CHAPTER ONE

NUISANCE

A nuisance can be defined as an interference with the use and enjoyment of land. The law of nuisance is the way the common law elaborates on the rights and duties that govern the relations between neighbours. Thus, in this chapter, we will read cases in which plaintiffs allege that they are being wronged by defendants who are doing such things as emitting offensive smells or disturbing noises.

The facts in these cases are fairly simple and easily understood, but they give rise to questions that are fundamental to the law of torts: What is it for one person to be wronged by another? Assuming that a wrong has been committed, what remedy should be awarded to the plaintiff? What sort of reasoning supports or ought to support the plaintiff's claim? How significant is it that issues concerning the legitimate use of land are being adjudicated by courts rather than settled by legislation or by municipal by-laws? What constraints are courts subject to in dealing with these issues?

Most of the material in this chapter consists of the opinions of judges giving their reasons for deciding particular cases. While reading this material, constantly ask yourself whether you agree with what the judge is saying. In offering us reasons, the judge is, as it were, inviting us to assess the reasons' soundness. Pay attention to what sort of considerations count as reasons for the judge and try to decide whether the reasons given are persuasive, whether the reasons given in one case are consistent with those given in another, and whether considerations that were not mentioned ought to have played a role. Also reflect on whether the decisions reached are in accord with your sense of justice and whether (or how) justice matters for law.

This chapter is introductory in that it is intended as the occasion for asking simple but fundamental questions about the nature of a civil wrong. It is also introductory in that it introduces different ways of thinking about torts. For instance, some scholars have proposed that we should think of the law of nuisance as a way of promoting desirable policies such as economic efficiency. Some of the material in this section explores this approach and contrasts it to an approach that emphasizes the rights of the parties.

The broad questions that arise in this chapter are difficult ones that, of course, will not be settled by the time you reach the end of it. Rather, this chapter sets the stage for further consideration of these questions in the chapters that follow.

I. THE GROUNDS OF LIABILITY

Appleby v Erie Tobacco Co

(1910), 22 OLR 533 (Div Ct)

MIDDLETON J (for the court): Appeal from judgment of the Chancellor dismissing an action to restrain a nuisance.

The nuisance complained of is the odour arising from the manufacture of tobacco on the defendants' premises. The odour from the tobacco arises chiefly from the processes of steaming, steeping, and stewing which it undergoes, and the boiling of sugar, licorice, and other ingredients with which it is mixed before it is reduced to "plug tobacco" ready for the market. These odours cannot be prevented if the manufacture is to go on, and, upon the evidence, the defendants appear to be doing their best to prevent injury to their neighbours.

Many witnesses were called for the plaintiff who describe the odour as a "most sickening smell," "a very bad smell," "very, very offensive," and "very nauseating." Some say that it produces vertigo and dizziness, others nausea and headache. Some do not find any evil result beyond that incident to the disagreeable nature of the odour.

The defendants produce a number of witnesses, many of whom say that the odour is "not unhealthy"; others say that it "does not affect" them; and one enthusiastic lover of the weed describes it as "just splendid."

Upon the whole evidence, there can be no doubt that there is a strong odour that to many, if not most, is extremely disagreeable.

In *Fleming v. Hislop* (1886), 11 App. Cas. 686 the standard set by Knight Bruce V-C in *Walter v. Selfe* (1851), 4 DeG&S 315, is accepted by the Lords. In the older case the defendant was a brickmaker. The smoke was complained of. The Vice-Chancellor says (p. 322): "Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to the elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people? ... As far as the human frame in an average state of health at least is concerned, mere insalubrity, mere unwholesomeness, may possibly ... be out of the case ... . A smell may be sickening though not in a medical sense ... . A man's body may be in a state of chronic discomfort, still retaining its health ... . The defendant's intended proceedings will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiffs' house."

In *Fleming v. Hislop*, 11 App. Cas. at p. 691, the Earl of Selborne states his view of the law thus: "What causes material discomfort and annoyance for the ordinary purposes of life to a man's house or to his property, is to be restrained ... although the evidence does not go to the length of proving that health is in danger." Lord Halsbury, at p. 697, states what is substantially the same thing: "What makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction."

Now, it is to be borne in mind that an arbitrary standard cannot be set up which is applicable to all localities. There is a local standard applicable in each particular district, but, though the local standard may be higher in some districts than in others, yet the question in each case ultimately reduces itself to the fact of nuisance or no

nuisance, having regard to all the surrounding circumstances. This is shown by the often-quoted passage in Lord Halsbury's judgment in *Colls v. Home and Colonial Stores Limited*, [1904] AC 179, at p. 185: "A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it is a nuisance which will give a right of action."

In *Rushmer v. Polsue and Alfieri Limited*, [1906] 1 Ch. 234, [1907] AC 121, this principle is applied to the case of a printing office established in a neighbourhood devoted to printing, next door to the plaintiff's residence and which rendered sleep impossible. Cozens Hardy LJ ... sums up the situation in a way that commended itself to the Lords. It was, he says, contended "that a person living in a district specially devoted to a particular trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner. I cannot assent to this argument. A resident in such a neighbourhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of the property and the class of people who inhabit it ... . But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant's works may be so substantial as to cause a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield, I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previous to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked. In short ... it is no answer to say that the neighbourhood is noisy, and that the defendant's machinery is of first-class character."

This case, as is shewn by this extract, puts an end to the controversy upon the question whether the reasonableness of the defendants' user of their own premises affects the plaintiff's rights. Kekewich J, in *Reinhardt v. Montasti* (1889), 42 Ch. D 685, carefully reviews the cases and concludes that it does not.

It is plain, in this case, that the defendants' manufactory does constitute a nuisance. The odours do cause material discomfort and annoyance and render the plaintiff's premises less fit for the ordinary purposes of life, even making all possible allowances for the local standard of the neighbourhood ... .

The remaining question is: must an injunction follow? ... The working rule, stated by A.L. Smith LJ, in *Shelfer v. City of London Electric Light Co.*, [1895] 1 Ch. 287, at p. 322, as defining the cases in which damages may be given in lieu of an injunction, shews that here an injunction is the proper remedy. No one should be called upon to submit to the inconvenience and annoyance arising from a noxious and sickening odour for a "small money payment," and the inconvenience and annoyance cannot be adequately "estimated in money." The cases in which damages can be substituted for an injunction sought to abate a nuisance of the first class must be exceedingly rare.

The injunction should, therefore, go, restraining the defendants from so operating their works as to cause a nuisance to the plaintiff by reason of the offensive odours arising from the manufacture of tobacco: the operation of this injunction to be stayed for six months to allow the defendants to abate the nuisance if they can do so, or to make arrangements for the removal of that part of the business causing the odour.

QUESTIONS

1. What are the factors to which the court refers in determining that the defendant has committed a nuisance? Do you think that the factors are relevant to a just resolution of this case? Why, for instance, is a local standard relevant? If this particular plaintiff is suffering, why should it matter whether there might be others who are similarly situated?
2. Can you think of any factors that are not mentioned by the court but which ought to be relevant?
3. Should the plaintiff have recovered if the factory had not caused discomfort but had lowered the value of his property?
4. If the plaintiff's right is being infringed, why does he have to put up with it for another six months?
5. Why does the court favour the interests of the plaintiff over the interests of the defendant? Do the "reasons" given by the judge supply any reasons for preferring the plaintiff? If they do not, what is the value of the judge's reasons? Would anything be lost if the judge declared that his decision had been determined by the flip of a coin?

Rogers v Elliott

146 Mass 349, 15 NE 768 (SJC 1888)

[The defendant, who was in charge of a church in a small town, regularly had the church bell rung several times a day. The plaintiff was recovering from sunstroke and suffered convulsions that his doctor attributed to the noise from the bell. The defendant refused the plaintiff's request not to ring the bells, and the plaintiff sued for the damage that the noise was causing him.]

KNOWLTON J: The defendant was the custodian and authorized manager of property of the Roman Catholic Church used for religious worship. The acts for which the plaintiff seeks to hold him responsible were done in the use of this property, and the sole question before us is whether or not that use was unlawful. The plaintiff's case rests upon the proposition that the ringing of the bell was a nuisance. The consideration of this proposition involves an inquiry into what the defendant could properly do in the use of the real estate which he had in charge, and what was the standard by which his rights were to be measured.

It appears that the church was built upon a public street in a thickly settled part of the town ... .

In an action of this kind, a fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured. In densely populated communities the use of property in many ways which are legitimate and proper necessarily affects in greater or less degree the property or persons of others in the vicinity. In such cases the inquiry always is, when rights are called in question, what is reasonable under the circumstances. If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those

whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them.

If one's right to use his property were to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one, who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate, or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night. Legal rights to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is, in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial.

In the case at bar it is not contended that the ringing of the bell for church services in the manner shown by the evidence materially affected the health or comfort of ordinary people in the vicinity, but the plaintiff's claim rests upon the injury done him on account of his peculiar condition. However his request should have been treated by the defendant upon considerations of humanity, we think he could not put himself in a place of exposure to noise, and demand as of legal right that the bell should not be used.

The plaintiff, in his brief, concedes that there was no evidence of express malice on the part of the defendant, but contends that malice was implied in his acts. In the absence of evidence that he acted wantonly, or with express malice, this implication could not come from his exercise of his legal rights. How far and under what circumstances malice may be material in cases of this kind, it is unnecessary to consider.

Judgment on the verdict.

QUESTIONS

1. Does the judge disbelieve the plaintiff's claim that his convulsions were caused by the ringing of the church bell? If the judge accepts the plaintiff's story that the defendant was causing him harm, why does the plaintiff not win?

2. The court reasons that a fluctuating standard would "paralyze industrial enterprises." Is the defendant here in an industrial enterprise? Does it matter that the defendant operated a church bell? Was the ringing of the church bell under these circumstances a Christian thing to do? Should it matter to the law whether the defendant acted in a Christian manner? Would the legal situation be any different if the noise was generated by an eccentric or minority religious group that had few followers in the local community?

3. Who do you think suffered more, the plaintiff in *Appleby* or the plaintiff in *Rogers*?

4. As you read the chapter, think about whether the other cases substantiate the judge's contention that property rights should not be subject to sudden fluctuations.

5. Should it matter whether the defendant was motivated by a desire to harm the plaintiff?

In *The Mayor, etc of Bradford v Pickles*, [1895] AC 587 (HL), the plaintiffs owned some land beneath which were large water springs that they used, for over 40 years, to supply the town of Bradford with water. The plaintiffs' land was the lower part of a hillside, and above it was a tract of land owned by the defendant. Beneath the defendant's tract there was a natural reservoir for subterranean water that normally flowed, but not in a defined stream, underground down to the plaintiffs' land and filled their springs. The defendant decided to sink a shaft in his own land to change the flow of the underground water. This reduced the amount of water that flowed down to the plaintiffs' springs. The plaintiffs alleged that the defendant's sole motive was to injure the plaintiffs and force them either to buy the defendant's land or pay him for the water they required. The plaintiffs sought an injunction to stop the defendant from continuing his work. The House of Lords refused to grant the injunction. After referring to an earlier case that held that an owner of land had a right to sink a well on his own premises and thereby extract the subterranean water percolating through his own soil, which would otherwise by force of gravity have found its way into the plaintiff's spring, Lord Halsbury LC observed:

> If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. But I am not prepared to accept Lindley LJ's view of the moral obliquity of the person insisting on his right when that right is challenged … . I see no reason why he should not insist on their purchasing his interest.

Contrast *Bradford* with *Hollywood Silver Fox Farm Ltd v Emmett*, [1936] 2 KB 408 (CA), where the plaintiff company carried on the business of breeding silver foxes on its land. During the breeding season, vixens are nervous and liable, if disturbed, to refuse to breed, to miscarry, or to kill their young. The defendant was an adjoining landowner who, as a result of a dispute with the plaintiffs, made his son discharge guns on his own land as near as possible to the breeding pens for the sole purpose of injuring the plaintiffs' business by interfering with the foxes' breeding. The plaintiffs sought an injunction to restrain the defendant's acts. The defendant, relying on *Bradford*, argued that (1) because the plaintiffs' business required an extraordinary degree of quiet, they could not prevent the defendant from using his land in a way that would not be a nuisance apart from the special use to which the plaintiffs put their land; and (2) as the proprietor, the defendant had a right to shoot on his own land, and his intentions were irrelevant in that they could not make a lawful act unlawful. The court granted the injunction and held that, in an action for nuisance by noise, the motive of the noisemaker must be considered in determining whether he was using his property in a legitimate and reasonable manner. The court cited the following sentences from a previous case: "No proprietor has an absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. If he violates that condition he commits a legal wrong, and if he does so intentionally he is guilty of a malicious wrong in its strict legal sense." The court then concluded that "the decision of the House of Lords in *Bradford Corporation v. Pickles* has no bearing in cases such as this."

Fontainebleau Hotel Corp v Forty-Five Twenty-Five, Inc

114 So 2d 357 (Fla Dist CA 1959)

PER CURIAM: This is an interlocutory appeal from an order temporarily enjoining the appellants from continuing with the construction of a fourteen-story addition to the Fontainebleau Hotel, owned and operated by the appellants. Appellee, plaintiff

below, owns the Eden Roc Hotel, which was constructed in 1955, about a year after the Fontainebleau, and adjoins the Fontainebleau on the north. Both are luxury hotels, facing the Atlantic Ocean. The proposed addition to the Fontainebleau is being constructed twenty feet from its north property line, 130 feet from the mean high water mark of the Atlantic Ocean, and 76 feet 8 inches from the ocean bulkhead line. The 14-storey tower will extend 160 feet above grade in height and is 416 feet long from east to west. During the winter months, from around two o'clock in the afternoon for the remainder of the day, the shadow of the addition will extend over the cabana, swimming pool, and sunbathing areas of the Eden Roc, which are located in the southern portion of its property.

In this action, plaintiff-appellee sought to enjoin the defendants-appellants from proceeding with the construction of the addition to the Fontainebleau (it appears to have been roughly eight stories high at the time suit was filed), alleging that the construction would interfere with the light and air on the beach in front of the Eden Roc and cast a shadow of such size as to render the beach wholly unfitted for the use and enjoyment of its guests, to the irreparable injury of the plaintiff; further, that the construction of such addition on the north side of defendants' property, rather than the south side, was actuated by malice and ill will on the part of the defendants' president toward the plaintiff's president ... .

The chancellor heard considerable testimony on the issues made by the complaint and the answer and, as noted, entered a temporary injunction restraining the defendants from continuing with the construction of the addition. His reason for so doing was stated by him, in a memorandum opinion, as follows:

> In granting the temporary injunction in this case the Court wishes to make several things very clear. The ruling is ... based solely on the proposition that no one has a right to use his property to the injury of another. In this case it is clear from the evidence that the proposed use by the Fontainebleau will materially damage the Eden Roc. There is evidence indicating that the construction of the proposed annex by the Fontainebleau is malicious or deliberate for the purpose of injuring the Eden Roc, but it is scarcely sufficient, standing alone, to afford a basis for equitable relief.

This is indeed a novel application of the maxim *sic utere tuo ut alienum non laedas*. This maxim does not mean that one must never use his own property in such a way as to do any injury to his neighbor. *Beckman v. Marshall*, Fla. 1956, 85 So. 2d 552. It means only that one must use his property so as not to injure the lawful rights of another. *Cason v. Florida Power Co.*, 74 Fla. 1, 76 So. 535, LRA 1918A, 1034. In *Reaver v. Martin Theatres*, Fla. 1951, 52 So. 2d 682, 683, 25 ALR 2d 1451, under this maxim, it was stated that "it is well settled that a property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property *which is recognized and protected by law, and so long as his use is not such a one as the law will pronounce a nuisance*." [Emphasis supplied.]

No American decision has been cited, and independent research has revealed none, in which it has been held that—in the absence of some contractual or statutory obligation—a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor. Even at common law, the landowner had no legal right, in the absence of an easement or uninterrupted use and enjoyment for a period of 20 years, to unobstructed light and air from the adjoining land. *Blumberg v. Weiss*, 1941, 129 NJ Eq. 34, 17 A2d 823; 1 Am.Jur., Adjoining Landowners, @ 51. And the English doctrine of "ancient lights" has been unanimously repudiated in this country ... .

There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite … .

We see no reason for departing from this universal rule. If, as contended on behalf of plaintiff, public policy demands that a landowner in the Miami Beach area refrain from constructing buildings on his premises that will cast a shadow on the adjoining premises, an amendment of its comprehensive planning and zoning ordinance, applicable to the public as a whole, is the means by which such purpose should be achieved. But to change the universal rule—and the custom followed in this state since its inception—that adjoining landowners have an equal right under the law to build to the line of their respective tracts and to such a height as is desired by them (in absence, of course, of building restrictions or regulations) amounts, in our opinion, to judicial legislation. As stated in *Musumeci v. Leonardo*, supra [77 RI 255, 75 A2d 177], "So use your own as not to injure another's property is, indeed, a sound and salutary principle for the promotion of justice, but it may not and should not be applied so as gratuitously to confer upon an adjacent property owner incorporeal rights incidental to his ownership of land which the law does not sanction." …

Since it affirmatively appears that the plaintiff has not established a cause of action against the defendants by reason of the structure here in question, the order granting a temporary injunction should be and it is hereby reversed with directions to dismiss the complaint.

NOTES AND QUESTIONS

1. Do you agree with the result in this case? What is the correct translation of the Latin maxim that the court says must be applied? Does it matter?

2. The court distinguishes between a property use that injures one's neighbour and a property use that injures the rights of one's neighbour. Does this mean that there is no right not to be injured? How does the court decide whether there has been an interference with the plaintiff's rights? In particular, how does a court decide that there has been an interference with the plaintiff's rights in *Appleby* but not in *Fontainebleau*?

