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Torts -- Comparative Injury Doctrine of Nuisance

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ancing, the courts have adopted rules which reflect the whole evolution of industrial technological advances, business methods, social values, and popluation. In *Harwell*, North Carolina took the path of least net injustice.

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Torts—Comparative Injury Doctrine of Nuisance

Should a court of equity close a forty-five million dollar cement plant, thereby destroying the jobs of over three hundred workers and depriving the county of important tax revenue, in order to prevent comparatively minor damages[1] to nearby property? This was the question that confronted the New York Court of Appeals recently in *Boomer v. Atlantic Cement Co.*[2] The cement plant emitted dirt, smoke, and vibrations which neighboring property owners claimed injured their lands. The owners filed several suits asking the court to restrain the operation of the plant as a nuisance and to award money damages for past injury. The trial court found that the operation of the plant did indeed constitute a nuisance, even though the plant was equipped with the most effective pollution control devices available, and that plaintiffs had been substantially injured. Damages for past injuries were awarded, but the court refused to issue an injunction because of the great hardship it would bring upon defendant and the community.[3] The appellate division affirmed.[4]

The court of appeals agreed with the lower courts that closing the plant was too drastic a remedy but disagreed with the manner in which the lower courts had avoided such remedy. With one judge dissenting, the court reversed the order of the trial court and instructed that an injunction be issued unless defendant paid plaintiffs' permanent damages. Such relief, said the court, would do justice between the parties as it would fully redress the economic loss to plaintiffs' properites without being overly oppressive to defendant. Citing *United States v. Causby*,[5] the

[1] Approximately 535 dollars per month.

[2] 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). This decision consolidated appeals handled separately by the appellate division.

[3] Boomer v. Atlantic Cement Co., 55 Misc. 2d 1023, 287 N.Y.S.2d 112 (Sup. Ct. 1967).

[4] Boomer v. Atlantic Cement Co., 30 App. Div. 2d 480, 294 N.Y.S.2d 452 (1968); Meliak v. Atlantic Cement Co., 31 App. Div. 2d 578, 295 N.Y.S.2d 622 (1968) (mem.).

[5] 328 U.S. 256 (1946).

court said "[t]he theory of damage is the 'servitude on land' of plaintiffs imposed by defendant's nuisance."[6] And, said the court, since plaintiffs' acceptance of the permanent damages would be in compensation for a servitude on the lands, plaintiffs would be barred from future recovery.[7]

Apparently the court's decision overrules previous New York cases[8] and aligns the state with those jurisdictions which adhere to the comparative injury doctrine.[9] That doctrine, stated simply, says that a court of equity should deny injunctive relief, notwithstanding the fact that the existence of a nuisance and substantial injury to plaintiff have been established, when issuance of the injunction would cause defendant much greater hardship than continuance of the nuisance would cause plaintiff.[10]

Such balancing of equities has been justified by courts which accept the doctrine as a natural consequence of several fundamental principles of equity. These courts insist that the granting or withholding of relief by a court of equity always rests in the discretion of the chancellor. As one court has put it, "To an injunction . . . no one has an absolute and unqualified right. Such an application appeals to the conscience of the chancellor, to the exercise of a wise and sound discretion . . . ."[11]

The extraordinary nature of injunctive relief is also stressed as supporting the comparative injury doctrine. Most likely a court about to compare the hardships will make some comment reminiscent of Mr. Justice Baldwin's statement that "[t]here is no power the exercise of which is

[6] 26 N.Y.2d at —, 257 N.E.2d at 875, 309 N.Y.S.2d at 319.

[7] Judge Jasen in his dissent attacked the majority's apparent overthrow of the long-standing New York rule that a nuisance which results in substantial continuing damage to neighboring property should be enjoined. The judge also referred to the grave dangers to health cause by particulate pollution and to the unconstitutionality of allowing defendant to impose a servitude on plaintiffs' lands by the payment of money damages. As an alternative to the majority's conditional injunction, Judge Jasen proposed issuance of an absolute injunction to take effect in eighteen months if the nuisance was not abated by then. 26 N.Y.2d at —, 257 N.E.2d at 875-77, 309 N.Y.S.2d at 319-22.

[8] *E.g.*, Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913); McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907); Strobel v. Kerr Salt Co., 164 N.Y. 303, 58 N.E. 142 (1900).

[9] For a thorough discussion of this doctrine see McClintock, *Discretion to Deny Injunction Against Trespass and Nuisance*, 12 MINN. L. REV. 565 (1928); Mechem, *The Peasant in His Cottage: Some Comments on the Relative Hardship Doctrine in Equity*, 28 S. CAL. L. REV. 139 (1955); Annot., 61 A.L.R. 924 (1929); Annot., 31 L.R.A. (n.s.) 881 (1911).

