Negligence, Nuisance and Rylands v Fletcher: The struggle for simplicity continues

(3 November 2000)

The Honourable Justice Chambers

Three years ago, the leaders of this august organisation were rash enough to ask me to address you on the topic of negligence, nuisance, and *Rylands v Fletcher*, and in particular on the inter-relationship of the three torts. Obviously because no one understood it then, I have been asked to repeat the lecture today, perhaps in the vain hope that my new job may have given me the ability to make comprehensible what was left incomprehensible last time. I regret that their hope in this regard is hopelessly misplaced.

Before I begin, I want to say that I think this is a very important topic for the insurance industry because the fact situations which give rise to possible claims in nuisance and *Rylands v Fletcher* frequently involve insurers, usually on both sides. My other introductory comment is that I appreciate that I am speaking to a mixed audience of both insurance company officers and insurance lawyers. This address will be pitched at the level of the insurance company officers and the lawyers will just have to try to keep up.

I realise from looking at the list of attendances which Frank Rose gave me that, while many of you were here when last I addressed you, there are also many new faces. In those circumstances, I should perhaps begin today by summarising briefly what my thesis was 3 years ago. The intention then is to see whether any of my predictions as to the future development of the law in this area have come true.

The theme of my address 3 years ago was the need for simplicity in this area of the law of torts. Tort law has become far too complicated. There is a need for clear enunciation of simple principles. I also tried to persuade you of three rules of thumb. They were:

- There will never be a case where a plaintiff will succeed in *Rylands v Fletcher* without also succeeding in nuisance.

- There will rarely be a case where a plaintiff would succeed in nuisance without also succeeding in negligence.

- The old action for liability for the escape of fire is now to be determined as a negligence action.

In particular, in formulating those rules of thumb, I referred to what were then two recent cases, one a decision of the House of Lords *Cambridge Water Co. v Eastern Counties Leather plc* [1994] 2 AC 264, and the other a decision of the High Court of Australia, *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 529. Although both those decisions have approached the issues with which I am concerned today somewhat differently, both were certainly consistent with my three rules of thumb.

Well, what has happened since then? The first general point to note is how many nuisance cases there have been, especially in New Zealand and the UK in the last 3 years. That in itself indicates that the struggle for simplicity is not yet won. Where the law is clear, where the principles are clear, there are usually few cases. That is because factual disputes against a clear legal framework are generally settled. The number of cases coming through and the nature of the arguments being addressed suggest that the highest courts have not articulated clearly enough what the principles should be. Nuisance is not an area like negligence where the fact situations vary hugely. The fact situations in the nuisance are relatively confined. It ought to be possible to make clear principles governing their legal resolution.

A second point I should make is that you should be very wary of what I say today. People who specialise in an area and then publish their views, as I have done in this area, tend to view all developments in their area against their own theories. Cases

which don't fit the theory are either skewed to make them fit or ignored or declared wrong. So be wary of that.

The final general point I would make is that you will find me somewhat more cautious and subdued than I was 3 years ago. That is because I do not want to adopt such an extreme position today that I am prevented from ever having the opportunity to determine a nuisance case. This concern is not far-fetched. There is a recent decision of the Scottish High Court of Justiciary which sounds warning bells to judicial officers who speak or write extra-judicially. In the case concerned, *Hoekstra v HM Advocate* [2000] TLR 298, the Scottish High Court was concerned with whether a judge who had sat on a criminal appeal should have sat. The appeal in question had involved drug dealing and the point in the appeal had turned on a particular right said to have been conferred on the accused by the European Convention on Human Rights. The appellate judge had written an article on the European Convention which had used imagery overwhelmingly negative to the Convention. The judge, in his article, had painted a picture of the Convention as something that threatened danger to the Scottish legal system. In the article, the judge showed that he was hostile to the idea that persons who were suspected by the police of being drug dealers should have rights of privacy, including a right against covert surveillance, under the Convention. The Scottish High Court held that, because of the views expressed by the judge, he should not have sat on that appeal. The tone of the article was such that it gave rise to a legitimate apprehension that the judge could not deal with such an argument impartially. The Scottish High Court of Justiciary ordered that the appeal had to be heard afresh by a new panel.

So that is a cautionary tale for all judges about the need for moderation in whatever they may say extra-judicially.

Well, enough by way of background. I want to look at four New Zealand cases and two English cases. The purpose of my enquiry is to alert you to recent developments in this area which may have implications for insurance companies. The second purpose is to see whether the rules of thumb hold true.

The first case with which I wish to deal is *Autex Industries Ltd v Auckland City Council* [2000] NZAR 324. When I spoke last time, this case had just been sent off to the Court of Appeal by Master Kennedy-Grant. I expressed the view that the claim for summary judgment in *Rylands v Fletcher* must surely be doomed. That prediction proved true.

