

Nuisance by Tree - Who's the Guilty Tree?

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Introduction:

1. The Australian backyard is inseparable from the great Australian dream. A place of recreation and entertainment, and the family playground, it is sacred in our national conscience. But backyards, and front yards too, are also host to gardens, containing all manner of trees and plant life. And there is a great deal of diversity to be found, or perhaps mismatching of species, as is hinted at in the chorus to "Home Among the Gum Trees":

Give me a home among the gum trees

With lots of plum trees...

2. Backyards are also fertile ground for actions in nuisance. Trees tend to grow over time, if not above the surface, then certainly below. In search of moisture, a tree's root networks can extend considerable distances, and some species display considerable aggression in doing so. If not restrained by underground root barriers, roots networks can starve other plant life, or cause drying in soil. That can undermine structures constructed above.
3. Growth takes time and, depending on the species, it is often some years later that the seeds of nuisance mature into a full dispute, by which time the relevant properties have changed hands, perhaps several times.

4. Time leads to complications, in which removing a tree may not be an easy option. For example, a tree might be an important aesthetic feature of a property (a giant *Moreton bay fig tree*, opposite the Melbourne Grammar School's Grimwade House campus, comes to mind – more on that later), from which the owners are understandably reluctant to part. Or, because from a moral perspective, the owners of a nuisance tree are faultless, and feel they should not have to incur the cost of abatement,¹ which after a period of some decades, and depending on the scale of the tree, might be considerable.
5. While in bygone times, what trees could be planted on private property, and where they could be planted, was the prerogative of the owner, it now ceases to be so if that choice interferes with a neighbour enjoying their own property. That is why, in planning a new garden, an arborist should be consulted (to determine what can be planted in what location), and why local government authorities have strict policies concerning what trees may be located on nature strips. In other words, there is reasoning which underpins the horrendous aesthetic taste of your local Council.
6. Accordingly, while the inside might be the foremost concern of those who attend home inspections, unless the Lot is to be cleared for redevelopment, it would be unwise not to inspect the backyard also, and the potential legal risks contained therein.
7. This short paper considers the applicable principles of nuisance for trees planted on private property, with attention to 'adoption' and 'continuation,' through which subsequent owners and occupiers are held responsible for the horticultural choices of their predecessors in title (law speak for 'previous owner').

¹ It should be noted the word 'abatement' describes both ending a nuisance in general, as well as the 'right of abatement' of a plaintiff to end a nuisance at their own expense, discussed later.

8. The principles discussed are drawn from *Robson v Leischke* (2008) 72 NSWLR 98, in the NSW Land and Environment Court, and its citations are incorporated as references.
9. Trees are a good case study in nuisance because of the peculiar form of nuisance they represent. Unlike, for example, chattels abandoned on a private road or a dwelling that encroaches over the boundary, the damage trees cause is not always visible, nor is it always obvious. Moreover, it can materialise over time, damage occurring slowly, not instantaneously. It is also an area that evokes great passion as between property owners.
10. And unlike other instances of nuisance, examples of nuisance trees often give rise to a parallel duty of care, meaning a person planting a tree, or failing to maintain a tree, might also be held accountable in negligence for their acts or omissions.

A Recap on Nuisance:

11. Common law nuisance is the principal mechanism for resolving disputes over invasive trees in Victoria; recourse can also be had to negligence and trespass. That is in contrast to New South Wales and Queensland, where legislation dealing specifically with neighbourhood disputes over trees has been enacted.²
12. To recall, **three elements** complete an action for private nuisance:
 - (a) the defendant has *interfered* with a property right of the plaintiff;
 - (b) the interference was both '*substantial and unreasonable*'; and
 - (c) the plaintiff has title to sue (this extends to tenants).
13. The second element – a substantial and unreasonable **interference** – will determine what action is appropriate.