3. Compare the reasoning of *Fontainebleau* with that in *Bryant v Lefever*, 4 CPD 172 (1879):

> The plaintiff and the defendants were occupiers of adjoining houses, which were of about the same height. Before 1876 the plaintiff was able to light a fire in any room of his house without the chimneys smoking; the two houses had remained in the same condition some thirty or forty years. In 1876 the defendants took down their house, and began to rebuild it. They carried up a wall by the side of the plaintiff's chimneys much beyond its original height, and stacked timber on the roof of their own house, and thereby caused the plaintiff's chimneys to smoke whenever he lighted fires … . The jury found in substance … that the erection of the defendants' wall sensibly and materially interfered with the comfort of human existence in the plaintiff's premises. They assessed the damages at £40 … . The defendants appealed … .
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> BRAMWELL LJ: No doubt there is a nuisance, but it is not of the defendants' causing. They have done nothing in causing the nuisance. Their house and their timber are harmless enough. It is the plaintiff who causes the nuisance by lighting a coal fire in a place the chimney of which is placed so near the defendants' wall, that the smoke does not escape, but comes into the house. Let the plaintiff cease to light his fire, let him move his chimney,

let him carry it higher, and there would be no nuisance. Who, then, causes it? It would be very clear that the plaintiff did, if he had built his house or chimney after the defendants had put up the timber on theirs, and it is really the same, though he did so before the timber was there. But (what is in truth the same answer), if the defendants cause the nuisance, they have a right to do so. If the plaintiff has not the right to the passage of air, except subject to the defendants' right to build or put timber on their house, then his right is subject to their right, and though a nuisance follows from the exercise of their right, they are not liable. "*Sic utere tuo ut alienum non laedas*" is a good maxim, but in our opinion the defendants do not infringe it: the plaintiff would if he succeeded … . Judgment for the defendants.

4. That one does not have a right to a view has been trite law since *Aldred's Case* (1619), 77 ER 816 at 821, where Wray CJ said that "for prospect which is a matter of delight and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house that has a long and large prospect … . But the law does not give an action for such things of delight."

5. Contrast *Fontainebleau* with *Prah v Maretti*, 321 NW 2d 182 (Wisc SC 1982):

This appeal … present[s] an issue of first impression, namely, whether an owner of a solar-heated residence states a claim upon which relief can be granted when he asserts that his neighbor's proposed construction of a residence (which conforms to existing deed restrictions and local ordinances) interferes with his access to an unobstructed path for sunlight across the neighbor's property … .

We consider first whether the complaint states a claim for relief based on common law private nuisance. This state has long recognized that an owner of land does not have an absolute or unlimited right to use the land in a way which injures the rights of others. The rights of neighboring landowners are relative; the uses by one must not unreasonably impair the uses or enjoyment of the other. [Footnote: In *Abdella v. Smith*, 34 Wis. 2d 393, at 399; 149 NW 2d 537 (1967), this court quoted with approval Dean Prosser's description of the judicial balancing of the reciprocal rights and privileges of neighbors in the use of their land: "Most of the litigation as to private nuisance has dealt with the conflicting interests of landowners and the question of the reasonableness of the defendant's conduct: The defendant's privilege of making a reasonable use of his own property for his own benefit and conducting his affairs in his own way is no less important than the plaintiff's right to use and enjoy his premises. The two are correlative and interdependent, and neither is entitled to prevail entirely, at the expense of the other. Some balance must be struck between the two. The plaintiff must be expected to endure some inconvenience rather than curtail the defendant's freedom of action, and the defendant must so use his own property that he causes no unreasonable harm to the plaintiff. The law of private nuisance is very largely a series of adjustments to limit the reciprocal rights and privileges of both. In every case the court must make a comparative evaluation of the conflicting interests according to objective legal standards, and the gravity of the harm to the plaintiff must be weighed against the utility of the defendant's conduct." Prosser, *Law of Torts*, sec. 89, p. 596 (2d ed. 1971) (Citations omitted)] … .

This court's reluctance in the nineteenth and early part of the twentieth century to provide broader protection for a landowner's access to sunlight was premised on three policy considerations. First, the right of landowners to use their property as they wished, as long as they did not cause physical damage to a neighbor, was jealously guarded … . Second, sunlight was valued only for aesthetic enjoyment or as illumination. Since artificial light could be used for illumination, loss of sunlight was at most a personal annoyance which was given little, if any, weight by society. Third, society had a significant interest in not restricting or impeding land development.

These three policies are no longer fully accepted or applicable. They reflect factual circumstances and social priorities that are now obsolete. First, society has increasingly regulated the use of land by the landowner for the general welfare ... . Second, access to sunlight has taken on a new significance in recent years. In this case the plaintiff seeks to protect access to sunlight, not for aesthetic reasons or as a source of illumination but as a source of energy. Access to sunlight as an energy source is of significance both to the landowner who invests in solar collectors and to a society which has an interest in developing alternative sources of energy. [Footnote: State and federal governments are encouraging the use of the sun as a significant source of energy ... . In this state the legislature has granted tax benefits to encourage the utilization of solar energy ... . The federal government has also recognized the importance of solar energy and currently encourages its utilization by means of tax benefits, direct subsidies and government loans for solar projects.] Third, the policy of favoring unhindered private development in an expanding economy is no longer in harmony with the realities of our society ... . The need for easy and rapid development is not as great today as it once was, while our perception of the value of sunlight as a source of energy has increased significantly. Courts should not implement obsolete policies that have lost their vigor over the course of the years. The law of private nuisance is better suited to resolve landowners' disputes about property development in the 1980s than is a rigid rule which does not recognize a landowner's interest in access to sunlight ... .

Private nuisance law, the law traditionally used to adjudicate conflicts between private landowners, has the flexibility to protect both a landowner's right of access to sunlight and another landowner's right to develop land. Private nuisance law is better suited to regulate access to sunlight in modern society and is more in harmony with legislative policy and the prior decisions of this court than is an inflexible doctrine of non-recognition of any interest in access to sunlight across adjoining land.

We therefore hold that private nuisance law ... is applicable to the instant case. Recognition of a nuisance claim for unreasonable obstruction of access to sunlight will not prevent land development or unduly hinder the use of adjoining land. It will promote the reasonable use and enjoyment of land in a manner suitable to the 1980s. That obstruction of access to light might be found to constitute a nuisance in certain circumstances does not mean that it will be or must be found to constitute a nuisance under all circumstances. The result in each case depends on whether the conduct complained of is unreasonable.

Accordingly we hold that the plaintiff in this case has stated a claim under which relief can be granted.

6. Is there any difference in principle between the facts of *Fontainebleau* and the following situations? If you had been on the court, how would you have decided these cases?

a. The defendant builds a grain silo that interferes with the flight path from the runway of the plaintiff airport.

b. *TH Critelli Ltd v Lincoln Trust and Savings Co*, 86 DLR (3d) 724, 1978 CanLII 2172 (Ont H Ct J): By increasing the height of its building, the defendant created a lee that caused more snow to accumulate on the roof of the plaintiff's adjacent building, imposing on the plaintiff the expense of reinforcing the roof. In holding for the plaintiff, Grange J remarked: "There is in my view, in such cases as this, a good deal of advantage in being there first. In the case at bar the plaintiff constructed its building taking reasonable precautions and reasonably not expecting a building such as the defendant's as its immediate and adjacent neighbour. The defendant Lincoln Trust on the other hand knew before construction of the existence of the plaintiff's building and that the planned construction would inevitably cause damage. Surely it was incumbent on Lincoln Trust to take steps to prevent that damage."

c. *Hunter v Canary Wharf Ltd*, [1997] 2 All ER 426 (HL): The defendants erected a tall building between the television transmitter and the plaintiffs' homes, thus interfering with television reception. The court dismissed the plaintiffs' action. Lord Goff stated:

> [I]n the absence of an easement, more is required than the mere presence of a neighbouring building to give rise to an actionable private nuisance. Indeed, for an action in private nuisance to lie in respect of interference with the plaintiff's enjoyment of his land, it will generally arise from something emanating from the defendant's land. Such an emanation may take many forms—noise, dirt, fumes, a noxious smell, vibrations, and suchlike. Occasionally, activities on the defendant's land are in themselves so offensive to neighbours as to constitute an actionable nuisance, as in *Thompson-Schwab v Costaki* [1956] 1 All ER 652, [1956] 1 WLR 335, where the sight of prostitutes and their clients entering and leaving neighbouring premises were held to fall into that category. Such cases must, however, be relatively rare.

7. Do you derive any assistance from the following extract from *Hay v Cohoes Co*, 2 NY 159 (1849), a case in which the defendant was held liable for damage caused by blasting while excavating a canal?

> It is an elementary principle with reference to private rights, that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others—otherwise it might be made destructive of their rights altogether. Hence the maxim *sic utere tuo,* &c. The defendants had the right to dig the canal. The plaintiff had the right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle. For if the defendants in excavating their canal, in itself a lawful use of their land, could, in the manner mentioned by the witness, demolish the stoop of the plaintiff with impunity, they might, for the same purpose, on the exercise of reasonable care, demolish his house, and thus deprive him of all use of his property.

Shuttleworth v Vancouver General Hospital

2 DLR 573, 1927 CanLII 489 (BCSC)

MURPHY J: Defendants, who for many years have carried on the Vancouver Civic Hospital, a very large institution, have within the past year erected on Block 418, which they own and which is the adjoining block to that on which the main hospital stands, an infectious diseases hospital. It is intended to treat therein all communicable diseases other than smallpox, plague and venereal diseases. This hospital was opened in its entirety three or four days before the trial of this action though portions of it had been used for some time.

The building is a reinforced concrete structure. It is hereinafter referred to as the Isolation Hospital. It extends almost from street to street through the centre of the block. One end faces on 13th Ave. Plaintiff's private dwelling also faces on 13th Ave. on the opposite side of the street and is directly across from the south end of the Isolation Hospital. The distance between the two from their nearest points is roughly 110 ft. From the upper storey windows of plaintiff's dwelling, it is possible to look into some of the Isolation Hospital rooms and see what is going on therein though the patients in their cots cannot be seen as the cots are placed by the

windows and the lower portion of these are painted. Plaintiff alleges the Isolation Hospital to be a nuisance and asks for an injunction or in the alternative, damages. The action is one of the class termed *quia timet* actions and is brought, not so much to obtain relief against wrongs already committed, by which the plaintiff has suffered actual damage, as to protect him from damage which he has reason to fear will be the result of the operation of the Isolation Hospital. The requirements for success in this action are I think, set out by Fitz Gibbon LJ in *AG v. Rathmines, etc., Hosp. Bd.*, [1904] 1 IR 161, at pp. 171-2:—"To sustain the injunction, the law requires proof by the plaintiff of a well-founded apprehension of injury—proof of actual and real danger—a strong probability, almost amounting to moral certainty, that if the Hospital be established, it will be an actionable nuisance. A sentiment of danger and dislike, however natural and justifiable—certainty that the Hospital will be disagreeable and inconvenient—proof that it will abridge a man's pleasure, or make him anxious—the inability of the Court to say that no danger will arise—none of these, even accompanied by depreciation of property will discharge the burden of proof which rests on the plaintiff, or can justify a precautionary injunction, restraining an owner's use of his own land upon the ground of apprehended nuisance to his neighbours." ...

Plaintiff bases his allegation that the Isolation Hospital will be a nuisance on three grounds. First, he says the crying of child patients will make it such. As to this, it is sufficient to say that the proper time to seek redress will be when the fact is established. Conceivably the collection in one place near a private dwelling of a number of sick children, who simultaneously, at frequent intervals, engage in violent crying, which is heard by persons occupying such private dwelling, may constitute an actionable nuisance. But there is no proof here that this will occur. There may be no great number of sick children in the Isolation Hospital at any one time. If there are they may not make sufficient disturbance to occasion an actionable nuisance. They may be so distributed in this large substantial building that plaintiff may not hear any crying—or, at any rate, crying sufficient to constitute an actionable nuisance.

The next ground put forward by the plaintiff is based on the fact above stated, that a person can, from the upper storey of plaintiff's house, see into some of the Isolation Hospital rooms. If I understand the matter aright, the contention based on this is, that inmates of plaintiff's house will have their sympathy for human suffering constantly aroused by this view to such a degree as to seriously interfere with their comfort and enjoyment of life. If it exists such susceptibility to sympathy for human suffering is doubtless admirable. People of coarser fibre might think that since, according to the experience of humanity up to the present, human disease and consequent suffering is inevitable, susceptibility to sympathy therefor would more likely be soothed than exacerbated by a view showing that every effort was being made to alleviate such suffering. Gross minds might even suggest that the true foundation of such susceptibility was a subconscious desire to mulct the hospital authorities in damages or by the obtaining of an injunction to force them to buy property at a high price. But whatever be the proper deduction, the law, as above stated, is clear that proof of the existence of objection based on sentiment will not give plaintiff a cause of action.

The point of substance in plaintiff's case is that there is danger of infection to members of his household from the existence or operation of the Isolation Hospital. The *Rathmines* case, supra; *Fleet v. Metropolitan Asylums Bd.*, 2 Times LR 361; *AG v. Nottingham Corp.*, [1904] 1 Ch. 673; *AG v. Guildford, etc., Hosp. Bd.* (1895), 12 Times LR 54, and other cases show that the onus is on plaintiff to prove a well-founded apprehension of injury, proof of actual and real danger. What plaintiff has in fact done is to call evidence to show that members of his household and his neighbours entertain a real fear of such infection. I am quite prepared to believe they do. He has

also sought to establish, mainly by cross-examination, that fear of infection from an Isolation Hospital, given the facts as to proximity proven herein, is widely held by people in general and even by members of the medical profession. No direct testimony that medical men do entertain such fear was led by him. Again, I am prepared to accept the contention that such fear under the given conditions would be widely entertained by laymen. In the absence of direct testimony, I cannot impute belief of the likelihood of infection to members of the plaintiff's household to any qualified physician. But the cases cited show plaintiff must go further and prove not only widespread belief but that such belief must be well founded in fact. He has failed to adduce such proof ... .

Evidence was led by plaintiff to show that, in the opinion of real estate men, the value of plaintiff's property has been depreciated by the erection of the Isolation Hospital. But if depreciation has taken place the only reason given before me is the existence of the fear of infection. It being my view that this does not *per se* constitute a ground for an action such as this, it follows that such depreciation—assuming it proven—has not been occasioned by any legal wrong. The mere fact of depreciation cannot found an action. "The act complained of must have been both tortious and hurtful": *Pearce & Meston on Nuisances*, p. 13. FitzGibbon LJ in the passage cited *ante* p. 576 expressly states that depreciation of property accompanying a sentiment of danger will not without more give a cause of action.

The case is dismissed with costs.

Action dismissed.

NOTES AND QUESTIONS

1. In *Laws v Florinplace Ltd*, [1981] 1 All ER 659 (ChD), the plaintiffs, ten residents in Longmore Street, brought a motion to restrain by interim injunction the continued operation of a hard-core pornography shop recently opened in the area. They claimed that the business, while not in breach of the criminal law, constituted a nuisance on two independent grounds: (1) The nature of the business would be apparent to residents and offend their sensibilities and, as such, was an unreasonable interference with the enjoyment of their property. (2) The business would attract undesirable clients and persons who might accost local girls. The court granted the interim injunction. Each ground presented a serious and triable issue. There can be nuisance where the use made by the defendants of their property is an affront to the reasonable susceptibilities of ordinary people and where this use is apparent to residents and visitors. Even if the business is carried on discreetly, its nature must be apparent if customers are to use the shop. Even if more than 80 percent of its customers are ordinary persons, the chance that a certain number might be otherwise is not a risk to be easily brushed aside.

2. Is *Laws* consistent with *Shuttleworth*?

3. If there is a nuisance in *Laws*, in what does it consist—in the type of business being operated; in the obtrusiveness of the sign; in the character of the clientele?

Fearn v Board of Trustees of the Tate Gallery

[2023] UKSC 4

[The plaintiffs owned apartments in a development that was adjacent to an art gallery run by the defendant. The living areas of the apartments, whose walls were constructed mainly of glass, were overlooked by a public viewing platform run by the gallery. The viewing platform afforded panoramic views of London but also allowed

gallery patrons to see directly into the plaintiffs' residences. It was visited by several hundred thousand patrons each year. One of the issues to be decided in the case was whether visual intrusion or overlooking could ever constitute a nuisance. The trial judge (Mann J) concluded that it could, but the Court of Appeal unanimously ruled that the weight of authority was against such a claim. In discussing the core principles of private nuisance, Lord Leggatt (with whom all their Lordships agreed) stated]:

9. In his classic article "The Boundaries of Nuisance" (1949) 65 LQR 480, 489 Professor Francis Newark described private nuisance as a "tort to land"—by which he meant that its subject matter is wrongful interference with the claimant's enjoyment of rights over land. ... As generally in the law of property, the legal concept of land includes here not only the earth itself but also buildings and other things which are physically attached to it and rights, for example easements, which attach in law to the land.

10. In *Hunter v Canary Wharf Ltd* [1997] AC 655 the House of Lords emphatically endorsed this thesis ... [and] decided that, because the interest protected by the tort of private nuisance is the use and enjoyment of land, only a person with a legal interest in the land can sue. Generally, the required interest is a right to exclusive possession of the land. That requirement is satisfied by the claimants in this case who are the leasehold owners of their flats under 999-year leases.

11. It follows from the nature of the tort of private nuisance that the harm from which the law protects a claimant is diminution in the utility and amenity value of the claimant's land, and not personal discomfort to the persons who are occupying it ...

12. A second fundamental point ... is that there is no conceptual or a priori limit to what can constitute a nuisance. To adapt what Lord Macmillan said of negligence in *Donoghue v Stevenson* [1932] AC 562, 619, the categories of nuisance are not closed. Anything short of direct trespass on the claimant's land which materially interferes with the claimant's enjoyment of rights in land is capable of being a nuisance.

