McLURE P:

Legal principles - private nuisance

241 For reasons that are unclear, the appellants' primary claim at trial and in the appeal is that the respondent was negligent, relying on (private) nuisance in the alternative.

242 Yet nuisance is the field of tort liability that protects an occupier's interest in the use and enjoyment of their land; its primary concern is with the reciprocal rights and duties of private individuals, usually neighbours, where there is a conflict over competing uses of land.

243 The gist of private nuisance is the interference with an occupier's use and enjoyment of their land. Public nuisance is an interference with a public or common right.

244 Nuisance covers property damage and personal injury (compendiously referred to hereafter as 'physical damage') and also extends to non-physical damage to an occupier's use and enjoyment of land, including that caused by air pollution, vibration, noise or dust. To that list, the appellants would add 'GM canola'.

245 The interference, in public and private nuisance, must be both substantial and unreasonable. This is in recognition of the fact that the existence of communities depends on the principles of give and take, and live and let live.

246 As stated in *Fleming's The Law of Torts* (9th ed):

The paramount problem in the law of nuisance is therefore to strike a tolerable balance between conflicting claims of neighbours, each invoking the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other ... Reasonableness in this context is a two-sided affair ... It is not enough to ask: is the defendant using his property in what would be a reasonable manner if he had no neighbour? The question is, is he using it reasonably, having regard to the fact that he has a neighbour? (467).

247 The test of whether an interference is unreasonable is objective. The approach to unreasonableness bears some similarity to the negligence calculus. However, unlike the tort of negligence, liability in nuisance is strict in the sense it is not *necessarily* discharged by the exercise of reasonable care, although it may be: ***Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management*** [2012] WASCA 79 [119], [126].

248 In making a judgment as to whether interference is unreasonable, regard is had to a variety of factors including the nature and extent of the harm or interference, the social or public interest value in the defendant's activity, the hypersensitivity (if any) of the user or use of the plaintiff's land, the nature of established uses in the locality, whether all reasonable precautions were taken to minimise any interference, and the type of damage suffered: ***Southern Properties*** [118].

249 An abnormally sensitive person (or use) is not entitled to additional protection by reason of his or her sensitivity: ***Munro v Southern Dairies Ltd*** [1955] VicLawRp 60; [1955] VLR 332, 335. Thus, where a use to which a plaintiff puts his land is abnormally sensitive, it would be unfair to allow the plaintiff to enlarge his rights at the expense of the defendant, unless the defendant failed to adopt a precaution which would have made it possible to avoid the damage without appreciable prejudice to his own interests: ***Hollywood Silver Fox Farm Ltd v Emmett*** [1936] 1 All ER 825; ***Robinson v Kilvert*** (1889) 41 Ch D 88.

250 In ***Robinson v Kilvert***, the defendant carried on the business of manufacturing paper boxes which required hot, dry air. He heated his premises for that purpose which raised the temperature on the plaintiff's floor above, which had the effect of diminishing the value of special quality paper

warehoused there. The action was dismissed because there would have been no damage but for the plaintiff's 'exceptionally delicate trade' (97).

251 The concept of an occupier's interest in the use and enjoyment of land is broad and comprehensive. It clearly includes an occupier's actual use of the land for agricultural purposes.

252 The law of nuisance has traditionally protected a wider range of interests than negligence. In particular, damages have been consistently awarded for pure economic loss in both public and private nuisance. There is no challenge to the trial judge's acceptance of this proposition [301]. It was expressly acknowledged by Gleeson CJ in ***Perre v Apand Pty Ltd*** [1999] HCA 36; (1999) 198 CLR 180 [14].

253 It is not contended in this case that the law of nuisance exclusively defines neighbourly relations. That is, it is not suggested the law of negligence has no application.

Disposition - negligence
382 There being a duty, breach and causation, I would uphold the appellants' claim in negligence in addition to the claim in nuisance.