² *Trees (Disputes Between Neighbours) Act* (NSW) 2006; *Neighbourhood Disputes (Dividing Fences and Trees) Act* 2011 (Qld)

14. Three forms of interference are sufficient to constitute a nuisance:

- (a) encroachment on the neighbour's land, short of trespass;
- (b) physical damage to the neighbour's land or any building, works or vegetation on it; and
- (c) unduly interfering with the comfortable and convenient enjoyment of a neighbour's land.³

Most examples of nuisance trees fall under the first and second forms.

15. Encroachment alone, it should be noted, provides no action in the absence of damage; were it otherwise, arborists' days would be occupied almost entirely by anticipatory pruning. A *quia timet* injunction might, however, be sought if an apprehension of damage exists. The apprehended damage must be imminent, and likely to be substantial or irreparable, in the sense there is a 'real appreciable probability' of that damage.⁴

16. For example, in *Asman v MaClurcan*,⁵ Young J declined the award of a mandatory injunction, while noting that if two three-year old Jacaranda trees were left alone, then due to the soil conditions, their roots would likely – in ten to fifteen years time, if nothing were done – penetrate the sandstone on which the plaintiff's house was founded.

17. A defendant must also have actual or imputed knowledge of the nuisance, even if he or she did not create it.⁶ More on this later.

18. Even if a defendant is aware of a nuisance, a plaintiff may be denied relief if the defendant shows they took 'reasonable steps' to prevent 'reasonably foreseeable' damage that might stem from the nuisance. In this vein, the usual principles of causation apply.

³ *Robson v Leischke* (2008) 72 NSWLR 98, 296 (Preston J)

⁴ *Ibid* 297

⁵ (1985) 3 BPR 9592

⁶ *Noble v Harrison* [1926] 2 KB 332, 342 (Rowlatt J)

19. When it is that damage is considered reasonably foreseeable, and what steps are reasonable, depends on the particular facts of the case. For trees, this can include, for example, the species of tree, where it is planted, and on the surrounding soil conditions.

Nuisances Caused by Trees:

20. Priestly J in *Robson* recalled different examples where invasive trees constituted a nuisance. It should be noted, however, that it is 'highly unusual' for simply planting a tree to be unreasonable (this is discussed later).⁷

21. Examples where **overhanging branches** constitute nuisance include:⁸

- (a) branches of a yew tree, the leaves and branches of which were poisonous to stock, projected over the neighbour's land where they were eaten by the neighbour's horse, which later died from poisoning;⁹ but there was no nuisance where the branches of a yew tree did not overhang the neighbour's property and the neighbour's horse instead gained access to the tree wholly on the defendant's property and ate the leaves and died;¹⁰
- (b) branches of a tree overhanging the neighbour's land interfered with the growth of fruit trees on the neighbour's land, the injury being a natural consequence of the defendant's trees being allowed to overhang;¹¹
- (c) branches of trees projected to such an extent over the neighbour's land that they brushed against their house, so disturbing them in their sleep, and leaves from the overhanging branches blocked the downpipe on the house causing two rooms to be flooded;¹² and
- (d) branches of a row of pine trees, planted close to the boundary, overhung the neighbour's property and, by reason of the encroachment, deposited

⁷ *Robson* (2008) 72 NSWLR 98, 299 (Preston J) ('*Robson*')

⁸ *Ibid* 297-8

⁹ *Crowhurst v Amersham Burial Board* (1878) 4 Ex D 5

¹⁰ *Ponting v Noakes* [1894] 2 QB 281 at 286, 288

¹¹ *Smith v Giddy* [1904] 2 KB 448 at 450, 451

¹² *Rose v Equity Boot Company Ltd* (1913) 32 NZLR 677 ('*Rose*')

pine needles and rubbish on the neighbour's property which corrupted and poisoned the soil.¹³

22. It should be noted that overhanging branches do not constitute a nuisance in and of themselves; they might even be desirable, such as for shade. If an owner feels otherwise, they can cut back branches that overhang, and can request access to the neighbouring property, if appropriate (a nuisance might arise if access is refused).¹⁴ For unlike roots, which physically enter the soil belonging of the neighbouring property, branches do not so 'interfere.'