13. Frequently, such interference is caused by something emanating from land occupied by or under the control of the defendant which physically invades the claimant's land. This may be something tangible, as where—to take a recent example—an incursion of Japanese knotweed from neighbouring land gave rise to a claim: see *Williams v Network Rail*. Or it may be something intangible, such as fumes, noise, vibration or an unpleasant smell. In all such cases, however, the basis of the claim is not the physical invasion itself but the resulting interference with the utility or amenity value of the claimant's land. Moreover, there is no requirement that the interference must be caused by a physical invasion and, as commentators have pointed out, there are many cases which do not fit this model: see C Essert, "Nuisance and the Normative Boundaries of Ownership" (2016) 52 Tulsa L Rev 85, 96–98; D Nolan, "The Essence of Private Nuisance" in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law*, vol 10 (2019), pp 81–83. So, for example, a nuisance may be caused by obstructing access to land (eg *Guppys (Bridport) Ltd v Brookling* (1983) 14 HLR 1); by a withdrawal of support for the claimant's land (eg *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836); by obstruction of an acquired right to light (eg *Jolly v Kine* [1907] AC 1) or to a flow of air (eg *Bass v Gregory* (1890) 25 QBD 481) through a defined aperture; or by preventing connection to a public sewer (*Barratt Homes Ltd v Dŵr Cymru Cyfyngedig (No 2)* [2013] 1 WLR 3486).

14. In the New Zealand case of *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525, the interference consisted in a dazzling glare caused by the deflection of the

sun's rays off the glass roof of the defendant's building. Similarly, in one American case a large neon advertising sign on a building directly opposite bedrooms of the plaintiff's hotel was held to cause a nuisance when illuminated at night: *Shelburne Inc v Crossan Corpn* (1923) 95 NJ Eq 188. In the *Bank of New Zealand* case, at p 530, Hardie Boys J rightly saw a "dearth" of similar cases as presenting "no great obstacle" to the claim, since "nuisance is one of those areas of the law where the courts have long been engaged in the application of certain basic legal concepts to a never-ending variety of circumstances ..."

15. In principle, the sight of something for which the defendant is responsible may be so offensive as to amount to a nuisance. In *Thompson-Schwab v Costaki* [1956] 1 WLR 335 the Court of Appeal upheld the grant of an interim injunction to restrain the use of the house next door to the claimant's house as a brothel. The court rejected a submission that the sight of prostitutes and their clients coming and going from the defendant's premises was not capable of constituting a nuisance as a matter of law, holding that whether a nuisance was established would depend on the facts found at the trial. See also *Laws v Florinplace Ltd* [1981] 1 All ER 659 (sex shop on a residential street). American case law provides further examples of interference with the enjoyment of land caused by offensive sights, such as *Foley v Harris* (1982) 286 SE 2d 186 where the keeping of numerous junked, abandoned and disabled vehicles on the defendant's land was held to be a nuisance.

16. In this case we are concerned, not with a sight to which an occupier of land is subjected when looking out, but with the interference caused by people constantly looking in. Leaving the actual facts of this case aside for the moment, it is not difficult to imagine circumstances in which an ordinary person would find such visual intrusion an intolerable interference with their freedom to use and enjoy their property. ...

17. In his judgment in the present case Mann J gave a similar (hypothetical) example of a landowner "who erects a viewing tower whose only purpose is to enable views into the gardens and houses of other neighbours, and who then charges an entry fee to allow members of the public to come in and do just that": [2019] Ch 369, para 169. It is obvious that, as a matter of fact, such an activity could substantially interfere with the ordinary use and enjoyment of the neighbours' land. There is in these circumstances no legal reason why it would not be actionable as a private nuisance.

NOTES AND QUESTIONS

1. Although not mentioned by Lord Leggatt, the legal conception of land also includes natural rights to: (1) receive water that flows in defined channels in its natural state in relation to flow, quantity, and quality (known as riparian rights, see *Groat v Edmonton (City)*, [1928] SCR 522); (2) the lateral and subjacent support of neighbouring land (see *Dalton v Angus* (1881), 6 App Cas 740); and (3) access property wherever it adjoins a public highway (see *Toronto Transit Commission v Swansea (Village)*, [1935] SCR 455). How does taking these rights into account affect your understanding of the decision?

2. Relying on *Fearn* and *Bank of New Zealand v Greenwood*, in *Thomas v Rio Tinto Alcan Inc*, 2024 BCCA 62, the court concluded that a substantial interference with an Indigenous community's constitutionally protected Aboriginal right to fish for food, social, and ceremonial purposes could constitute a nuisance at common law since this right was "associated with or adjacent to their reserve lands, to which they have exclusive occupation" and recognized "the need for reconciliation, and cultural security and continuity for Indigenous peoples" (paras 79-80).

II. LEGAL PROCESS AND PUBLIC POLICY

Holmes, "Privilege, Malice and Intent"

(1894) 8 Harv L Rev 1 at 3-4, 7, 9

Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore, decisions ... often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*, which teaches nothing but a benevolent yearning, or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is whether there is a wrong or not, and if not, why not.

When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case, even if everybody agrees what the answer should be. I do not try to mention or to generalize all the facts which have to be taken into account; but plainly the worth of the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts. Therefore, the conclusion will vary, and will depend on different reasons according to the nature of the affair.

For instance, a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already. He has a right to build a house upon his land in such a position as to spoil the view from a far more valuable house hard by. He has a right to give honest answers to inquiries about a servant, although he intends thereby to prevent his getting a place. But the reasons for these several privileges are different. The first rests on the economic postulate that free competition is worth more to society than it costs. The next, upon the fact that a line must be drawn between the conflicting interests of adjoining owners, which necessarily will restrict the freedom of each; upon the unavoidable philistinism which prefers use to beauty when considering the most profitable way of administering the land in the jurisdiction taken as one whole; upon the fact that the defendant does not go outside his own boundary; and upon other reasons to be mentioned in a moment. The third, upon the proposition that the benefit of free access to information, in some cases and within some limits, outweighs the harm to an occasional unfortunate ... .

Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless. Views of policy are taught by experience of the interests of life. Those interests are fields of battle. Whatever decisions are made must be against the wishes and opinion of one party, and the distinctions on which they go will be distinctions of degree. Even the economic postulate of the benefit of free competition, which I have mentioned above, is denied by an important school ... .

But in all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed.

QUESTIONS

1. What does Holmes mean by saying that the Latin words quoted in the first paragraph teach "nothing but a benevolent yearning"?

2. Do you agree that one should compare the gain from allowing the act to be done with the loss that it inflicts? Has this been what the courts have been doing in the cases we have read to this point? How would Holmes have decided *Appleby*, *Rogers*, *Fontainebleau*, and *Shuttleworth*? What sort of facts would have to be available to allow the judge to make the comparison?

3. Do you agree with the reasons that Holmes gives for not allowing a right to a view?

4. What does Holmes mean by saying that the interests of life are fields of battle? What view of the law does this imply? Is this view acceptable to you?

Compare Holmes's conception of public policy with the conception of public benefit in the following cases.

Bamford v Turnley

(1862), 122 ER 27 (Exch)

[The plaintiff alleged that the defendant's adjacent brick-making operation constituted a nuisance.]

MARTIN B (reading the judgment of BRAMWELL B): The defendant has done that which, if done wantonly or maliciously, would be actionable as being a nuisance to the plaintiff's habitation by causing a sensible diminution of the comfortable enjoyment of it.

The plaintiff, then, has a *prima facie* case. The defendant has infringed the maxim *sic utere tuo ut alienum non laedas*. Then, what principle or rule of law can he rely on to defend himself? It is clear to my mind that there is some exception to the general application of the maxim mentioned. The instances put during the argument, of burning weeds, emptying cess-pools, making noises during repairs, and other instances which would be nuisances if done wantonly or maliciously, nevertheless may be lawfully done. It cannot be said that such acts are not nuisances, because, by the hypothesis, they are; and it cannot be doubted that, if a person maliciously and without cause made close to a dwelling-house the same offensive smells as may be made in emptying a cesspool, an action would lie. Nor can these cases be got rid of as extreme cases, because such cases properly test a principle. Nor can it be said that the jury settle such questions by finding there is no nuisance, though there is. For that is to suppose they violate their duty, and that, if they discharged their duty, such matters would be actionable, which I think they could not and ought not to be. There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz., that those 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. This principle would comprehend all the cases I have mentioned, but would not comprehend the present, where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner—not unnatural nor unusual, but not the common and ordinary use of land. There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live … .

But it is said that ... it is lawful because it is for the public benefit. Now, in the first place, that law to my mind is a bad one which, for the public benefit, inflicts loss on an individual without compensation. But further, with great respect, I think this consideration misapplied in this and in many other cases. The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. But whenever this is the case—whenever a thing is for the public benefit, properly understood—the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site; and accordingly no one thinks it would be right to take an individual's land without compensation to make a railway. It is for the public benefit that trains should run, but not unless they pay their expenses. If one of those expenses is the burning down of a wood of such value that the railway owners would not run the train and burn down the wood if it were their own, neither is it for the public benefit they should if the wood is not their own. If, though the wood were their own, they still would find it compensated them to run trains at the cost of burning the wood, then they obviously ought to compensate the owner of such wood, not being themselves, if they burn it down in making their gains. So in like way in this case a money value indeed cannot easily be put on the plaintiff's loss, but it is equal to some number of pounds or pence, £10, £50 or what not: unless the defendant's profits are enough to compensate this, I deny that it is for the public benefit he should do what he has done; if they are, he ought to compensate.

The only objection I can see to this reasoning is, that by injunction or by abatement of the nuisance a man who would not accept a pecuniary compensation might put a stop to works of great value, and much more than enough to compensate him. This objection, however, is comparatively of small practical importance; it may be that the law ought to be amended, and some means be provided to legalise such cases, as I believe is the case in some foreign countries on giving compensation; but I am clearly of opinion that, though the present law may be defective, it would be much worse, and be unjust and inexpedient, if it permitted such power of inflicting loss and damage to individuals, without compensation, as is claimed by the argument for the defendant. ...

In the result, then, I think ... that our judgment should be for the plaintiff.

NOTES AND QUESTIONS

1. In *Fearn*, Lord Leggatt elaborated one aspect of Bramwell B's speech as follows:

34. The underlying justification for [many of the established doctrines of the law of nuisance] ... was spelt out by Lord Millett in *Southwark,* [2001] 1 AC 1, when he explained (at p 20) that: "The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him." This explanation gets to the nub of the rule of "give and take, live and let live" stated by Bramwell B in *Bamford v Turnley*. It is a principle of equal justice, a form of the golden rule that you should "do as you would be done by". Put negatively, people cannot fairly demand of others behaviour which they would not at the same time allow others to demand of them. See further Ernest J Weinrib, *The Idea of Private Law*

(2012), pp 190–194; C Essert, "Nuisance and the Normative Boundaries of Ownership" 52 Tulsa L Rev 85, 103–106.

35. This principle of reciprocity explains the priority given by the law of nuisance to the common and ordinary use of land over special and unusual uses. A person who puts his land to a special use cannot justify substantial interference which this causes with the ordinary use of neighbouring land by saying that he is asking no more consideration or forbearance from his neighbour than they (or an average person in their position) can expect from him. Nor can such a person complain on that basis about substantial interference with his special use of his land caused by the ordinary use of neighbouring land. By contrast, a person who is using her land in a common and ordinary way is not seeking any unequal treatment or asking of her neighbours more than they ask of her.

2. In light of Lord Leggatt's explanation, how should the law deal with a situation where both the use of the plaintiff and the use of the defendant are unusual in the locale in which they are based? In a similar vein, could it be said that his explanation of nuisance liability unfairly stifles new and innovative uses of land, as was claimed by Lord Sales in his dissent in *Fearn*?

3. Does the concept of common and ordinary use help resolve the issues raised by the following case?

Miller v Jackson

[1977] 3 All ER 338 (CA)

LORD DENNING MR: In summer time village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club-house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practice while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that, when a batsman hits a six, the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped; with the consequences, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.

I must say that I am surprised that the developers of the housing estate were allowed to build the houses so close to the cricket ground. No doubt they wanted to

make the most of their site and put up as many houses as they could for their own profit. The planning authorities ought not to have allowed it. The houses ought to have been so sited as not to interfere with the cricket. But the houses have been built and we have to reckon with the consequences.

At the time when the houses were built it was obvious to the people of Lintz that these new houses were built too close to the cricket ground. It was a small ground, and there might be trouble when a batsman hit a ball out of the ground. But there was no trouble in finding purchasers. Some of them may have been cricket enthusiasts. But others were not. In the first three years, 1972, 1973 and 1974, quite a number of balls came over or under the boundary fence and went into the gardens of the houses, and the cricketers went round to get them. Mrs Miller was very annoyed about this. To use her own words:

> When the balls come over, they the cricketers, either ring or come round in twos and threes and ask if they can have the ball back, and they never ask properly. They just ask if they can have the ball back, and that's it. They have been very rude, very arrogant and very ignorant, and very deceitful ... to get away from any problems we make a point of going out on Wednesdays, Fridays and the weekends.

Having read the evidence, I am sure that that was a most unfair complaint to make of the cricketers. They have done their very best to be polite. It must be admitted, however, that on a few occasions before 1974 a tile was broken or a window smashed. The householders made the most of this and got their rates reduced. The cricket club then did everything possible to see that no balls went over. In 1975, before the cricket season opened, they put up a very high protective fence. The existing concrete fence was only six feet high. They raised it to nearly 15 feet high by a galvanised chain-link fence. It cost £700. They could not raise it any higher because of the wind. The cricket ground is 570 feet above sea level. During the winter even this high fence was blown down on one occasion and had to be repaired at a cost of £400. Not only did the club put up this high protective fence. They told the batsmen to try to drive the balls low for four and not hit them up for six. This greatly reduced the number of balls that got into the gardens. So much so that the rating authority no longer allowed any reduction in rates.

Despite these measures, a few balls did get over. The club made a tally of all the sixes hit during the seasons of 1975 and 1976. In 1975 there were 2,221 overs, that is, 13,326 balls bowled. Of them there were 120 six hits on all sides of the ground. Of these only six went over the high protective fence and into this housing estate. In 1976 there were 2,616 overs, that is 15,696 balls. Of them there were 160 six hits. Of these only nine went over the high protective fence and into this housing estate.

No one has been hurt at all by any of these balls, either before or after the high fence was erected. There has, however, been some damage to property, even since the high fence was erected. The cricket club have offered to remedy all the damage and pay all expenses. They have offered to supply and fit unbreakable glass in the windows, and shutters or safeguards for them. They have offered to supply and fit a safety net over the garden whenever cricket is being played. In short, they have done everything possible short of stopping playing cricket on the ground at all. But Mrs Miller and her husband have remained unmoved. Every offer by the club has been rejected. They demand the closing down of the cricket club. Nothing else will satisfy them. They have obtained legal aid to sue the cricket club.

In support of the case, the plaintiff relies on the dictum of Lord Reid in *Bolton v. Stone*: "If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all." I would agree with that saying if the houses

or road were there first, and the cricket ground came there second. We would not allow the garden of Lincoln's Inn to be turned into a cricket ground. It would be too dangerous for windows and people. But I do not agree with Lord Reid's dictum when the cricket ground has been there for 70 years and the houses are newly built at the very edge of it. I recognise that the cricket club are under a duty to use all reasonable care consistently with the playing of the game of cricket, but I do not think the cricket club can be expected to give up the game of cricket altogether. After all they have their rights in their cricket ground. They have spent money, labour and love in the making of it; and they have the right to play on it as they have done for 70 years. Is this all to be rendered useless to them by the thoughtless and selfish act of an estate developer in building right up to the edge of it? Can the developer or purchaser of a house say to the cricket club: "Stop playing. Clear out." I do not think so. And I will give my reasons.

The Law in the 19th Century

If we were to approach this case with the eyes of the judges of the 19th century they would, I believe, have seen it in this way. Every time that a batsman hit a ball over the fence so that it landed in the garden, he would be guilty of a trespass. If he hit it so that it went under the fence and down the bank, he would be guilty of a trespass. So would the committee of the cricket club, because they would have impliedly authorised it. They cheered the batsman on. If one or two of the players went round and asked the householder if they could go into the garden to find it, the householder could deny them access; he could say: "You are not to come in here to get your ball. I am not going to get it for you. Nor will I let you. It is going to stay there." If the cricketers said: "It's a new ball. It cost us over £6," the householder could say: "That is your look-out. You ought not to have put it there." Of course, if the householder picked up the ball himself and gave it to his son to play with, he would be liable in conversion. But otherwise he would not be liable at all. He could say: "An Englishman's house is his castle. You are not coming in. Nor are you to hit your cricket ball in here. If you go on doing it, I am going to get an injunction to stop you. Once I prove the violation of a legal right, the Court of Chancery will grant me an injunction to prevent the recurrence of that violation": see *Imperial Gas Light & Coke Co v. Broadbent*. Even if there was any doubt about the plaintiff's right to sue in trespass, he would have a claim in nuisance, once he proved that the balls were repeatedly coming over or under the fence and making things uncomfortable for him. To those claims, in the 19th century, either in trespass or in nuisance, the committee of the cricket club would have no answer. They could not claim an easement because there is no such easement known to the law as a right to hit cricket balls into your neighbour's land. It would be no good for them to say that the cricket ground was there before the house was built. The householder could rely on the case a hundred years ago of the physician who built his new consulting room next to the old established kitchen of his neighbour. The physician was held entitled to stop the working of the kitchen on the ground that the noise was a nuisance to him in his consulting-room: see *Sturges v. Bridgman* (1879), 11 Ch. D 852 ... .

