

2021 Mock Trial Round 3 – Magistrate Script

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Tony Fleming V Burwood Council

This is a civil case in which the Plaintiff claims damages and an injunction against the Defendant for private nuisance. The purpose of this trial is to determine the question of liability and damages shall be determined at a later date.

The Plaintiff will receive the following: -

1. Legal Notes
2. Cases
3. Statement of Claim
4. Statement of Defence
5. Statement of Tony Fleming
6. Statement of Alex Chen

The Defence will receive the following: -

1. Legal Notes
2. Cases
3. Statement of Claim
4. Statement of Defence
5. Statement of Parker Livermore
6. Statement of Charlie Mitchell

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LEGAL NOTES

The Plaintiff seeks an injunction and an award for damages against the Defendant who, the Plaintiff alleges is guilty of nuisance. The Plaintiff is asking for an injunction ordering the Defendant to prevent the growth of tree roots and an award for damages for repairs to pipes, a fence, a garden path, and front veranda that the Plaintiff claims have been damaged by tree roots coming from the Defendants property.

This trial is to determine the question of liability only. The issue of the quantum of damages will be determined at a later date.

The onus of proof in this matter is the balance of probabilities; section 140 Evidence Act 1995 (NSW).

The law of nuisance in effect provides that an owner of land may make any natural use of it, but he or she can be liable for damage that use causes to the property of others.

In this case, the Plaintiff is the owner of the property and is eligible to bring the action against the Defendant. There is no dispute that there has been damage to the Plaintiff's property.

The issues before the court is whether the Defendant has:

- caused unreasonable interference with the Plaintiff's enjoyment of land and
- if the damage to the Plaintiff's property is the Defendant's fault.

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LEGAL CASES

DON BRASS FOUNDRY PTY LTD V STEAD (1948) 48 SR (NSW) 482

Whether there has been "unreasonable interference" is an objective test - whether a person of ordinary habits and sensibilities in the plaintiff's position and circumstance would regard the interference with the enjoyment of the land as unreasonable; some "reasonable give and take" is involved; and another way of stating the test is whether there has been "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions" of the community

SEDLEIGH-DENFIELD V O'CALLAGHAN & ORS [1940] UKHL

The liability for a nuisance is not, at least in modern law, a strict or absolute liability. If the defendant, by himself or those for whom he is responsible, has created what constitutes a nuisance, and if it causes damage, the difficulty now being considered does not arise; but he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it. This rule seems to be in accordance with good sense and convenience. The responsibility which attaches to the occupier because he has possession and control of the property cannot logically be limited to the mere creation of the nuisance. It should extend to his conduct if, with knowledge, he leaves the nuisance on his land. The same is true if the nuisance was such that, with ordinary care in the management of his property, he should have realised the risk of its existence.

SUTHERLAND SHIRE COUNCIL V BECKER [2006] NSWCA 344

The defendant will be liable if, when the nuisance arose, the defendant did not take any reasonable means to bring it to an end when the defendant became aware, or ought to have been aware, of the existence of the nuisance, and damage results.

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Statement of Claim

COURT DETAILS

Court	DISTRICT COURT
#Division	EQUITY
#List	CIVIL
#Registry	Burwood
#Case Number	THEKO/2021

TITLE OF PROCEEDINGS

Plaintiff Tony Fleming

Defendant Burwood Council

FILING DETAILS

Filed for	PLAINTIFF
Legal Representative	S OAKLEY
#Legal Representative Reference	LREP123
Contact name and telephone	MENINGA & Co SOLICITORS Ph 02 9584 2564

TYPE OF CLAIM

TORTS –NUISANCE (PRIVATE)

RELIEF CLAIMED

1. The plaintiff claims damages in the sum of \$12 000
2. An injunction ordering the defendant to prevent the growth of the tree roots.

PLEADINGS AND PARTICULARS

The Plaintiff relies on the following facts and assertions.

1. The Plaintiff is the owner of the property at 2 Guardian Street.
2. The Plaintiff purchased the property in 1980.
3. The Defendant is the owner of the land where 3 fig trees are located.

The nuisance of the Defendant has caused the Plaintiff loss of enjoyment of their land.

PARTICULARS OF NUISANCE

4. (a) The Defendant has allowed the roots of the fig trees to spread onto the Plaintiffs property.
(b) The Plaintiff has suffered damage to his/her property as a result of the nuisance of the defendant.
(c) The Defendant failed to make the necessary repairs and maintenance of the tree to prevent the nuisance.