23. In this respect, it should be noted that a plaintiff **must take reasonable steps to mitigate their loss**. This is distinct from exercising a right of abatement, in which a plaintiff themselves, rather than initiating proceedings, takes steps – which a defendant could be compelled to take – to end a nuisance. The law does not favour abatement, particularly if it requires entry to a defendant's land (an option that must be supported by 'strong reasons'.)¹⁵

24. It is suggested that what is reasonable in mitigation depends on cost. For blocked drains or gutters, it would not be unreasonable for a plaintiff to clear the leaves themselves, as this is not costly (though perhaps annoying) unless such clearing were to be constant and burdensome. Indeed, if a tree predated a dwelling – particularly if a plaintiff has built close to a boundary – a plaintiff might be said to have accepted this, though not if the roots were causing problems.

25. While **costs incurred by way of abatement by a plaintiff are not recoverable**, there is an exception. If steps taken in abatement would equally be reasonable if taken in mitigation of damages, and do not end the nuisance, or involve entry or damage to the defendant's land, a plaintiff may recover those costs.¹⁶ It was noted, in *The Proprietors — Strata Plan No 14198 v Cowell*, however, that a

¹³ *Mandeno v Brown; Mandeno v Wilkie* [1952] NZLR 447; see also *Woodnorth v Holdgate* [1955] NZLR 552 at 554-555

¹⁴ *Rose* (1913) 32 NZLR 677, 679

¹⁵ *Traian v Ware* [1957] VR 200, 207 (Martin J)

¹⁶ *The Proprietors — Strata Plan No 14198 v Cowell* (1989) 74 LGRA 301, 302 ('Cowell')

defendant should receive notice of the proposed actions before they are taken, with some specificity as to the nuisance (there, the specificity was not required, because the defendants were uncooperative). The plaintiff there recovered the costs of severing the nuisance tree's roots, but not removing or poisoning the trees (which took place before trial). Damages for rectification of the dwelling were also awarded.

26. If a tree is required to be lopped, to end the dropping of large branches or needles onto the plaintiff's property, a defendant would not provide an answer by suggesting the plaintiff could end the nuisance themselves.¹⁷

27. Examples where **encroaching roots** constituted a nuisance include:¹⁸

- (a) roots encroached into the neighbour's property extracting moisture from the ground, causing shrinkage of the soil, undermining the foundations, and/or causing cracking or subsidence of the buildings on the neighbour's land;¹⁹
- (b) encroaching roots damaged storm water and sewerage drains;²⁰
- (c) encroaching roots damaged retaining walls;²¹
- (d) encroaching roots caused damage to a neighbour's lawn and patio and interfered with their enjoyment of their land;²²
- (e) encroaching roots caused substantial interference with a neighbour's

¹⁷ *Mandeno* [1952] NZLR 447

¹⁸ *Robson* (2008) 72 NSWLR 98, 298-9 (Preston J)

¹⁹ *Butler v Standard Telephones & Cables Ltd* [1940] 1 KB 399^[L]; *McCombe v Read* [1955] 2 QB 429; *Davey v Harrow Corporation* [1958] 1 QB 60^[L]; *King v Taylor* (1976) 238 EG 265; *Masters v Brent LBC* [1978] QB 841; *Solloway v Hampshire County Council* (1981) 79 LGR (Eng) 449^[L]; *Barton v Chhibber* [1988] Aust Torts Reports 80-185, 67,745; *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478; 74 LGRA 301; *Richmond City Council v Scantelbury* [1991] 2 VR 38; (1988) 68 LGRA 49; *Hurst v Hampshire County Council* (1997) 96 LGR (Eng) 27; *Delaware Mansions Ltd v Westminster City Council*; *Valherie v Strata Corporation No 1841* [2004] SASC 170; *South Australia v Simionato* (2005) 143 LGRA 128^[L]

²⁰ *Morgan v Khyatt* [1964] 1 AC 475; *Peisley v Ashfield Municipal Council* (1970) 21 LGRA 243 (finding of actionable nuisance affirmed in *Peisley v Ashfield Municipal Council* (1971) 23 LGRA 166); *King v Taylor* (1976) 238 EG 265^[L]; *Young v Wheeler* [1987] Aust Torts Reports 68, 966 (80-126) at 68, 966 (potential threat of damage)

