THE NUISANCE ACTION: A USEFUL TOOL FOR THE ENVIRONMENTAL LAWYER

By

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INTRODUCTION

Contemporary emphasis on legislation as a remedy for Canada's environmental ills has unfortunately tended to overshadow another important curative device useful to the environmental laywer, the common law action in nuisance.[1] Historically the nuisance suit has been seen by the Bar as the most appropriate of common *and* civil law remedies for phenomena we would today describe as environmental problems.[2] In 1611 distraught citizens were using nuisance as a means of relief from pollution.[3] The action's availability for environmental protection has continued to the present day.

There are two distinct kinds of nuisance action, public and private. This paper will examine public and private nuisance law as to its nature and applicability to environmental problems. The two branches of nuisance law will first be examined individually, to point out their peculiarities, then collectively, from the standpoint of defences to them and remedies they may afford.

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1 See J.P.S. McLaren, "The Common Law Nuisance Actions and the Environmental Battle-Well Tempered Swords or Broken Reeds?" (1972), 10 Osgoode Hall L.J. 505.

2 See *ibid.*; and L.S. Fink, "Canadian Law and Aircraft Noise Disturbance: A Comparative Study of American, British and Canadian Law" (1965), 11 McGill L.J. 55; and R.I. Cohen, "Nuisance: Proprietary Derelict" (1968), 14 McGill L.J. 124.

3 *William Alfred's Case* (1611), 77 E.R. 816 (K.B.)

PUBLIC NUISANCE

Until the sixteenth century only criminal actions were allowed for activities involving public nuisance.[4] Such misdeeds as keeping a brothel, emitting foul smoke, and polluting water[5] were only actionable at the suit of the Attorney-General.[6] During the sixteenth century, however, there developed a private public nuisance action to provide relief against activities of those types. This action was allowable when the plaintiff suffered ". . . a greater hurt than everyman had."[7]

Thus today it has come to be that a private citizen's damages in public nuisance must be 'particularly distinct' from that suffered by the general public, otherwise only the Attorney-General can bring the suit.[8] The only other possible public nuisance action is a 'relator-action', where the Attorney-General acts on the information of a plaintiff. The action is taken in the names of both the plaintiff and the Attorney-General.[9]

Standing to sue is best obtained with the support of the Attorney-General, but that support may not be given readily, especially when economic interests are involved.[10] 'Standing' for a strictly private action in public nuisance can be achieved in two ways. First, if the plaintiff has suffered damage to his land he may have standing to sue for public nuisance. However, damage to land will also be grounds for a private nuisance suit and it is the latter course of action that is usually taken.[11]

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4 See J.G. Fleming, *The Law of Torts* (4th ed. 1971) at p. 340.

5 As to what makes an offence "against the public" see *Att.-Gen.* v. *Haney Speedways* (1963), 39 D.L.R. (2d) 48 and *Att.-Gen.* v. *P.Y.A. Quarries Ltd.*, [1957] 1 All E.R. 894.

6 See Fleming, *op. cit.* p. 339.

7 *Ibid.*, p. 340.

8 See *Criminal Code*, R.S.C. 1972, ch. C-34, s. 176.

9 *McLeod* v. *White* (1955), 37 M.P.R. 341 at 355, and *Att.-Gen.* v. *Ewen* (1895), 3 B.C.R. 468 (B.C.S.C.).

10 See Fleming, *op. cit.*, p. 341, and the *Judicature Act*, R.S.N.B. 1952, ch. 120, s. 35.

11 See *Cairns* v. *Canadian Refining Co.* (1914), 26 O.W.R. 490 (C.A.); McLaren, *op. cit.*, p. 517. Also see A.W. Reitze, *Environmental Law* (2nd ed., 1972), at pp. 5-25, who thinks it may sometimes be easier to prove public nuisance based on an invasion of land rights than it is to prove private nuisance based on such an invasion.

The second way of getting standing to sue is that already referred to, where the plaintiff has suffered 'particular damage', different from that suffered by the rest of the public. A major problem which one may encounter in this connection stems from the uncertainty as to what is meant by 'particular damage'.