[10] *E.g.*, Pritchett v. Wade, 261 Ala. 156, 73 So. 2d 533 (1954); Storey v. Central Hide & Rendering Co., 148 Tex. 509, 226 S.W.2d 615 (1950); Beard v. Coal River Collieries, 103 W. Va. 240, 137 S.E. 7 (1927).

[11] McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Co., 164 F. 927, 940 (9th Cir. 1908), *cert. denied*, 212 U.S. 583 (1909).

more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case than the issuing of an injunction. . . ."[12] Likewise the comparative injury jurisdictions point out that a court of equity should never grant relief which would be inequitable or "operate contrary to the real justice of the case."[13] From such principles of equity these courts conclude that an injunction is not the proper remedy when it would cause defendant disproportionately greater hardship than continuance of the nuisance would cause plaintiff.

Not all courts agree, however. Previous New York cases[14] and a substantial number of other jurisdictions[15] reject the notion of balancing the equities. These courts argue that whenever a clear case of nuisance is established and the wrong causes plaintiff substantial injury which cannot be adequately remedied at law, plaintiff has an absolute right to injunctive relief even though there is a large disparity in the economic consequences of the nuisance and of the injunction.[16]

Courts which refuse to balance the equities generally disagree with

[12] Bonaparte v. Camden & A.R.R., 3 F. Cas. 821, 827 (No. 1617) (C.C.D.N.J. 1830). For an example of a nuisance case employing such a statement see Bartman v. Shobe, 353 S.W.2d 550 (Ky. 1962).

[13] McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Co., 164 F. 927, 940 (9th Cir. 1908).

[14] *See* cases cited note 8 *supra.*

[15] *E.g.*, Meriwether Sand & Gravel Co. v. State, 181 Ark. 216, 26 S.W.2d 57 (1930); Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 928 (1911); Wente v. Commonwealth Fuel Co., 232 Ill. 526, 83 N.E. 1049 (1908); Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N.W. 805 (1919); Hennessey v. Carmony, 50 N.J. Eq. 616, 25 A. 374 (1892).

North Carolina apparently rejects the comparative injury doctrine also. "[W]here a nuisance is established . . . no private enterprise for the mere purpose of bringing gain to its owner can be allowed to destroy one's home or to impair his health. Both are irreparable injuries, and no damage can compensate a man for destruction of his home or for the undermining of his health." Redd v. Edna Cotton Mills, 136 N.C. 342, 344, 48 S.E. 761, 762 (1904). However, the state's courts will balance the equities when an injunction would cause "public inconvenience" and that term is given a very broad meaning. *See* Attorney General *ex rel.* Bradsher v. Lea, 38 N.C. 301 (1844); Barnes v. Calhoun, 37 N.C. 199 (1842).

[16] Phrased more eloquently:

> The law, in cases of this kind, will not undertake to balance the conveniences, or estimate the difference between the injury sustained by the plaintiff and the loss that may result to the defendant from having its trade and business, as now carried on, found to be a nuisance. No one has a right to erect works which are a nuisance to a neighboring owner, and then say he has expended large sums of money in the erection of his works, while the neighboring property is comparatively of little value. The neighboring owner is entitled to the reasonable and comfortable enjoyment of his property, and, if his rights in this respect are invaded, he is entitled to the protection of the law, let the consequences be what they may.

Susquehana Fertilizer Co. v. Malone, 73 Md. 268, 282-83, 20 A. 900, 902 (1890).

the comparative injury jurisdictions as to the nature of equitable relief, contending that such relief is not "of grace" but is a matter of right whenever plaintiff is able to make out his case.

> The phrase "of grace" predicated of a decree in equity . . . has no rightful place in the jurisprudence of a free commonwealth, and ought to be relegated to the age in which it was appropriate. It has been somewhere said that equity has its laws as law has its equity. This is but another form of saying that equitable remedies are administered in accordance with rules as certain as human wisdom can devise, leaving their application only in doubtful cases to the discretion, not the unmerited favor or grace of the chancellor. Certainly no chancellor . . . will at this day admit that he dispenses favors or refuses rightful demands, or deny that, when a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demandable ex debito justitiae, and needs not be implored ex gratia.[17]

Courts which hold this view of the nature of equitable relief argue that the comparative injury doctrine takes the property of the poor and gives it to the rich,[18] and "puts the hardship on the party in whose favor the legal right exists instead of on the wrong-doer."[19] Furthermore, these courts contend that the injunction cannot result in injury to defendant because defendant is not injured by being restrained from doing that which he had no right to do.[20]

