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Trees, stormwater and rocks - how much of a nuisance can they be

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What is nuisance?

- A nuisance is the substantial and unreasonable interference with the use and enjoyment of one's land.
- Attempts to balance the right of an occupier to use their land freely with that of their neighbour to enjoy the use of their land without interference.

What is nuisance?

- Encroachment of tree roots and branches
- Flooding/stormwater
- Withdrawal of lateral support of land
- Fire/smoke
- Spread of dust
- Smells
- Noise
- Bright lights
- Spraying of pesticides

What is nuisance?

- A person is liable for a nuisance or a potential nuisance where they have:
 - Created the nuisance;
 - Permitted the nuisance to arise by failing to exercise reasonable care;
 - Continued or adopted the nuisance; or
 - Negligently failed to remedy or abate the nuisance.

- Statutory authority
- Contributory negligence
- Prescription
- Act of God
- Act of a third party
- Consent



Remedies

- Abatement
- Injunction
- Damages



Owners of Strata Plan 13218 v Woollahra Municipal Council [2002] NSWCA 92



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Owners of Strata Plan 13218 v Woollahra Municipal Council [2002] NSWCA 92

- Decision at first instance:
 - Preferred the expert evidence of the Plaintiff.
 - But the (then – now abolished) highway immunity rule where Council itself did not plant the tree meant it could not be held liable for the damage.



Owners of Strata Plan 13218 v Woollahra Municipal Council [2002] NSWCA 92

- On Appeal:
 - Powell JA – Brodie was immaterial as it was a dispute between adjacent property owners. Accepted Plaintiff's evidence and held Council had actual knowledge of the nuisance, failed to abate it and thus was liable.
 - Young CJ– Would have dismissed the appeal because he was not persuaded the Plaintiff had proved the roots caused the damage and the duty of Council as a roads authority was different to that of an adjacent property owner.
 - Rolfe AJA – Did not agree there was a different duty owed as a roads authority but he accepted the tree roots had caused the damage and Council had taken no reasonable action to abate the nuisance.



Michos v Council of the City of Botany Bay [2012] NSWSC 625





Michos v Council of the City of Botany Bay [2012] NSWSC 625

- Between 1989 and 2000 Council reimbursed the plaintiffs on at least two occasions for unblocking sewer lines.
- In 2000, heritage order created over both the plaintiffs' property and the three fig trees.
- Complaints continued, root barrier installed, damage continued to increase, blockages continued to warrant attention.
- In 2006, Council commenced a more formal process for dealing with the complaints.
- A formal response to the plaintiffs claim was given in March 2009.
- Plaintiffs commenced proceedings in October 2009.



Michos v Council of the City of Botany Bay [2012] NSWSC 625

- Mrs Michos was the only lay witness to give evidence.
- Council:
 - Conceded some tree roots had entered the plaintiffs' property;
 - Denied it was sufficient to constitute an actionable nuisance;
 - Argued it was using its own land reasonably by keeping the trees on the verge and it would be unreasonable for the trees to be removed;
 - Argued the plaintiffs had not responded reasonably to the impact of the tree roots.



Michos v Council of the City of Botany Bay [2012] NSWSC 625

- Court's decision:
 - Council found liable to the plaintiffs in both nuisance and negligence;
 - Plaintiffs had made out their claim for injunctive relief because the roots posed an actual risk;
 - Awarded compensation for the damage to the property at just under \$85,000;
 - Awarded damages of \$40,000 for loss of enjoyment;
 - Ordered the installation of a root barrier.



Michos v Council of the City of Botany Bay [2012] NSWSC 625





Michos v Council of the City of Botany Bay [2012] NSWSC 625

- [59] Consistently with the notion of give and take, a neighbour may tolerate an interference with the enjoyment of the land for various reasons; but when the interference has reached the stage that the neighbour no longer feels obliged or willing to tolerate it, the neighbour will be entitled to claim that there is an unreasonable interference with the enjoyment of the land, notwithstanding earlier tolerance; but the neighbour will not be entitled to claim damages for the interference that was tolerated prior to the complaint being made: *Orr v Ford* (1989) 167 CLR 316 at 341 per Deane J.

