THE ESSENTIALS OF NUISANCE: A DISCUSSION OF RECENT NEW ZEALAND DEVELOPMENTS IN THE TORT OF NUISANCE

MARGARET A. VENNELL*

The origins of the tort of nuisance are obscure but stem from three different sources. As early as the Twelfth Century an action lay in the assize of nuisance, which was originally part of the assize of novel disseisin, but later became distinct from it. When it was first developed the assize of nuisance lay largely for loss of profit through the defendant's interference with incorporeal rights (for example rights of way etc., appurtenant to the plaintiff's land but exercised over other land). Later it was used for interference with the enjoyment of the plaintiff's land. The assize of nuisance was intended to protect a property right and could only be brought by a freeholder against a freeholder.[1]

The second source was found within "the pleas of the Crown" remediable on indictment before the King's justices as a misdemeanour. This was interference with the neighbourhood, particularly interference with the highway, but it included other interferences. This was known as common or public nuisance.[2]

Because the assize and the action for public nuisance proved defective, (for example there was no civil remedy for the public nuisance, while the assize did not cover all interferences with enjoyment, nor did it protect occupiers other than freeholders), an action on the case for interferences gradually came to be recognised. By the seventeenth century the action on the case had virtually supplanted the other two actions, but the action on the case took over some elements from the assize and from public nuisance. As a result, although the courts may still tend to treat the three essentially different kinds of nuisance (which are still recognisable as deriving from their early origins) in different ways, there is an overlap which has tended to obscure the principles of law. Even today the three essentially different forms are recognisable: the commission of the wrongful act of public nuisance combined with special damage; interference with a property right, such as an easement or profit (the assize of nuisance); and annoyance to an occupier of land resulting from some act or omission on the land of another (the action on the case for nuisance).[3]

Generally a private nuisance is described as an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it.[4] As a corollary of this statement it is frequently also said that the essence of a nuisance is a state of affairs that is either continuous or

* LL.B. (N.Z.). Senior Lecturer in Law, University of Auckland.

1 *Potter's Historical Introduction to English Law* (4th ed. 1958) 420; *Sedleigh-Denfield* v *O'Callaghan* [1940] A.C. 880, 902 per Lord Wright.

2 *Potter*, op. cit., 421.

3 *Potter*, op. cit., 421-425.

4 *Read* v. *J. Lyons & Co. Ltd.* [1945] K.B. 216, 236 per Scott L. J.

a condition or activity which unduly interferes with the use or enjoyment of land. But whether or not the "activity" will in fact amount to an actionable nuisance or not will depend on a number of considerations, including the character of the defendant's conduct, and a balancing of conflicting interests.[5] Certainly it is also true that at least in the context of cases which fall within the pattern of this definition it can be said that the activity which injures another will only be actionable if it is unreasonable.[6]

In fact an examination of the cases on private nuisance shows that they fall into three distinct groups.[7] Firstly, nuisances which are encroachments (i.e. buildings, trees or roots). This type closely resembles trespass. Secondly, those which cause physical damage to land or to something erected or growing on it.[8] Thirdly, those which amount to an interference with the enjoyment of land (e.g. noise, smoke, disease etc.)[9]. Other textbook writers recognise a fourth kind of nuisance, which may in fact be a particular form of the second, that is nuisance to servitudes (a direct descendant of the assize of nuisance).[10]

In the first and second (and fourth) kinds of nuisance once the plaintiff has proved the encroachment or the damage to his land, as the case may be, then ipso facto it is assumed that he has suffered a substantial degree of interference; all other elements such as in particular the conduct of the defendant (including its unreasonableness or not) are quite irrelevant.[11] In other words, the different kinds of actionable nuisance are in fact discernible as deriving from their historical origins either from the assize of nuisance or the action on the case for nuisance; the first two and the fourth descending from the assize of nuisance whereas the third kind as specified above deriving from the action on the case for nuisance (where unreasonableness, and a corresponding balancing of interests is required, which is not required in the other forms of nuisance). It may be possible to argue that those kinds of nuisance which trace their origins to the assize of nuisance may in fact be a form of strict liability whereas that form which is discernible as deriving from the action on the case for nuisance is not a form of strict liability. It will be argued that the recent New Zealand cases can be classified in the same way, that apparently irreconcilable cases fall into different classes, and that the different classes of nuisance require different matters to be established.