The dichotomy between those courts which reject the comparative injury doctrine and those which accept it, however, is not as distinct as the foregoing discussion might suggest. The dividing line is blurred, sometimes beyond recognition, by the exceptions that many of the courts which purport to reject the doctrine make to their no-balancing rule. For example, most jurisdictions balance the equities on applications for injunctions pendente lite and refuse such applications where the injunction would injure defendant much more than continuance of the nuisance would damage plaintiff.[21] Likewise, the equities may be balanced whenever: (1) plaintiff's injury is trivial per se even though occasioned by an

[17] Walters v. McElroy, 151 Pa. 549, 557, 25 A. 125, 127 (1892).
[18] Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 5, 101 N.E. 805, 806 (1913).
[19] 1 J. POMEROY, EQUITABLE REMEDIES § 530 (1905).
[20] Walters v. McElroy, 151 Pa. 549, 558, 25 A. 125, 127 (1892).
[21] *E.g.*, United States v. Luce, 141 F. 385 (C.C.D. Del. 1905); Sexton v. Public Serv. Co-Ordinated Transp., 5 N.J. Super. 555, 68 A.2d 648 (1949); Huskin v. Yancey Hosp., Inc., 238 N.C. 357, 78 S.E.2d 116 (1953).

admitted nuisance;[22] (2) plaintiff is guilty of laches or there is an element of estoppel present;[23] (3) plaintiff comes to the court in bad faith, as when he seeks the court's aid only to force defendant to pay an exorbitant price for his property;[24] or (4) the public has an interest in the continuation of the nuisance.[25] These exceptions, combined with the agility with which some jurisdictions are able to alter their viewpoints,[26] make simple categorizations of a court's position extremely perilous and render predictions of whether a given court will or will not balance the equities in a particular case most unreliable.

But if a court does balance the equities and the balancing results in the denial of the injunction, one question is invariably raised: Does the denial of the injunction amount to an improper taking of plaintiff's property? *Boomer* vividly demonstrates the problem. Defendant's activities invaded plaintiffs' property rights. The court, however, instead of ordering the cessation of the wrongful acts, allowed defendant to purchase those rights which were being invaded and placed plaintiffs in such a position that they had no choice but to sell the rights.[27] Such action would appear to amount to a kind of private, and therefore unconstitutional, inverse condemnation.[28]

Most courts which deny injunctive relief after balancing the conveniences, however, are not impressed by the private condemnation argu-

[22] *E.g.*, MacDonald v. Perry, 32 Ariz. 39, 255 P. 494 (1927); Gray v. Manhattan Ry., 128 N.Y. 499, 28 N.E. 498 (1891).

[23] *See* Grey *ex rel.* Simmons v. Mayor of City of Patterson, 60 N.J. Eq. 385, 45 A. 995 (1900); Knoth v. Manhattan Ry., 187 N.Y. 243, 79 N.E. 1015 (1907); Kinsman v. Utah Gas & Coke Co., 53 Utah 10, 177 P. 418 (1918).

[24] *See* Edwards v. Allouez Mining Co., 38 Mich. 46 (1878).

[25] *E.g.*, Daughtry v. Warren, 85 N.C. 136 (1881); Booth-Kelly Lumber Co. v. City of Eugene, 67 Ore. 381, 136 P. 29 (1913).

[26] *Compare* Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 A. 1065 (1904), *with* Elliott Nursery Co. v. Duquesne Light Co., 281 Pa. 166, 126 A. 345 (1924).

[27] Of course plaintiffs could have refused to accept the permanent damages and maintained successive actions at law for damages as further injury was incurred. Such a course, however, is so onerous as to eliminate it as a realistic alternative.

[28] *Boomer* is strikingly similar to inverse condemnation cases such as Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801 (1936), and Papphenheim v. Metropolitan Elevated Ry., 128 N.Y. 436, 28 N.E. 518 (1891). In cases of this type, defendant's activities substantially impair some property right of plaintiff and suit is brought to enjoin the acts causing the injury. Since the defendant possesses the power to condemn the invaded property the court usually grants an injunction conditioned on defendant's payment of plaintiff's permanent damages and thereby avoids forcing defendant to institute a separate condemnation proceeding. The critical difference between these cases and the principal case is that the Atlantic Cement Co. had no power to condemn the property rights which the operations of its plant invaded.

ment. Many,[29] including the United States Supreme Court,[30] follow the practice of the court of appeals in *Boomer* and make little or no reply to the contention. Others hint that the emphasis on the constitutional impropriety of the court's action is misplaced and that the only question involved concerns the abiltiy of a court of equity to mold its judgment to fit the circumstances of the case. And this ability, it is said, is not affected by defendant's lack of the power of condemnation.[31] One court, replying directly to the condemnation contention, noted that similar arguments could be advanced in cases in which injunctions are denied because of the adequacy of the remedy at law.[32] "The answer to the 'condemnation' argument," said the same court, "is that one who comes to equity does so by choice. Equity forces nothing from him, and he may stand on his legal remedies if he wishes. But if he wants equity he must do equity."[33]

Neither the courts' silence, nor their emphasis on the powers of equity courts, nor their instructions on what one must do to merit equitable relief, however, resolves the issue. The fact remains that defendant has, in effect, been allowed to condemn plaintiff's property rights for private purposes by creating a nuisance which invades those rights. If such action is not unconstitutional, it would seem that the courts should be able to state why it is not.

