. On the whole, I do not think that such approaches are indicative of an absence of genuine complaint, but I have remarked in other cases before this on the tendency of persons complaining of private nuisance to waste much time in seeking from sources other than the Court a remedy which only the Court can give them. Furthermore, it ought to be more generally realised than it is that failure to approach the Court promptly may in that type of case seriously prejudice the plaintiff's chances of ultimate success. I have already said something as to what is necessary to constitute a nuisance in law. It is defined in one of the text books as "An unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it," but that definition of itself is so wide that it is necessary to add to it and qualify it in order to set out clearly what it is that will constitute an actionable private nuisance of the kind here complained of. In the first place, there must be a substantial degree of interference with the comfort and convenience of the occupier who complains of a private nuisance, or with some other aspect of the use or enjoyment of his land. The interference must be so substantial as to cause damage to him. On that matter I may refer to what is said in *Winfield on Torts* (2nd ed.), p. 482. Dealing with the subject of interference, the learned author says:

> The forms of this are innumerable. Noise, smells, pollution of air or water, are the most usual instances, but there are many others. The two main heads are injury to property and interference with personal comfort. The escape of fumes which kill vegetation and cattle is an illustration of the first, and excessive tolling of church bells of the second. But whatever be the type, it does not follow that any harm

constitutes a nuisance. The whole law on the subject really represents a balancing of conflicting interests. Some noise, some smell, some vibration, every one must endure in any modern town, otherwise modern life would be impossible.

And later he continues:

Where the interference is with personal comfort, it is not necessary in order to establish a nuisance that any injury to health should be shown. It is enough that there is a material interference with the physical comfort of human existence reckoned "not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people".

The last phrase, of course, is a quotation from the well known judgment of Knight-Bruce V.-C., as he then was, in *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315, at p. 322. I think Mr. Jacobs was right in his submission that the loss of even one night's sleep may amount to such a substantial interference with personal comfort as to constitute a nuisance, and I adopt with respect what was said by Sir Wilfrid Greene M.R. in a case to which Mr. Jacobs referred me, *Andreae* v. *Selfridge & Company Ltd.*, [1937] 3 All E.R. 255, at p. 261. Speaking there of interference with rest caused by the defendant's working of cranes, His Lordship said:

There were other occasions on which it conducted noisy operations at night. I do not propose to go through them. There are a number of letters of complaint, and those complaints were either attempted to be explained away or they were remedied. But that the complaints were substantial complaints I, for one, am satisfied, and I certainly protest against the idea that, if persons, for their own profit and convenience, choose to destroy even one night's rest of their neighbours, they are doing something which is excusable. To say that the loss of one or two nights' rest is one of those trivial matters in respect of which the law will take no notice appears to me to be quite a misconception, and, if it be a misconception existing in the minds of those who conduct these operations, the sooner it is removed the better.

I have already said something in the remarks I have just made about the standard of comfort which a land owner is entitled to expect. The test which the law applies is not the test of an abnormal sensitiveness. A man is not entitled to relief merely because he may happen to be unduly sensitive to noise or smell or any other form of interference with his property. Nevertheless a man who lives next door to premises from which some interference emanates may get relief when another man some distance away will fail to obtain it. That, after all, is only commonsense, because the degree of interference may and frequently does vary with the distance of the plaintiff's premises from the source of the interference. A good deal of evidence was led in the present case to show that the defendant's use of the premises was in accordance with accepted standards, and evidence was called from an inspector of the Department of Agriculture and from the Senior Health Inspector of the City of Sandringham on that point. That evidence was, of course, relevant insofar as it tended to negative the facts alleged by the plaintiff and his witnesses, but it was irrelevant, in my opinion, insofar as it was relied on, if it was relied on, for the purpose of the submission that reasonable use of the premises was sufficient to negative nuisance. On that point there are a number of authorities. I need, I think, refer only to three. In *Broder* v. *Saillard* (1876), 2 Ch. D. 692, at pp. 700-702, Sir George Jessel M.R. was dealing with a case in which a nuisance of noise from a stable was complained of, among other things, and at pp.700-701 he said:

I come now to the second branch of the case—the noise. It is very hard on the defendant, who is a gentleman with three horses in his stable, and whose horses do not appear to make more than the ordinary noise that horses do, if he is not to be allowed to keep his horses in his stable. On the other hand, it is very hard on the plaintiffs if they cannot sleep at night, and cannot enjoy their house, because the noise from the stables is so great as seriously to interfere with their rest and comfort. The question is, on which side the law inclines? If there were no authority on the question I should have felt no difficulty about it, because I take it the law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbour makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it. It is no answer to say that the defendant is only making a reasonable use of his property, because there are many trades and many occupations which are not only reasonable, but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling-houses, so as to interfere with the comfort of their inhabitants. I suppose a blacksmith's trade is as necessary as most trades in this kingdom; or I might take instances of many noisy and offensive trades, some of which are absolutely necessary, and some of which, no doubt, may not only be reasonably followed, but to which it is absolutely and indispensably necessary for the welfare of mankind that some houses and some pieces of land should be devoted; therefore I think that is not the test. If a stable is built, as this stable is, not as stables usually are, at some distance from dwelling-houses, but next to the wall of the plaintiffs' dwelling-house, in such a position that the noise would actually prevent the neighbours sleeping, and would frighten them out of their sleep, and would prevent their ordinary and comfortable enjoyment of their dwelling-house, all I can say is, that is not a proper place to keep horses in, although the horses may be ordinarily quiet.