In recent years another conceptual problem has entered into any consideration of the tort of nuisance, namely the problem of foreseeability

5 As expressed in *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880, 903 by Lord Wright: "A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with."

6 The concept of "unreasonableness" is quite different from that which forms an essential element of the tort of negligence. Cases which are relevant to a consideration of the concept of "unreasonableness" in nuisance include *St. Helen's Smelting Co.* v. *Tipping* (1865) 11 H.L.C. 642; *Halsey* v. *Esso Petroleum Co. Ltd.* [1961] 1 W.L.R. 683; *Robinson* v. *Kilvert* (1889) 41 Ch. D. 88; *Midwood* v. *Mayor of Manchester* [1905] 2 K.B. 597.

7 See *Clark & Lindsell on Torts* (14th ed. 1975) paras. 1393-1395.

8 See e.g. *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880 (blocked drain); *Wringe* v. *Cohen* [1940] 1 K.B. 229.

9 E.g. *Metropolitan Asylum District* v: *Hill* (1881) 6 App. Cas. 193; *Halsey* v. *Esso Petroleum Co. Ltd.* [1961] 1 W.L.R. 683.

10 I.e. easements, profits à prendre and natural rights. See *Winfield and Jolowicz on Tort* (10th ed. 1975) 319 and R. F. V. Heuston, *Salmond on the Law of Torts* (16th ed.) 72-74.

11 *St Helen's Smelting Co.* v. *Tipping* (1865) 11 H.L.C. 642, 650-651 per Lord Westbury L. C.

which was discussed in *The Wagon Mound (No. 2)*[12]. To an extent *The Wagon Mound (No. 2)* could be regarded as the logical extension of the dictum of Lord Wright in *Sedleigh-Denfield* v. *O'Callaghan*:[13]

> [A]n occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in modern law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser, or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it. This rule seems to be in accordance with good sense and convenience. The responsibility which attaches to the occupier because he has possession and control of the property cannot logically be limited to the mere creation of the nuisance. It should extend to his conduct if, with knowledge, he leaves the nuisance on his land. The same is true if the nuisance was such that with ordinary care in the management of his property he should have realised the risk of its existence . . . . [T]hough a public nuisance in many respects differs or may differ from a private nuisance, yet there is in my opinion no difference, in the respect here material, which is that if the defendant did not create the nuisance he must, if he is to be held responsible, have continued it, which I think means simply neglected to remedy it when he became or should have become aware of it.

This view may also have found a later expression in *Goldman* v. *Hargrave*,[14] although in that case liability was held to lie in negligence, rather than nuisance.

In *The Wagon Mound (No. 2)* the issue of foreseeability in nuisance came to a head and the Privy Council made an analysis of the part it plays in nuisance. In the Supreme Court of New South Wales Walsh J. had found liability based on nuisance but not in negligence, and the case in the Privy Council was therefore argued in nuisance. Giving the judgment of the Board, Lord Reid expressed its view in the following terms:[15]

> Comparing nuisance with negligence the main argument for the respondent was that in negligence foreseeability is an essential element in determining liability and therefore it is logical that foreseeability should also be an essential element in determining the amount of damages: but negligence is not an essential element in determining liability for nuisance and therefore it is illogical to bring in foreseeability when determining the amount of damages. 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 . . . . [T]here are many cases (e.g. *Dollman* v. *Hillman* [1941] 1 All E.R. 355 C.A.) where precisely the same facts will establish liability both in nuisance and in negligence. And although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability . . . . So in the class of nuisance which includes this case foreseeability is an essential element in determining liability. It could not be right to discriminate between different cases of nuisance so as to make foreseeability a necessary element in determining damages in those cases where it is a necessary element in determining liability, but not in others. So the choice is between it being a necessary element in all cases of nuisance or in none. In their Lordships' judgment the similarities between nuisance and other forms of tort to which *The Wagon Mound (No. 1)* applies far outweigh any differences, and they must therefore hold that the judgment appealed from is wrong on this branch of the case. It is not sufficient that the injury suffered by the respondents' vessels was the direct result of the nuisance if that injury was in the relevant sense unforeseeable.