Another problem raised by *Boomer* and neglected by the opinion concerns the terms of the conditional injunction. Should provision be made to allow defendant to recover part of the damages paid if the nuisance is abated in the future? Or, conversely, should the decree allow plaintiffs to return to the court if the nuisance becomes more intense in the future?

Probably the court need concern itself with neither of these contingencies when drafting the decree. As for the possiblity of future abatement, it is generally said that where a nuisance is not legally abatable the defendant cannot object to the assessment of permanent damages because the court will presume that the nuisance will continue to operate

[29] *See* cases cited note 10 *supra.*

[30] *See* Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334 (1933); New York City v. Pine, 185 U.S. 93 (1902).

[31] Knoth v. Manhattan Ry., 109 App. Div. 802, 96 N.Y.S. 844 (1905), *aff'd*, 187 N.Y. 243, 79 N.E. 1015 (1907).

[32] Bartman v. Shobe, 353 S.W.2d 550 (Ky. 1962).

[33] *Id.* at 555. Interestingly enough one court has suggested that the issuance of an injunction that would cause defendant comparatively greater hardship than continuance of the nuisance would cause plaintiff would constitute an improper appropriation of defendant's property. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904).

under the same conditions for an indefiinte period.[34] Since defendant's ability to in fact abate the nuisance will not prevent the recovery of permanent damages, it may be assumed that he should not be allowed to recover any money paid to plaintiffs if the nuisance is actually abated. On plaintiffs' side, so long as the nature and extent of the servitude conveyed to defendant by acceptance of the permanent damages is clearly defined, plaintiffs should have no trouble obtaining relief from increased injury by an action to enjoin the overburdening of the servient estate. Defining the nature and extent of the servitude conveyed, however, may itself present serious difficulties since it is an open question how an easement to pollute is to be measured.

Notwithstanding the questions left unanswered by the decision in *Boomer*, it is difficult to quarrel with the majority's resolution of the conflict between the parties. The facts of the case placed the court in the unenviable position of being forced to choose between following its former decisions and closing the cement plant or overruling itself and awarding plaintiffs what seems less than adequate remedy. No other alternative presented itself. The cement company could not be forced to experiment with pollution control devices because its plant already had the best available. Retention of the case to allow the court to keep the situation under its supervision would have been possible but would not have satisfied the needs of plaintiffs. And a delayed injunction, such as that proposed by the dissent,[35] would have amounted to nothing more, under the circumstances, than a delayed closing of defendant's plant. Thus it appears that the course followed by the majority was the only practical solution to the problem.

This is not to say that the decision is to be applauded. On the contrary, it is most unsatisfactory. Pollution continues to emanate from defendant's plant—pollution which not only injures plaintiffs' properties but also damages the health of the general public. And the fact remains that plaintiffs have been afforded inadequate relief. All that can be said about the decision is that it is an example of a case which, because of the limited powers and resources of the courts, is incapable of satisfactory judicial resolution.

It must be remembered, however, that all pollution cases are not as extreme as *Boomer*. Seldom do the facts of a case force a court to elect

[34] Northern Ind. Pub. Ser. Co. v. W.J. & M.S. Vesey, 210 Ind. 338, 351, 200 N.E. 620, 626 (1936).

[35] 26 N.Y.2d at —, 257 N.E.2d at 877, 309 N.Y.S.2d at 322.

between closing a multi-million dollar operation, thereby devastating a large business and destroying the economy of an entire community, and awarding the plaintiff inadequate relief. In the majority of pollution cases other alternatives are present. For example, it may be possible to reduce or eliminate the injurious pollution by obligating the defendant to install effective pollution control devices. Or, where the defendant is an extremely wealthy concern, it may be possible to stimulate the development of new and more efficient pollution control devices by forcing investment in research. At the very least, a court should explore all plausible courses of action before resorting to the comparative injury doctrine as a means of resolving the dispute. Such resolution is so unsatisfactory, especially in the pollution area where the public interest is great, that it should be limited to cases in which the facts allow no other solution. Above all the courts must not evade the problems raised by the pollution crisis by indiscriminately employing the doctrine of comparative injury.

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