²¹ *Elliott v Islington London Borough Council* (1990) 10 EG 145 at 417 (and even when the roots do not encroach, but exert pressure behind a retaining wall on the common boundary, a nuisance might be caused: *Owners-Strata Plan No 13218 v Woollahra Municipal Council* (2002) 121 LGRA 117 at [16], [22] per Powell JA but contra at [52], [53] per Young CJ in Eq)

²² *Mendez v Palazzi* (1976) 12 OR (2d) 270

gardening operations.²³

28. It would not surprise the reader that roots present a more damaging form of nuisance than branches.

29. *Hiss v Galea* [2012] VCC 2010 considered the effect that a row of *Bhutan cypress* trees had on the footings of a neighbouring concrete slab, although the ruling contains quite a technical discussion. Of interest too is that, prior to construction, existing substantial trees were removed from the property, leading to heave from the rehydration of soils, with moisture no longer absorbed by the roots.

30. **Failing to maintain** a tree is another example. In *Gibson v Denton*, in the State of New York, a defendant was held liable in nuisance where the tree had been blown over in the following circumstances:²⁴

The pine tree had been cut into near the ground, and at that place was only about eighteen inches in diameter; it had also been blazed, and on that part there was no bark. About one-half of the trunk, eight feet up and down, was without bark, and the wood appeared dead. The lower limbs were decayed, and other limbs did not appear like those of other pine trees – not as bright as they ought to have been. The trunk was one-third or more decayed. It stood fully exposed to the wind. This condition had existed several years before the tree fell, ***and its unsound condition was apparent.*** (*My italics*)

[The] Plaintiff twice, in 1891 and also once in August 1892, requested the defendant to remove the tree. He informed her of its condition, told her it had been blazed, cut into, was rotten, and that the occupants of his house were afraid of it. The defendant promised to attend to it, but neglected to do so. During a heavy gale the tree was blown down, damaging the plaintiff's house to the amount for which he recovered judgment.

²³ *Woodnorth v Holdgate; Roud v Vincent* [1958] NZLR 794

²⁴ 38 NYS 554 (1896), 199-200; see also *Quinn v Scott* [1965] 1 WLR 1004

31. The Court there compared the tree to an artificial nuisance, such as a dilapidated structure, whose collapse would undoubtedly entitle the plaintiff to damages.

32. It could be said, in that respect, an occupier must maintain any trees growing on their land, and if their condition is poor, remove them.

33. Is damage always foreseeable? In *Caminer*, a tree had appeared sound and healthy, but after it fell, the roots were found to have root rot. In the circumstances, however, it could not have been detected:

The tree was a large, well-grown elm, between 120 and 130 years old. After it fell it was found that three of its roots were badly affected by a disease known as elm butt rot. The other three roots showed signs of rot, but were not so badly affected. The disease was of long standing, and must have been present in the roots many years before the respondents took possession of the property. The roots had not been cut at the time when the tree fell and there was no indication from its condition above ground that it was affected by this disease which had not taken a normal course inasmuch as the fungus which caused it was working out sideways along the main roots and had not affected the trunk. ***There was nothing, therefore, to indicate by external examination that the tree was in any way diseased and even if the trunk had been bored it was very unlikely that the existence of the disease would have been discovered.***²⁵ (My italics)

34. At a more general level, if a tree is simply planted in the wrong location, **natural growth** might constitute a nuisance. For example, if planted next to a wooden fence, the trunk itself might cause the lifting of an adjacent structure, such as the fence, or undermine the foundations.