The Law in the 20th Century

The case here was not pleaded by either side in the formulae of the 19th century. The plaintiffs did not allege trespass ... . The case was pleaded in negligence or alternatively nuisance.

The tort of nuisance in many cases overlaps the tort of negligence ... . But there is at any rate one important distinction between them. It lies in the nature of the

remedy sought. Is it damages? Or an injunction? If the plaintiff seeks a remedy in damages for injury done to him or his property, he can lay his claim either in negligence or in nuisance. But, if he seeks an injunction to stop the playing of cricket altogether, I think he must make his claim in nuisance. The books are full of cases where an injunction has been granted to restrain the continuance of a nuisance. But there is no case, so far as I know, where it has been granted so as to stop a man being negligent. At any rate in a case of this kind, where an occupier of a house or land seeks to restrain his neighbour from doing something on his own land, the only appropriate cause of action, on which to base the remedy of an injunction, is nuisance ... . It is the very essence of a private nuisance that it is the unreasonable use by a man of his land to the detriment of his neighbour. He must have been guilty of the fault, not necessarily of negligence, but of the unreasonable use of the land: see *The Wagon Mound (No 2)* by Lord Reid.

It has been often said in nuisance cases that the rule is *sic utere tuo ut alienum non laedas*. But that is a most misleading maxim. Lord Wright put it in its proper place in *Sedleigh-Denfield v. O'Callagan*: "[It] is not only lacking in definiteness but is also inaccurate. An occupier may make in many ways a use of his land which causes damage to the neighbouring landowners, and yet be free from liability ... a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or, more correctly, in a particular society."

I would, therefore, adopt this test: is the use by the cricket club of this ground for playing cricket a reasonable use of it? To my mind it is a most reasonable use. Just consider the circumstances. For over 70 years the game of cricket has been played on this ground to the great benefit of the community as a whole, and to the injury of none. No one could suggest that it was a nuisance to the neighbouring owners simply because an enthusiastic batsman occasionally hit a ball out of the ground for six to the approval of the admiring onlookers. Then I would ask: does it suddenly become a nuisance because one of the neighbours chooses to build a house on the very edge of the ground, in such a position that it may well be struck by the ball on the rare occasion when there is a hit for six? To my mind the answer is plainly No. The building of the house does not convert the playing of cricket into a nuisance when it was not so before. If and insofar as any damage is caused to the house or anyone in it, it is because of the position in which it was built ... .

It was said, however, that the case of the physician's consulting-room was to the contrary. But that turned on the old law about easements and prescriptions, and so forth. It was in the days when rights of property were in the ascendant and not subject to any limitations except those provided by the law of easements. But nowadays it is a matter of balancing the conflicting interests of the two neighbours. That was made clear by Lord Wright in *Sedleigh-Denfield v. O'Callagan*, when he said: "A balance has to be maintained between the right of the occupier to do what he likes with his own and the right of his neighbour not to be interfered with." In this case it is our task to balance the right of the cricket club to continue playing cricket on their cricket ground, as against the right of the householder not to be interfered with. On taking the balance, I would give priority to the right of the cricket club to continue playing cricket on the ground, as they have done for the last 70 years. It takes precedence over the right of the newcomer to sit in his garden undisturbed. After all he bought the house four years ago in mid-summer when the cricket season was at its height. He might have guessed that there was a risk that a hit for six might possibly land on his property. If he finds that he does not like it, he ought, when cricket is played, to sit in the other side of the house or in the front garden, or go out; or take advantage of the offers the club have made to him of fitting unbreakable glass, and so forth. Or, if he does not like that, he ought to sell his house and move elsewhere.

I expect there are many who would gladly buy it in order to be near the cricket field and open space. At any rate he ought not to be allowed to stop cricket being played on this ground.

This case is new. It should be approached on principles applicable to modern conditions. There is a contest here between the interest of the public at large and the interest of a private individual. The public interest lies in protecting the environment by preserving our playing fields in the face of mounting development, and by enabling our youth to enjoy all the benefits of outdoor games, such as cricket and football. The private interest lies in securing the privacy of his home and garden without intrusion or interference by anyone. In deciding between these two conflicting interests, it must be remembered that it is not a question of damages. If by a million-to-one chance a cricket ball does go out of the ground and cause damage, the cricket club will pay. There is no difficulty on that score. No, it is a question of an injunction. And in our law you will find it repeatedly affirmed that an injunction is a discretionary remedy. In a new situation like this, we have to think afresh as to how discretion should be exercised. On the one hand, Mrs Miller is a very sensitive lady who has worked herself up into such a state that she exclaimed to the judge: "I just want to be allowed to live in peace. Have we got to wait until someone is killed before anything can be done?" If she feels like that about it, it is quite plain that, for peace in the future, one or other has to move. Either the cricket club have to move, but goodness knows where. I do not suppose for a moment there is any field in Lintz to which they could move. Or Mrs Miller must move elsewhere. As between their conflicting interests, I am of opinion that the public interest should prevail over the private interest. The cricket club should not be driven out. In my opinion the right exercise of discretion is to refuse an injunction; and, of course, to refuse damages in lieu of an injunction. Likewise as to the claim for past damages. The club were entitled to use this ground for cricket in the accustomed way. It was not a nuisance, nor was it negligence of them so to run it. Nor was the batsman negligent when he hit the ball for six. All were doing simply what they were entitled to do. So if the club had put it to the test, I would have dismissed the claim for damages also. But as the club very fairly say that they are willing to pay for any damage, I am content that there should be an award of £400 to cover any past or future damage.

I would allow the appeal, accordingly.

GEOFFREY LANE LJ:

[After reciting the facts and finding the defendants liable for negligence in damages, Geoffrey Lane LJ continued:]

Was there here a use by the defendants of their land involving an unreasonable interference with the plaintiffs' enjoyment of their land? There is here in effect no dispute that there has been and is likely to be in the future an interference with the plaintiffs' enjoyment of no 20 Brackenridge. The only question is whether it is unreasonable. It is a truism to say that this is a matter of degree. What that means is this. A balance has to be maintained between on the one hand the rights of the individual to enjoy his house and garden without the threat of damage and on the other hand the rights of the public in general or a neighbour to engage in lawful pastimes. Difficult questions may sometimes arise when the defendants' activities are offensive to the senses, for example by way of noise. Where, as here, the damage or potential damage is physical the answer is more simple. There is, subject to what appears hereafter, no excuse I can see which exonerates the defendants from liability in nuisance for what they have done or from what they threaten to do. It is true no

one has yet been physically injured. That is probably due to a great extent to the fact that the householders in Brackenridge desert their gardens whilst cricket is in progress. The danger of injury is obvious and is not slight enough to be disregarded. There is here a real risk of serious injury.

There is, however, one obviously strong point in the defendants' favour. They or their predecessors have been playing cricket on this ground (and no doubt hitting sixes out of it) for 70 years or so. Can someone by building a house on the edge of the field in circumstances where it must have been obvious that balls might be hit over the fence, effectively stop cricket being played? Precedent apart, justice would seem to demand that the plaintiffs should be left to make the most of the site they have elected to occupy with all its obvious advantages and all its equally obvious disadvantages. It is pleasant to have an open space over which to look from your bedroom and sitting room windows, so far as it is possible to see over the concrete wall. Why should you complain of the obvious disadvantages which arise from the particular purpose to which the open space is being put? Put briefly, can the defendants take advantage of the fact that the plaintiffs have put themselves in such a position by coming to occupy a house on the edge of a small cricket field, with the result that what was not a nuisance in the past now becomes a nuisance? If the matter were *res integra*, I confess I should be inclined to find for the defendants. It does not seem just that a long-established activity, in itself innocuous, should be brought to an end because someone chooses to build a house nearby and so turn an innocent pastime into an actionable nuisance. Unfortunately, however, the question is not open. In *Sturges v. Bridgman* this very problem arose. The defendant had carried on a confectionary shop with a noisy pestle and mortar for more than 20 years. Although it was noisy, it was far enough away from neighbouring premises not to cause trouble to anyone, until the plaintiff, who was a physician, built a consulting-room on his own land but immediately joining the confectionary shop. The noise and vibrations seriously interfered with the consulting-room and became a nuisance to the physician … . That decision involved the assumption, which so far as one can discover has never been questioned, that it is no answer to a claim in nuisance for the defendant to show that the plaintiff brought the trouble on his own head by building or coming to live in a house so close to the defendant's premises that he would inevitably be affected by the defendant's activities, where no one had been affected previously … . It may be that this rule works injustice, it may be that one would decide the matter differently in the absence of authority. But we are bound by the decision in *Sturges v. Bridgman* (1879), 11 Ch. D 852 and it is not for this court as I see it to alter a rule which has stood for so long … .

Given that the defendants are guilty of both negligence and nuisance, is it a case where the court should in its discretion give relief, or should the plaintiffs be left to their remedy in damages? There is no doubt that if cricket is played damage will be done to the plaintiffs' tiles or windows or both. There is a not inconsiderable danger that if they or their son or their guests spend any time in the garden during the weekend afternoons in the summer they may be hit by a cricket ball. So long as this situation exists it seems to me that damages cannot be said to provide an adequate form of relief. Indeed, quite apart from the risk of physical injury, I can see no valid reason why the plaintiffs should have to submit to the inevitable breakage of tiles and/or windows, even though the defendants have expressed their willingness to carry out any repairs at no cost to the plaintiffs. I would accordingly uphold the grant of the injunction to restrain the defendants from committing nuisance. However, I would postpone the operation of the injunction for 12 months to enable the defendants to look elsewhere for an alternative pitch.

So far as the plaintiffs are concerned, the effect of such postponement will be that they will have to stay out of their garden until the end of the cricket season but thereafter will be free to use it as they wish … .

CUMMING-BRUCE LJ: I agree with all that Geoffrey Lane LJ has said in his recital of the relevant facts and his reasoning and conclusion on the liability of the defendants in negligence and nuisance, including his observation about the decision in *Sturges v. Bridgman* … .

The only problem that arises is whether the learned judge is shown to be wrong in deciding to grant the equitable remedy of an injunction which will necessarily have the effect that the ground which the defendants have used as a cricket ground for 70 years can no longer be used for that purpose … . There is authority that in considering whether to exercise a judicial discretion to grant an injunction the court is under a duty to consider the interests of the public … .

So on the facts of this case a court of equity must seek to strike a fair balance between the right of the plaintiffs to have quiet enjoyment of their house and garden without exposure to cricket balls occasionally falling like thunderbolts from the heavens, and the opportunity of the inhabitants of the village in which they live to continue to enjoy the manly sport which constitutes a summer recreation for adults and young persons, including one would hope and expect the plaintiffs' son. It is a relevant circumstance which a court of equity should take into account that the plaintiffs decided to buy a house which in June 1972 when completion took place was obviously on the boundary of a quite small cricket ground where cricket was played at weekends and sometimes on evenings during the working week. They selected a house with the benefit of the open space beside it. In February, when they first saw it, they did not think about the use of this open space. But before completion they must have realised that it was the village cricket ground, and that balls would sometimes be knocked from the wicket into their garden, or even against the fabric of the house. If they did not realise it, they should have done. As it turns out, the female plaintiff has developed a somewhat obsessive attitude to the proximity of the cricket field and the cricketers who visit her to seek to recover their cricket balls. The evidence discloses a hostility which goes beyond what is reasonable, although as the learned judge found she is reasonable in her fear that if the family use the garden while a match is in progress they will run risk of serious injury if a great hit happens to drive a ball up to the skies and down into their garden. It is reasonable to decide that during matches the family must keep out of the garden. The risk of damage to the house can be dealt with in other ways, and is not such as to fortify significantly the case for an injunction stopping play on this ground.

With all respect, in my view the learned judge did not have regard sufficiently to these considerations. He does not appear to have had regard to the interest of the inhabitants of the village as a whole. Had he done so he would in my view have been led to the conclusion that the plaintiffs having accepted the benefit of the open space marching with their land should accept the restrictions on enjoyment of their garden which they may reasonably think necessary. That is the burden which they have to bear in order that the inhabitants of the village may not be deprived of their facilities for an innocent recreation which they have so long enjoyed on this ground. There are here special circumstances which should inhibit a court of equity from granting the injunction claimed. If I am wrong in that conclusion, I agree with Geoffrey Lane LJ that the injunction should be suspended for one year to enable the defendants to see if they can find another ground.

Appeal allowed. Past and future damages at £400.

QUESTIONS

Why does Lord Denning think that playing cricket is in the public interest? Is his conception of the public interest here the same as Bramwell B's conception of public benefit in *Bamford*? Bramwell B has said that the public consists of the individuals in it. Does Lord Denning disagree with this?

Sturges v Bridgman

(1879), 11 ChD 852 (CA)

THESIGER LJ (for the court) (JAMES, BAGGALLAY, and THESIGER LJJ concurring):

The Defendant in this case is the occupier, for the purpose of his business as a confectioner, of a house in Wimpole Street. In the rear of the house is a kitchen, and in that kitchen there are now, and have been for over twenty years, two large mortars in which the meat and other materials of the confectionery are pounded. The Plaintiff, who is a physician, is the occupier of a house in Wimpole Street, which until recently had a garden at the rear, the wall of which garden was a party-wall between the Plaintiff's and the Defendant's premises, and formed the back wall of the Defendant's kitchen. The Plaintiff has, however, recently built upon the site of the garden a consulting-room, one of the side walls of which is the wall just described. It has been proved that in the case of the mortars, before and at the time of action brought, a noise was caused which seriously inconvenienced the Plaintiff in the use of his consulting-room and which, unless the Defendant had acquired a right to impose the inconvenience, would constitute an actionable nuisance. The Defendant contends that he had acquired the right, either at Common Law or under the Prescription Act, by uninterrupted user for more than twenty years.

In deciding this question one more fact is necessary to be stated. Prior to the erection of the consulting-room no material annoyance or inconvenience was caused to the Plaintiff or to any previous occupier of the Plaintiff's house by what the Defendant did ... . Here then arises the objection to the acquisition by the Defendant of any easement. That which was done by him was in its nature such that it could not be physically interrupted; it could not at the same time be put a stop to by action. Can user which is neither preventible nor actionable found an easement? We think not ... .

[T]he laws governing the acquisition of easements by user stands thus: Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario*; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence ... .

[U]ntil the noise, to take this case, became an actionable nuisance, which it did not at any time before the consulting-room was built, the basis of the presumption of the consent, viz., the power of prevention physically or by action, was never present.

It is said that if this principle is applied in cases like the present, and were carried out to its logical consequences, it would result in the most serious practical inconveniences, for a man might go—say into the midst of the tanneries of Bermondsey, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavoury character, and, by building a private residence upon a vacant piece of land, put a stop to such trade or manufacture altogether. The case also is put of a blacksmith's forge built away from all habitations, but to which, in course of time, habitations approach. We do not think that either of these hypothetical cases presents any real difficulty. As regards the first, it may be answered that whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong. As regards the blacksmith's forge, that is really an *idem per idem* case with the present. It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be any annoyance or inconvenience to either of its owner or occupier; and it would be on the other hand in an equal degree unjust, and, from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law gives no power to prevent. The smith in the case supposed might protect himself by taking a sufficient curtilage to ensure what he does from being at any time an annoyance to his neighbour, but the neighbour himself would be powerless in the matter. Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes. The Master of the Rolls in the Court below took substantially the same view of the matter as ourselves and granted the relief which the Plaintiff prayed for, and we are of opinion that his order is right and should be affirmed, and that this appeal should be dismissed with costs.

NOTES AND QUESTIONS

1. In *Miller*, Lord Denning MR and Geoffrey Lane LJ took different attitudes toward this case. With whose attitude do you agree?

2. Do you think that *Sturges* is a badly reasoned case? Do either Lord Denning MR or Geoffrey Lane LJ provide reasoned grounds for their dissatisfaction with *Sturges*?

3. Lord Denning MR states in *Miller* that "there is no such easement known to the law as a right to hit cricket balls into your neighbour's land." Would Thesiger LJ agree? (An easement is the right of one landowner to use the land of another.)

4. In *Coventry v Lawrence*, [2014] 1 AC 822 (UKSC), Lord Neuberger dealt with the issue of whether coming to the nuisance was a defence:

> For some time now, it has been generally accepted that it is not a defence to a claim in nuisance to show that the claimant acquired, or started to occupy, her property after the nuisance had started—i.e. that it is no defence that the claimant has come to the nuisance. This proposition was clearly stated in *Bliss* 4 Bing NC 183, 186 per Tindal CJ. Coming to the nuisance

appears to have been assumed not to be a defence in *Sturges v Bridgman* 11 Ch D 852. And in *London, Brighton and South Coast Railway Co v Truman* (1885) LR 11 App Cas 45, 52, Lord Halsbury LC described the idea that it was a defence to nuisance as an "old notion ... long since exploded" and he also said that "whether the man went to the nuisance or the nuisance came to the man, the rights are the same" in *Fleming v Hislop* (1886) LR 11 App Cas 686, 697.

The [defendants] suggest that there is authority prior to the decision in *Bliss* 4 Bing 183, which supports the contention that the law was somewhat different in earlier times ... . In his *Commentaries on the Laws of England* 1st ed, (1765–1769), Vol II Chap 26, p 403, Blackstone, after explaining that a defendant can be liable in nuisance for setting up a tannery near my home, continues "but if he is first in possession of the air and I fix my habitation near him, the nuisance is of my own seeking, and must continue." ...

In my view, the law is clear, at least in a case such as the present, where the claimant in nuisance uses her property for essentially the same purpose as that for which it has been used by her predecessors since before the alleged nuisance started: in such a case, the defence of coming to the nuisance must fail. For over 180 years it has been assumed and authoritatively stated to be the law that it is no defence for a defendant to a nuisance claim to argue that the claimant came to the nuisance ... .

