PRIVATE NUISANCE, FAULT AND PERSONAL INJURIES

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I. INTRODUCTION

Is a plaintiff entitled to recover damages for personal injuries in an action in private nuisance? If so, is the plaintiff required to prove fault on the part of the defendant in order to succeed?

These are simple questions but they do not have simple answers. The answers depend on the relationship between private nuisance and its younger, more energetic, cousin, negligence. Surprisingly, the exact nature of that relationship remains unclear, even after more than a century and a half.

The purpose of this short article is to show how unclear are the answers to these questions and to examine some of the responses that have been made to them in the past. This exercise is by no means "merely academic", as startling practical consequences follow from some of the answers that have been suggested. It may be that, in certain circumstances, a plaintiff is entitled to recover damages for personal injuries even though the defendant has taken all reasonable care. The very possibility that such a heretical proposition may be correct justifies attention to the questions posed above.

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II. PRIVATE NUISANCE AND PERSONAL INJURIES

The tort of private nuisance is primarily concerned with the value, use and enjoyment of real property. Nevertheless, the majority of academic writers agree that plaintiffs *are* entitled to recover damages for personal injury in private nuisance, although there is little or no authority that directly supports such a view. For example, Fleming states that "occasionally an occupier may recover for incidental injury sustained by him in the exercise of an interest in land".[1] Although he gives examples, he cites no authority in support of the proposition. Similarly, Trindade and Cane state that private nuisance "may consist of personal injury to the inhabitants".[2] Although they give examples, they, too, cite no authority. Luntz, Hambly and Hayes suggest that an injured plaintiff *should* be able to recover damages in private nuisance, again without citation of authority.[3]

Some texts refer to authority which indirectly supports the proposition that damages for personal injuries are recoverable in private nuisance. The index to the Nuisance title in *Halsbury's Laws of England* contains an entry which reads, "personal injuries, damages for", but the footnote referred to[4] contains only *Rylands v Fletcher* cases. As Halsbury's itself states, "the rule in *Rylands v Fletcher* is strictly not part of the law of nuisance".[5] Similarly, Morison and Sappideen's index contains an entry, "Nuisance, private ... damage element in action ... personal injuries",[6] but the reference is to an extract from the judgment of the Privy Council in *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty and Another*[7] (*"The Wagon Mound (No 2)"*). *The Wagon Mound (No 2)* was a *public* nuisance case and the cases referred to in the extract in Morison and Sappideen are also public nuisance cases.[8]

1. J G Fleming *The Law of Torts* 7th edn (Sydney: Law Book Co, 1987) 381.
2. F A Trindade and P Cane *The Law of Torts in Australia* (Melbourne: Oxford University Press, 1985) 521.
3. H Luntz D Hambly and R Hayes *Torts, Cases and Commentary* 2nd edn and Supp. 1986 (Sydney: Butterworths, 1985) 939, 985.
4. 34 *Halsbury's Laws of England* (4th edn 1980) para 339 n 6.
5. 34 *Halsbury's Laws of England* (4th edn 1980) para 339.
6. W L Morison and C Sappideen *Torts, Commentary and Materials* 7th edn (Sydney: Law Book Co, 1989) 922.
7. [1967] 1 AC 617.
8. *Clark v Chambers* (1878) 3 QBD 327; *Harrold and Another v Watney* [1898] 2 QB 320; *Farrell v John Mowlem & Co Ltd* [1954] 1 Lloyd's Rep 437. Referred to in Morison and Sappideen supra n 6, 821.

Other academic writers are more cautious, merely recording the absence of authority. For example, Street states, "No English authority on the point in respect of private nuisance has been traced",[9] and Buckley states, "there appears to be no English case in which a plaintiff has recovered damages for personal injury ... at any rate in circumstances where a negligence action would not have succeeded".[10] Salmond and Heuston go a little further, stating:

> [T]he emphasis on the proprietary character of the nuisance action raises doubt as the (sic) whether damages can be recovered for personal injuries ... There seems, however, to be no case which definitely either affirms or denies the right to recover for personal injuries in an action of private nuisance ... It is therefore submitted that the better view is that damages for personal injury cannot be recovered in private nuisance.[11]

In Australia, as in England, there is no case that affirms or denies the existence of an action for damages for personal injuries in private nuisance. *Evans and Wife v Finn*[12] is authority for the related proposition that *danger* to life and limb constitutes an actionable private nuisance but the only reported case which contains any material which is squarely on point is *Benning v Wong*[13] ("*Benning*"). Although *Benning* is a *Rylands v Fletcher* case, it contains the following firmly stated obiter dictum by Justice Windeyer.