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PARTICULARS OF DAMAGE

5.	(a) Cracks and blockages in the sewer and stormwater pipes	\$5000
	(b) Damage to brick fence	\$1000
	(c) Damage to walkway	\$1000
	(d) Damage to veranda	\$5000

SIGNATURE OF LEGAL REPRESENTATIVE

I certify that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings.

These fees may include a hearing allocation fee.

Signature of solicitor	S Oakley
Solicitor for Plaintiffs	
Date	24 April 2021

NOTICE TO DEFENDANT

You will be in default if you do not file a defence within 28 days of being served with this statement of claim. The court may enter judgement against you without any further notice to you. The judgement may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgement entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can respond in one of the following ways:

1. **If you intend to dispute the claim:** by filing a defence and/or making a cross claim.
2. **If money is claimed, and you believe you owe the money claimed, by:**

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- Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim
 - Applying to the court for further time to pay the claim.
3. **If money is claimed, and you believe you owe part of the money claimed, by**
- Paying the plaintiff that part of the money that is claimed.
 - Filing a defence in relation to the part that you do not believe is owed.

You can get further information about what you need to do to respond to the claim from:

- The court registry
- A legal practitioner
- Law Access NSW on 1300 888 259 or at www.lawaccess.nsw.gov.au

Court forms are available on the UCPR website at www.lawlink.nsw.gov.au/ucpr or at any NSW court registry.

REGISTRY ADDRESS

Street Address 49 Fitzmaurice St Burwood NSW 2134
Postal Address PO Box 96 Burwood NSW 2134
Telephone 02 6922 0909

AFFIDAVIT VERIFYING

Name Tony Fleming
Address 2 Guardian St, Burwood
Occupation Teacher
Date 24 April 2021

I say on oath that:

1. I am the plaintiff.
2. I believe that the allegations of fact in the statement of claim are true.

SWORN at Burwood.
Signature T Fleming
Signature of witness S Oakley
Name of Witness S Oakley
Capacity of Witness Solicitor

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FURTHER DETAILS ABOUT THE PLAINTIFF

Plaintiff

Name	Tony Fleming
Address	2 Guardian Street Burwood NSW 2134

Legal Representative for the Plaintiff

Name	S Oakley
Practicing Certificate Number	135846854
Firm	Meninga & Co Solicitors
Address	Suite 3 24 Main St Burwood NSW 2134

DX address	1234 Burwood
Telephone	02 9584 2564
Fax	02 9584 2555
Email	Admin@meningasolicitors.com.au

DETAILS ABOUT DEFENDANTS

Defendant

Name	Burwood Council
Address	Elsie St Burwood NSW 2134

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DEFENCE STATE TO CLAIM

COURT DETAILS

Court	DISTRICT COURT
Division	EQUITY
List	CIVIL
Registry	BURWOOD
Case Number	THEKO/2021

TITLE OF PROCEEDINGS

Plaintiff	Tony Fleming
Defendant	Burwood Council

FILING DETAILS

Filed for	Defendant
Legal Representative	J DALEY
Legal representative reference	LREPO5
Contact Name	J DALEY
Telephone	02 9587 4569

PLEADINGS AND PARTICULARS

1. The Defendant admits paragraph 1, 3 of the Plaintiff's Statement of Claim
2. The Defendant denies the contents of paragraphs 4, 5 of the Plaintiffs Statement of Claim
3. The Defendant does not know and cannot admit paragraph 2 of the Plaintiff's Statement of Claim
4. The Defendant denies the Plaintiffs entitlement to costs and damages
5. Alternatively, the Defendant says that it took all necessary steps to stop the nuisance.
6. In the further alternative, the Defendant says that it was the Plaintiffs actions that caused the further damage.

SIGNATURE OF LEGAL REPRESENTATIVE

This defence does not require a certificate under section 347 of the Legal Profession Act 2004.

I certify that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature J Daley
Capacity Solicitor on Record

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Date of Signature 26 June 2021

AFFIDAVIT VERIFYING

Name Parker Livermore (on behalf Burwood Council)
Address 4 Blanch St Burwood
Occupation Mayor
Date 25 April 2021

I Parker Livermore affirm that:

1. I believe that the allegations of fact contained in the defence are true.
2. I believe that the allegations of fact that are denied in the defence are untrue.
3. After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

AFFIRMED at Burwood.
Signature of deponent P Livermore
Signature of witness J Daley
Name of Witness Jeremy Daley
Address of Witness 38 North Road, Burwood NSW 2134
Capacity of Witness Solicitor

FURTHER DETAILS ABOUT FILING PARTY

Filing Party
Name Parker Livermore (on Behalf of Burwood Council)
Address 4 Blanch St,
BURWOOD NSW 2134