NEWNES & MURPHY JJA:

Introduction
384 This is an appeal against a decision of Kenneth Martin J in which his Honour dismissed the appellants' claims against the respondent in negligence and nuisance with respect to the respondent's growth and harvesting, in late 2010, of a crop of genetically modified (GM) canola, some plant material of which was blown, after harvesting, across by wind onto the appellants' farm.

385 It is not in dispute that in the particular circumstances of this case, the GM plant material that landed on the appellants' farm posed no risk of any genetic trait transfer to any species of crop or produce on the appellants' land.

386 For the reasons which follow, we would dismiss the appeal.

The question of duty of care Specific observations on *Perre v Apand*
642 In this appeal, the appellants placed particular reliance on ***Perre v Apand Pty Ltd***.***[176]*** In ***Perre***, the defendant, Apand Pty Ltd (Apand) commanded 60% of the potato crisp industry in Australia, and its operations included research and development into new varieties of potato which would enhance its commercial interests.[177] In the course of its experimentation with new varieties of potato, it caused a variety called 'Saturna' potatoes to be grown. There was a certification process for potatoes which, if successfully completed, led to a high expectation that the resulting potato seed would be disease free. Apand did not complete the certification programme for the Saturna variety. Instead, Saturna seeds were sold to a grower in Victoria for commercial production. The grower was in an area which was never part of a certified scheme and which was susceptible to diseases. Apand subsequently caused experimental crops of Saturna potatoes to be grown in South Australia, using the Victorian crop as seed. As it transpired, the seed from Victoria was infected with a disease called bacterial wilt. The seed infected with bacterial wilt was supplied to various growers in South Australia, including the Sparnons, who were part of a grower partnership. The Sparnons suffered an outbreak of bacterial wilt on their property and sued Apand, successfully, including in negligence and breach of implied warranty.

The relevant principles
765 The essence of the wrong in private nuisance is the detraction from the occupier's enjoyment of the natural rights belonging to the occupation of the land (or in the case of easements, detraction from the enjoyment of the acquired rights annexed to the land).[297]

766 In ***Hargrave v Goldman***,[298] Windeyer J said:

In nuisance liability is founded upon a state of affairs, created, adopted or continued by one person (otherwise than in the reasonable and convenient use by him of his own land) which, to a substantial degree, harms another person ... in his enjoyment of his land.

767 However, not every detraction from the occupier's enjoyment of the rights belonging to its land will constitute an actionable nuisance. In ***Gartner v Kidman***,[299] Windeyer J referred to the observations of Bramwell B in ***Bamford v Turnley***[300] to the effect that 'acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action'.[301] Windeyer J observed that by 'conveniently done', Bramwell B meant, no doubt, 'done in a reasonable and proper manner', and that Bramwell B had contrasted such use with a use 'not unnatural nor unusual' but 'not the common and ordinary use of land'.[302]

768 While negligence is not essential to a claim in nuisance, fault of some kind is almost always necessary.[303] Fault generally involves foreseeability.[304]

769 As the learned authors of *Fleming's The Law of Torts*[305] point out:

Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, having regard to the prevailing standard of comfort of the time and place.

770 Whether a particular use of land substantially interferes with the use and enjoyment of another's land is to be judged objectively. At least in the absence of physical injury to land, the locality of the district will generally be relevant to what constitutes substantial interference with the use and enjoyment of land, and regard is had to what an ordinary average resident of that district ought reasonably to have expected under the circumstances.[306]

771 An interference which 'alone causes harm to something of an abnormal sensitiveness does not of itself constitute a nuisance': *Clerk & Lindsell on Torts*.[307] A person is not, therefore, entitled to relief merely because they may happen to be unduly sensitive to noise or smell or any other form of interference with their property: ***Munro v Southern Dairies Ltd***;[308] albeit, the position will be different if the activity causing the interference was done maliciously: ***Christie v Davey***;[309] ***Hollywood Silver Fox Farm Ltd v Emmett***.[310]