> In nuisance, [the plaintiff's] claim would not be only for an injurious affection of his land diminishing the value of his interest in it ... I see no reason why ... damages should not extend to any personal harm the nuisance has there caused him.[14]

This appears to be the only judicial statement on the subject in either Australia or England. It tends to confirm the view of the majority of the writers reviewed above, namely that an action for damages is available to a plaintiff in private nuisance *if* the injuries were suffered in consequence of occupation of the property affected by the nuisance.

9. M Brazier (ed) *Street's The Law of Torts* 8th edn (London: Butterworths, 1988) 328.
10. R A Buckley *The Law of Nuisance* (London: Butterworths, 1981) 76.
11. R F V Heuston and R A Buckley (eds) *Salmond and Heuston on the Law of Torts* 19th edn (London: Street & Maxwell, 1981) 71.
12. (1904) 10 SR (NSW) 297.
13. (1969) 122 CLR 249. Interestingly, the index to the sixth edition of the casebook which is now Morison and Sappideen, refers the reader to *Benning* under the entry "Nuisance, Private ... damage in action ... personal injuries" where the seventh edition refers the reader to *The Wagon Mound (No 2)* - see W L Morison C S Phegan and C Sappideen *Cases on Torts* 6th edn (Sydney: Law Book Co, 1985) 987 referring to 954.
14. Supra n 13, 318.

As Luntz, Hambly and Hayes put it:

> Loss of amenity in the enjoyment of property is compensable in private nuisance; and there seems to be no greater way of destroying the occupier's peaceful occupation than by injuring him when he is on the premises.[15]

Assuming this view to be correct, what difference does it make? Does it matter whether or not a plaintiff can recover damages for personal injuries in private nuisance when it is established beyond doubt that such an action is available in the tort of negligence?

At first sight, it would seem to make little difference whether the plaintiff chooses to frame an action in negligence or nuisance, if the end result in both cases is the recovery of damages for personal injuries. However, this overlooks the fact that nuisance, being a different tort from negligence, is established by proof of different elements. If it is easier for the plaintiff to establish liability in nuisance, then there is an obvious advantage in framing the action in nuisance rather than in negligence. If, by proceeding in nuisance, the plaintiff can avoid having to prove that the defendant was at fault, that advantage becomes very significant.

Before considering whether a plaintiff claiming damages for personal injuries in private nuisance can succeed without proof of fault, we must first consider whether it is possible for *any* plaintiff to succeed in private nuisance without proof of fault, and if so, why.

III. PRIVATE NUISANCE AND FAULT

Although nuisance and negligence both developed as actions on the case,[16] it is clear that they are separate torts. The distinction between the torts was stated as follows by the Privy Council in *The Wagon Mound (No 2):*

> It is quite true that negligence is not an essential element in nuisance. 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.[17]

15. Supra n 3, 939.
16. Nuisance is older than negligence. It dates back to the twelfth century assize of nuisance, which separated from the assize of novel disseisin in the reign of Henry II: see T F T Plucknett *A Concise History of the Common Law* 5th edn (London: Butterworths, 1956) 372, 469. It was first pleaded as a trespass on the case in the fourteenth century and nuisance on the case superseded the assize of nuisance in the sixteenth century: see A R Kiralfy *The Action on the Case* (London: Street & Maxwell, 1951) Ch 3. In contrast, negligence did not develop out of the action on the case as a recognisable tort until the nineteenth century: see P Winfield "The History of the Negligence in the Law of Torts" (1926) 42 LQR 184.
17. Supra n 7, 639.

Negligence "in the narrow sense" means the concept of fault used in the tort of negligence, namely breach of a duty of care owed by the defendant to the plaintiff. The pervasiveness of the tort of negligence makes it easy to forget that breach of a duty of care is not the only possible concept of fault. The tort of negligence expresses carelessness in terms of breach of a duty of care; but it does not follow from this alone that carelessness must always mean breach of a duty of care, nor that carelessness is the concept of fault used in torts other than negligence.