Furthermore, the notion that coming to the nuisance is no defence is consistent with the fact that nuisance is a property-based tort, so that the right to allege a nuisance should, as it were, run with the land. It would also seem odd if a defendant was no longer liable for nuisance owing to the fact that the identity of his neighbour had changed, even though the use of his neighbour's property remained unchanged. Quite apart from this, the concerns expressed by Lord Denning in *Miller* [1977] 1 QB 966 would not apply where a purchasing claimant has simply continued with the use of the property which had been started before the defendant's alleged nuisance-causing activities started.

There is much more room for argument that a claimant who builds on, or changes the use of, her property, after the defendant has started the activity alleged to cause a nuisance by noise, or any other emission offensive to the senses, should not have the same rights to complain about that activity as she would have had if her building work or change of use had occurred before the defendant's activity had started. ...

It is unnecessary to decide this point on this appeal, but it may well be that it could and should normally be resolved by treating any pre-existing activity on the defendant's land, which was originally not a nuisance to the claimant's land, as part of the character of the neighbourhood—at least if it was otherwise lawful. After all, until the claimant built on her land or changed its use, the activity in question will, *ex hypothesi*, not have been a nuisance. This is consistent with the notion that nuisance claims should be considered by reference to what Lord Goff referred to as the "give and take as between neighbouring occupiers of land" quoted in para 5 above (and some indirect support for such a view may be found in *Sturges*, at pp 865–866).

On this basis, where a claimant builds on, or changes the use of, her land, I would suggest that it may well be wrong to hold that a defendant's pre-existing activity gives rise to a nuisance provided that (i) it can only be said to be a nuisance because it affects the senses of those on the claimant's land, (ii) it was not a nuisance before the building or change of use of the claimant's land, (iii) it is and has been, a reasonable and otherwise lawful use of the defendant's land, (iv) it is carried out in a reasonable way, and (v) it causes no greater nuisance than when the claimant first carried out the building or changed the use. ...

5. In *Fearn*, Lord Leggatt examined *Sturges* and responded to the analysis given in *Coventry* as follows:

42. A further rule, also illustrated by *Sturges v Bridgman*, is that "coming to a nuisance" is not a defence. In other words, it is not in itself a defence to a claim for nuisance that the

defendant was already using his land in the way now complained of before the claimant acquired or began to occupy the neighbouring land. Nor is it a defence that the defendant's activity did not amount to a nuisance until the claimant's land was built on or its use was changed. This may initially seem counterintuitive. ... But it is worth noticing the reasons why Mr Bridgman's longstanding use of his property did not give him a defence, and why indeed it would have been unjust if it had done so, because those reasons shed further light on the principles which underpin the law of nuisance. The rationale for the approach taken by the common law can be seen by comparing the alternatives.

43. One alternative approach would be to treat an activity as an actionable nuisance even though it is not interfering with any actual use of the claimant's property if it impairs a potential use. Such an approach would have allowed Dr Sturges (or his predecessor in title) to bring an action to stop the use of Mr Bridgman's pestles and mortars before the consulting room was built even though that use was then causing no material inconvenience, on the basis that the noise and vibrations would prevent the ordinary use of any new room that his neighbour might later wish to build against the party wall. There are good reasons why the law does not permit such a claim. First, requiring actual interference to be shown allows someone in Mr Bridgman's position to make use of his land, at least for the time being, in a way that benefits him and is not inconveniencing his neighbour. Second, the potential conflict of use might never actually arise. For example, Mr Bridgman's neighbour might never have chosen to build a new room on the other side of the party wall, or Mr Bridgman might have installed new kitchen equipment which did not cause the same noise and vibrations, or his premises might have been converted to a different use. It is not desirable to have litigation about possible future conflicts that may never actually occur.

44. A second theoretical possibility would be to allow a person to acquire a right to continue a use of land through long uninterrupted use during a period when the neighbouring landowner has no right to prevent such use because the neighbour is not at that time using her own land in such a way that the activity is a nuisance. However, such a regime would be equally objectionable. It is wrong in principle that a person should be able to acquire rights over neighbouring land and diminish his neighbour's rights over her own land without the neighbour's consent or acquiescence, simply by his unilateral action in carrying on an activity at a time when the owner or occupier of the neighbouring land has no power to prevent it.

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46. The general rule that coming to a nuisance is not a defence was confirmed by the Supreme Court in *Lawrence v Fen Tigers Ltd* [2014] AC 822. There is discussion (obiter) in the judgments of Lord Neuberger PSC and Lord Carnwath JSC in that case of the possibility that a use of the defendant's land which pre-dates a change in use of the claimant's land may nevertheless support a defence by contributing to the character of the locality. The points discussed may in future need to be revisited but do not arise for decision on this appeal.

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(2) Why the public interest is not relevant to liability

121. ... The reason is simply that private nuisance is a violation of real property rights (see paras 10–11 above). The very nature of property rights requires that, as a general principle, they be respected by all others unless relinquished voluntarily. The fact that it would be of general benefit to the community to use your land for a particular purpose—say, as a shortcut or as a place for taking exercise—is not a reason to allow such use without your consent. The same applies to nuisance. It is not a justification for carrying on an activity which substantially interferes with the ordinary use of your land that the community as a whole will benefit from the interference. In *Sturges v Bridgman* 11 Ch D 852, for example, no one thought it relevant to examine the public utility of Mr Bridgman's use of his land for making

confectionery or to seek to compare this with the public utility of Dr Sturges' use of his consulting room. (Although the economist Ronald Coase was understood by some to have proposed such an approach in a famous essay, it is entirely inconsistent with the common law: see RH Coase, "The Problem of Social Cost" (1960) 3 JL & Econ 1; and David Campbell & Matthias Klaes, "What Did Ronald Coase Know about the Law of Tort?" (2016) 39 Melb U L Rev 793.) The point of the law of private nuisance is to protect equality of rights between neighbouring occupiers to the use and enjoyment of their own land when those rights conflict. In deciding whether one party's use has infringed the other's rights, the public utility of the conflicting uses is not relevant.

122. Property rights are not absolute. There are circumstances in which they may be subordinated to the general good of the community—a classic example being the expropriation of land needed for a major infrastructure project. But it is fundamental to the integrity of any system of property rights that, in any such case, the individuals whose rights are infringed or overridden receive compensation for the violation of their rights. In other words, the public interest may sometimes justify awarding damages rather than granting an injunction to restrain the defendant's harmful activity, but it cannot justify denying the victim any remedy at all.

123. The seminal decision in which this is most clearly articulated is *Bamford v Turnley* 3 B & S 66 … .

6. As mentioned by Lord Leggatt, Coase, in a foundational article in the literature of the economic analysis of law, "The Problem of Social Cost" (1960) 1 JL & Econ 1, considered *Sturges* in the following terms:

This paper is concerned with those actions of business firms which have harmful effects on others. The standard example is that of a factory the smoke from which has harmful effects on those occupying neighbouring properties. The economic analysis of such a situation has usually proceeded in terms of a divergence between the private and social product of the factory, in which economists have largely followed the treatment of Pigou in *The Economics of Welfare*. The conclusions to which this kind of analysis seems to have led most economists is that it would be desirable to make the owner of the factory liable for the damage caused to those injured by the smoke, or alternatively, to place a tax on the factory owner varying with the amount of smoke produced and equivalent in money terms to the damage it would cause, or finally, to exclude the factory from residential districts (and presumably from other areas in which the emission of smoke would have harmful effects on others). It is my contention that the suggested courses of action are inappropriate, in that they lead to results which are not necessarily, or even usually, desirable … .

The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm. I instanced in my previous article the case of a confectioner the noise and vibrations from whose machinery disturbed a doctor in his work. To avoid harming the doctor would inflict harm on the confectioner. The problem posed by this case was essentially whether it was worth while, as a result of restricting the methods of production which could be used by the confectioner, to secure more doctoring at the cost of a reduced supply of confectionery products … .

Let us first reconsider the case of *Sturges v. Bridgman* … . The courts had little difficulty in granting the doctor the injunction he sought. "Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect on the development of land for residential purposes."

The court's decision established that the doctor had the right to prevent the confectioner from using his machinery. But, of course, it would have been possible to modify the arrangements envisaged in the legal ruling by means of a bargain between the parties. The doctor would have been willing to waive his right and allow the machinery to continue in operation if the confectioner would have paid him a sum of money which was greater than the loss of income which he would suffer from having to move to a more costly or less convenient location or from having to curtail his activities at this location or, as was suggested as a possibility, from having to build a separate wall which would deaden the noise and vibration. The confectioner would have been willing to do this if the amount he would have to pay the doctor was less than the fall in income he would suffer if he had to change his mode of operation at this location, abandon his operation or move his confectionery business to some other location. The solution of the problem depends essentially on whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's. But now consider the situation if the confectioner had won the case. The confectioner would then have had the right to continue operating his noise and vibration-generating machinery without having to pay anything to the doctor. The boot would have been on the other foot: the doctor would have had to pay the confectioner to induce him to stop using the machinery. If the doctor's income would have fallen more through continuance of the use of this machinery than it added to the income of the confectioner, there would clearly be room for a bargain whereby the doctor paid the confectioner to stop using the machinery. That is to say, the circumstances in which it would not pay the confectioner to continue to use the machinery and to compensate the doctor for the losses that this would bring (if the doctor had the right to prevent the confectioner's using his machinery) would be those in which it would be in the interest of the doctor to make payment to the confectioner which would induce him to discontinue the use of the machinery (if the confectioner had the right to operate the machinery) ... . With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources. It was of course the view of the judges that they were affecting the working of the economic system—and in a desirable direction. Any other decision would have had "a prejudicial effect upon the development of land for residential purposes," an argument which was elaborated by examining the example of a forge operating on a barren moor, which was later developed for residual [*sic*] purposes. The judges' view that they were settling how the land was to be used would be true only in the case in which the costs of carrying out the necessary market transactions exceeded the gain which might be achieved by any rearrangement of rights. And it would be desirable to preserve the areas (Wimpole Street or the moor) for residential or professional use (by giving non-industrial users the right to stop the noise, vibration, smoke, etc., by injunction) only if the value of the additional residential facilities obtained was greater than the value of cakes of iron lost. But of this the judges seem to have been unaware.

7. Atiyah, *Accidents, Compensation, and the Law*, 2nd ed (London: Weidenfeld & Nicolson, 1975) at 532-33, illustrates Coase's thesis by attaching figures to the alternatives Coase considers:

> [*Sturges*] is criticized by Professor Coase on the ground that the real question facing the court in an action of this sort, is the economic question, namely which of the services which have to be sacrificed here are more valuable to society? But he also points out that since the parties could have modified the court's ruling by subsequent agreement between themselves, the ruling did not, in fact, greatly matter from the economic point of view. Thus if, for instance, the additional value to the confectioner of the use of his machinery was (say) £500 a year, while the additional value to the doctor of the use of his consulting room at the end of his garden was (say) £200 a year, it would plainly have been in the interest of both parties

for the confectioner to resume using his machinery, and to pay the doctor anything between £200 and £500 a year. In the economic world in which all men are economic men, this is just what would have happened so that the court's original decision to grant an injunction would not have stopped the confectioner using his machinery. Equally, if the doctor's loss of income from his inability to use his consulting room as £500 a year, and the confectioner's loss from inability to use his machinery was only £200, and the court had refused an injunction, it would have been profitable for the doctor to pay the confectioner anything between £200 and £500 a year not to use the machinery, and it would have been profitable for the confectioner to take it. Thus, once again, there is no misallocation of resources, whatever result the law arrives at. If it places the risk on the party who should bear it in order to optimize the allocation of resources, the risk will remain there, whereas if the law places the risk on the wrong party, the parties will correct the law's mistakes by a bargain.

8. Epstein, "A Theory of Strict Liability" (1973) 2 J Leg Stud 151 at 164-65, criticizes Coase as follows:

In The Problem of Social Cost, Professor Coase argues that the concept of causation, as he understands it, does not permit the solution of individual legal disputes. Although he does not work from the "but for" paradigm, he does adopt a model of causation that treats as a cause of a given harm any joint condition necessary to its creation. Since the acts of both parties are "necessary" it follows that the concept of causation provides, in this analysis, no grounds to prefer either person to another. The problem is "reciprocal" in both causal and economic terms. In effect, Coase argues that the harms in question resulted because two persons each wished to make inconsistent use of a common resource:

> The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm. I instanced in my previous article the case of a confectioner the noise and vibrations from whose machinery disturbed a doctor in his work. To avoid harming the doctor would inflict harm on the confectioner. The problem posed by this case was essentially whether it was worth while, as a result of restricting the methods of production which could be used by the confectioner, to secure more doctoring at the cost of a reduced supply of confectionery products. Another example is afforded by the problem of straying cattle which destroy crops on neighbouring land. If it is inevitable that some cattle will stray, an increase in the supply of meat can only be obtained at the expense of a decrease in the supply of crops. The nature of the choice is clear: meat or crops. What answer should be given is, of course, not clear unless we know the value of what is obtained as well as the value of what is sacrificed to obtain it. To give another example, Professor George J. Stigler instances the contamination of a stream. If we assume that the harmful effect of the pollution is that it kills the fish, the question to be decided is: is the value of the fish lost greater or less than the value of the product which the contamination of the stream makes possible.

In the first portion of this paragraph, Professor Coase argues that the question is reciprocal because "to avoid the harm to A would be to inflict harm upon B." The real question is "should A be allowed to harm B or should B be allowed to harm A." But that image of reciprocity is not carried through in the concrete description of particular cases used to support the general proposition. The first case concerns a "confectioner the noise and vibrations from whose machinery disturbed a doctor": the second, "straying cattle ... destroy crops on

neighboring land"; in the third, "the harmful effect of the pollution ... kills the fish." Coase describes each situation by the use of sentences that differentiate between the role of the subject of each of these propositions and the role of the object. There is no question but that the confectioner harmed the doctor; the cattle the crops; and the contaminants, the fish. The problem only takes on a guise of reciprocity when the party harmed seeks his remedy in court. To use but the first example, the doctor wishes to call in aid the court to "harm" the confectioner, in the sense that he wishes to restrain him from acting to harm his practice. But he is justified in so doing because of the harm the confectioner either has inflicted or will inflict upon him. It would be a grave mistake to say that before the invocation of judicial remedies the grounds of dispute disclosed reciprocal harm. The confectioner did not seek to enjoin the doctor from the practice of medicine, because that practice did not and could not harm the confectioner. The notion of causal reciprocity should not be confused with the notion of redress for harm caused.

Are Epstein's comments a valid criticism of Coase's approach?

Tock v St John's Metropolitan Area Board

[1989] 2 SCR 1181

[The appellants suffered extensive damage when their basement flooded after a heavy rain as the result of a blocked storm sewer operated by the respondent municipality. They alleged that the flooding constituted a nuisance. The respondent's defence was that the operation of the sewer system was authorized by statute.]

WILSON J (LAMER and L'HEUREUX-DUBÉ JJ concurring): I have had the benefit of reading the reasons for judgment of my colleague, Justice La Forest, and, while I agree with his proposed disposition of the appeal, I have reservations about his approach to the law of nuisance as it applies to public bodies acting under statutory authority.

I do not ... share La Forest J's view that this Court should, or indeed can, on this appeal virtually abolish the defence of statutory authority for policy reasons and treat municipalities exercising statutory authority in the same way as private individuals. Such a major departure from the current state of the law would, it seems to me, require the intervention of the legislature.

Moreover, I do not favour replacing the existing law in this area with a general test of whether it is reasonable or unreasonable in the circumstances of the case to award compensation. This test may, because of the high degree of judicial subjectivity involved in its application, make life easier for the judges but, in my respectful view, it will do nothing to assist public bodies to make a realistic assessment of their exposure in carrying out their statutory mandate. Nor will it provide much guidance to litigants in deciding whether or not to sue. It is altogether too uncertain. Nor can I, with respect, accept the proposition that a single individual suffering damage from an isolated nuisance should be dealt with differently from a group of people suffering damage from an ongoing nuisance. This seems to me to be quite incompatible with the concept of principled decision-making. Accordingly, while I agree with my colleague in the result he has reached in this case, I prefer to write my own concurring reasons.

I agree that the flooding of the appellants' basement constituted an unreasonable interference with the appellants' use and enjoyment of the property and that, had the parties been two private individuals, it clearly would have been an actionable nuisance. However, since the respondent is a municipality, the law dictates that

different considerations apply. The crucial question is whether or not the respondent is able to rely on the defence of statutory authority in the circumstances of this case.

Since the availability of the defence of statutory authority depends on the language of the statute I set out the relevant provisions of *The Municipalities Act*, SN 1979, c. 33, on which the respondent must rely:

> 154.(1) The council may, subject to the provisions of The Department of Consumer Affairs and Environment Act, 1973 and regulations made thereunder, construct, acquire, establish, own and operate
>
> (a) a public water supply system for the distribution of water within or, with the approval of the Minister, outside of the town,
>
> (b) a public sewerage system, either independently of or in conjunction with a public water supply system, for the collection and disposal of sewerage within or, with the approval of the Minister, outside of the town, and
>
> (c) a storm drainage system within or, with the approval of the Minister, outside of the town.
>
> (2) For the purposes of subsection (1) the council may
>
> (a) acquire any waters required for the purpose of providing a sufficient supply of water for the town, and
>
> (b) acquire by purchase or expropriation any lands adjacent to such waters to prevent pollution of those waters.
>
> (3) For the purpose of exercising its powers under subsection (1) the council may lay out, excavate, dig, make, build, maintain, repair, and improve all such drains, sewers, and water supply pipes as the council deems necessary.

There is no doubt that these provisions authorize the respondent to construct and continue to operate and maintain the sewage system in question. They are, however, permissive as opposed to mandatory. They confer a power; they do not impose a duty. Is this distinction relevant to the question of the respondent's liability in nuisance? To answer this it is necessary to review some of the leading authorities on the subject.