J.G. Fleming[12] thinks 'particular damage' is damage different in degree from that suffered by the general public.[13] Professor Prosser,[14] on the other hand, maintains that 'particular damage' must be different in degree and in *kind* from that of the general public.[15] Canadian decisions to date seem to support Prosser but the question is still not finally settled.[16]

Another stumbling-block with the 'particular damage' requirement is the question as to whether the damage must be direct or simply consequential. Prosser and Fleming state that it does not matter whether it is direct or consequential,[17] but one of the most recent Canadian decisions on public nuisance law held that the damage must be direct.[18] The decision has been severely criticized on this point and the issue may still be open in Canada.[19]

The public nuisance suit has other peculiarities. A class action is not maintainable for public nuisance[20] even though the interests of a number of complainants may be similar.[21] Nevertheless, it may be possible to join the actions of several plaintiffs on the basis that they have common questions of law or fact to be decided.[22]

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12 See Fleming, *op. cit.*, at p. 341.

13 *Ibid.*, p. 342.

14 See W. L. Prosser, "Private Action for Public Nuisance" (1966), 52 Virginia L. R. 997, at p. 1011.

15 *Ibid.*, at pp. 1012, 1015, 1017, 1018, and 1022.

16 See McLaren, *op. cit.*, p. 514; A.R. Lucas, "Environmental Control Through Civil Actions" in *B.C. Annual Law Lectures* (Victoria, 1970) 20; and W. Estey, "Public Nuisance and Standing to Sue" (1972), 10 Osgoode Hall L.J. 563 at p. 572.

17 See Prosser, *op. cit.*, at p. 1007.

18 *Hickey* v. *Electric Reduction Co.* (1971), 21 D.L.R. (3d) 368 (Nfld. S.C.), and see *McRae* v. *British Norwegian Whaling Co. Ltd.*, [1927-31] Nfld. L.R. 274.

19 See McLaren, *op. cit.*, p. 513, and Estey, *op. cit.*, p. 572.

20 *St. Lawrence Rendering Co.* v. *Cornwall*, [1951] 4 D.L.R. 790.

21 *Preston* v. *Hilton* (1920), 647.

22 McLaren, *op. cit.* p. 519, and N.B. *Rules of Court*, 1969, O.16, r.9.

Finally, in order to bring a successful public nuisance suit, one must prove that the damage caused out-weighs the public utility of the act causing damage.[23] This factor, which can be a formidable burden, will be discussed more fully under the head of 'private nuisance'.

As the law stands now, public nuisance actions are limited tools for environmental protectionists. Beyond the problems already outlined, courts are reluctant to allow public nuisance actions because they profess to fear a 'flood of claims'.[24] Proof of this reticence is marked in Canada where courts have recently held that *financial loss* is not loss that would satisfy the requirements of 'particular damage'![25] In spite of this, our courts may see fit in the future to widen the ambit of public nuisance law in the light of environmental concern and current legal views in other jurisdictions.[26]

PRIVATE NUISANCE

The private nuisance action is an old common law remedy.[27] Basically concerned with invasions of an occupier's interest in the beneficial use and enjoyment of land, it is, like trespass, a tort action that need not involve any physical damage to land. But, unlike trespass, it rarely involves physical intrusions. Normally, private nuisance entails 'consequential infringement' of rights to land.[28]

There are two requisites for standing to sue in a private nuisance suit: there must be either 'physical injury' to land[29] or dam-

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23 See Reitze, *op. cit.*, pp. 5-25, where he questions whether this doctrine applies as much here as it does with private nuisance.

24 See *Filion* v. *N.B. International Paper Co.*, [1934] 3 D.L.R. 22 at p. 26.

25 See *Hickey* v. *Electric Reduction Co., op. cit.*, pp. 370-71. Also see *Filion* v. *N.B. International Paper Co., ibid.*, p. 96. But see the earlier case of *Rainy River Navigation Co., Ltd.* v. *Ontario & Minnesota Power Co.* (1914), 17 D.L.R. 850, where loss of money was seen to be "particular damage".