Planting a Nuisance:

²⁵ *Caminer v Northern & London Investment Trust Ltd* [1951] AC 88, 488 (Porter LJ)

35. When does planting a tree found an action in nuisance?
36. As mentioned, planting a tree does not, of itself, make the defendant an 'unreasonable user' of his neighbour's land. That depends on the species of tree, and where it is planted in relation to the neighbouring property.²⁶ For example, planting pine trees close to the boundary in *Mandeno* were not a 'natural use' of the land, in New Zealand (compared to planting them for shelter).²⁷ This is because the pine trees were likely to overhang, or have components fall onto, the neighbour's property.
37. More likely is that the actions of a defendant in relation to an existing tree will create a nuisance.
38. A defendant can also create a nuisance by carrying out works to a tree (such as inappropriate lopping, pruning or cutting of branches from the roots of the tree) or to its surrounds (such as changing the soil levels or hydrological or nutrient conditions) or poisoning the tree.²⁸ In one matter I encountered, a treehouse was established in a large *Eucalyptus cinerea*, wooden planks having been nailed into the trunk of the tree. This was likely to adversely affect its health.
39. A defendant so acting is responsible—
- (a) for all foreseeable consequences, if their actions were an unreasonable use; and
 - (b) all reasonably foreseeable consequences if they knew, or should have known, that damage to the neighbouring property was reasonably foreseeable, and failed '*to take such positive action as a reasonable person, in his position and circumstances, would have taken to prevent such damage.*'²⁹

²⁶ *Robson* (2008) 72 NSWLR 98, 299 (Preston J)

²⁷ *Mandeno* [1952] NZLR 447, 499-50 (O'Leary CJ)

²⁸ *Robson* (2008) 72 NSWLR 98, 301 (Preston J)

²⁹ *Ibid* 301

Adoption and Continuation:

40. There is a conceptual distinction between ‘adopting’ and ‘continuing’ a nuisance (or potential nuisance). For trees, it is more probable that a defendant will have ‘continued’ a nuisance than adopted it, simply because fewer factual situations permit the nuisance caused by trees to be adopted.
41. Adoption and continuation can extend responsibility for nuisance not only where ownership or occupation changes, but also where a third person (or *force majeure*) has caused the nuisance.³⁰ For trees, this covers the situation where a tree is self-sown (that is, where a seed has come to germinate in a particular spot, after a journey on the wind, or upon its expulsion from passing avifauna), or a tree that is damaged by a trespasser, for example, by ringbarking.
42. In Robson J's view, where adoption or continuation is made out, a defendant will be liable because they are ‘negligent in not abating it.’³¹
43. An occupier of land *continues* a nuisance if, with actual or *constructive* knowledge of its existence, they fail, within a reasonable period of time, to take reasonable measures to bring it to an end.³² In other words, **actual or imputed knowledge** is the additional element.
44. Robson J explains that, if a defendant occupying land knew or ought to have known of the unsuitability of the tree, **such as because of the kind of tree or its location or condition or health or other reason**, and the possibility of damage occurring in consequence is a real risk, the defendant would be under a duty to take such positive action as a reasonable person, in his position and circumstances, would consider necessary to eliminate the nuisance.

³⁰ *Sedleigh-Denfield v O'Callaghan* [1940] AC 8, 894 (Viscount Maugham) (*‘Sedleigh-Denfield’*)

³¹ *Robson* (2008) 72 NSWLR 98, 299 (Preston J)

³² *Ibid* 295

The defendant would be liable for nuisance if he fails to do so and the tree causes damage.³³

45. An occupier of land *adopts* a nuisance if they make use of '*the erection, building, bank or artificial contrivance*' forming the nuisance (per Viscount Maugham).³⁴

Hodgson J, with reference to Viscount Maugham, stated the nuisance from a tree might also be 'adopted';³⁵ Robson J extended this to 'natural object.'³⁶

46. Examples of 'adopting' a nuisance tree would include using it for privacy or noise abatement.³⁷ It is more likely, however, that such a nuisance is thereby continued, rather than adopted.

47. In the context of residential properties in inner-city Melbourne (or other cities, for that matter), whose scale is far from a pre-Elizabethan mansion, it might be said that continuation is almost automatic. That said, it would not make a new owner solely responsible, where a predecessor in title could have acted to prevent the damage, and did nothing.