The facts were very simple. An Auckland City Council water main burst some 8 metres from Autex's premises. Water caused damage to Autex's premises, plant, equipment and stock. Autex sued the Council in respect of its losses. Two causes of action were pleaded. The first pre-supposed strict liability. The second pleaded negligence. In respect of the first cause of action, Autex sought summary judgment. Autex argued that this was a *Rylands v Fletcher* case; therefore negligence did not have to be proved.

The Court of Appeal divided. The majority ruled that the case was not appropriate for summary judgment. The majority left open what the law should be in this area. They said that whether the old case of *Irvine & Co. Ltd v Dunedin City Corporation* [1939] NZLR 741 should continue to be followed needed appropriate evidence which was not before them. The Court of Appeal said that there should be expert evidence as to the likely economic and social implications of alternative legal rules. The court should not make these public policy decisions simply relying on intuitive assessments.

I agree wholeheartedly with the majority on that point. Defence lawyers far too often attempt to strike out pleadings at the cutting edge. It is usually much better to run the case and have a solid foundation of fact, including appropriate expert evidence, before one determines in which direction the law should move.

The minority judgment in *Autex* would have allowed summary judgment to be entered. The minority disagreed with the High Court of Australia in *Burnie*. The minority was persuaded by Professor Fleming's well-known defence of a claim in strict liability for activities which present an abnormal risk. I regret to say I find the minority's judgment unconvincing. Professor Fleming has lived most of his life in California while continuing to write successive editions of his Australian text on torts. Living in the United States has influenced him greatly in this area of the law because

the United States has embraced a doctrine of strict liability for extra-hazardous activities. That doctrine has never formed part of English law or New Zealand law. It was expressly disavowed by the House of Lords in *Read v J Lyons & Co. Ltd* [1946] AC 169. This is not the place for a detailed discussion as to why a theory of strict liability for extra-hazardous activities should not be adopted. That was, after all, the view of only the minority. In my view, it would be a retrograde step for us to go down that line.

In summary, therefore, *Autex* leaves the question open as to whether New Zealand will follow the High Court of Australia. *Autex* is certainly not inconsistent with my three rules of thumb. At the same time, it does not provide support for them either. *Autex* subsequently settled. I would question whether anything was achieved by the attempt to get summary judgment. A case involving only $200,000 was bound to settle and would have settled without an expensive foray to the Court of Appeal.

The second case to which I refer is *Langdon v Bailey*, a very recent decision of Panckhurst J, decided on 8 September: unreported, AP3-00 (Timaru Registry). The facts were simple. Mr Bailey was driving his truck along a public road. Sparks from it caused a fire in the tinder-dry vegetation on the roadside. The fire then spread to Mr Langdon's farm and caused damage to trees, fences and pasture. In the District Court, Mr Langdon's claim for damages failed because the judge found that it was not foreseeable that the truck would emit sparks and cause a fire. Mr Langdon's appeal was dismissed.

Mr Langdon's argument was that the District Court Judge had been wrong because liability should have been found in private nuisance and liability in private nuisance is strict. Panckhurst J dismissed the appeal on the following grounds.

First, private nuisance is essentially a tort concerned with competing interests in land. Mr Bailey was not using his land in any particular way: he was merely driving down the highway. The heresy of Mahon J's views in *Paxhaven Holdings Ltd v Attorney-General* [1974] 2 NZLR 185 and *Clearlite Holdings Ltd v Auckland City Corporation* [1976] 2 NZLR 729 has finally been put to rest. On this point, Panckhurst J undoubtedly was correct.

Panckhurst J's second point was that nuisance requires some 'repetitive activity which causes damage to the plaintiff's land or his enjoyment of it'. With respect, Panckhurst J was not correct on that point. It is well established that there can be liability in nuisance for a one-off act which causes damage.

Thirdly, Panckhurst J held that, assuming the cause of action in nuisance was available, which, of course, he had found it was not, he would still have concluded that the judge's finding concerning foreseeability was fatal to the claim. On that topic, Panckhurst J was quite correct. It is now well established beyond any doubt that there cannot be liability in nuisance unless the harm was reasonably foreseeable.

The result in *Langdon v Bailey* is support for my second rule of thumb: 'There will rarely be a case where a plaintiff would succeed in nuisance without also succeeding in negligence.' Mr Langdon failed in negligence because the harm was not foreseeable. He failed in nuisance for exactly the same reason.

