Definition of a Legal Nuisance – Legal Aspects of Complaint Management

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Introduction

Any local Council Dog Management Officer will advise that a not uncommon urban scenario is as follows:

A shift worker arrives home each day at 7.00am has something to eat and then tries to sleep from about 8.00am through until mid-afternoon. He or she lives in a conventional three bedroom brick- veneer house in the suburbs. His or her next door neighbours both work during the day. Their dog barks incessantly when they are not at home. The constant barking can be heard by the shift worker who finds it difficult to fall asleep. If he or she succeeds in doing so and then wakes during the sleeping period, the barking makes it difficult to get back to sleep again. How does the shift worker stop the dog barking? There are a number of legal measures available to him. This paper concentrates on one of those measures, namely the law of nuisance as a possible means of seeking to redress problems caused by the type of animals commonly kept in an Australian urban environment.

Frequently animals, which create problems for humans within that environment, are also the cause of neighbourhood disputes. Allegations that someone's pet is causing an annoying problem for a neighbour can create the type of neighbourhood disputes, which can test the skills, and patience of the most seasoned mediators. Arguably the most frequent animal problem, which creates annoyance in an urban environment, is that associated with the continual and excessive noise of dogs barking. However, problems may also arise with cats (fighting, urinating on and in people's cars, on their dwelling walls and doors and outdoor garden furniture etc), chickens (smell, attraction of vermin such as rats and mice and the crowing of roosters), horses (smell and noise), pigeons (smell, attraction of vermin, soiling of neighbouring roofs, washing and rainwater etc).

Disputes of this nature are, wherever possible, best resolved informally or through the use of mediation services. However, there will be occasions when the nature of the issue and the personalities involved means that resolution of the dispute will only occur through Court intervention. That intervention may occur either through the use of a range of statutory mechanisms, or the tort law of nuisance. In this paper I propose to concentrate on the requirements to establish a case based on the law of nuisance.

Definition of Nuisance

The legal definition of a nuisance is similar in some respects to what is understood in every day language by the term "nuisance". The Macquarie Dictionary defines a nuisance as:

"1. a highly obnoxious or annoying thing or person,

2. something offensive or annoying to individuals or to the community, to the prejudice of their legal rights."

The second definition is more akin to the legal term. In Balkin & Davis, "Law of Torts"[i] it states that the essence of the tort of nuisance is interference with the enjoyment of land. "It covers interference with use and enjoyment of land by water, fire, smoke, smell, fumes, gas, noise, heat, electricity or any other similar thing which may cause such an inconvenience"[ii].

There are two forms of nuisance, private nuisance and public nuisance. A claim in private nuisance may arise where a person is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land, or of an interest in land where, in light of the surrounding circumstances this injury or interference is held to be unreasonable.

It is with regard to the claim in private nuisance that most issues arising out of urban animal management (or mis-management as the case may be) arise. A public nuisance involves an unlawful act which endangers the life, health, property, morals or comfort of the public, or obstructs or interferes with the public in the exercise or enjoyment of public rights. It is essentially a nuisance, which is so wide-spread in its range, or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his or her own responsibility to put a stop to it, but it should be taken on the responsibility of the public at large. An action brought to stop a major pollution incident, which was endangering the life, or health of a range of residents in a particular suburb would be an example of a public nuisance. There is some authority for the proposition that an action for public nuisance is available where animals have obstructed a highway and in so doing caused a plaintiff special or particular damage greater than that suffered by the general public. It appears that in South Australia two sheep on a country road, which caused an accident, would not be sufficient to constitute a public nuisance. In Western Australia there is a separate Highways (Liability for Straying Animals) Act 1983 which seems to eliminate actions for public nuisance in situations where animals stray onto roads because of provisions which state that liability for damage caused by animals straying onto a highway is determined solely according to the law relating to negligence and intentional acts or omissions.

Private Nuisance – What is Required?

(a) **Physical injury to land, or a substantial interference with its enjoyment, or an interference with rights over land.**

It is generally clear whether a physical injury to land has occurred. If someone produces fumes in a factory which destroys delicate plants kept on an adjoining property that may be an actual private nuisance.

If a claimant is alleging an interference with their enjoyment of land, then they must prove that there is a substantial interference. A trivial interference will not suffice. The test of whether or not an interference is substantial must involve consideration of what reasonable mature people, without any particular personal sensitivity might accept as an interference.