At p. 702 his Lordship added:

The test, therefore, is whether the stables are unluckily so situated as that the noise from the horses, not being uncommon horses in any way, materially disturbs the comfort of the plaintiffs' dwelling-house, and prevents the people sleeping at night.

In *Rapier* v. *London Tramways Company*, [1893] 2 Ch. 588, a nuisance from stables was again complained of. In that case the London Tramways Company was carrying on its undertaking under statutory authority, and Lindley L.J., at pp. 599-600, says this:

Unless the Act of Parliament is so worded as to limit their duty to that extent, I think the common law must prevail, that they must exercise their power so as not to commit a nuisance. At common law, if I am sued for a nuisance, and the nuisance is proved, it is no defence on my part to say, and to prove, that I have taken all reasonable care to prevent it.

Lastly, in *Painter* v. *Reed*, [1930] S.A.S.R. 295, Richards J. had to deal with a case involving allegations of nuisance of noise and smell from horses. He held that the alleged nuisance by smell had not been proved, but that the nuisance by noise had been, and the head note, I think, accurately represents the substance of his judgment. It is to this effect:

In an action for nuisance, where it was shown that the defendant had taken much trouble to make the carrying on of his business as unobjectionable as possible, and had carried on his business in a fair and reasonable way, and at a site proper for such a business, *Held*, on the evidence, that noises caused in the early mornings by the movements and stamping of horses, which disturbed the sleep of the plaintiff, constituted an actionable nuisance, and should be restrained by injunction.

In the same way, it has been held that the mere fact that a business may be so carried on as to be useful to the public, or even important from the point of view of public benefit, is insufficient to justify what otherwise would be a nuisance. On that I need only make a brief reference to a case cited during the argument before me, *Shelfer* v. *City of London Electric Lighting Company,* [1895] 1 Ch. 287. The relevant passage is in the judgment of Lindley L.J., at pp. 315-316. His Lordship said:

> The Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (*e.g.,* a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Expropriation, even for a money consideration, is only justifiable when Parliament has sanctioned it. Courts of Justice are not like Parliament, which considers whether proposed works will be so beneficial to the public as to justify exceptional legislation, and the deprivation of people of their rights with or without compensation.

In one paragraph of the defence reference was made to the carrying on of the stabling of horses in their present position on the Willis Street property since the year 1934 or thereabouts. I do not think that Mr. Frederico in his final address really advanced the contention that it was a defence to show that the plaintiff had in any sense "come to the nuisance," as the common phrase is, and it is sufficient to refer to the authorities collected in *Winfield: Law of Tort* (2nd ed.), at pp. 511-512, to show that the mere fact that a plaintiff can in a sense be said to have "come to a nuisance" is not of itself a defence. The locality, however, is of importance and, as Professor Winfield observes at p. 512:

> If a man chooses to make his home in the heart of a coal-field or in a manufacturing district, he can expect no more freedom from the discomfort usually associated with such a place than any other resident can.

In the present case it is, of course, material to consider the general nature of the locality of Willis Street, Hampton, and particularly whether the discomfort or inconvenience of which the plaintiff now complains is so characteristic of the general neighbourhood that he ought not to be heard to complain of what other people are accustomed habitually to put up with. Evidence was also led before me as to the general nature of the retail milk distribution trade in Melbourne and the economic necessity for the use of horses for milk delivery in this city. I allowed that evidence, though I had some doubt as to its true relevance. I allowed it because I thought it was necessary to consider an allegation of nuisance against the social background of the time, and there is some authority for the view that the operations of a trade in a locality where it is essential cannot be complained of. Even if that proposition, however, can be maintained to its full extent, which I greatly doubt, it can extend only to what can be shown to be essential and unavoidable in the particular locality. I therefore take into account only within the limits stated the evidence given as to the necessity for horse delivery. While I am dealing with these questions of legal principle, it remains to mention one other matter. I have already said that evidence was led as to the defendant's intention to erect stables, and indeed a great deal of evidence was led as to its attempts in the past to get from the local council, which seems to have been somewhat coy in the matter, a licence for the erection of these stables. I allowed that evidence because at the time it seemed to me that it might go to the

question of the appropriate remedy, if the plaintiff was entitled to relief, and indeed Mr. Frederico, when he ultimately came to address me, suggested that even if I thought the plaintiff had some ground for general complaint, I should refuse an injunction upon an undertaking by the defendant company to proceed with the erection of the proposed stables. In support of that submission he cited the recent case of *Field* v. *South Australian Soccer Association,* [1953] S.A.S.R. 224, a decision of Napier C.J. In my opinion, however, I must decide the present suit on the basis of the pleadings as they stand and not upon the basis of what the defendant will do if it is allowed to do it, and if it can do it without creating some further or other nuisance than any nuisance which may exist at the present time. There are no stables on the defendant's property at present and I propose therefore to decide this case simply upon the basis that my duty is to determine whether what has happened up to the present time has constitued an actionable nuisance, and if it has, what remedy ought to be awarded to the plaintiff in relation to it. Since so much evidence was gone into in relation to the stables, I will, however, when I come to deal with the facts, make some reference to that matter, in case it may be of some use to the parties hereafter.