The third case to which I wish to refer is another decision of the Court of Appeal: *Hamilton v Papakura District Council* [2000] 1 NZLR 265. In this case, the Papakura District Council distributed the local town water supply. Watercare Services Ltd provided the water. Mr and Mrs Hamilton, who were hydroponic growers of tomatoes, owned three properties on which they had greenhouses. Two of the properties were serviced by the town water supply. The tomatoes at those two properties began to show symptoms of damage, including leaf curling and burning. Other growers in the area were similarly affected. The tomatoes at the other property did not show any signs of damage. The Hamiltons issued proceedings against the Council and Watercare. They alleged that there were toxic herbicide residues present in the water. In the High Court it was held that the Hamiltons had not proved on the balance of probabilities that there were toxic herbicide residues present in the water. They appealed to the Court of Appeal. Their appeal was dismissed.

First, the Court of Appeal held that the harm that occurred was not on the facts foreseeable. That was enough to dispose of the claim, whatever tortious cause of action was relied on. Again, the case provides strong authority for the proposition

that there will be no liability in *Rylands v Fletcher*, nuisance or negligence unless the harm that occurred or harm of that type was reasonably foreseeable. The case also establishes that there is no difference in the foreseeability test between nuisance and negligence. The moment one states that as a proposition, one realises that it is absurd to continue talking about nuisance or *Rylands v Fletcher* as strict liability torts. They are not.

Secondly, the case is very important in that it confirms that *Rylands v Fletcher* was simply an example of a nuisance claim. *Hamilton* provides strong support for my first rule of thumb: 'There will never be a case where a plaintiff will succeed in *Rylands v Fletcher* without also succeeding in nuisance.' The corollary of that rule of thumb, of course, is that there is no point in having separate causes of action pleading *Rylands v Fletcher* and nuisance. The case is also supportive of the second rule of thumb that there will rarely be a case where a plaintiff would succeed in nuisance without also succeeding in negligence. In this case, the Hamiltons failed in negligence. They also failed in nuisance.

It is true that the Court of Appeal said that negligence is not an element in a nuisance action. In one sense that is a correct proposition. But, for the reasons I explained in my earlier paper, it is a mistake to think that nuisance is a better tort from the plaintiff's perspective than negligence. Nuisance comes to the same result as negligence but by a different form of words. It is tempting to repeat the argument I made on this topic 3 years ago because I remain convinced that it is right. But in the interests of time, I will press on.

Hamilton is apparently going on appeal to the Privy Council.

The final New Zealand case to which I wish to refer is *Varnier v Vector Energy Ltd*, a decision of Salmon J decided earlier this year: unreported, CP 82-99 (Auckland Registry), 16 March 2000. The facts were interesting. Mr Varnier and Ms Ravell had an interest in a unit in Birdwood Crescent in Parnell. In 1998, following the power crisis in the Auckland CBD, Vector erected the emergency power lines which are still such a blot on our landscape. These emergency power lines run very close to Mr Varnier's unit. The plaintiffs alleged that the power lines emitted electro-magnetic

fields in excess of acceptable levels and that as a consequence the unit could not be occupied for residential accommodation because occupants suffered headaches and general unwellness. It was also said that electronic equipment within the house, such as television, telephone and computers, were interfered with. The claim was brought in nuisance, trespass, negligence and *Rylands v Fletcher*. Vector applied for summary judgment on the grounds that none of the claims could succeed. Salmon J dismissed the application for summary judgment. The case should proceed to trial. It subsequently settled, which is why I can talk about it safely.

It appears from the judgment that a principal argument was whether Vector had a defence of statutory authority. The defence was said to arise from s 62 of the Electricity Act 1992. Salmon J referred to the guidelines in *Todd, The Law of Torts in New Zealand* (2nd ed, para. 9.6.2) as to when statutory authority could provide a defence in tort. He concluded that he could not be satisfied that the immunity would extend to protecting the line company from liability for this sort of damage. Again, with respect to defence counsel involved in this case, it shows the folly of unnecessary pre-trial applications.

I now wish to look at two interesting English cases. The first was *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426, a decision of the House of Lords. The case is interesting from a New Zealand perspective, partly because our very own Lord Cooke of Thorndon sat in the House of Lords – it was one of the first cases in which he did sit – and also interesting because in part he dissented. There were two appeals heard together. In the first appeal, the plaintiffs claimed that their homes were within a shadow area for television reception caused by a tower block nearly 250 metres high and over 50 metres square, which was built by the defendant developer. They said that the television reception in their homes had been adversely affected and they claimed damages in nuisance. The issue in that case was whether interference with television reception was capable of constituting an actionable private nuisance.

In the second appeal, the plaintiff residents, not all of whom were householders, claimed damages in nuisance against the defendant development corporation, London Docklands Development Corp, for the deposit of substantial quantities of dust from the construction of a road near their properties.