26 See McLaren, *op. cit.* p. 515, and P.R. Ehrlich and A.H. Ehrlich *Population, Resources, Environment: Issues in Human Ecology* (San Francisco, 1972) at p. 365.

27 See Fleming, *op. cit.*, p. 338.

28 *Ibid.*, p. 344.

29 *River Park Enterprises* v. *Town of Fort St. John* (1965), 62 D.L.R. (2d) 519 (B.C.S.C.) where the lowering in value of a property by a "sensible material" injury was held to be a physical injury.

age to the use and enjoyment of land,[30] and the person bringing the action must be an occupier of the land affected.[31] In sharp contrast with the 'standing criteria' for the public nuisance action, the foregoing are relatively easy to meet. Nevertheless, there are some problems in bringing a private nuisance suit to court.

As with the 'public suit', class actions are not permitted but, it will be remembered, one may join the suits of several plaintiffs if they have similar questions of law or fact to be decided.[32]

There is some uncertainty as to the nature and extent of the plaintiff's burden of proof. Private nuisance is somewhat akin to strict liability in that it does not depend on proof of negligence.[33] However, there is law to the effect that private nuisance is not 'strict' in the sense that no other factors are to be considered in proof. It is uncertain what these other factors are. In the final analysis it seems that the proponents of this view demand an 'articulation of the defendant's fault'[34] whereas conventional theorists assume it. In 'conventional Canada' therefore, it appears safe to presume that neither reasonable care[35] nor lack of knowledge[36] on the defendant's part will absolve him of liability in a nuisance action.

It has been held almost consistently that the acts complained of must have continued for a significant period in order to support a private nuisance suit.[37] However, there is some authority in Canada to the effect that an activity of even short duration can be sufficient.[38]

Another factor with which a plaintiff may have to contend is that of 'relative neighborhood'.[39] The sense of this concept is that a person has no right to complain of nuisance if he or she has

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30 Fleming, *op. cit.*, p. 345.

31 *Billingsgate Fish Ltd.* v. *B.C. Sugar Refining Co.* (1933), 46 B.C.R. 543 (B.C.S.C.).

32 See footnote 22.

33 McLaren, *op. cit.*, p. 521.

34 *Ibid.*, p. 522; also see Fleming, *op. cit.*, p. 353.

35 *Drysdale* v. *Ducas* (1896), 26 S.C.R. 20.

36 *Portage La Prairie* v. *B.C. Pea Growers Ltd.*, [1966] S.C.R. 150. See also *Esco* v. *Fort Henry Hotel* (1962), 35 D.L.R. (2d) 206.

37 See Reitze, *op. cit.*, pp. 5-25.

38 *Aldridge* v. *Van Patter*, [1952] 4 D.L.R. 93.

39 See *Lockwood* v. *Brentwood Park Investments Ltd.* (1970), 10 D.L.R. (3d) 143 at p. 165. Also see *Housten* v. *Brown-Holder Biscuits Ltd.* (1936), 10 M.P.R. 544 (N.B.S.C.).

chosen to live in a district where nuisance is commonplace. Thus, if one decides to live in an industrial zone, one cannot complain about noise or smell.[40] However, a plaintiff's right of action is not automatically lost simply becuase he has "moved to the nuisance",[41] and it is no defence for a polluter to rely on an industrial zone regulation if he is causing a nuisance.[42] Further, there has been some expression of Canadian judicial opinion to the effect that progress does not necessarily entail gross pollution.[43] Thus, it does not seem unreasonable to speculate that courts may soon circumscribe the 'relative neighborhood' rule through 'judicial re-zoning'.[44]

The problem of ascertaining which of several defendants has caused damage is one common to the plaintiff in either a public or a private nuisance action.[45] There are two ways to overcome this difficulty. Once all the probable defendants have been joined,[46] the plaintiff may rely on circumstantial evidence to prove his case.[47] A polluter cannot exonerate himself merely because he contributed to existing pollution,[48] nor can he argue successfully that his contribution was negligible.[49] Unless pollution sources are monitored,[50] a plaintiff can establish at least an inference that all of the defendants are severally liable via circumstantial evidence.