[After reviewing the 19th-century English cases on the defence of statutory authority, Wilson J continued:]

The principles to be derived from the foregoing authorities would seem to be as follows:

(a) if the legislation imposes a duty and the nuisance is the inevitable consequence of discharging that duty, then the nuisance is itself authorized and there is no recovery in the absence of negligence;

(b) if the legislation, although it merely confers an authority, is specific as to the manner or location of doing the thing authorized and the nuisance is the inevitable consequence of doing the thing authorized in that way or in that location, then likewise the nuisance is itself authorized and there is no recovery absent negligence.

However:

(c) if the legislation confers an authority and also gives the public body a discretion, not only whether to do the thing authorized or not, but how to do it and in what location, then if it does decide to do the thing authorized, it must do it in a manner and at a location which will avoid the creation of a nuisance. If it does it in a way or at a location which gives rise to a nuisance, it will be liable therefor, whether there is negligence or not.

In other words, in the situations described in (a) and (b) above the inevitability doctrine is a good defence to the public body absent negligence. In situation (c) it is

no defence at all and it is unnecessary for the plaintiff to prove negligence in order to recover.

In my view, these principles make a great deal of sense. The inevitability doctrine represents a happy judicial compromise between letting no one who has suffered damage as a consequence of the statutorily authorized activities of public bodies recover and letting everyone so suffering damage recover. Recovery will be allowed unless it is shown that the interference with the plaintiff's rights was permitted by either:

(1) express language in the statute such as a provision specifying that no action for nuisance may be brought for any damage caused: see, for example, the decision of this Court in *District of North Vancouver v. McKenzie Barge & Marine Ways Ltd.*, [1965] SCR 377; or

(2) by necessary implication from the language of the statute coupled with a factual finding that the damage was the inevitable consequence of what the statute ordered or authorized the public body to do ... .

I find no acceptable rationale for the extension of the inevitable consequences doctrine to cases where the public body was perfectly free to exercise its statutory authority without violating private rights. It is only in cases where the public body has no choice as to the way in which or the place where it engages in the nuisance-causing activity that the inevitable consequences doctrine protects it. For only in such cases can it be said that the legislature has authorized any nuisance which is the inevitable consequence of the public body's carrying out its mandate.

The early principles, it seems to me, are rooted in common sense and logic. There is no need to throw the baby out with the bath water.

[After cautioning against "an undue restriction on the right of private citizens to recover for damage caused by the public body's failure to give adequate consideration to private rights when deciding how and where to locate public facilities," Wilson J concluded:]

The legislation in this case was purely permissive within the meaning of these cases. It authorized a sewage system to be constructed but did not specify how or where it was to be done.

The respondent was accordingly obliged to construct and operate the system in strict conformity with private rights. It did not do so. The defence of statutory authority is not available to it and the appellants are entitled to recover.

LA FOREST J (DICKSON CJC concurring): This appeal raises the important question whether a municipal authority which operates and maintains a sewer may, in the absence of negligence on its part, incur liability to a person whose property is damaged as a result of flooding caused by a random blockage of the sewer ... .

The truth is that there is an air of unreality and contrivedness to the defence of statutory authority in this context, however one may seek to rationalize it. Where the statute in question does not expressly exempt a body for damages in nuisance, or, in the alternative, does not provide for a compensation scheme of its own or contain other clear legislative indications, I doubt that divination of an unexpressed intent of the legislature can shed much light on the question whether the person who has suffered damage should be denied compensation. At this remove from the 19th century, therefore, it would seem appropriate to reformulate the law in more functional terms. To give one instance, I would reject the notion that the distinction as to whether a statute is permissive or mandatory is, without more, determinative. Thus, if one looks at the statute authorizing the storm drain in question here, it is clear that the statute is framed in permissive terms. By application of the traditional test, this would ground the presumption that the sewer was meant to be built in strict

conformity with private rights, whereas, had the statute been mandatory, the operative presumption would have been that the statutory powers were merely to be exercised without negligence, as that term was defined earlier. But I cannot see how liability for nuisance can credibly be said to depend on whether the legislature has conferred a general power to build sewers that, on all accounts, it must be taken to know will be built as and where the demand arises, or whether it goes to the trouble of passing a special enactment to authorize each sewer in turn. Whatever statutory route is taken will result in the construction of sewerage and drainage facilities in the same locations, and the nature of the authorization cannot, in all reason, have any bearing on the question whether compensation is owed, or is not owed, for damage suffered as a consequence of the operation of the sewer.

Turning to the question of inevitability, it seems to me that, in strict logic, most nuisances stemming from activities authorized by statute are in fact inevitable. Certainly, if one is to judge from the frequency with which storm drain and sewer cases occur in the reports, it would seem a safe conclusion that blockage of such systems is inevitable if one accepts this to mean that it is demonstrably impossible to operate these systems without such occurrences. But what escapes me is why any particular importance should be accorded this fact when weighing a nuisance claim against a statutory authority. The fact that the operation of a given system will inevitably visit random damage on certain unfortunate individuals among the pool of users of the system does not tell us why those individuals should be responsible for paying for that damage.

This rationale was recently adverted to by Robins J in *Schenck v. The Queen in Right of Ontario*, supra, where fruit farmers successfully sued the Ontario Government in nuisance for damage resulting to their orchards adjacent to provincial highways from the application of salt to the highways to permit winter travel. In reasons successively approved by the Ontario Court of Appeal and this Court, Robins J perceptively observed that arguments about inevitability are essentially arguments about money ... .

Constraints of time and money will always militate against the building of absolutely failsafe systems (on the assumption that such systems are possible) and the maintaining of the best conceivable inspection system. Accordingly, a public authority charged with operating any service will inevitably have to strike a balance between the need to give due consideration to factors bearing on efficiency and thrift, and the need to protect persons and property from damage that the system in question is likely to cause. In a word, it will be necessary to make compromises, and I have no reason to doubt that these compromises will take into account the possibility of a certain amount of inevitable damage. This, it seems to me, is bound to occur where the costs of preventing predictable damage far outweigh the actual costs of that damage. To take one example, a public authority, depending on the nature of the threat posed to life and limb, might incur considerable difficulty in justifying to its ratepayers a decision to disburse annually an extra million dollars for a program of inspection that stood merely to forestall damage of one hundred thousand dollars.

But the decision not to inspect in such circumstances does not change the fact that the resultant damage should properly be viewed as a cost of running the system. Similarly, in *Schenck v. The Queen in Right of Ontario*, there were no doubt alternative ways to make highways passable in winter, but they probably came at substantially greater cost. If one can judge from the almost universal use of salt in this country, there was no realistic alternative. To my mind, the flaw in the inevitability test, as traditionally expressed, is that it does not take due account of the fact that "inevitable" damage is often nothing but a hidden cost of running a given system.

In short, I question the applicability to the facts of the instant case of the defence of statutory authority as it is conventionally formulated. Where, as here, the authorizing statute does not specifically provide that a right of action in nuisance is taken away (see *Arif v. City of Fredericton* (1986), 77 NBR (2d) 34 (QB) for an example of a statute that does take away such a right), I see no point in donning the cloak of a soothsayer to plumb the intent of the legislature. After all, if the legislature wishes to shift the risk from a public authority to the individual, it can do so in express terms. I see no reason why it should be presumed to be authorizing a serious nuisance. Nor do I accept that any weight should be accorded a showing by the public body that damage was inevitable. The determination that damage was inevitable, in the sense in which that term was defined earlier, does not provide a rationale for concluding that it is reasonable to demand of the person whom misfortune has singled out that he or she pay for the damage concerned. The costs of damage that is an inevitable consequence of the provision of services that benefit the public at large should be borne equally by all those who profit from the service.

Rather than approaching the matter in this way, I think the best way to resolve the problem is to proceed rather as one does when facing a claim in nuisance between two private individuals, and ask whether, given all the circumstances, it is reasonable to refuse to compensate the aggrieved party for the damage he has suffered. When the problem is stated in this fashion, I fail to see any reason that would compel this result on the facts of this case.

This does not denude the defence of statutory authority of all vigour. If, as Lord Dunedin explained, the legislature has authorized the construction of a work at a particular place, the owner of neighbouring land cannot complain if that work is built there. Similarly, if the legislature authorizes the construction of a work, such as a sewerage system, the adjacent landowners cannot complain of ordinary disturbances or loss of amenity that necessarily results to them from its construction or operation if it is built and operated with all reasonable care and skill. To permit action by a landowner in such circumstances (assuming this can be regarded as a nuisance) would in effect be to deny the statutory mandate. Again, if a municipality is given statutory authority to construct a garbage dump, landowners in the vicinity where it is built will not suffer an actionable wrong from unavoidable smells emitted from the dump or increased traffic from trucks. But if toxic waste escapes into their basements or wells, this would pose a completely different issue.

The damage in the present case is attributable to a single calamitous event which, in turn, finds its origin in the operation by the respondent of a service of undoubted public utility. This circumstance in itself provides no rationale for denying compensation. As McIntyre JA put it in *Royal Anne Hotel Co. v. Ashcroft*, supra, at p. 468, this would have the effect of visiting a disproportionate share of the cost of the beneficial service on the hapless individual who suffered the damage. As I earlier observed, damage attributable to a calamitous event such as the flooding that occurred here should rather be viewed as what it in fact is, a part of the overall cost of providing a beneficial service to the community. As such it is appropriate, in my view, that the obligation of meeting such costs be placed on the body that undertakes it. That body, unlike its hapless victim, is in a position to defray the cost by spreading it among all subscribers to the system. In the alternative, if the authority is to bear the costs of accidents of this nature, it may realize that it is more cost-effective to forestall their occurrence by increasing the frequency of inspections.

I do not share the qualms of the Court of Appeal that to hold the respondent liable in this instance, in the absence of a showing that it was negligent, will make of it an "absolute insurer in respect of all its works." To evoke this spectre of indeterminate liability is, with respect, to lose sight of the fact that a plaintiff does not, as a matter

of course, win an action in nuisance on a mere showing that he has suffered damage as a result of interference with the use or enjoyment of his land … . There is always the question whether the injury is one for which it is reasonable or unreasonable to award compensation, and this holds true whether the defendant is a private individual or a statutory body. I see no reason to doubt that in many cases the courts, when called upon to strike a balance between the interests of the private citizen and a statutory body, will conclude that it is appropriate that the interests of the private citizen yield to those of the public at large.

Without purporting to formulate a hard and fast rule, it seems to me that a useful distinction exists between isolated and infrequent occurrences which inflict heavy material damage on a single victim, such as we are concerned with in this case, and those ordinary disturbances diffuse in their effect and having a broad and general impact on the comfort, convenience and material well-being of the public at large. We all have to put up with a certain degree of inconvenience, and indeed some material harm as a price of living in organized society. We accept, for example, that we can look to no one for redress because salt on the roads causes our cars to rust out in five years, but as *Schenck v. The Queen in Right of Ontario*, supra, has shown, it is unreasonable that an individual's land be subjected to random and severe damage from that activity without compensation. The test for recovery in nuisance, after all, is whether the effect of the activity on a landowner's enjoyment of property is unreasonable or not. I, therefore, see no ground for viewing a finding of liability on the part of the Board as in any way a floodgates decision that stands, in the long term, to compromise the ability of statutory authorities duly to carry out their legislative mandates … . I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the trial judge. The appellants are entitled to their costs throughout.

SOPINKA J: … The burden of proof with respect to the defence of statutory authority is on the party advancing the defence. It is not an easy one. The courts strain against a conclusion that private rights are intended to be sacrificed for the common good. The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

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In my opinion, the heavier onus which must be discharged was not met in this case. The trial judge so found. I therefore would dispose of the appeal as proposed by my colleagues.

NOTE

In *Ryan v Victoria (City)*, [1999] 1 SCR 201, a judgment of the court delivered by Major J made the following observations about *Tock*:

> 54 Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the "inevitable result" or consequence of exercising that authority. … An unsuccessful attempt was made in *Tock* to depart from the traditional rule. Wilson J. writing for herself and two others, sought to limit the defence to cases involving either mandatory duties or statutes which specify the precise manner of performance.

La Forest J. (Dickson C.J. concurring) took the more extreme view that the defence should be abolished entirely unless there is an express statutory exemption from liability. Neither of those positions carried a majority.

55 In the absence of a new rule it would be appropriate to restate the traditional view, which remains the most predictable approach to the issue and the simplest to apply. That approach was expressed by Sopinka J. in *Tock* ... .

Antrim Truck Centre Ltd v Ontario (Transportation)

2013 SCC 13

[The appellant owned and operated a truck stop. The respondent province reconfigured the highways in the area, thus effectively putting the appellant out of business because motorists could now get to its property only by a circuitous route. The appellant applied to the Ontario Municipal Board under the *Expropriations Act*, RSO 1990, c E.26, which provides for compensation for "such reduction in the market value of the land of the owner, and ... such personal and business damages ... as the statutory authority would be liable for if the construction were not under the authority of a statute." The Board awarded compensation on the ground that, in the absence of statutory authorization, the reconfiguring of the highways would have been a private nuisance. This award was set aside by the Court of Appeal on the grounds that (1) the Board failed to consider the character of the neighbourhood and the sensitivity of the complainant, and (2) the Board "failed to recognize the elevated importance of the utility of the defendant's conduct where the interference is the product of an 'essential public service.'" The truck-stop owner appealed to the Supreme Court of Canada.]

CROMWELL J (for the court):

C. First Question: What Are the Elements of Private Nuisance?

[18] [A] nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable ... .

[19] The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. ...

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[22] What does this threshold require? ... [A] substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference. As La Forest J. put it in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, actionable nuisances include "only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes," and not claims based "on the prompting of excessive 'delicacy and fastidiousness'" ... . Claims that are clearly of this latter nature do not engage the reasonableness analysis.

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D. Second Question: How Is Reasonableness Assessed in the Context of Interference Caused by Projects That Further the Public Good?

[25] The main question here is how reasonableness should be assessed when the activity causing the interference is carried out by a public authority for the greater public good. As in other private nuisance cases, the reasonableness of the interference must be assessed in light of all of the relevant circumstances. The focus of that balancing exercise, however, is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation.

[26] In the traditional law of private nuisance, the courts assess, in broad terms, whether the interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances: see, e.g., A.M. Linden and B. Feldthusen, *Canadian Tort Law* (9th ed. 2011), at p. 580. The Divisional Court and the Court of Appeal identified several factors that have often been referred to in assessing whether a substantial interference is also unreasonable. In relation to the gravity of the harm, the courts have considered factors such as the severity of the interference, the character of the neighbourhood and the sensitivity of the plaintiff: see, e.g., *Tock*, at p. 1191. The frequency and duration of an interference may also be relevant in some cases: *Royal Anne Hotel*, at pp. 760-61. A number of other factors, which I will turn to shortly, are relevant to consideration of the utility of the defendant's conduct. The point for now is that these factors are not a checklist; they are simply "[a]mong the criteria employed by the courts in delimiting the ambit of the tort of nuisance": *Tock*, at p. 1191; J.P.S. McLaren, "Nuisance in Canada," in A.M. Linden, ed., *Studies In Canadian Tort Law* (1968), 320, at pp. 346-47. Courts and tribunals are not bound to, or limited by, any specific list of factors. Rather, they should consider the substance of the balancing exercise in light of the factors relevant in the particular case.

[27] The way in which the utility of the defendant's conduct should be taken into account in the reasonableness analysis is particularly important in this case and would benefit from some explanation.

[28] The first point is that there is a distinction between the utility of the conduct, which focuses on its purpose, such as construction of a highway, and the nature of the defendant's conduct, which focuses on how that purpose is carried out. Generally, the focus in nuisance is on whether the *interference suffered by the claimant* is unreasonable, not on whether *the nature of the defendant's conduct* is unreasonable. This point was made by the court in *Jesperson's Brake & Muffler Ltd. v. Chilliwack (District)* (1994), 88 B.C.L.R. (2d) 230 (C.A.). In that case, the construction of an overpass resulted in a 40 percent drop in the market value of the claimant's lands. The statutory authority argued that the claimant had to establish (and had failed to do so) that *the statutory authority* had used *its* land unreasonably. The Court of Appeal correctly rejected that contention. The focus of the reasonableness analysis in private nuisance is on the character and extent of the interference with the claimant's land; the burden on the claimant is to show that the interference is substantial and unreasonable, not to show that the defendant's use of its own land is unreasonable.

[29] The nature of the defendant's conduct is not, however, an irrelevant consideration. Where the conduct is either malicious or careless, that will be a significant factor in the reasonableness analysis: see e.g. Linden and Feldthusen, at pp. 590-91; Fleming, at s. 21.110; *Street on Torts*, at p. 439. Moreover, where the defendant can establish that his or her conduct was reasonable, that can be a relevant consideration,

particularly in cases where a claim is brought against a public authority. A finding of reasonable conduct will not, however, necessarily preclude a finding of liability. The editors of *Fleming's The Law of Torts* put this point well at s. 21.120:

> [U]nreasonableness in nuisance relates primarily to the character and extent of the harm caused rather than that threatened. ... [T]he "duty" not to expose one's neighbours to a nuisance is not necessarily discharged by exercising reasonable care or even all possible care. In that sense, therefore, liability is strict. At the same time, evidence that the defendant has taken *all possible precaution* to avoid harm is not immaterial, because it has a bearing on whether he subjected the plaintiff to an unreasonable interference, and is decisive in those cases where the offensive activity is carried on under statutory authority. ... [I]n nuisance it is up to the defendant to exculpate himself, once a *prima facie* infringement has been established, for example, by proving that his own use was "natural" and not unreasonable. [Emphasis added.]