Legal Representative for filing party

Name J Daley
Practicing certificate number 1358765843
Firm J Daley & Associates
38 North Road
BURWOOD NSW 2134
DX Address 1365 Burwood
Telephone 02 9587 4569
Fax 02 9587 4568
Email office@jdassoc.com.au

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AFFIDAVIT OF PLAINTIFF TONY FLEMING

1. My name is Tony Fleming, I live at 2 Guardian St Burwood.
2. I have lived in this house since I bought it in 1980.
3. The house is on the corner and out the front on the footpath are 3 really large Fig trees. While I really enjoy the privacy the trees offer, their roots are causing havoc with my property.
4. The roots of the trees have caused the brick fence at the front to lift and start to fall apart, the walkway to my front door is not only coming apart but is starting to lift up and is a major trip hazard. The front veranda is cracking, and I have constant plumbing issues due to the tree roots blocking the pipes.
5. I have been asking the council for years to do something about the trees, but they refuse. It is costing me a fortune in repairs and plumbing bills and that is why I am here today.
6. I believe the council should be held responsible and be made to pay for the repairs to my place and remove the trees. After years of trouble, I have finally had enough.
7. I have written several letters and the Mayor always responds with a letter claiming to be looking into it, but they do very little. Every now and then the council engineer Charlie Mitchell shows up to inspect my property, but not much else is done.
8. The council hide behind the fact that the trees are part of a heritage order, something about protecting a corner streetscape, but I think they use this as an excuse not to remove the trees. I mean protecting a view of a street is just ridiculous.
9. The only effort the council has ever made to fix the problem was a few years ago when they sent some workers around to install a root blocker along the fence line. I told them when they were digging the hole that it was not deep enough, but they didn't seem to care, and I was not so politely told to mind my own business.
10. Even now when the engineer comes to inspect the damage the roots are causing, he/she pays little attention to the root blocker as it is obvious it was poorly installed and has holes in it that allow the roots to come through.
11. The only response that Charlie gives in response to my accusations that the root blocker was poorly installed is to blame me for the damage.
12. Charlie claims that when making repairs to the fence, I have put holes in the root blocker which is false as I went nowhere near the blocker when repairing the fence. Why would I damage something that is protecting my property?
13. My plumber Alex Chen now says that roots have gone completely through my pipes and they are all going to need to be replaced, costing over \$5000, if the root blocker had worked then I wouldn't have this problem.

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AFFIDAVIT OF PLAINTIFF ALEX CHEN

1. My name is Alex Chen. I am a qualified plumber, although over the past few years business has been tough so I have also spread my business and become a general handy person as well.
2. For a number of years now I have been attending to the plumbing issues of Mr/Mrs Fleming. It started off as just your usual blocked pipes and leaky taps, but eventually the blocked pipes became more and more frequent, so I used an electric eel down the pipes to see what the issue was.
3. I was surprised to see the amount of damage that the roots had caused to the pipes. I managed to clear the roots but told Mr/Mrs Fleming that something more permanent needed to be done as the roots would only continue to cause problems and would eventually block the pipes permanently.
4. Mr/Mrs Fleming then showed me some of the damage to the fence, walkway and veranda and it confirmed that the roots from the Fig trees on the footpath were causing havoc with not only the pipes but the entire front yard of Mr/Mrs Fleming.
5. I advised Mr/Mrs Fleming to write to the council and have them remove the trees. He/she informed me that the trees was part of a heritage order and could not be removed, but council were installing a root blocker.
6. I told Mr/Mrs Fleming that once the root blocker was installed, I would come back and do the repairs to the fence and walkway, but I would not be able to repair the veranda as this was more difficult that I was able to do. As part of my repair work, I often fix fences and walkways, but verandas are a part of the structure of a house, and this is a little more complicated.
7. When the root blocker was installed, I returned to the property to fix the fence and walkway. As I was doing the repairs to the fence I could see where the root blocker had been installed and it did not look right. As I mentioned to Mr/Mrs Fleming my concerns, he/she replied, "I told the council when they were putting it in they were not digging deep enough but they did not listen".
8. I made the repairs to the fence and walkway and suggested the Mr/Mrs Fleming send the invoice to the council.
9. A couple of months later Mr/Mrs Fleming called me to come and once again look at the pipes as they were blocked. I again put the electric eel down the pipes to see that they were completely overrun by tree roots once again. I also noticed that they fence and walkway I had not long repaired were once again in need of repair.
10. Mr/Mrs Fleming said "the council are claiming I damaged the root blocker and are refusing to fix it". I told Mr/Mrs Fleming to contact a lawyer and take action against the council to get them to fix the problem for good.