Both cases came before the House of Lords on preliminary questions. In the television case, the House of Lords held that interference with television reception caused by the mere presence of a building was not capable of constituting an actionable private nuisance. Subject to planning control, a person was free to build on his or her own land unrestricted by the fact that the presence of his or her building might of itself interfere with neighbours' enjoyment of their land. More was required than the mere presence of a neighbouring building to give rise to an actionable private nuisance. It followed that the plaintiff's claim in the television action was dismissed. On that action, all their Lordships were united.

The result must be right. The defendant had used their land entirely lawfully. There was nothing unreasonable in what they had done. You may say, 'Well, it's a bit tough on the plaintiffs who couldn't watch the tele', but as Lord Goff of Chieveley pointed out, there is, at least in London, the ready availability of cable television. As well, there is satellite television. And indeed in the presence case, the problem was eventually solved by the introduction by the BBC of a new relay station.

In the dust action, the issue was, who is entitled to sue in nuisance? There were a large number of plaintiffs. Some of them were householders – freeholders, tenants. Some were licensees. Other plaintiffs were people with whom householders shared their home, for example spouses or partners, or children or other relatives. All of them were claiming damages. Who could sue? At first instance Havery J held that only those with a right to exclusive possession of the relevant property could sue. The Court of Appeal disagreed. The Court of Appeal held that, provided the person was in occupation of the property as a home, he or she had capacity to sue in private nuisance. The House of Lords held by a majority that the Court of Appeal was wrong and that Havery J had been right. Lord Cooke dissented. I would hope in this country that our courts would follow Lord Cooke's dissent. His view is certainly in line with most academic commentary and also with some other New Zealand decisions. Lord Cooke referred extensively to academic writings on this topic. That provoked a rather snaky response from Lord Goff:

> 'Since preparing this opinion, I have had the opportunity of reading in draft the speech of my noble and learned friend, Lord Cooke of Thorndon, and I have noticed his citation of academic authority which supports the view that the right to sue in private nuisance in respect of interference with amenities should no longer be restricted to those who have an interest in the affected land. I would not wish it to be thought that I myself had not consulted the relevant academic writings. I have, of course, done so, as is my usual practice; and it is my practice to refer to those which I have found to be of assistance, but not to refer, critically or otherwise, to those which are not. In the present circumstances, however, I feel driven to say that I found in the academic works which I consulted little more than an assertion of the desirability of extending the right of recovery in the manner favoured by the Court of Appeal in the present case. I have to say … that I have found no analysis of the problem; and, in circumstances such as this, a crumb of analysis is worth a loaf of opinion.'

So take that, you academics!

The final case to which I wish to refer is *Lippiatt v South Gloucestershire Council* [1999] 4 All ER 149. In this case, the defendant council owned a strip of land which for 3 years was occupied by a group of travellers. The plaintiffs, who were tenant farmers of adjacent land, brought proceedings against the council in which they alleged that the travellers had frequently trespassed on their land, obstructed access to a field, and carried out various activities on it, including dumping rubbish, leaving excrement, and tethering animals. They alleged that the council had been aware of the travellers' presence on its strip of land and had tolerated it. The council moved to strike out the claim on the grounds that it had no prospect of success. The English Court of Appeal held that the claim was arguable and must go forward to trial. The Court of Appeal held that an occupier of land could be liable in the tort of nuisance for the activities on his or her licensees, even though the particular acts may have taken place on the plaintiffs' land. The point was that, on the alleged facts, the defendant council had let people gather on its land. It was that act of tolerating their presence and not forcing them to move on when complaints started coming in that potentially rendered the council legally liable in nuisance. There was in fact an old case on very similar facts to this: *Attorney-General v Corke* [1933] Ch 89. In my view, that case was correctly decided and would have been similarly determined in New Zealand.

My conclusion, therefore, based on these cases – and they are merely a sampling of cases in this area in the last 3 years – is that my rules of thumb remain intact. The practical consequences of these rules of thumb are these.

1. There is no point pleading nuisance and *Rylands v Fletcher* as separate causes of action.

2. If you don't think you'll get home in negligence, settle. Don't think nuisance will save you. The end result of the nuisance case is likely to be exactly the same as the end result of the negligence case, even if the way the judge expresses his or her reasons may differ slightly. The essential elements are the same in any of these torts: Did the defendant cause the harm? Was the harm reasonably foreseeable? Did the defendant act reasonably? Was the defendant at fault?

3. Nuisance remains a separate tort even though the result will usually be the same as in negligence. It remains essentially a mechanism for resolving disputes between neighbouring land occupiers. The exact nature of the possessory interest plaintiff and defendant must have is in some doubt in New Zealand and presumably will not be finally resolved until our Court of Appeal comes to consider the majority's views in *Hunter*.