Having emphasised that negligence "in the narrow sense" is not an essential part of the tort of nuisance, the Privy Council in *The Wagon Mound (No 2)* continued:

> [A]lthough negligence may not be necessary, fault of some kind is almost always necessary ...[18]

These sentiments were echoed by the High Court of Australia in *Elston and Others v Dore*:

> Although, as was pointed out in *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound (No 2))*, the wide and uncertain boundaries of the law of nuisance include cases in which negligence in the narrow sense is not essential, fault of some kind is almost always necessary.[19]

The choice of words in these two dicta is careful, and significant. "[*A*]*lmost* always necessary" deliberately implies that there are circumstances, albeit few, where proof of fault is not necessary to establish liability in private nuisance.

The idea that, in some cases, private nuisance is a tort of strict liability has its starting point in the case of *The Directors, etc of the St Helen's Smelting Co v Tipping*[20] ("*St Helen's*"). In that case the plaintiff complained of damage to trees and shrubs on his property caused by emissions from the defendant's smelting works. In coming to its decision the House of Lords distinguished between two different kinds of private nuisance. Where the nuisance consists of interference with the plaintiff's use and enjoyment of property, the question of

18. Ibid.
19. (1982) 149 CLR 480 Gibbs CJ, Wilson and Brennan JJ, 488; with whom Murphy J agreed.
20. (1865) 11 HLC 642; 11 ER 1483.

liability depends on a balancing of all the circumstances of the case, including, in particular, the locality. In contrast, where the nuisance causes "material injury to property, then there unquestionably arises a very different consideration".[21] In such cases the locality is irrelevant. On the facts of the case, the plaintiff won, even though he lived in the foul atmosphere of Lancashire at the height of the Industrial Revolution, because he had suffered material damage to his trees.

Although it is the source of a crucial distinction between kinds of private nuisance, *St Helen's* is authority only for the limited proposition that, in cases of material damage to property, the locality is irrelevant to the question of liability in nuisance. A much more radical proposition concerning fault is to be found in the case of *Rapier v London Tramways Co*[22] ("*Rapier*"). In *Rapier* the plaintiff complained of smells emanating from the defendant's stables. The Court of Appeal held, affirming the decision of Justice Kekewich,[23] that the smell constituted an actionable interference with the plaintiff's use and enjoyment of his property and that it was no defence for the defendant to say that it had taken all reasonable care to prevent the interference. In the words of Lord Justice Lindley (with whom Lords Justices Bowen and Kay agreed),

> 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.[24]

Rapier is authority for the proposition that, even in cases of nuisance by interference with use and enjoyment, reasonable care on the defendant's part is irrelevant. In other words, it stands for the proposition that private nuisance is, in general, a tort of strict liability. It is clear that this can no longer be regarded as correct, not least because of the dicta from *The Wagon Mound (No 2)* and *Elston and Others v Dore* quoted above. The accepted view is that, in cases of nuisance by interference with the plaintiff's use and enjoyment of property, the court considers all of the circumstances in determining whether the

21. Ibid Lord Westbury LC, 1486.
22. [1893] 2 Ch 588.
23. A rare occurrence!
24. Supra n 22, 599-600.

interference is unreasonable. If the defendant has taken precautions against interference, that is one circumstance to take into account along with all the others.[25]

However, the ghost of *Rapier* still walks the battlements of the tort of nuisance. Although the wide proposition for which it stands can no longer be regarded as correct (if it ever could), *Rapier* seems to have merged with the narrower proposition in *St Helen's* to produce a hybrid, namely that reasonable care on the part of the defendant is irrelevant in cases of material injury to property. This is a short, but significant, step beyond *St Helen's* itself. The House of Lords in *St Helen's* said that locality is irrelevant in cases of material physical injury; the extended proposition is that *none* of the surrounding circumstances is relevant to liability in such cases.

There is some Australian authority that supports the extended "hybrid" proposition that *no* surrounding circumstances are relevant in material damage cases. In *Harris v Carnegie's Pty Ltd and Another*[26] ("*Harris*") the plaintiff complained of interference by noise and dust raised by the defendant who was renovating the premises next door. The defendant argued that it had taken reasonable precautions to guard against the interference of which the plaintiff complained. Justice A'Beckett considered the rule in *Harrison v Southwark and Vauxhall Water Co*[27] ("*Harrison*") that noise and dust interference during building renovations is not actionable in private nuisance if the defendant has taken reasonable precautions. *Harrison* was distinguished on the grounds that it did not apply where the plaintiff had suffered material damage to property. In other words, reasonable precautions on the part of the defendant were irrelevant because the plaintiff had suffered material damage to property.