Another solution to the causation problem is to argue that the burden is on the several defendants to prove the extent of their individual contributions to the pollution.[51] Once that has been established, judgment can be allowed against any one of them. It would

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40 Lucas, *op. cit.*, at p. 18 notes that it is here that "physical injury" to property becomes invaluable to the action. See also *River Park Enterprises* v. *Town of Fort St. John*, *op. cit.*, p. 519.

41 *Drysdale* v. *Ducas*, *op. cit.*, p. 20.

42 *Savage* v. *McKenzie* (1961), 25 D.L.R. (2d) 175 (N.B.C.A.).

43 See the view of Puddester, J., in *Kent* v. *Dominion Coal and Steel Corp.* (1965), 49 D.L.R. (2d) 241 at pp. 257-262 (Nfld. C.A.).

44 McLaren, *op. cit.*, p. 535.

45 C. Wright, *Special Lectures of the Law Society of Upper Canada* (Toronto, 1953) p. 103.

46 Tortfeasor's Act, R.S.N.B. 1952, c. 232, s.2.

47 Wright, *op. cit.*, is extremely relevant on this point.

48 *Walker* v. *McKinnon*, [1949] 4 D.L.R. 739.

49 *Russell Transport Ltd.* v. *Ontario Malleable Iron Co.*, [1952] 4 D.L.R. 719.

50 See McLaren, *op. cit.*, p. 542.

51 See Ehrlich and Ehrlich, *op. cit.* p. 365, and *Brown* v. *Town of Morden* (1958), 12 D.L.R. (2d) 576. See also *Kelly* v. *Canadian Northern Rwy.*, [1950] 2 D.L.R. 760.

then be open to the defendants to settle contribution among themselves.[52]

A concept that may seriously affect a nuisance suit is the 'balancing of interests' doctrine to which reference was made earlier. Briefly stated, the doctrine involves the weighing of the 'social utility' of a nuisance activity against the harm caused thereby.[53] At one time the courts generally ruled in favour of social utility.[54] Today the trend has changed.[55] While the creation of jobs and a booming economy are still factors to be considered,[56] Canadian Courts[57] have lately shown an inclination to hold environmental interests paramount.[58]

The private nuisance action can be an effective device for environmental protection. Unlike the public nuisance suit, standing to sue is relatively easy to achieve and the difficulty of such obstacles as the 'balancing of interests' and 'relative neighborhood' doctrines is inversely proportional to a lawyer's skill in persuading a court of the proper value to be ascribed to the environment.[59]

DEFENCES

Two main defences are available to the defendant in a nuisance suit. If the act complained of has continued for twenty years without objection from the plaintiff there exists a defence by way of prescription.[60] But, the plaintiff *must* have been aware of the 'nuisance' throughout the twenty year span[61] and the act causing harm must have been constant in incidence and effect during the same period.[62] The difficulty inherent in meeting these stipulations makes the defence of prescription rare.[63]

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52 See Tortfeasor's Act, s.2.

53 See B. Wilson, "A choice of Values" (1961) 4 Canadian Bar Journal 448 at p. 454.

54 See Lingley, L.J. in *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. D. 287 at p. 316.

55 See *Kent* v. *Dominion Steel Corp.*, *op. cit.*

56 See *Hickey* v. *Electric Reduction Co.*, *op. cit.*

57 See *McKie* v. *KVP Co.*, [1948] 3 D.L.R. 201 (affm'd [1949] S.C.R. 698); and *Gauthier* v. *Naneff* (1971), 14 D.L.R. (3d) 513 a. 519.

58 In this respect Canadian courts seem to be more liberal than their American counterparts. See Reitze, *op. cit.* pp. 5-23.

