

## Nuisance Caused By Water

*Corbett v Pallas, unreported, New South Wales Court of Appeal, 23 March 1995.*

Does the person who builds a swimming pool in their backyard create a private nuisance when the construction causes flooding of a neighbour's land?

### Background

In October 1987, Mrs Corbett commenced the construction of a swimming pool in the backyard of her home. Part of the backyard was excavated and by early 1988 the shell of the pool had been installed. At about that time there was a period of heavy rain during which water flowed from Mrs Corbett's property into the land and house of her neighbour Mr Pallas.

Mr Pallas, following expert advice, constructed a new retaining wall between his and Mrs Corbett's land. The question of who should pay for this wall was decided in the District Court - Judge Sinclair held that Mrs Corbett should bear the cost.

Mrs Corbett appealed to the Court of Appeal against this decision.

### The applicable rules

The Court of Appeal agreed with the decision reached by Judge Sinclair, who had concluded that the installation of the swimming pool had caused flooding of Mr Pallas's land, particularly as Mrs Corbett had taken no measures to alter the drainage of water from her land.

In reaching this conclusion, the Court of Appeal outlined the legal rules applicable in determining whether there had been a nuisance caused by water. These rules are:

1. Where the nuisance alleged is damage caused by water entering the plaintiff's land, to establish a prima facie case it is sufficient for the plaintiff to prove that material damage to his or her property has resulted from an increase in the flow, or percolation, of surface water due to the defendant's act in altering the conformation of land in the course of the defendant's use of it.
2. The plaintiff does not have to prove unnatural or unreasonable use of the land by the defendant.
3. If the conformation of the land is altered in the course of some specific use that may avoid liability, the burden of proof is on the defendant to establish it as a distinct defence.
4. Unreasonable use is not an ingredient of the cause of action, but certain types of use may amount to a "natural" and reasonable use of the land and provide a defence.

5. Whether a particular user of land is "natural" must be determined reasonably having regard to all the circumstances, including the purposes for which the land is being used and the manner in which the flow of water was increased.

### Conclusion

The Court of Appeal, in considering these rules and applying them to the circumstances in this case, concluded that Mrs Corbett was liable to Mr Pallas for nuisance caused by water.

- Reprinted with permission from Phillip Fox's Construction Law.