Similarly, in *Kraemers v Her Majesty's Attorney-General for the State of Tasmania*[28] ("*Kraemers*") it was said that in cases of nuisance by material damage to property, the plaintiff's cause of action is made

25. For Australian examples of the defendant's precautions being taken into account in cases of nuisance by interference with use and enjoyment see *Painter v Reed* [1930] SASR 295; *Lester-Travers v City of Frankston* [1970] VR 2. For English authority see *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409, considered below: see text accompanying n 27.
26. [1917] VLR 95.
27. Supra n 25.
28. [1966] Tas SR 113.

out solely on proof of the damage of which the plaintiff complains. Chief Justice Burbury said:

> [I]t is not true to say that unreasonable conduct of the defendant *vis-a-vis* the plaintiff is an ingredient in the cause of action for nuisance ... Where material or substantial injury to property is caused (as in the present case) nothing more need be shown by the plaintiff. The criterion the law applies to the plaintiff's entitlement to sue is material injury to his property.[29]

However, Chief Justice Burbury went on to say that once the plaintiff had made out the cause of action in this way, the onus of proof passed to the defendant who could excuse the interference by proof of the reasonableness of the defendant's use of property.[30] Thus *Kraemers* is authority for the slightly more limited proposition that the plaintiff's *cause of action* does not depend on any of the surrounding circumstances (including any precautions taken by the defendant) but that the defendant's *liability* may do so.

To summarise, we may say that there is clear, but hardly overwhelming, authority for the proposition that the plaintiff's cause of action in private nuisance does not depend on proof of fault in cases of material damage to property. There is also clear, but no more overwhelming, authority for the proposition that reasonable care by the defendant is entirely irrelevant in such cases and that private nuisance is, to that extent at least, a tort of strict liability.

Having established that damages for personal injuries may be recoverable in private nuisance and that private nuisance is, in certain circumstances, a tort of strict liability, we are now in a position to consider the heretical, amalgamated question posed at the beginning of this article: can a plaintiff recover damages for personal injuries in private nuisance without proof of fault?

IV. PRIVATE NUISANCE, FAULT AND PERSONAL INJURIES

The amalgamated question is heretical simply because of the pervasiveness of the tort of negligence in the area of personal injuries. It is axiomatic to the modern torts lawyer that there can be no liability for

29. Ibid, 122.
30. Ibid, 122-123.

damages for personal injuries without proof of fault. This view is stated boldly by Trindade and Cane,

> The balance of modern authority, however, seems to establish that liability for physical damage in nuisance depends on proof of negligence ...[31]

Similarly, they state:

> In modern law there are few cases, in theory at least, in which damages for physical injury or damage are recoverable in the absence of negligence.[32]

The footnote which follows the first of the propositions contains no citation of authority but refers the reader to later pages where the second proposition appears. The footnote which follows the second proposition contains a single reference to a dictum of Lord Macmillan in *Read v J Lyons & Co Ltd*.[33] This hardly constitutes "the balance of modern authority", particularly in the light of the fact that a majority of the High Court of Australia took a different view from Lord Macmillan in *Benning*.[34] It may well be that the balance of modern *practice* proceeds on the basis that liability for personal injury and physical damage depends on proof of negligence, but that is a very different thing.

In contrast, Luntz, Hambly and Hayes take a very different view. They, too, make a bold statement:

> ... an occupier of land who suffers personal injuries ... as a result of a dangerous "state of affairs" maintained by the defendant on his land may succeed ... in private nuisance, regardless of whether he can establish "fault" on the part of the defendant.[35]

No authority is cited to support this proposition because there is none. The cases considered in the preceding sections of this article undoubtedly provide some support for it but there is no case that affirmatively states that personal injuries are actionable in private nuisance without proof of fault.

Which of these opposing views is correct? Each is, essentially, an assertion that draws support from, but is not established by, authority. Trindade and Cane are modernists whose assertion depends on the undeniable fact that, in practice, personal injuries actions are always

31. Supra n 2, 526.
32. Ibid, 542.
33. [1947] AC 156, 170-171.
34. Supra n 13.
35. Supra n 3, 612.

considered in terms of the tort of negligence. Luntz, Hambly and Hayes are purists whose assertion depends on the undeniable fact that, as a matter of law, negligence and nuisance are two different torts made out by proof of different elements.