48. *Cowell*, which is discussed in more detail below, is an unusual example, in that the nuisance trees predated the relevant dwelling, a two-storey brick building divided into 8 units, with concrete footings laid on a clay sub-soil. While the trees had no adverse effect on the former dwelling, the construction of the units was such that the roots became a nuisance, blocking the drains, and caused cracking to appear in the driveway and walls of the units in proximity. That resulted from shrinkage in the clay sub-soil.

49. In other words, the plaintiffs themselves created the nuisance.³⁸

³³ Ibid 301-2

³⁴ Ibid 296; *Sedleigh-Denfield* [1940] AC 8, 894 (Viscount Maugham)

³⁵ *Cowell* (1989) 74 LGRA 301, 307 (Hodgson J)

³⁶ *Robson* (2008) 72 NSWLR 98, 296 (Preston J)

³⁷ *Cowell* (1989) 74 LGRA 301, 307 (Hodgson J)

³⁸ Ibid 306

50. What *Cowell* does not indicate is that, where a new dwelling is constructed, a defendant must assess the impact of any trees on the new development:

They caused damage... it would seem, ***because of the way in which the units were erected and the concreting of the area between the boundary and the units***. I do not think it was a matter that the defendants should have anticipated, in those circumstances, that the trees would cause damage.³⁹ (*My italics*)

51. If it were thought the responsibilities of an occupier of land are not unlike a duty of care, where continuation is concerned, that would not be incorrect.

Regulatory Obstacles:

52. There are awkward situations in which a tree cannot be removed, thanks to the power of government to issue tree protection orders (or however else described).

53. Is a defendant absolved of responsibility? Not exactly.

54. A tree protection order existed in *Cowell*,⁴⁰ which covered the nuisance tree. In April 1985, the Council gave permission to sever the roots of seven *Camphor laurel* at the common boundary line. After requesting that the defendants abate the nuisance, to no avail, proceedings were initiated in August 1985. The earliest the defendants were said to have knowledge of the nuisance was February 1983, though the extent of that knowledge is unclear from the judgment.⁴¹ Indeed, the trees predated the unit development on the plaintiff's land, and would not have caused problems but for the nature of the construction (the previous dwelling on the land would not have been affected).

³⁹ Ibid 307

⁴⁰ (1989) 74 LGRA 301

⁴¹ Ibid 307

55. When the plaintiff had first written to the Council in 1984, seeking permission to sever the tree roots, the defendants were opposed, saying they wanted to retain the trees for privacy.⁴² The preservation order was revoked in February 1986.

56. Hodgson J held, taking the plaintiff's case at its highest, that 'the most that could have been expected' from the defendants was for them to seek permission from the Council, in early 1983, and then sever the roots (or remove the trees) when that permission was given. Even if that occurred, the plaintiff could not have recovered for damage caused before confirming the nuisance with the defendants.

57. While his Honour did not criticise their opposition expressly, his view was to the effect that, on receiving actual knowledge of a nuisance (in an appropriate level of detail), a defendant may not oppose a plaintiff's efforts to remove regulatory obstacles to abatement, and may be required to support those efforts.

58. In any event, despite not identifying anything specific, his Honour said that the defendants should have done something to abate the nuisance prior to mid-1985: it may have been sufficient for them to sever the roots at the boundary, and undertake to keep them within the boundary, but they did nothing.

59. What if the complainant were the Council?

60. Few footpaths or roads are not overhung by a tree that emanates from private property. In those circumstances, a Council will often order the property owner, under its bylaws, to take steps to prune or lop back the offending tree. If a tree protection order exists, the defendant is still responsible.

61. But roots, which may damage footpaths or roads, or the mere presence of a large tree, are arguably different. An anecdote I recall, concerned the abovementioned,

⁴² Ibid 303

giant *Moreton Bay fig tree*. The Council had attached a protection order to the tree some years before. A council officer later wrote to the owner, noting that the tree roots had damaged the footpath, and requested rectification at the expense of the owner.

62. The owner reminded the Council of the protection order, and indicated that so long as the tree was protected, meaning it could not be removed, the owner was not responsible for any damage to the footpath, which Council should repair at its own expense. The Council has since done so.