12 *Overseas Tankship (U.K.) Ltd.* v. *The Miller Steamship Co. Pty. Ltd.* [1967] 1 A.C. 617.
13 [1940] A.C. 880, 904-905.
14 [1967] 1 A.C. 645.
15 Supra n. 12 at 639-640.

This judgment was exhaustively examined by R. W. M. Dias in an article in the Cambridge Law Journal.[16] Dias says that the "deed" in nuisance deserves some attention. Further he says:[17]

> In private nuisance the emphasis is not just on interference, but on its unreasonableness in the opinion of the court. This depends on a balance of competing interests, individual and social, the outcome of which in a given case may be that the interference of itself is unreasonable and a nuisance whether or not the defendant had acted wrongfully. In other cases it is only the wrongfulness of the defendant's behaviour that makes the interference unreasonable. For if the conduct is wrongful, then it could not have been necessary; so any interference it causes is likewise unnecessary and therefore unreasonable. In this way wrong-doing becomes essential to nuisance liability whenever the unreasonableness of the deed depends on it. The emphasis, however, remains on the deed. So it is that a malicious or intentional act can make into a nuisance an interference not otherwise unreasonable. The same applies to careless wrongdoing, but with the additional feature that in so far as the law recognises a result produced by carelessness, this amounts to the tort of negligence. If such result happens to be an unreasonable interference with another's use and enjoyment of property, then negligence and nuisance overlap. In public nuisance they certainly do.

Dias makes an examination of whether in fact there can be nuisance without wrongdoing and says that the dicta are confusing. In *Sedleigh-Denfield* v. *O'Callaghan*[18] Lord Wright had said: "The liability for a nuisance is not, at least in modern law, a strict or absolute liability." However in *Read* v. *J. Lyons & Co. Ltd.*[19] Lord Simonds said that "if a man commits legal nuisance it is no answer to his injured neighbour that he took the utmost care not to commit it. There the liability is strict, and there he alone has a lawful claim who has suffered an invasion of some proprietary or other interest in land". As against this, Dias points out that Lord Reid has now said that "although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability."[20]

Dias suggests that the solution to these two differing viewpoints can be found by looking at the

> . . . distinction between foreseeability of the likelihood that an event may occur and foreseeability of the kind of damage that ensues assuming that the event does occur. Nuisance is peculiar in that the "event", or deed, which constitutes it, is not just interference, but unreasonable interference in the opinion of the court. The court's reaction is often unforeseen, perhaps unforeseeable. But apart from this, the unreasonable degree of interference may result from unforeseeable physical factors, such as changes in temperature or the velocity and direction of the wind, etc. While there may be foreseeability of only a slight and indeed permissible degree of interference, there may not be foreseeability of the "event" that constitutes nuisance, namely interference to such an extent as to make it unreasonable. The defendant may have used the utmost endeavours to prevent it from becoming unreasonable, but should it turn out to be such, he may be liable in spite of having taken all reasonable care. This would be nuisance without negligence . . . . The point is that even though there is no foreseeability of interference to an unreasonable extent, yet the *kind* of interference that was foreseeable will restrict the defendant's liability to that kind of interference.[21]

16 R. W. M. Dias, "Trouble on Oiled Waters: Problems of *The Wagon Mound (No. 2)*" [1967] C.L.J. 62.
17 Ibid., 79.
18 Supra n. 8 at 904.
19 [1947] A.C. 156, 183.
20 Supra n. 15.
21 Dias, supra n. 16 at 80-81.

Dias concludes:[22]

> It is this peculiar nature of the deed in nuisance that puts nuisance in a category between strict liability and negligence. Ordinarily when liability is strict there need be no forseeability that the event in question is likely to occur. In nuisance the position is, not that there need be no forseeability of interference at all, but that there need be no forseeability of an unreasonable degree of interference, which is the "event" constituting nuisance.