There are other fields where the applied law of day-to-day practice is at odds with the pure law of the authorities. One other example in the law of torts is the area of assessment of damages for loss of earning capacity, where the pure law states that damages are for the loss of the *ability* to earn, regardless of actual earnings,[36] whereas the day-to-day applied law operates on the basis that damages are calculated on the basis of earnings actually lost. In circumstances like this, where the pure law and the applied law are different, it is difficult for an academic to know what to do. Does one say, as Trindade and Cane do, that the law ought to reflect the daily practice of dispute settlement? Or does one say, as Luntz, Hambly and Hayes do, that the law is the law and practice ought to reflect it? Each view is tenable; one can look at the way things are, or the way things are done. Ultimately, the choice between being a modernist and being a purist is simply one of personal preference.

As yet, there has been no reported case which has required a judge to indicate a positive preference between these points of view, or, indeed, to come up with another. However, it is not difficult to imagine circumstances which would require a definite answer to our amalgamated question. The "hard case" is one where the plaintiff has suffered personal injuries as a result of a private nuisance in circumstances where the defendant has taken reasonable precautions. Imagine, for example, a house-owner struck in the eye by a golf ball as he sits in the garden of his house. The golf ball has been struck from the neighbouring golf course which is bordered by a high, fine-meshed fence erected by the golf club to prevent balls straying from the course. The fence has previously been completely effective in keeping golf balls on the golf course. Only this one shot (a freakishly bad bottomed slice) has managed to clear the fence. The house-owner is struck square in the eye by the ball and he loses his eye as a result.

36. See, for example, *Arthur Robinson (Grafton) Pty Ltd and Another v Carter* (1968) 122 CLR 649 Barwick CJ, 658.

In these circumstances, the house-owner would almost certainly fail if he tried to sue the golf club in negligence. In an action in negligence the court weighs the reasonableness of the precautions taken by the defendant against the magnitude of the risk of injury to the plaintiff.[37] The above example has been deliberately constructed so that the risk of injury is very small, so small that it would be unreasonable to expect further precautions to be taken against it over and above the fence already erected. Thus, the result would be similar to that in *Bolton and Others v Stone*,[38] the case of the freakish six, on which the example was modelled. As the reasonable man would take no further precautions apart from the existing fence, the plaintiff house-owner would fail in an action in negligence.

But what if the plaintiff were to bring his action in private nuisance, rather than in negligence? It is possible that the court would say, as Trindade and Cane suggest, that the plaintiff could not succeed in private nuisance if he could not succeed in negligence. However, the raw material is available for a court to take one of two very different approaches. It is possible that, under either approach, the plaintiff house-owner would win, notwithstanding his inability to prove fault on the part of the golf club.

We have seen that it is fairly clear that a plaintiff may sue in private nuisance for personal injuries, at least where the plaintiff has title to the property affected, as does our house-owner. We have also seen that in *Kraemers* Chief Justice Burbury said:

> Where material or substantial injury to property is caused ... nothing more need by shown by the plaintiff.[39]

If a similar approach were taken in a personal injury case, all that the plaintiff would need to prove would be the injury. In the circumstances of our example it is quite easy to imagine a court taking this approach. If the golf ball had broken a window rather than landed in the house-owner's eye, the plaintiff's cause of action would, it seems, be made out on proof of the damage alone. Why should he be any worse off because he has lost his eye rather than a window? Why should he be any worse off because he is sitting in his own garden, rather than on

37. *The Council of the Shire of Wyong v Shirt and Others* (1980) 146 CLR 40 Mason J, 47-48.
38. [1951] AC 850.
39. Supra n 28, 122.

the highway outside, where he could bring an action in respect of his injuries in *public* nuisance?[40] Further, if the court were to follow *Harris*[41] the precautions taken by the defendant would be irrelevant to the question of liability, however reasonable they might be. Thus, the plaintiff house-owner would succeed against the golf club on proof of the injury alone, notwithstanding the precautions taken by the defendant.

Alternatively, if the court were to follow *Kraemers*[42] the onus would shift to the defendant golf club to establish the reasonableness of its use. The defendant would be obliged to argue that its use of its premises was reasonable, notwithstanding that that use had caused the plaintiff to lose an eye. Reasonable *use* is not necessarily the same thing as reasonable *precautions*. It is conceivable that the defendant's *use* could be considered unreasonable because of its result, notwithstanding the reasonableness of the precautions.

In summary, there are at least three possible outcomes of this "hard case": no liability without proof of fault, strict liability, or a shift in the usual onus of proof from the plaintiff having to prove unreasonableness to the defendant having to prove reasonableness. If either the second or the third of these approaches were taken, the plaintiff would be placed at a considerable advantage by bringing an action in private nuisance rather than in negligence.