63. While this anecdote is not binding precedent, it does illustrate a principle that, if a tree causes damage to a public asset or facility, but the owner cannot abate that nuisance because of a protection order (or other law), a local authority cannot both maintain the encumbrance and demand rectification from an owner.

64. Such could also be true for damage to a neighbouring property if the nuisance tree cannot be removed, by virtue of a restrictive covenant, in that the nuisance could not be abated while the encumbrance is maintained.

65. If an authority declines to remove an encumbrance, however, and the damage is caused to a neighbouring property, the outcome is less clear; in *Cowell*, Council agreed to remove the protection order, so from that time, the defendants became liable for resulting property damage. But if the Council declined, it is unclear what the defendants might have done, beyond seeking judicial review of the order (the cost of which would be quite high).

Limitation of Actions and Proportionate Liability:

66. Who is responsible if a nuisance tree was located on a property that had different owners and/or occupiers when the alleged damage occurred? Is the new owner entirely responsible?

67. For property damage, a plaintiff may bring an action for nuisance within six years of the damage arising (three years if personal injury is alleged).⁴³
68. As damage from nuisance trees will accrue over time, it is important to show that the damage took place within the limitation period, and was not caused beforehand. Moreover, it must also be shown that the relevant owner or occupier was aware of the nuisance at all material times, and failed to abate it.
69. Nuisance is apportionable under the *Wrongs Act 1958*,⁴⁴ meaning all persons with some responsibility for the loss and damage can be held responsible to their level, as concurrent wrongdoers, defined as two or more persons '*whose acts or omissions caused, independently of each other or jointly, the loss or damage.*'⁴⁵
70. This means – depending on the facts of the case, in particular their knowledge of the nuisance at material times (and options available to them) – that current and former owners and occupiers will be liable for loss and damage in an amount that is proportionate to the loss and damage which they were responsible for, and they should be made parties to any proceeding.
71. In other words, a former owner or occupier can be liable even after ceasing to own or occupy.
72. This means, where a property has changed hands, that a current owner may not be responsible for structural damage that occurred over the previous decade, but will be required to meet the expense of removing the tree.

Avoiding a Nuisance (and Issues with Trees Generally):

73. Given all this, what are property owners to do?

⁴³ *Limitation of Actions Act 1958* (Vic) s 5

⁴⁴ *Wrongs Act 1958* (Vic) pt IVAA, s 24AH

⁴⁵ *Wrongs Act 1958* (Vic) s 24AH

74. Before purchasing and getting too enthusiastic at a house inspection, first inspect the backyard. There might be a big expense waiting after settlement.
75. If you are planning a new dwelling, consider avoiding construction on the boundary, if significant trees are on the neighbouring lot. This will depend on the species of tree, soil conditions, and the proposed design and construction method.⁴⁶ Get advice from an appropriate professional.
76. Before choosing or planting new trees, get advice from an arborist, or at the very least do some research. Certain species are inappropriate for the local soil conditions. Some trees should not be planted close to the boundary, as even if restrained by a root barrier, the bulk of the tree might cause issues.
77. In particular, avoid planting substantial trees close to any fence, picket or brick, without advice. The presence of a large tree alone can lift the fence, or otherwise damage it. Indeed, though neighbours would usually share responsibility for erecting and maintaining a boundary fence, if a nuisance tree is the cause of the damage, that would not be so, unlike fences that fall into a state of disrepair with time.
78. If you plan on removing an existing tree, consult with your local government authority to check if restrictions exist, or if a permit is required. The fact a tree is on your property does not necessarily give you control over it.
79. Beware also of the effect that removing a tree might have on the surrounding soil conditions. Trees can dry the immediate area around them, and their removal can lead to soil becoming rehydrated, the resulting 'heave' potentially causing damage to your own or a neighbouring dwelling. Best consult a geotechnical engineer for that.

⁴⁶ Of relevance, guidelines for the design of footings for trees are found in Appendix H of *AS 2870-2011: Residential Slabs and footings* (Standards Australia).