Reverting to the original categories of nuisance referred to above, "foreseeability" of the unreasonable interference will be necessary in respect of those nuisances which are descended from the action on the case for nuisance and for public nuisance, though probably not to those which owe their origins to the assize of nuisance, in which case liability will be strict.

It seems pertinent to examine four comparatively recent New Zealand cases to decide into which category they can be fitted, and whether they can be reconciled with *The Wagon Mound (No. 2)*. The first of these is *Paxhaven Holdings Ltd.* v. *Attorney-General*.[23] In this case some fuel oil had been left by the Ministry of Transport on some land which was grazed by the appellant. The appellant's cattle drank some of the fuel oil and died. On appeal from the Magistrate's Court, Mahon J. in considering the tort of nuisance said:[24]

> There seems to have been a tendency in recent times to subsume the tort of nuisance, where it involves unintentional infliction of harm, within the concept of negligence. In the case of adjoining occupiers where the issue of reasonable user is relevant the ultimate test may be reasonable foresight, as in negligence, and it was also said by Lord Reid in delivering the advice of the Board in *The Wagon Mound (No. 2)* that in cases of public nuisance foreseeability will be an essential element of liability. But in relation to private nuisance it was accepted by Lord Reid in the same case ([1967] A.C. 617, 638) that liability will often exist independently of proof of negligence. He accepted as correct the dictum of Devlin J. in *Farrell* v. *John Mowlem & Co. Ltd.* [1954] 1 Lloyd's Rep. 437:
>
> "I think the law still is that any person who actually creates a nuisance is liable for it and for the consequences which flow from it, whether he is negligent or not" (ibid, 440). Private nuisance is a civil wrong, based on a disturbance of rights in land, the remedy lying in the hands of the individual whose rights have been disturbed: *Prosser on Torts* (3rd ed.) 594. The basis of liability is harm inflicted on a proprietary or possessory right, not the type of conduct which gives rise to the damage complained of. In this case the servants of the respondent created on land occupied by the appellant a source of continuing danger to the appellant's livestock. There can be no doubt that such an act materially interfered with the appellant's use of that land for farming purposes

This analysis by Mahon J. is correct if this type of nuisance is one of those descended from the assize of nuisance where once the interference has been established nothing else is necessary; in other words the "deed" as referred to by Dias has taken place. *Paxhaven* is an example of a nuisance occurring without negligence, so that foreseeability of interference to an unreasonable extent is not necessary, but of course once liability is established foreseeability will be relevant to restrict the defendant's liability to that kind of interference which was foreseeable (a point which was not in issue in *Paxhaven*).[25]

22 Ibid., 81.
23 [1974] 2 N.Z.L.R. 185.
24 Ibid., 189.
25 Both *Paxhaven* and *Clearlite Holdings Ltd.* v. *Auckland City Corporation* [1976] 2 N.Z.L.R. 729 raise the interesting question whether an action in nuisance can lie in respect of an

A comparable situation arose in *Clearlite Holdings Ltd.* v. *Auckland City Corporation.*[26] Here the Corporation had employed the second defendants, the contractors, to lay new drainage pipes. In the course of these operations the contractor was required to drive a tunnel from one street to another to carry the pipes. A vertical shaft was first sunk in one street and from that shaft a tunnel was driven under the plaintiff's land beneath its factory. Subsequently the concrete floor of the factory cracked along the line of the tunnel and on investigation it was discovered that the floor had subsided to the extent of two inches. The plaintiffs sought recovery of the cost of repairing the floor from the defendants on alternative grounds of negligence and nuisance. Mahon J. found on the facts that there was no negligence on the part of either defendant. The central question for Mahon J. was therefore whether the damage to the factory floor amounted to a nuisance.[27] It was therefore necessary for him to attempt an analysis of nuisance. His Honour said:[28]

> The gist of a claim for private nuisance lies in the damage which has been caused. The nature of the conduct causing the damage is subsidiary to the major concept . . . . A private nuisance is a civil wrong based on a disturbance by the defendant of rights in land. It seems to be immaterial, in a case of actual damage to the land itself, to base any distinction upon the locality of the conduct complained of. All that is required in a case of this kind is a positive act creating the damage. In contrast with cases of public nuisance, absence of negligence is no defence. In contrast also with actions for nuisance based upon interference with the enjoyment of rights in property, the utility or reasonableness of a defendant's conduct is irrelevant. As Lord Westbury L. C. pointed out in *St. Helen's Smelting Co.* v. *Tipping* (1865) 11. H.L. Cas. 642, 650 there is an essential distinction between material injury to property on the one hand, and those other indirect interferences which produce sensible personal discomfort, on the other.

interference arising on land in the occupation of the plaintiff himself. This is a complex issue which is outside the scope of this article. In both cases Mahon J. held, on the basis of fairly sparse authority, that in such circumstances an action could lie. See further n. 27 infra.