Having now said all I think that it is necessary to say about the legal principles applicable to this suit, I turn my attention to the facts. [His Honour then considered the facts of the case, and continued:]

The last witness called for the defendant was Mr. Welsh, the secretary of the Melbourne and Metropolitan Milk Distributors' Association. Mr. Welsh is a very capable man with a thorough knowledge of his industry, and was a very good and helpful witness. I found his evidence as to the organisation of the milk distributing industry in Melbourne, Sydney, the United States and Great Britain, and his consideration of its particular problems of delivery in each place, both interesting and instructive. I accept him as an accurate and careful person, and I see no reason to doubt his statement that, as Mr. White also said, flies and smells can be controlled in stables. But I cannot accept his opinion that there was nothing about the stalls, or the keeping of horses on the Willis Street fence when he saw them, that called for comment. He was not really able to cite to me another similar case of such a tumble-down sort of accommodation for horses in the whole of the area of which he has told me. He may not have noticed smells or flies when on the premises, but that is not to say that they were not there at other times to be noticed by other people living near the horses. I am satisfied by his evidence that horse delivery is still, and is for some time likely to be, the most suitable and economical method of retail milk delivery in the particular conditions of the Melbourne industry, and that suburban stables are quite common, and for the most part, at all events, occasion no great trouble. But that is not to say that delivery by electric or motor vehicles may not be on the way in in this city, and it seems to me that the general improvement in living and social standards in this country, which is a very estimable matter in itself, is likely to cause a necessary acceleration in that process, which milk distributors would be wise to recognise. Though one must judge a question of nuisance in the social and local setting in which it is complained of, changes in the organisation of industry must necessarily follow changes in social conditions. I have now referred to all the witnesses called in this lengthy hearing, and I am in a position to state my conclusions of fact and of law in the light of the legal principles which I enunciated earlier. In my judgment, there has been caused by the defendant's keeping of horses on its Willis Street premises a substantial nuisance

of noise, smell of manure and urine, and flies, to the plaintiff, as occupier of the premises at 23 Willis Street, from at least the latter part of 1952 onwards. Though there has recently been some improvement as regards smell and flies, there is still, in my judgment, what amounts to a substantial and actionable nuisance. I do not say that it is occasioned daily, but the prevailing wind is south-westerly, and the nuisance is continuous in the sense that more often than not the plaintiff must be getting smell and noise. The flies, I think, are probably seasonal, and are troublesome in the hot weather. The nuisance has not been cured since the issue of the writ. With regard to the evidence about the stables, proper management probably could avoid smell and flies sufficiently to constitute a nuisance, if stables were built; but I am not satisfied that on their past record the persons responsible for the conduct of the dairy would avoid the creation of such a nuisance. I say that, not because I think it has any relevance to the question whether the defendant company should or should not proceed to erect stables, but because of the application which was made to me to refuse an injunction in this case, upon the basis of an undertaking by the defendant company to erect stables. That must be a matter resting in the Court's discretion, and since I am not satisfied that those responsible for the conduct of this dairy up to the present time would be likely to conduct stables in such a way as to avoid a nuisance of smell or flies, I decline to entertain the suggestion made by Mr. Frederico. I decline to entertain it also for the further reason that I am not satisfied that, even if stables were erected, and whoever ran the dairy, a nuisance of noise would be avoided, especially since it is proposed to have more horses there, and since that would involve more handling of horses and carts, and, doubtless, of milk. Nor am I satisfied, if it be material, that the proposed stables are an essential and unavoidable incident of the conduct of the defendant's business in that locality. In the result, I think there has been a serious nuisance which has gone on too long in disregard of the defendant's neighbours, and their comfort and convenience. I think definitely it is not a case for an award of damages only. There has been a clear invasion of a legal right of the plaintiffs, and an injunction must go. For reasons already stated it is not a case where I would consider refusing an injunction upon the giving of undertakings. In my judgment there should be an injunction to restrain the defendant, by its directors, servants and agents, from causing or committing on the premises at Grenville Street and Willis Street, Hampton, on which it conducts its business, any nuisance (whether by way of smell, noise or flies) to the plaintiff as owner and occupier of premises at 23 Willis Street, Hampton, by the having or keeping of horses on or near the defendant's said premises. [His Honour then considered the question of damages.]

Judgment for the plaintiff.

Solicitor for the plaintiff: *R. H. Dunn.*

Solicitors for the defendant: *Davis, Cooke & Cussen.*

S.G.H.