V. CONCLUSION

If the "hard case" described above, or one like it, were decided in favour of the plaintiff, it would establish a precedent that would alter existing practice. The "hard case" forces answers to the questions of whether personal injuries are actionable in private nuisance, and if so, under what circumstances. If a higher court were to decide affirmatively that personal injuries are actionable in private nuisance without proof of fault, that would hold true in all cases, not simply those like the "hard case" itself, where there is nuisance but no negligence. Thus, in *all* cases where the plaintiff suffered injury in the course of occupation of property,[43] private nuisance would be established by proof of

40. *Castle v St Augustine's Links Ltd* (1922) 38 TLR 615.
41. Supra n 26.
42. Supra n 28.
43. The plaintiff must have some proprietary interest in the property to have standing to sue: *Oldham v Lawson (No 1)* [1976] VR 654.

the injury alone. Proof of fault would be rendered unnecessary, as would any action the plaintiff might have in negligence.

Clearly, this would change the nature of litigation and the process of settlement negotiations. Where the onus of proof is on the plaintiff, as in negligence, it is the defendant who is in the position of relative strength in settlement negotiations. If the onus of proof were on the defendant to establish that its use of property was reasonable, it would be the plaintiff who would be in a position of relative strength in settlement negotiations. Obviously, if the "hard case" decision were to go so far as to decide that private nuisance is a tort of strict liability in personal injury cases, there would be little or nothing about which to negotiate once the plaintiff could show that an injury suffered had been caused by the defendant.

For the "hard case" to be decided in favour of the plaintiff, the court would have to take what I have described as a purist view of the law of torts. When faced with a similar decision in the past, the High Court of Australia made the choice to be purist rather than modernist. In *Williams v Milotin*[44] the High Court of Australia had to decide whether it was possible to bring an action in trespass, rather than negligence, where the defendant had unintentionally injured the plaintiff. If the action in trespass were still available, the plaintiff need only prove the injury and it would then be for the defendant to prove that it had not been negligent. The High Court unanimously took the purist view, stating,

> The two causes of action are not the same now and they never were ... The essential ingredients in an action of negligence for personal injuries include the special or particular damage - it is the gist of the action - and the want of due care. Trespass to the person includes neither.[45]

The number of cases affected by a similarly purist approach to the tort of nuisance would be small, but not insignificant. Most personal injuries are suffered when the plaintiff ventures out into the wide and dangerous world, usually in motor vehicle or workplace accidents.

44. (1957) 97 CLR 465.
45. Ibid, 474. Compare the position in England, which has taken the modernist approach that all actions for personal injuries must be brought in negligence, notwithstanding the former distinctions between torts: *Fowler v Lanning* [1959] 1 QB 426; *Letang v Cooper* [1965] 1 QB 232. Compare also highway cases, which are an exception to the general Australian rule: *Chin v Venning and Another* (1975) 49 ALJR 378.

However, if the purist approach were taken, all personal injuries suffered by a plaintiff during the occupation of the plaintiff's own premises would be actionable in private nuisance against the person who caused the injury, regardless of whether that person had any title to the land from which the nuisance emanated.[46]

Ironically, the availability of such an action would probably be significant in precisely those situations where an action in private nuisance would normally be out of the question. One cannot bring an action in private nuisance to complain of industrial noise, fumes and smells if one lives in an industrial area.[47] However, it is in industrial areas that interference by noise, fumes and smells is likely to become great enough to cause physical injury. It may be the case, as we have seen, that a plaintiff injured by industrial pollution could succeed in private nuisance, even where the plaintiff would not be able to complain of nuisance by interference with use and enjoyment, and even where the plaintiff would be unable to prove negligence on the part of the industrial defendant. Admittedly, the plaintiff would face difficulties in establishing causation, but these would be no greater than the self-same difficulties in an action in negligence and the plaintiff in private nuisance would face the enormous advantage of not being required to prove that the industrial defendant causing the pollution had failed to take reasonable care.

It is ironic that it is the purist view that leads to this radical result. The modernist view espoused by Trindade and Cane would be that a plaintiff in such a situation could not succeed without proof of fault. This inversion brings to mind the biblical admonition, "But many that are first shall be last; and the last first."[48]

There is something perversely satisfying about a situation where the purist, conservative view leads to a more radical result than the modernist, transformative one.

46. *Fennell and Another v Robson Excavations Pty Ltd and Others* [1977] 2 NSWLR 486.
47. Supra n 20; *Sturges v Bridgman* (1879) 11 Ch D 852.
48. *Mark* 10: 31 (King James version).