26 [1976] 2 N.Z.L.R. 729.

27 He had perforce to answer the ancillary question whether or not an action in nuisance can be brought for damage arising on the plaintiff's own land and not emanating from land in the defendant's occupation. Mahon J. concluded that an action would lie. He concluded:

> I can see no objection to the plaintiff in a case like the present succeeding in an action for nuisance where the person causing the damage has been at the relevant time a licensee of the land occupied by the plaintiff . . . .
>
> In any common law system certain anomalies will inevitably occur and their existence will not necessarily justify the conclusion that some settled rule is wrong. But on this particular branch of the law of nuisance the supposed inability of the plaintiff to recover for a nuisance committed on his own land seems to me to be nothing more than a mediaeval relic having its origin in those distant days when recovery for injury to proprietary rights in real property could only be obtained, apart from cases of disseisin, by writ of trespass or by action on the case limited to tortious conduct on the part of the neighbouring occupier. (ibid., 739).

This is a problem which seems rarely to have arisen. Fleming, for example, says that "Responsibility for nuisance is not exclusive to occupiers, it devolves upon anyone who actively creates a nuisance, whether or not he is in occupation of the land from which it emanates." (Fleming, *Law of Torts* (4th ed. 1971) 353). Fleming, however, does not appear to be considering the situation where the nuisance actually emanates from land in the plaintiff's own occupation.

28 [1976] 2 N.Z.L.R. 729, 739-740. This statement may be compared with that of Macdonald J. in the British Columbia Supreme Court: "No use of property is reasonable which causes substantial discomfort to others or is a source of damage to their property" (*Royal Anne Hotel* v. *Ashcroft* [B.C.] 1 C.C.C.T. 299, 308) and those of Haslam J. in *J. W. Birnie Ltd.* v. *The Mayor of Taupo* (unreported: No. A 153/70 Hamilton Registry and No. A. 179/73 Rotorua Registry, noted (1976) 2 Recent Law (N.S.) 242.

He concluded:[29]

> In litigation involving private nuisance the test of liability is not whether the tortious interference reflects negligent conduct, but whether it is unreasonable having regard to the legitimate interests of the plaintiff, and where direct physical damage to property results then, in my opinion, the invasion of the plaintiff's rights is actionable without fault so long as the damage represents the consummation of a risk, no matter how remote, factually inherent in the conduct of the defendant. In the present case, as in all cases which contemplate the digging of a tunnel only a few feet below the surface of the ground, the possibility of some degree of subsidance of the land above must have been within reasonable contemplation as a remote contingency. In most cases such a result of the tunnelling operations would be of no consequence, but when tunnelling at a shallow depth under an existing building it might be of some consequence. I think that in such circumstances the operations of a contractor in a case like the present require, in accordance with settle[d] policy on this branch of the law, the application of strict liability.

What *Clearlite* emphasises is that there are important distinctions both in substance and result between those kinds of nuisance which are descended from the assize of nuisance and the action in negligence. (The difference may not be so clear in relation to those actions in nuisance which descend from the action on the case in nuisance). *Clearlite* shows that an important characteristic of the tort is that it is the impact of the defendant's activity on the plaintiff's interest which is the focus of attention and not the nature of the defendant's conduct. The interference must be unreasonable in the sense that the plaintiff should not be required to suffer it, not that the defendant failed to meet an appropriate standard of care. So too, if the interference is unreasonable, it is irrelevant that the defendant was taking all possible care. Dias expresses it slightly differently, but the purport is the same that in nuisance the emphasis is on the deed, although the arguments Dias puts forward are wide enough to embrace all four types of nuisance action, even those stemming from the action on the case. Mahon J.'s statement that the "invasion of the plaintiff's rights is actionable without fault so long as the damage represents the consummation of a risk, no matter how remote, factually inherent in the conduct of the defendant"[30] is but another way of saying that in nuisance, foreseeability is the test of the extent of liability rather than a test for liability itself.[31]