59 See B. Wilson, *op. cit.*, p. 456.

60 *DeVault* v. *Robinson* (1920), 591. This defence may not apply to public nuisance at all. See Reitze, *op. cit.*, pp. 5-25.

61 See footnote 49.

62 *Hulley* v. *Silversprings Co.*, [1922] 2 Ch. 268, and Fleming, *op. cit.*, p. 367.

63 See McLaren, *op. cit.*, p. 544.

Reliance on statutory authority[64] is the most common defence to a nuisance suit. Many large Canadian companies are incorporated by special Act and given immunity from nuisance actions.[65] Such Acts fall under the head of 'imperative legislation'. The immunity they bestow is air-tight.[66] Where, however, the legislation is 'permissive'. the authority granted by the Act is discretionary,[67] the legislation is framed so that power granted thereunder can be exercised only if it does not infringe private rights,[68] or the Act contains no express provision as to tort liability,[69] the defence of statutory authority will succeed.

If a defendant can show that the damage caused by his exercise of authority is inevitable[70] he may have a valid defence. In such cases the burden of proving inevitability rests with the defendant who must show that all reasonable care and skill, in the light of contemporary scientific knowledge, has been observed in connection with the enterprise he undertakes.[71]

REMEDIES

The remedy very often sought by a plaintiff in a nuisance suit is an injunction. Interestingly, Canadian courts have shown themselves more liberal than their American counterparts in granting injunctions. While some decisions have followed the American view[72] that only damages[73] will be awarded where an injunction would lead to economic hardship,[74] more recent cases indicate that the courts will exercise their discretion in granting injunctions

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64 Even after a plaintiff has won a nuisance case, the court's decision can be negatived by legislation. See *KVP Co. Ltd.*, S.O. 1950, c. 33, s.l.

65 See *Fundy Forest Industries Ltd.*, S.N.B. 1971, c. 80, ss. 2,3,4; and *MacMillan Rothesay Limited*, S.N.B. 1970, c. 58, s. 5.

66 See *Turpin* v. *Halifax-Dartmouth Bridge Commission* (1959), 21 D.L.R. (2d) 623 at p. 625. However, one might try to sue in negligence, depending on the wording of the statute. See *Provender Millers* v. *Southampton C.B.C.*, [1940] 1 Ch. 131 at 140.

67 *J.P. Porter Co.* v. *Bell*, [1955] 1 D.L.R. 62 at p. 72 (N.S.C.A.).

68 *Stephens* v. *Village of Richmond Hill*, [1955] 4 D.L.R. 572.

69 *Connery* v. *Government of Manitoba* (1971), 21 D.L.R. (3d) 234.

70 See Flemming, *op. cit.* p. 366; also see footnote 68.

71 *Manchester Corp.* v. *Farnsworth*, [1930] A.C. 171 at p. 182; and *Lawrysyn* v. *Kipling* (1965), 55 D.L.R. (2d) 471.

72 See Reitze, *op. cit.* pp. 5-27.

73 See Fleming, *op. cit.*, at p. 370.

74 See *Rombough* v. *Crestbrook Timber Co.* (1966), 55 W.W.R. 577.

if a defendant is harming the environment.[75]

Damages of course are always an alternative to injunctive relief and can be awarded on the merits of the case.[76]

Another possible remedy is abatement. The 'privilege' of abatement is a self-help remedy, an alternative to damages.[77] It is available only for a short time after knowledge of the nuisance activity is acquired and should be used only when an emergency does not allow resort to usual process.[78] Notice of intent to abate must normally be given by the complainant.[79] There are apparently no Canadian cases involving the use of this remedy.

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75 Footnote 36; and *Canada Paper Co.* v. *Brown* (1922), 66 D.L.R. 287; and *Groat* v. *Edmonton*, [1928] 3 D.L.R. 725; 1928 S.C.R. 522.

76 Footnote 73.

77 *Logan Navigation Co.* v. *Lambeg Bleaching Co.* [1927] A.C. 226 at 244.

78 Reitze, *op. cit.*, pp. 5-28.

79 Fleming, *op. cit.*, p. 373.