[30] The second point is that the utility of the defendant's conduct is especially significant in claims against public authorities. Even where a public authority is involved, however, the utility of its conduct is always considered in light of the other relevant factors in the reasonableness analysis; it is not, by itself, an answer to the reasonableness inquiry. Moreover, in the reasonableness analysis, the severity of the harm and the public utility of the impugned activity are not equally weighted considerations. If they were, an important public purpose would always override even very significant harm caused by carrying it out. As the editors of *Fleming's The Law of Torts* put it, the utility consideration "must not be pushed too far. ... [A] defendant cannot simply justify his infliction of great harm upon the plaintiff by urging that a greater benefit to the public at large has accrued from his conduct": s. 21.110. The words of McIntyre J.A. in *Royal Anne Hotel* are apposite:

> There is no reason why a disproportionate share of the cost of such a beneficial service should be visited upon one member of the community by leaving him uncompensated for damage caused by the existence of that which benefits the community at large. [p. 761]

[31] *The Queen v. Loiselle*, [1962] S.C.R. 624, demonstrates that even a very important public purpose does not simply outweigh the individual harm to the claimant. Mr. Loiselle operated a garage and service station on the main Montréal – Valleyfield highway. His business ended up on a dead-end highway as a result of the construction of the St. Lawrence Seaway. This Court upheld an award of compensation for injurious affection, noting that the "statutory authority given to construct the works in question was ... expressly made subject to the obligation to pay compensation for damage to lands injuriously affected": p. 627. In other words, the landowner was entitled to compensation even though construction of the Seaway served an important public objective.

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[38] Generally speaking, the acts of a public authority will be of significant utility. If simply put in the balance with the private interest, public utility will generally outweigh even very significant interferences with the claimant's land. That sort of simple balancing of public utility against private harm undercuts the purpose of providing compensation for injurious affection. That purpose is to ensure that individual members of the public do not have to bear a disproportionate share of the cost of procuring the public benefit. This purpose is fulfilled, however, if the focus of the reasonableness analysis is kept on whether it is reasonable for the individual to bear the interference without compensation, not on whether it was reasonable

for the statutory authority to undertake the work. In short, the question is whether the damage flowing from the interference should be properly viewed as a cost of "running the system" and therefore borne by the public generally, or as the type of interference that should properly be accepted by an individual as part of the cost of living in organized society: *Tock*, at p. 1200.

[39] ... The distinction is thus between, on one hand, interferences that constitute the "give and take" expected of everyone and, on the other, interferences that impose a disproportionate burden on individuals. That in my view is at the heart of the balancing exercise involved in assessing the reasonableness of an interference in light of the utility of the public authority's conduct.

[40] Of course, not every substantial interference arising from a public work will be unreasonable. The reasonableness analysis should favour the public authority where the harm to property interests, considered in light of its severity, the nature of the neighbourhood, its duration, the sensitivity of the plaintiff and other relevant factors, is such that the harm cannot reasonably be viewed as more than the claimant's fair share of the costs associated with providing a public benefit. This outcome is particularly appropriate where the public authority has made all reasonable efforts to reduce the impact of its works on neighbouring properties.

[41] It is clear, for example, that everyone must put up with a certain amount of temporary disruption caused by essential construction. Although not a case involving a public authority, the judgment of Sir Wilfrid Greene M.R. in *Andreae v. Selfridge & Co., Ltd.*, [1938] 1 Ch. 1, is instructive:

> [W]hen one is dealing with temporary operations, such as demolition and rebuilding, everybody has to put up with a certain amount of discomfort, because operations of that kind cannot be carried on at all without a certain amount of noise and a certain amount of dust. Therefore, the rule with regard to interference must be read subject to this qualification ... that in respect of operations of this character, such as demolition and building, if they are reasonably carried on and all proper and reasonable steps are taken to ensure that no undue inconvenience is caused to the neighbours, whether from noise, dust, or other reasons, the neighbours must put up with it. [pp. 5-6]

[42] There are several important ideas in this quotation. One is that the duration of the interference is a relevant consideration. Admittedly, duration was not a relevant factor in this case because the injury was permanent. In cases where it is relevant however, it is helpful to consider that some sorts of temporary inconvenience are more obviously part of the normal "give and take" than are more prolonged interferences. While temporary interferences may certainly support a claim in nuisance in some circumstances, interferences that persist for a prolonged period of time will be more likely to attract a remedy: see, in the context of public nuisance, *Wildtree Hotels Ltd. v. Harrow London Borough Council*, [2001] 2 A.C. 1 (H.L.).

[43] Another important idea is that the traditional consideration relating to the character of the neighbourhood may be highly relevant in the overall balancing. This point is particularly relevant in cases where a claim is brought against a public authority. As Michael Senzilet has written,

> With the urban environments of today, people live much closer together and much closer to public corridors than they did 100 years ago ... In today's urban fabric, buildings are closer together, closer to roads, building lots are smaller, and there are far more public projects that are both possible and required. Surely, the choice of living in the urban core, in a suburb, or in the countryside exposes one to differences and one's choice must be made taking into account those differences.

("Compensation for Injurious Affection Where No Land Is Taken," unpublished LL.M. thesis, University of Ottawa (1987), at p. 73)

[44] A final point emerging from the *Andreae* case, which I alluded to above, relates to the manner in which the work is carried out. While nuisance focuses mainly on the harm and not on the blameworthiness of the defendant's conduct, the fact that a public work is carried out with "all reasonable regard and care" for the affected citizens is properly part of the reasonableness analysis: see, e.g., *Allen v. Gulf Oil Refining Ltd.*, [1981] A.C. 1001, *per* Lord Wilberforce, at p. 1011.

[45] To sum up on this point, my view is that in considering the reasonableness of an interference that arises from an activity that furthers the public good, the question is whether, in light of all of the circumstances, it is unreasonable to expect the claimant to bear the interference without compensation.

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F. Fourth Question: Did the Court of Appeal Err in Finding That the Board's Application of the Law of Nuisance to the Facts Was Unreasonable?

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[54] Provided that the Board reasonably carried out the analysis in substance, it was not required to specifically enumerate and refer by name to every factor mentioned in the case law. As La Forest J. made clear in *Tock*, the factors he enumerated are simply examples of the sorts of criteria that the courts have articulated as being potentially of assistance in weighing the gravity of the harm with the utility of the defendant's conduct. They do not make up either an exhaustive or an essential list of matters that must be expressly considered in every case. ...

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[56] Similarly in my view, the Board did not fail to take account of the utility of the respondent's activity or fail to engage in the required balancing as the Court of Appeal concluded it had. As we have seen, the Board adverted to the importance of the highway construction. It did not, however, allow that concern to swamp consideration of whether it was reasonable to require the appellant to bear without compensation the burden inflicted on it by the construction. The Board properly understood that the purpose of the statutory compensation scheme for injurious affection was to ensure that individuals do not have to bear a disproportionate burden of damage flowing from interference with the use and enjoyment of land caused by the construction of a public work. It was reasonable for the Board to conclude that in all of the circumstances, the appellant should not be expected to endure permanent interference with the use of its land that caused a significant diminution of its market value in order to serve the greater public good.

NOTES AND QUESTIONS

1. It may be interesting to note that cases such as *The Queen v Loiselle* and *Wildtree Hotels*, which were cited in *Antrim* and had very similar facts, were analyzed by their respective courts as public nuisance rather than private nuisance claims. In this context, the tort of public nuisance protects a person's right to pass and repass on a public road as opposed to protecting their private rights in relation to land. Is there any reason to prefer this analysis to that presented in *Antrim*?

2. Is more than a substantial and unreasonable interference with the use and enjoyment of land required in order to constitute a private nuisance? If there are additional requirements,

are they based on principal or policy? For example, in *British Columbia (Minister of Public Safety) v Latham*, 2023 BCCA 104, the Court decided that a mere "regulatory nuisance" (i.e., government actions or funding that interfere with a plaintiff's use of land done in the absence of statutory authority) was not actionable using the tort of private nuisance unless the government entity "owned, occupied, or made use of land from which a nuisance emanated" and thereby engaged in "competing uses of land" (at paras 95-96). *Antrim* was distinguished on the basis that it involved a competing use of land, namely the province's construction of a highway on public land near a truck stop owner's private land (para 79). Do you find this reasoning convincing?

III. REMEDIES

Courts of Justice Act

RSO 1990, c C.43

Damages in substitution for injunction or specific performance

99 A court that has jurisdiction to grant an injunction or order specific performance may award damages in addition to, or in substitution for, the injunction or specific performance.

Coventry v Lawrence

[2014] 1 AC 822 (UKSC)

LORD NEUBERGER: ... Where a claimant has established that the defendant's activities constitute a nuisance, *prima facie* the remedy to which she is entitled (in addition to damages for past nuisance) is an injunction to restrain the defendant from committing such nuisance in the future; of course, the precise form of any injunction will depend very much on the facts of the particular case. However, ever since Lord Cairns' Act (the Chancery Amendment Act 1858 (21 & 22 Vict c 27)), the court has had power to award damages instead of an injunction in any case, including a case of nuisance ... . Where the court decides to refuse the claimant an injunction to restrain a nuisance, and instead awards her damages, such damages are conventionally based on the reduction in the value of the claimant's property as a result of the continuation of the nuisance. Subject to what I say ... below, this is clearly the appropriate basis for assessing damages, given that nuisance is a property-related tort and what constitutes a nuisance is judged by the standard of the ordinary reasonable person.

The question which arises is what, if any, principles govern the exercise of the court's jurisdiction to award damages instead of an injunction. The case which is probably most frequently cited on the question is *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

In *Shelfer*, the Court of Appeal upheld the trial judge's decision to grant an injunction to restrain noise and vibration. Lindley LJ said at pp 315–316:

> [E]ver since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the legislature intended to turn that court into a tribunal for legalising wrongful acts; or in other words, the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer

is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (e.g., a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed.

A L Smith LJ said at pp 322–323, in a frequently cited passage:

> [A] person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance ... . In such cases the well known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction.
>
> There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution ... . In my opinion, it may be stated as a good working rule that—(1) If the injury to the plaintiff's legal rights is small, (2) And is one which is capable of being estimated in money, (3) And is one which can be adequately compensated by a small money payment, (4) And the case is one in which it would be oppressive to the defendant to grant an injunction—then damages in substitution for an injunction may be given.

[After reviewing the cases, Lord Neuberger specified two problems: the stringency of the *Shelfer* approach, and the role of the public interest. He continued:]

The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered, particularly in the very constrained way in which the Court of Appeal has suggested ... . And, as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good. On this aspect, I would adopt the observation of Millett LJ in *Jaggard* [1995] 1 WLR 269, 288, where he said:

> Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently.

Having approved that statement, it is only right to acknowledge that this does not prevent the courts from laying down rules as to what factors can, and cannot, be taken into account by a judge when deciding whether to exercise his discretion to award damages in lieu. Indeed, it is appropriate to give as much guidance as possible so as to ensure that, while the discretion is not fettered, its manner of exercise is as predictable as possible. I would accept that the *prima facie* position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not. ...

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Where does that leave A L Smith LJ's four tests? ... First, the application of the four tests must not be such as "to be a fetter on the exercise of the court's discretion." Secondly, it would, in the absence of additional relevant circumstances pointing the

other way, normally be right to refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted.

As for the second problem, that of public interest, I find it hard to see how there could be any circumstances in which it arose and could not, as a matter of law, be a relevant factor. Of course, it is very easy to think of circumstances in which it might arise but did not begin to justify the court refusing, or, as the case may be, deciding, to award an injunction if it was otherwise minded to do so. But that is not the point. The fact that a defendant's business may have to shut down if an injunction is granted should, it seems to me, obviously be a relevant fact, and it is hard to see why relevance should not extend to the fact that a number of the defendant's employees would lose their livelihood, although in many cases that may well not be sufficient to justify the refusal of an injunction. Equally, I do not see why the court should not be entitled to have regard to the fact that many other neighbours in addition to the claimant are badly affected by the nuisance as a factor in favour of granting an injunction.

It is also right to mention planning permission in this context. In some cases, the grant of planning permission for a particular activity (whether carried on at the claimant's, or the defendant's, premises) may provide strong support for the contention that the activity is of benefit to the public, which would be relevant to the question of whether or not to grant an injunction. Accordingly, the existence of a planning permission which expressly or inherently authorises carrying on an activity in such a way as to cause a nuisance by noise or the like, can be a factor in favour of refusing an injunction and compensating the claimant in damages. This factor would have real force in cases where it was clear that the planning authority had been reasonably and fairly influenced by the public benefit of the activity, and where the activity cannot be carried out without causing the nuisance complained of. However, even in such cases, the court would have to weigh up all the competing factors.

In some such cases, the court may well be impressed by a defendant's argument that an injunction would involve a loss to the public or a waste of resources on account of what may be a single claimant, or that the financial implications of an injunction for the defendant would be disproportionate to the damage done to the claimant if she was left to her claim in damages. In many such cases, particularly where an injunction would in practice stop the defendant from pursuing the activities, an injunction may well not be the appropriate remedy.

Since writing this, I have read with interest Lord Sumption's suggestions as to how the law on the topic of damages instead of an injunction in nuisance cases might develop. At any rate on the face of it, I can see much merit in the proposals which he proffers. However, it would be inappropriate to go further than I have gone at this stage, in the light of the arguments which were raised on this appeal. There may well be objections, qualifications, and alternatives which could be made in relation to Lord Sumption's suggested approach, and they should be considered before the law on this topic is developed further. ...

A final point which it is right to mention on this issue is the measure of damages, where a judge decides to award damages instead of an injunction. It seems to me at least arguable that, where a claimant has a *prima facie* right to an injunction to restrain a nuisance, and the court decides to award damages instead, those damages should not always be limited to the value of the consequent reduction in the value of the claimant's property. While double counting must be avoided, the damages might well, at least where it was appropriate, also include the loss of the claimant's

ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction.

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LORD SUMPTION: ... In my view, the decision in *Shelfer* is out of date, and it is unfortunate that it has been followed so recently and so slavishly. It was devised for a time in which England was much less crowded, when comparatively few people owned property, when conservation was only beginning to be a public issue, and when there was no general system of statutory development control. The whole jurisprudence in this area will need one day to be reviewed in this court. There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests. In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission. However, at this stage, in the absence of argument on these points, I can do no more than identify them as calling for consideration in a case in which they arise.

NOTES

1. The rationale for the *Shelfer* rule mentioned in *Coventry* was perhaps most uncompromisingly stated by Idington J in *Canada Paper Co v Brown* (1922), 63 SCR 243 (on appeal from Quebec). In that case, the plaintiff owned property that had, for several generations, belonged to his family and on which he built an expensive country home. Nearby, the defendant appellant worked a pulp mill, whose factories were the most important industry in the small town of Windsor. The mill was operating before the plaintiff acquired his land. But after his house had been built, the defendant introduced the use of sulphates for commercial reasons, which seriously inconvenienced the plaintiff by the emission of noxious fumes. At times, the fumes rendered the plaintiff's home uninhabitable. Idington J stated:

> The appellant for mere commercial reasons, disregarding the rights of respondent and all others, saw fit to introduce, in the conduct of its business, a process in the use of sulphate which produced malodorous fumes which polluted the air, which the respondent was as owner for himself and his family and guests fully entitled to enjoy in said home and on said property, to such an extent as to render them all exceedingly uncomfortable.
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> The argument, that because the exercise by appellant of powers it arrogates to itself but are non-existent in law, may conduce to the prosperity of the little town or village in which the appellants' works are situated, seems to have led to a mass of irrelevant evidence being adduced, and as a result thereof the confusion of thought that produces the remarkable conclusion that because the prosperity of said town or village would be enhanced by the use of the new process therefore the respondent has no rights upon which to rest his rights of property.
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> I cannot assent to any such mode of reasoning or that there exists in law any such basis for taking from any man his property and all or any part of what is implied therein.
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> • • •
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> The invasion of rights incidental to the ownership of property, or the confiscation thereof, may suit the grasping tendencies of some and incidentally the needs or desires of the majority in any community benefiting thereby; yet such a basis or principle of action

should be stoutly resisted by our courts, in answer to any such like demands or assertions of social right unless and until due compensation made by due process of law.

Progress may be legislatively made in that direction by many means offering due compensation to the owners, but we must abide by the fundamental law as we find it until changed.

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And, I respectfully submit, that as long as we keep in view the essential merits of the remedy in the way of protecting the rights of property and preventing them from being invaded by mere autocratic assertions of what will be more conducive to the prosperity of the local community by disregarding such rights, we will not go far astray in taking as our guide the reasoning of any jurisprudence which recognizes the identical aim of protecting people in their rights of property when employing their remedy of perpetual injunction.

2. Contrast the attitude of Idington J in *Brown* with that of Middleton J in *Black v Canadian Copper Co* (1917), 12 OWN 243 (HC), reported as follows:

> Action for damages alleged to have been sustained by the plaintiffs respectively in respect of their neighbouring farms and gardens, etc., from vapours contained in metallurgical smoke issuing from the roast-beds and smelter-stacks of the defendants, near Sudbury. In all these actions claims were originally made for injunctions, but these claims were abandoned and the cases resolved themselves mainly, if not altogether, into assessments of damages ... . MIDDLETON J, in an elaborate written judgment, said that the difficulty was to ascertain what damage, if any, had been done by the emission of the smoke-vapours from the roast-beds and smelter-stacks. Mines cannot be operated without the production of smoke from the roast-yards and smelters, which smoke contains very large quantities of sulphur dioxide. There are circumstances in which it is impossible for the individual so to assert his individual rights as to inflict a substantial injury upon the whole community. If the mines should be prevented from operating, that community could not exist at all. Once close the mines, and the mining community would be at an end, and farming would not long continue. Any capable farmer would find farms easier to operate and nearer general markets if the local market ceased. The consideration of this situation induced the plaintiff's counsel to abandon the claims for injunctions. The Court ought not to destroy the mining industry—nickel is of great value to the world—even if a few farms are damaged or destroyed: but in all such cases compensation, liberally estimated, ought to be awarded.