Balkin & Davis refer to an English Court case where it was held that the loss of even one night's sleep through excessive noise is not trivial. Regular sleep deprivation through the continual barking of a dog may constitute a substantial interference with a person's enjoyment of their land, as might noise caused by the crowing of a large number of roosters. The keeping of horses and their attendant noise and smell and the impact of that activity on neighbours has been held to be a substantial interference with the neighbour's enjoyment of their land.

Noise which is frequently the basis for complaints are unreasonable and substantial interference with a person's enjoyment of their land must generally be unusual or excessive. It may also be important to determine what time of the day or night the noise is emitted and for what period of time.

(b) **Duration of interference.**

The interference may be temporary as long as it is substantial and interferes with a person's enjoyment and use of their land. Not surprisingly, an interference, which is short and brief, may not be considered unreasonable.

(c) **Locality of Nuisance**

The locality within which a nuisance occurs can be important in determining whether the interference is substantial. If, for example, within the locality the majority of the people keep fowls, then a plaintiff may have difficulty arguing that the inconvenience from smells and vermin was any different to any other resident with in their locality. Planning laws have also an impact in this situation. If a planning scheme recognises the activity complained about as appropriate in the locality, it may be harder to support an argument that there has been substantial interference. The noise from barking guard dogs on an industrial property in an industrial zone may not constitute a private nuisance in such a locality but would very likely be a substantial interference if the locality was characterised by residential dwellings.

(d) **Damage**

As a general rule to succeed in an action for private nuisance you must prove that you have suffered actual damage. A sleep deprivation if you are a shift worker, the inability to use your outdoor entertaining area because of smell, or the contamination of your rainwater tank by pigeon activity would all be examples of damage sufficient to meet the requirements of private nuisance.

(e) **Unreasonableness**

The Courts have been at pains to emphasise that when considering whether conduct alleged to cause a nuisance is unreasonable or not, they must always bear in mind the need to maintain a balance between the right of an occupier to do what they like with their own land and the right of his neighbours not to be interfered with. Generally, in considering whether the behaviour is unreasonable or not the Courts will look at the generally accepted notion of appropriate behaviour in that context within that society.

In the Victorian case of Munro v Southern Dairies Limited the plaintiff complained of noise, smell and flies caused by the defendants stabling of horses on his city land. The defendant argued that because the activity which it conducted was of great benefit to the public, it was therefore not unreasonable. The Victorian Supreme Court rejected the argument finding such a reason was insufficient to justify what was, on all the evidence, a nuisance.

Who will be liable for a nuisance?

If we take the example of the barking dogs annoying the shift worker, who will be liable for that nuisance assuming it is held to be a substantial interference for the shift worker's enjoyment of his or her land?

The basic rules are that a person will be liable for a nuisance where he or she, or any person for whom that person is responsible (such as an employee) created the nuisance, permitted the nuisance to arise by failing to exercise reasonable care, "adopted" the nuisance or negligently failed to remedy or abate the nuisance.

In the shift worker example, the dogs created the nuisance, but arguably the owners have permitted it to arise by failing to exercise reasonable care to prevent the dogs barking and furthermore, if made aware of the problem, they have failed within a reasonable period of time to remedy or abate the nuisance.

Onus of Proof

In any particular case, the person alleging the nuisance (usually known as the plaintiff) will have the onus of proving on the balance of probabilities that the defendant cause the nuisance or allowed it to continue.

Thus it is encumbent on a plaintiff to present evidence of not only the nuisance and its impact on the plaintiff, but also that the plaintiff has approached the defendant and attempted to seek a resolution of the problem to no avail.

In considering liability, the Courts will generally look at the defendant's conduct and even the defendant's financial circumstances when considering the issue of abatement of the nuisance.

If a defendant has acted with malice towards the plaintiff, that may reinforce the position that the defendant has committed a nuisance. There was an interesting case in New South Wales in 1950 where a woman let off fire crackers on her property to scare a flock of pigeons, which regularly flew from the defendant's land onto hers. The Judge found that the plaintiff had herself abated a nuisance emanating from the defendant's property and was entitled to do so.

As with most areas of the common law there are a number of exemptions to the general rules that apply to private nuisance, particularly when considering the liability/responsibility of landlords and tenants. It is for this and other reasons that many of the statutory remedies now available are the ones which are more suitable to address nuisance type problems arising with urban animals.

However, before turning to look at various statutory provisions mention should be made of the range of defences available.

Defences to a common law claim of private nuisance

Some of the available defences include:

(a) **Statutory Authority**

This arises where a statute or Act of Parliament authorised the act or omission that constitutes the nuisance. It is unlikely to apply in an urban animal management situation.