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Gales Holdings Pty Ltd v Tweed Shire Council (2013) 85 NSWLR 514





Gales Holdings Pty Ltd v Tweed Shire Council (2013) 85 NSWLR 514

- “If the defendant knew or ought to have known of the nuisance and the real risk of reasonably foreseeable consequential damage to the plaintiff, it had an obligation to take such positive action as a reasonable person in its position and circumstances would consider necessary to eliminate the nuisance”.



O'Brien v Pittwater Council



- Relief sought:
 - Injunction restraining Council from continuing to discharge the excess water onto the property or in the alternative, via the Norma Road drainage system.
 - In the alternative, damages for:
 - Diminution in the value of the property;
 - The additional costs associated with building a drain through her property to accommodate the increased volume of stormwater discharged on to the property;
 - Costs of maintaining the drain.

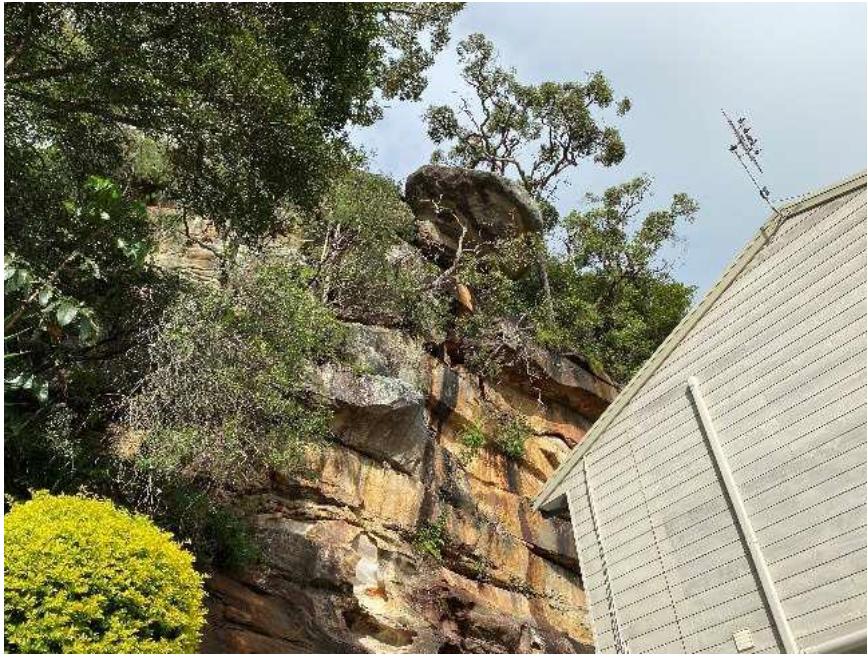


O'Brien v Pittwater Council

- The nuisance occurring by means of the Norma Road drainage system had been continued by Council and with its knowledge.
- Increased level of debris, but not an increased level of silt or noise, resulting from the increased flow of water, was a substantial interference with the use and enjoyment of the land which constituted a nuisance to which the plaintiff was entitled to a remedy.
- The nuisance could be remedied by Council placing a grate or mesh over the Norma Road pipe to prevent debris travelling onto the property.



Frost v Northern Beaches Council [2022] NSWSC1214





Frost v Northern Beaches Council [2022] NSWSC1214

- The boulder was entirely the work of nature and had not been increased or modified by Council or the Spencers.
- The plaintiff's predecessors contributed to the problem.
- The plaintiff was aware of the boulder when he purchased the property.
- The Spencers resources were limited.
- The plaintiff had the capacity to fund the works without financial hardship.
- The work would solely benefit the plaintiff.
- The plaintiff did not offer to make any contribution.



Frost v Northern Beaches Council [2022] NSWSC1214

- The plaintiff had to “clearly” prove the defendants can and in their circumstances ought to have done more than they have.
- Not satisfied that reasonable steps on the part of the defendants required that they abate the nuisance by removing and/or bolting the boulder.
- Where reasonable steps do not require the defendants to bear the whole burden, and in the absence of any offer of contribution, no breach of duty was established.



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