The other two recent New Zealand cases, *French* v. *Auckland City Corporation*[32] and *Matheson* v. *Northcote College Board of Governors,*[33] are in direct contrast to *Paxhaven* and *Clearlite,* being examples of that kind of nuisance in which a state of affairs is created which interferes with the enjoyment of land – the true descendent of the action on the case for nuisance. Although these two cases raised unusual issues, as forms of interference they could be regarded as classic examples of the type of interference which was actionable under the action on the case for nuisance where it was the unreasonableness of what might in some circumstances be regarded as a legitimate activity which caused the tipping of the scales so as to create an actionable nuisance.

29 Ibid., 740-741.
30 Id.
31 Expressed by Dias as follows: "The point is that even though there is no foreseeability of interference to an unreasonable extent, yet the *kind* of interference that was foreseeable will restrict the defendant's liability to that kind of interference." (Supra n. 16 at 81).
32 [1974] 1 N.Z.L.R. 340.
33 [1975] 2 N.Z.L.R. 106.

In *French's* case the plaintiff occupied a piece of land and the defendant owned the adjoining piece of land. Both properties were infested with variegated thistle. The court found that the plaintiff had made intensive efforts to control the variegated thistle on the property leased to him, that the defendant had not made a systematic and substantial effort to eradicate the thistles on its land, but that if the defendant had done so then within two or three years the plaintiff would have had the thistles on his property under control.

Although there had been no earlier precedent in which a court had held a landowner liable in either nuisance or negligence[34] in respect of the escape of seed from, or the natural growth of the soil, McMullin J. concluded that an action may now lie, be it based on nuisance or negligence, for the spread of weeds through natural agencies.[35] Whether or not, in an individual case an action will lie will "depend on the surrounding circumstances, some of which will be the extent of the spread of weeds, the damage likely to result, the cost and practicability of preventing the spread, and the location of the properties concerned."[36] McMullin J. accepted that the action could lie in either negligence or nuisance, but that in either case:[37]

> Circumstances must always be relevant. The occupier of a weed-infested area in an urban or intensely farmed area may be liable, but the occupier of a property in a more remote area may be under no liability at all. In so far as such a claim is based on nuisance, a claimant, in order to merit legal intervention, will have to demonstrate that the annoyance or damage which he suffers is substantial and, in any case, the law will be concerned to strike a tolerable balance between the conflicting claims of landowners to enjoy their properties and the interests of surrounding occupiers. In so far as the claim is based on negligence, a claimant will have to demonstrate the breach on the part of an occupier of a duty to take reasonable care to avoid the spread of weeds or the seeds.

In this judgment there is clearly no doubt that foreseeability is relevant to the establishment of liability, and that negligence and nuisance are very close if not co-extensive, even although the tests for liability are not quite the same. If one can see this case as belonging to that group of actions in nuisance which are descended from the action on the case in nuisance, the divergence in results of such cases as *Clearlite* and *Paxhaven* from the more recognisable actions in nuisance of which *French* is an example may be more understandable.

Another recent and more typical action in nuisance, albeit the fact situation was comparatively unusual, was *Matheson* v. *Northcote College Board of Governors.*[38] The plaintiffs were owners and occupiers of a re-

34 In fact there were a number of cases to the contrary: see e.g. *Giles* v. *Walker* (1890) 24 Q.B.D. 656. 350. *Sparke* v. *Osborne* (1908) 7 C.L.R. 51.

35 McMullin J. gained support for his decision from the judgment of the Privy Council in *Goldman* v. *Hargrave* [1967] A.C. 645 in which liability was held to lie in certain circumstances where a landlord might be found to have a hazard on his land, even in circumstances where the hazard might not be of his own creation, but in circumstances where the landowner might be said to have "acquired the hazard".