(b) **Act of God**

This arises where the act creating the nuisance was so exceptional that no reasonable person could have anticipated it, or that it amounted to an act of God.

(c) **Act of a Third Party**

If an intruder caused the problem on the defendant's property which gave rise to the nuisance unbeknown to the defendant, the defendant may have a defence when any claim is made against him or her.

(d) The plaintiff consented or acquiesced to the nuisance occurring

What remedies are available

1. Abatement

This is self-help by the plaintiff. If it was possible for the shift worker to lawfully quieten the dogs then he or she could do so. The Courts do not like encouraging abatement where it requires a plaintiff to enter onto someone else's land, eg the defendant's land. A plaintiff can abate in anticipation of a nuisance occurring. Abatement cannot cause unnecessary damage or loss to the defendant's land or property.

2. Injunction

This is the most common remedy. The Court issues an injunction restraining a nuisance or possible nuisance or requiring abatement of a nuisance. The Court makes an order requiring the defendant to cease certain activities or deal with the defendant's animals in an alternative way so as to avoid a continuation of the problem affecting the plaintiff. In very serious cases that order might include a requirement that the defendant remove the animals causing the nuisance from the defendant's land.

3. Damages

The Court may award these as compensation for the annoyance, inconvenience and discomfort caused by an interference with the use and enjoyment of land. The plaintiff does not need to prove that the plaintiff has suffered any material property damage in order to obtain an order for compensatory damages.

4. Court Process and Evidentiary Matters Actions based on the Tort Rule of Private Nuisance

Civil actions are usually brought in the middle or lower level Courts in each State. Thus in South Australia you would normally expect a private nuisance claim to be brought in either the civil division of the Magistrates Court or the District Court. Which level the action is brought normally depends on the amount being claimed by way of damages. Some lower level Courts do not have the power to issue injunctions in which case the action must be brought in a higher Court.

As previously noted a plaintiff bringing a claim in private nuisance needs to prove their case on the balance of probabilities, which is a standard of proof that is lower than that applying in criminal cases where the prosecution must prove its case beyond reasonable doubt.

Where an injunction is being sought the matter may be listed quite quickly often because of the nature of the nuisance and the interference occurring to the neighbouring landowner. Generally a plaintiff would need to call evidence on the following matters:-

i) the location of their land and its relationship to the defendant's land;

ii) details about how the plaintiff uses his or her land;

iii) details of the nuisance ie, the barking of dogs, odour or dust from animal keeping. This type of evidence is often accompanied by photographs. It is also more common for the judicial officer whether it be a Magistrate or a Judge hearing such claims to undertake a view of the land and surrounding locality. In fact in a situation where there are allegations being made about the activity causing a substantial interference with a person's enjoyment of the land in my opinion it is essential for the Court to undertake a view of the subject land and the surrounding locality. Observations made by the Court on the view can be extremely helpful in assisting the Court's understanding of the nature of the problem.

5. Evidence about how the nuisance is affecting the owner of the land whether it be the owner or the owner's family personally through health problems, or sleep deprivation or through physical damage or interference with the owner's property.

6. Evidence about the plaintiff's attempts to resolve the matter prior to the litigation eg through letters to the defendant, verbal requests or discussions with the defendant or sometimes physical changes to aspects of the plaintiff's property.

7. Occasionally technical expert evidence on issues such as animal behaviour, odour and perhaps environmental health issues.

A significant percentage of all cases commenced in Australian Courts resolve before the Court has to make a decision on the matter. Private nuisance claims are one area where it is submitted the resolution of the matter would be better achieved outside of the litigious process. Given the significant costs of litigation and the fact that many private nuisance issues (and particularly those that arise out of animal management matters) are annoying, but not necessarily matters of great financial moment resolution through alternative dispute resolution techniques is by far the more preferable option.

Many local government authorities have either established or can refer people to community mediation services which are able to mediate between neighbours in dispute to try and reach a resolution of the matters or problems which have given rise to the dispute. In the writer's experience many neighbourhood disputes, which although objectively of a fairly minor nature, can nevertheless promote enormous anguish and cost for the parties involved. Often introducing an independent third party to mediate between the disputing neighbours can bring about a resolution of a long standing neighbourhood feud. Sometimes for the purposes of that process there may be merit in the independent third party engaging or encouraging the parties to engage the services of a specialist in animal behaviour to advise on possible ways of resolving a nuisance problem associated with animals in the urban context.

Statutory Alternatives to the Common Law Action for Private Nuisance

With the growth of statute law over the past 30 years there are now a wide range of legal actions, which can be brought by persons suffering loss of enjoyment of their land or physical discomfort or injuries to their health through the actions of persons causing a nuisance.