3. *Boomer v Atlantic Cement Co*, 257 NE 2d 870 (NY CA 1970), a leading US case, reversed the New York equivalent of the *Shelfer* rule. The defendant operated a large cement plant, and neighbouring landowners brought actions for injunction and damages complaining of injury to their property caused by dirt, smoke, and vibrations coming from the defendant's plant. The court, impressed by the large disparity in economic consequences of the nuisance and of the injunction, held, Jasen J dissenting, that although a nuisance existed, the plaintiff could recover damages but ought not to be granted an injunction. Observing that "[a] court performs its essential function when it decides the rights of the parties before it," the court considered the control and amelioration of air pollution to be beyond its competence. It rejected the alternative of postponing the effect of an injunction to a specified future date so as to let the defendant have the opportunity to devise new pollution controls because there was no assurance that any significant technical improvement could occur. It would place an unacceptable burden on the defendant to discover a solution that had thus far escaped the cement industry as a whole and penalize the defendant alone among members of the industry if it was unable to do so. Noting that the defendant had invested more than $45 million in the plant and employed over 300 people, the court remitted the case to the trial court "to grant an injunction which shall be vacated upon payment by defendant of

such amounts of permanent damage to the respective plaintiffs as shall for this purpose be determined by the court."

4. In *KVP Co Ltd v McKie*, [1949] SCR 698, the plaintiffs were individual landowners on the Spanish River, and the defendant company operated a pulp and paper mill higher up the river. The plaintiffs' lands were used for various purposes, including agriculture, summer residences, and tourism. Refuse discharged polluted the river. At trial, McRuer CJHC found that offensive smells created by the pollution substantially interfered with the plaintiffs' use and enjoyment of their properties and awarded them damages and an injunction against KVP Company Ltd. McRuer CJHC noted that only legislation could take away the plaintiffs' rights to be protected from a nuisance. The Court of Appeal unanimously dismissed an appeal launched by the defendant against the injunction.

After the Court of Appeal decision, the following amendment to the *Lakes and Rivers Improvement Act*, SO 1949, c 48, s 6, now RSO 1990, c L.3, s 39, was enacted by the Ontario legislature:

> 39(1) Where in an action or proceeding a person claims and but for this section would be entitled to, an injunction against the owner or occupier of a mill for an injury or damage, direct or consequential, sustained by the person, or for any interference directly or indirectly with any rights of the person as riparian proprietor or otherwise, by reason or in consequence of the throwing, depositing or discharging, or permitting the throwing, depositing or discharging of any refuse, sawdust, chemical, substance or matter from the mill or from it and other mills into a lake or river, or by reason or in consequence of any odour arising from any such refuse, sawdust, chemical, substance or matter so thrown, deposited or discharged or so permitted to be thrown, deposited or discharged, the court or judge may,
>
> (a) refuse to grant an injunction if it is proved that having regard to all the circumstances and taking into consideration the importance of the operation of the mill to the locality in which it operates and the benefit and advantage, direct and consequential, which the operation of the mill confers on that locality and on the inhabitants of that locality, and weighing the same against the private injury, damage or interference complained of, it is on the whole proper and expedient not to grant the injunction ... .
>
> (2) Nothing in subsection (1) affects any right of the person claiming the injunction to damages against the owner or occupier of the mill for any such injury, damage or interference.
>
> (3) Where damage from the same cause continues, the person entitled to the damages may apply from time to time in the same action or proceeding for the assessment of subsequent damages or for any other relief to which by subsequent events he from time to time becomes entitled.

The 1949 amendment was expressly made applicable "to every action or proceeding in which an injunction is claimed in respect of any of the matters mentioned in such section, including every pending action and proceeding and including every action or proceeding in which an injunction has been granted and in which any appeal is pending."

On further appeal to the Supreme Court of Canada, the appeal was dismissed. The amended statute was held not to affect the present litigation because it was not an enactment declaratory of what the law was deemed to be at the time of the Court of Appeal decision, and provincial law could not empower the Supreme Court to decide in a way that was impossible in law at the time of the decision of the Court of Appeal.

After the decision of the Supreme Court of Canada, the Ontario legislature enacted the *KVP Co Ltd Act*, SO 1950, c 33, which included the following terms:

> 1(1) Whether or not its operation is now stayed, every injunction heretofore granted against The KVP Company Limited, herein called "the Company" restraining the Company from polluting the waters of the Spanish River, is dissolved.

(2) The dissolution of any such injunction shall not prejudice the right of any person to damages heretofore awarded in the action in which any such injunction was granted and shall not prejudice the right of any person to damages suffered from the date of the trial in which any such injunction was granted to the date when the injunction would have, but for this Act, become effective.

2. Nothing in this Act shall prejudice the right of any person to bring any action against the Company arising from the pollution of the waters of the Spanish River.

5. Similar legislative intervention occurred as a result of *Stephens v The Village of Richmond Hill*, [1955] OR 806, [1955] 4 DLR 572 (Sup Ct), aff'd [1956] OR 88, 1 DLR (2d) 569 (CA). The defendant municipality constructed a sewage disposal plant on the Don River, as a result of which the river became severely polluted. The plaintiff, whose property the river ran through at a point downstream from the plant, brought an action for infringement of her riparian rights and claimed damages and an injunction. At trial, Stewart J found that her rights had been seriously interfered with and awarded damages. He also held that she was entitled to an injunction on the ground that public works must not be executed so as to interfere with the private rights of individuals unless the legislature decrees otherwise. Here, the relevant enabling statute could not be interpreted so as to allow the defendant to rely on the defence of statutory authority, and in any case the damage had not been shown to be inevitable as the defence required. Stewart J then dealt with the issue of the public welfare in the following passage:

> It has been further argued that, should these claims be granted, the people of Richmond Hill may in effect be deprived of the only readily and economically available method of disposing of their sewage. In fact, Mr. Wilson says that 95% of all municipalities which have similar sewage-disposal systems may be put to great expense in improving or changing them. It is quite natural and proper that Dr. Barry, Dr. King, Mr. Redfern, and Caverley (a member of the council of Richmond Hill) should insist upon the importance of the welfare of the people at large, but I conceive that it is not for the judiciary to permit the doctrine of utilitarianism to be used as a make-weight in the scales of justice. In civil matters, the function of the Court is to determine rights between parties. It investigates facts by hearing "evidence" (as tested by long-settled rules) and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal … .
>
> It is the duty of the state (and of statesmen) to seek the greatest good for the greatest number. To this end, all civilized nations have entrusted much individual independence to their Governments. But be it ever remembered that no one is above the law. Neither those who govern our affairs, their appointed advisers, nor those retained to build great works for society's benefit, may act so as to abrogate the slightest right of the individual, save within the law. It is for Government to protect the general by wise and benevolent enactment. It is for me, or so I think, to interpret the law, determine the rights of the individual and to invoke the remedy required for their enforcement.

The defendant's appeal to the Ontario Court of Appeal was dismissed except that the order for damages was reversed, the plaintiff not having shown that she had suffered any actual injury. The granting of the injunction was upheld on the grounds that (1) the plaintiff had made out a *prima facie* case in nuisance, (2) a person whose proprietary rights have been interfered with is entitled to an injunction except in special circumstances (such as damages having been shown to be an adequate remedy), and (3) the municipality had no statutory authority either to build the sewage plant or to pollute the river without liability.

The Ontario legislature subsequently passed the *Public Health Amendment Act*, SO 1956, c 71, which by s 6(3) dissolved the injunction against the defendant municipality and

retroactively deemed the sewage plant to have been constructed, maintained, and operated by statutory authority. Section 6(4) provided that any person's rights to damages in nuisance or negligence arising out of the construction and operation of the plant were preserved.

6. Nolan, in "A Tort Against Land: Private Nuisance as a Property Tort" in Nolan & Robertson, eds, *Rights and Private Law* (Oxford: Hart Publishing, 2011) 463 at 486-88, analyzes the historical aftermath of the litigation in *A-G v Birmingham Borough Council* (1858), 70 ER 220, where, for reasons very similar to those given by Stewart J, the court issued an injunction to prevent the local authority from discharging raw sewage into the local river. The injunction was issued even though the Court was told that the effect of the injunction would be to turn the city of Birmingham into "one vast cesspool" and to bring about "a plague, which will not be confined to the 250,000 inhabitants of Birmingham, but will spread over the entire valley and become a national calamity" (at 224):

> Statements like [those of Stewart J] ... are apt to produce two slightly different varieties of negative response. The first such response is that they are symptomatic of an individualistic common law ethos which puts private property rights above the interests of the masses—in the *Birmingham* case, the riparian rights of an aristocratic landowner above the health of those living in one of England's biggest cities. And the other response is that such statements reflect a failure on the part of some common law judges to recognise that private law rules exist not to protect private rights but to maximise overall social welfare.
>
> Although those who respond in these two different ways may not always share the same political outlook, they are guilty of the same two mistakes. The first mistake is the failure to appreciate that the appropriate forum for arguments regarding social welfare is not the private law court but the legislature. Only the most diehard libertarian would deny that sometimes private rights must give way to the public interest, but one of the strengths of the rights analysis of private law is that it reserves the power to make such decisions to legislators who are democratically accountable for their actions. The second mistake is the erroneous assumption that the judiciary are in a position to assess where the interests of the masses lie, or which outcome will maximise overall welfare. Indeed, the critics are wrong to assume that *they themselves* know the answers to these questions, as recent research on the aftermath of the *Birmingham* litigation demonstrates. For an illuminating article by Ben Pontin reveals that, far from bringing about the calamity predicted by counsel for the defendant, the decision in *Birmingham* to award an injunction triggered a spate of similar actions against other local authorities, which had the effect of bringing about desperately needed municipal investment in modern systems of sewage purification [see 'The Secret Achievements of Nineteenth Century Nuisance Law: *Attorney General v Birmingham Corporation* (1858–95) in Context' (2007) 19 *Environmental Law and Management* 271]. Although the normative appeal of rights analysis would in no way be diluted if the practical effects of the injunction had been less positive, there is nevertheless a rich irony in the fact that a ruling founded on the force of private rights which was long lambasted as 'inefficient' and 'regressive' turns out to have had such beneficial long-term consequences.

Spur Industries v Del E Webb Development Co

494 P2d 700 (Ariz SC 1972)

CAMERON VCJ: From a judgment permanently enjoining the defendant, Spur Industries, Inc., from operating a cattle feedlot near the plaintiff Del E. Webb Development Company's Sun City, Spur appeals. Webb cross-appeals. Although

numerous issues are raised, we feel that it is necessary to answer only two questions. They are:

1. Where the operation of a business, such as a cattle feedlot is lawful in the first instance, but becomes a nuisance by reason of a nearby residential area, may the feedlot operation be enjoined in an action brought by the developer of the residential area?
2. Assuming that the nuisance may be enjoined, may the developer of a completely new town or urban area in a previously agricultural area be required to indemnify the operator of the feedlot who must move or cease operation because of the presence of the residential area created by the developer?

[Cameron VCJ then outlined the facts. The defendant operated a cattle feedlot situated 15 miles west of Phoenix, in what had long been an agricultural district. The plaintiff purchased land (for considerably less than the price of land in urban Phoenix) in the neighbourhood of the feedlot in order to develop an urban area to be known as Sun City. As the development grew, it came closer and closer to the feedlot, until the developer encountered sales resistance because of the flies and smells of the feedlot.]

At the time of the suit, Spur was feeding between 20,000 and 30,000 head of cattle, and the facts amply support the finding of the trial court that the feed pens had become a nuisance to the people who resided in the southern part of Del Webb's development. The testimony indicated that cattle in a commercial feedlot will produce 35 to 40 pounds of wet manure per day, per head, or over a million pounds of wet manure per day for 30,000 head of cattle, and that despite the admittedly good feedlot management and good housekeeping practices by Spur, the resulting odor and flies produced an annoying if not unhealthy situation as far as the senior citizens of southern Sun City were concerned. There is no doubt that some of the citizens of Sun City were unable to enjoy the outdoor living which Del Webb had advertised and that Del Webb was faced with sales resistance from prospective purchasers as well as strong and persistent complaints from the people who had purchased homes in that area ... .

It is noted, however, that neither the citizens of Sun City nor Youngtown are represented in this lawsuit and the suit is solely between Del E. Webb Development Company and Spur Industries ... .

It is clear that as to the citizens of Sun City, the operation of Spur's feedlot was both a public and a private nuisance. They could have successfully maintained an action to abate the nuisance. Del Webb, having shown a special injury in the loss of sales, had a standing to bring suit to enjoin the nuisance. *Engle v. Clark*, 53 Ariz. 472; 90 P2d 994 (1939); *City of Phoenix v. Johnson*, supra. The judgment of the trial court permanently enjoining the operation of the feedlot is affirmed ... .

There was no indication in the instant case at the time Spur and its predecessors located in western Maricopa County that a new city would spring up, full-blown, alongside the feeding operation and that the developer of that city would ask the court to order Spur to move because of the new city. Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.

Del Webb, on the other hand, is entitled to the relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City. It does not equitably or legally follow, however, that Webb, being entitled to the injunction, is then free of

any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained. It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.

Having brought people to the nuisance to the foreseeable detriment of Spur, Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down. It should be noted that this relief to Spur is limited to a case wherein a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business and for which the business has no adequate relief.

It is therefore the decision of this court that the matter be remanded to the trial court for a hearing upon the damages sustained by the defendant Spur as a reasonable and direct result of the granting of the permanent injunction. Since the result of the appeal may appear novel and both sides have obtained a measure of relief, it is ordered that each side will bear its own costs.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

HAYS CJ, STRUCKMEYER and LOCKWOOD JJ, and UDALL, Retired Justice, concur.

QUESTIONS

1. Who committed a tort in this case? Who was held liable? Who won?
2. If you agree with this decision, do you think that its reasoning should have been applied to *Miller*, above?
3. What if the plaintiff had asked for damages rather than an injunction?
4. What do you think the result should be if the Sun City homeowners, rather than the developer, sued Spur? At the time of *Spur v Webb*, an action against Spur by over 400 property owners in Sun City was pending. After *Spur v Webb* was decided, Spur filed a third-party complaint against Webb so as to be able to obtain indemnity from Webb for damages for which Spur might be liable to the property owners. Webb contended that under the doctrine of *res judicata*, Spur's third-party complaint was excluded because *Spur v Webb* had definitively settled Spur's claims against Webb. In *Spur Feeding Co v Superior Court of Maricopa County*, 505 P2d 1377 (Ariz SC 1973), Cameron VCJ (Hays CJ and Struckmeyer and Lockwood JJ concurring) held for Spur:

> A reading of the opinion in *Spur v. Webb*, supra, leads us to the inescapable opinion that it is not res judicata as to the parties before the court in the instant case.
>
> The previous opinion of this court in *Spur v. Webb*, supra, concerned itself with two parties and only two questions:
>
> 1. whether Spur's operation should be enjoined, and,
> 2. if so, who was going to pay for the cost of closing or moving.
>
> In the present case before the court, we are concerned primarily with:
>
> 1. whether each of the over 400 plaintiffs have sustained any damages as a result of Spur's previous operation, and
> 2. if so, whether Webb's conduct as to each of the individual plaintiffs is such that Webb should be required to indemnify Spur as to any damages the court might find the plaintiffs are entitled to receive.

> Not only are the parties different, but the facts of the case are different than those of the prior case of *Spur v. Webb*, supra. Defendant Spur is entitled to have litigated the conduct of Webb as to each of the plaintiffs and to have the question of indemnity litigated as to each of them.

Holohan J dissented:

> Spur claims that Webb is liable to it because Webb knew of the cattle feeding operation of Spur, but it continued to develop its property for sale of homes which in turn resulted in suits by the home buyers against Spur. The Third Party complaint alleges that Webb could have prevented harm to the home buyers if they had been warned of the existence of what Spur delicately refers to as "odors emanating from the animals and body wastes produced by such animals." Spur alleges that its activity is passive and secondary, and Webb is the primary and active actor in causing the damage to home buyers who should have been warned of the odors caused by Spur's activities.
>
> Inviting though the argument of Spur may be, it overlooks the fact that Spur was a wrongdoer as to Webb as well as the new buyers. Webb has a right to develop its land; Spur has no right to commit a nuisance. If the home buyers have a claim against Webb it is separate and distinct from the claim that they have against Spur. Webb had a right to have the nuisance created by Spur abated … .
>
> Spur so conducted its activities that it increased the magnitude of offensive odors being sent beyond its land until the situation reached the state of affairs presented at the trial in the first Spur case. Spur had no right to restrict its neighbors from developing their land. Spur was a wrongdoer, and each year it magnified its wrong. Despite this condition, the Court decided in the first Spur case that Webb should pay to close down a nuisance and move it. Today the Court apparently holds that Webb must indemnify the wrongdoer for any damages caused to property owners by the operation of the nuisance.

5. According to Lewin, "Compensated Injunctions and the Evolution of Nuisance Law" (1986) 71 Iowa L Rev 775 at 792, the *Spur* controversies were resolved as follows:

> On remand [of *Spur v Webb*], discovery was commenced on the issue of Spur's cost of moving, but the case was settled without a hearing. Although the terms of the settlement were not made public, they involved Spur moving the feedlot to a new location, with payment of an undisclosed sum of money by Del Webb to Spur … . The lawsuit of the residents was settled after the settlement of Del Webb's suit against Spur with the payment of undisclosed sums to the individual plaintiffs.

Lewin points out that *Spur v Webb* is the only reported case to award a compensated injunction.

SUPPLEMENTARY READING

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