36 [1974] 1 N.Z.L.R. 340, 350.

37 Ibid., 351.

38 [1975] 2 N.Z.L.R. 106. It should be noted that in this particular action the remedy sought was an injunction. It has been suggested that the essential elements of the tort may differ if the remedy being sought is an injunction. See the consideration given to the article by J. P. S. McLaren, "Nuisance in Canada" printed in "Studies – Canada and Tort Law", by Mahon J. in *Clearlite*, supra n.28 at 740. However it is doubtful that the point was material in that case.

sidential property adjacent to Northcote College. The plaintiffs sought an injunction to restrain the defendant by its servants, agents, pupils and persons under its care and control from continuing certain acts which were alleged to constitute an actionable nuisance. These acts included the throwing of firecrackers and striking of golfballs on to the plaintiff's land, trespassing on the plaintiff's land, stealing fruit and interfering with the plaintiff's use and enjoyment of their land and causing nuisance, annoyance and damage to that land. The problem at issue in this case was whether a school board could be held liable in nuisance for the individual actions of its pupils, which actions themselves might amount to the tort of trespass to land. Although McMullin J. accepted a proposition from *Salmond*[39] to the effect that "Nuisance is commonly a continuing wrong – that is to say, it consists in the establishment or maintenance of some state of affairs which continuously or repeatedly causes the escape of noxious things onto the plaintiff's land", in *Stone* v. *Bolton*[40] it has been accepted that the gist of a claim may be the carrying on of a game, or other situation, on a property adjacent to the highway, or other adjoining land. In *Matheson* McMullin J. accepted the argument of counsel that the College Board of Governors had so badly supervised and controlled the school that pupils were not prevented from committing acts of trespass and that the board had not taken steps in the way of erecting fences to prevent the acts complained of. Therefore the damage to the plaintiffs' property was a consequence of the state of affairs for which the board was responsible and therefore amounted to a private nuisance.[41]

Although the facts in *Matheson* were unusual it was another example of those classes of nuisance where it is the activity taken as a whole which tips the balance over onto the side of unreasonableness. Foreseeability is relevant to establish liability and the fact situation is another example of those actions in nuisance which descend from the action on the case.

Conclusion

Is there any clear pattern to be seen in the tort of nuisance in the late 1970's in New Zealand? The pattern which seems to have emerged is that there are at least two distinct types of private nuisance existing side by side. On the one hand the *Paxhaven* and *Clearlite* cases are examples of the tort of nuisance in which strict liability exists,[42] this type of nuisance being directly descended from the assize of nuisance and having no connection with the tort of negligence. On the other hand, there is another type of nuisance, of which the *French* and *Matheson* cases are examples, which falls within the class which has "traditionally" been regarded as comprising the tort of nuisance (in which the reasonableness of the defendant's conduct is

39 Supra n. 10 at 53-54.

40 [1951] A.C. 850.

41 Supra n. 38 at 112. This is comparable with a little known Scottish case, where liability was probably established in nuisance (although this is not entirely clear): *Scott's Trustees* v. *Moss*, Court of Session (1889) 17 R.32, 27 S.L.R. 30 (referred to by Weir, *A Casebook on Tort* (1967) 252). A balloonist was expected to descend on to a piece of land, to which the public had paid to be admitted. The descent instead took place on an adjoining farm, which was in the occupation of the pursuer. As a consequence all the people in the neighbourhood rushed to the pursuer's field, with the result that all the crops growing in the field were destroyed.

42 This is in contrast with the doctrine of foreseeability as expressed in *The Wagon Mound (No. 2)*.

an important element), but which, since it stems from the action on the case in nuisance, is historically a comparative newcomer. This is the type of nuisance which is not a form of strict liability and in which foreseeability plays an integral part. Because of its origins in the action on the case this is the type of nuisance which now closely resembles negligence (which also derives from the action on the case), and in some cases so closely resembles negligence as to be co-existant.[43]

43 In forming my views for this article I have gained much assistance from, in particular, Professor Newark's illuminating article "The Boundaries of Nuisance" (1949) 65 L.Q.R. 480, and Milner's "*Negligence in Modern Law*" (1967).