With respect to animal management the most obvious problems are associated with noise from barking dogs, odours and smells, flies and vermin from poor animal husbandry.

In the past 30 years there have been significant legislative changes, which now establish a range of legal options to seek redress of nuisance type problems.

Barking dogs

Paul Kelly has already discussed in some detail the provisions of the South Australian Dog and Cat Management Act 1995 insofar as they related to controls over barking dogs.

Section 45A(5) of that Act is to a large extent a statutory expression of the principles of private nuisance .It does however create a criminal offence. It is also necessary to prove that the noise created by the dog or dogs (whether barking or otherwise) persistently occurs or occurs to such a degree or extent that it unreasonably interferes with the peace, comfort or convenience of a person.

The South Australian legislation also creates a capacity for civil orders to be issued by local councils in relation to specified dogs. They include control (nuisance) dog orders (Section 50(5)) and control (barking dog) orders (Section 50(6)).

The control (nuisance) dog orders appear to be designed to address the problem of dogs, which escape from premises and wander at large within an area. Control (barking) dog orders require a person to take reasonable steps to prevent a dog repeating their behaviour that gave rise to the order.

The system of civil orders is backed up by an offence provision in Section 55 of the Act, which makes it an offence to contravene a control order.

In New South Wales the Companion Animals Act 1998 also provides for a dog to be declared a nuisance in a number of circumstances including where it is often at large, or making a noise by barking or otherwise continuing to the point that it unreasonably interferes with the peace of any person in any other premises. The local council has the power to issue the order requiring the owner of the dog to prevent the behaviour causing the problem.

In most states environmental protection legislation also includes provisions, which are designed to address unreasonable noise nuisances. Abatement orders and environment protection orders or notices can be issued to a person responsible for the noise emissions. In the case of continual dog barking there may be the opportunity for such abatement notices to be issued to the owner of the dogs responsible for the barking.

Odours, vermin, flies

Environmental protection legislation in many cases will provide the ability to control odours from poorly managed animal husbandry. For example, in South Australia, if the odour appears such as to constitute an environmental nuisance within the meaning of that term in the Environment Protection Act, 1993 that can be the basis for the issue of an environment protection order or in circumstances where the environment nuisance was intentionally caused, prosecution.

The other significant legislative areas to which resort can be had for the purposes of controlling problems with odour and perhaps more particularly flies and vermin associated with the source of that odour are the environmental health statutes. Each State has environmental health legislation often based on the very early statutes designed to improve health and sanitation in urban areas. In South Australia the relevant legislation is the Public and Environmental Health Act, 1987 where premises are kept in an insanitary condition, notice can be served on the owner or occupier of those premises requesting them to remove the insanitary condition. Failure to comply with such a requirement can be an offence punishable by a fine.

Many of the statutory remedies require action on the part of various authorities rather than empowerment of the affected individual. This means that the individuals affected by the nuisance activities must approach the relevant Government or local authority seeking their assistance and the use by the authority of their enforcement powers. In the case of legislation controlling dogs and cats and public and environmental health, the relevant authority who has responsibility for monitoring and enforcement is usually the local council.

The environment protection statutes, on the other hand, generally make an independent statutory authority such as an environment protection authority the body responsible for administration and enforcement. In some States, such as South Australia, local government can also play a minor role in enforcement of Environment Protection Act legislation – usually in relation to the less serious environmental problems (of which barking dogs and animal odours and noise are common examples.)

There are some cases, such as in South Australia, where third parties, such as affected neighbours, can themselves bring action. Under the South Australian Environment Protection Act third parties who are able to show that they have interests affected by a breach of the Environment Protection Act can bring civil enforcement proceedings under Section 104 of the Act in certain circumstances. Sometimes, as in Olsen v Windybanks Child Care Centre that occurs where the relevant authority such as the EPA had refused to take action (usually because they believed the case to be a weak one).

Conclusion

The common law remedies for urban animal management problems largely lie in the tort of private nuisance. It was a remedy developed over many years of legal decision and precedent setting. The development in more recent times of statutory provisions dealing with monitoring and enforcement of nuisances of various kinds address many of the causes of traditional animal source nuisances and has provided more certainty and strength to controls and remedies in this area.

Problems arising from poor animal management in urban areas are best addressed by measures other than litigation. Our society has much more effective structures now in place for resolution of complaints in this area. Litigation and reliance on old common law rules and tests should be used as a last resort and only after mediation and the use of statutory civil orders have failed to achieve results.

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