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AFFIDAVIT OF DEFENCE PARKER LIVERMORE

1. My name is Parker Livermore, I am the Mayor of Burwood Shire.
2. I have been the Mayor of Burwood for 12 years now.
3. Over the years I have had a very good time as Mayor, with very little going wrong and no major issues. The community is very happy with me as Mayor, and I guess that is why they keep voting for me.
4. The biggest issues I have had to deal with are complaints about potholes that don't get fixed fast enough. Well, that and the complaint from Mr/Mrs Fleming.
5. I have been receiving complaints from Mr/Mrs Fleming for almost my entire time as Mayor. Complaints are received almost weekly, and I do my best to respond, but it takes time to investigate these things. I mean we can't just pay for things without fully looking into why the damage has occurred.
6. The trees that Mr/Mr Fleming wanted removed are subject to a heritage protection order. These orders are put in place to help keep the street views in the same condition they were originally planned to be. This means it is not a simple solution of removing the trees.
7. For every complaint I received from Mr/Mrs Fleming I had our head engineer investigate it. Once Charlie confirmed that the tree roots had caused some damage to Mr/Mrs Flemings property, I asked to be provided with options of how to fix it.
8. With removing the trees not an option, I was told the best solution was to install a root blocker along the fence line of Mr/Mrs Fleming's property. To prevent any further damage to Mr/Mrs Fleming's property I ordered for our maintenance team to install the root blocker.
9. Having installed the root blocker, I was shocked to receive another letter from Mr/Mrs Fleming claiming further damage. I asked Charlie to go and investigate and received a report stating that the root blocker had been damaged, allowing for the roots to grow through and onto the property of Mr/Mrs Fleming.
10. After being told that the damage of the root blocker was caused by Mr/Mrs Fleming I wrote to him/her and stated that the Council would not be paying for any further repairs or damage to his/her property and recommended he/she fix the holes in the root blocker.
11. This was the last communication I had with Mr/Mrs Fleming until I received notification of the legal action. Why should taxpayer's money be used to repair something that was damaged by Mr/Mrs Fleming and is not the fault of the council?
12. I mean we did our job and repaired the original problem and if the root blocker had not been damaged then there would not have been any further spreading of the tree roots and no further damage.

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AFFIDAVIT OF DEFENCE CHARLIE MITCHELL

1. My name is Charlie Mitchell. I am the chief engineer and head of maintenance for the Burwood Council.
2. I have been working with Burwood Council for 10 years now and Parker Livermore has been the Mayor for the whole time.
3. Work with the council is easy, mainly managing the road maintenance and gardens. All runs smoothly, and we are on top of all repairs, complaints and maintenance issues. I have a good team who have been working with the council for a long time and work hard.
4. When we first started receiving complaints about the trees outside 2 Guardian Street, I investigated the situation. It was clear that the damage was caused by the tree roots on the footpath and that something needed to be done.
5. As we have such a good reputation in the council maintenance department, as soon as I discover a problem, I want it fixed straightaway.
6. I informed the mayor of the damage and suggested that due to the Heritage order on the trees, then the best solution would be to install a root blocker. With the Mayor's permission I arranged for the installation.
7. Installing root blockers is something my team and I do on a regular basis and we are very experienced in doing it. But installing the one at Guardian Street was a real pain. The home-owner Mr/Mrs Fleming was hassling my team the whole time, telling them they were not doing their job properly.
8. I informed Mr/Mrs Fleming we do this sort of work all the time and know what we are doing, but he/she did not let up, supervising practically all day and making sure all was done correctly. It was a relief when we finally finished and could leave and get some peace and quiet.
9. I thought that would be the last I would ever have to deal with the property on Guardian Street, so I was surprised when the Mayor said that more damage had occurred. I could not believe that it was possible for more root damage, so went back to the property to inspect.
10. When I arrived, I was shocked to see that the roots had caused the fence and pathway to start to lift again and that the pipes were also blocked. I inspected the root blocker, which could be seen as the fence was lifting and noticed big holes in it where the roots had come through. Knowing that it is not possible for tree roots to break through I asked Mr/Mrs Fleming about the repairs that had been made.
11. I was not surprised when I was informed that a plumber had repaired the fence and walkway as it was not good work. The person who did the work obviously did not know what they were doing, and because of that they damaged the root blocker. By trying to save money and get a handyman instead of a professional bricklayer to fix the fence and path, Mr/Mrs Fleming allowed for damage to the root blocker.
12. I told the Mayor what I had found and that I would recommend not paying for any further repairs as it was not the councils fault. The original damage may have been from the roots of the fig tree, but we fixed that and if a professional had repaired the fence and path no other damage would have occurred.