THE ROLE OF THE LAW OF NUISANCE AS A MECHANISM FOR CONTROLLING POLLUTION

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1.0 Introduction:

Nuisance law Is a branch from law of tort. It concerns with the protection of the environment Examples are: pollution by oil or noxious fumes, interference with leisure activities and offensive smells from premises used for keeping animals or noise from industrial installations So, there are three areas of nuisance that are: nuisance which have no environmental flavour; protection of private rights in the enjoyment of land; nuisance replaced with statutory powers designed to control environmental damage

Nuisance can be divided into two:-

a) Public nuisance, and
b) Private nuisance.

2.0 Public Nuisance

Public or common nuisance is a crime and it affects the reasonable comfort and convenience of life. Examples are: carrying on an offensive trade, selling food unfit for human consumption, and obstructing public highways. The government or authority will take action against the polluter such as Injunction or damages to control the pollution because it affects the community at large. This can also be called the alienability rules.

3.0 Private nuisance

Private nuisance is an unlawful interference with a person's use or enjoyment of land. It is a continuous or recurrent and the law tries to preserve a balance between two conflicting interest that is occupier In using his land and his neighbour in enjoyment of his land. This situation can be applied to property and liability rules.

The occupier can use his land according to the planning law that is to determine the pattern of permissible land uses between neighbours. This is to save guard his neighbour property right because the occupier activity can be actionable nuisance.

4.0 Discussion on the Law of nuisance as a mechanism for controlling pollution

The law of nuisance is one of a number of mechanisms for controlling pollution in operation today. The law of nuisance acts alongside other methods of control such as government policy - enacted through statutory regulation or fiscal policy.

Ogus and Richardson repeatedly refer to the perceived difference of purpose between the above instruments. Parliament is seen as the appropriate tool for policy-making: while the Courts should uphold "principles". Lindley stated, "Courts of Justice are not like Parliament which considers whether proposed works will be so beneficial to the public as to justify exceptional legislation, and the deprivation of people of their rights with or without compensation."

The principles which are upheld by the Courts are those of individual property rights. These rights have been held to prevail over the public interest, subject only to legislative intervention. Given this state of affairs is it possible that Courts can arrive at a just or efficient solution to individual or collective pollution problems? To answer this question we need to look more closely at the mechanism.

Firstly, what pollution problems can the law of nuisance reasonably deal with? The law of nuisance might reasonably be expected to deal with "any adverse change in the environment which the purchaser might not reasonably anticipate when he buys his interest in land" (Ogus and Richardson, Cambridge Law Journal 36). In other words, the law might reasonably be expected to uphold the maintenance of land or its value against unreasonable interference after its sale.

In practice, the law of nuisance may only deal with those pollution problems which are deemed "actionable". The most restrictive clause among the eight requirements put forward by R.H. Coase (Journal of Law and Economics, 1960) is that the plaintiff, "must have a legal interest in the occupation or enjoyment of the land." This restricts the law of nuisance to specific rather than general cases and means that really only tenants or owners may seek remedy under this law. While it seems reasonable to use some restriction to deter the unreasonable use of prosecution as a threat, it accepts that pollution is not of itself a wrong - it is only a wrong insofar as it interferes with the lives of people with certain standing who also have the time, money and energy to sue.

The free market will react to a situation in which land becomes the subject of pollution through the price mechanism. Rents in polluted areas will fall. It is assumed that this lowering of rent will compensate the occupier for the interference. If the rent reaches zero and the occupier is insufficiently compensated he will move elsewhere (the polluter might provide the means and the opportunity). Alternatively, the occupier or land owner could attempt to bribe the polluter to reduce the damaging actvitiy. It would be possible to reach an allocatively efficient outcome in this manner, but not without some flow of resources either towards the polluter and away from the polluted parties or vice versa. This outcome may also be equitable where the two parties are for example similarly composed households (the household which values its land highest will pay most for it); but where one party is advantaged and the other disadvantaged such as when a single household "takes on" a company it is obvious which party can value its hand and amenities the highest and will prevail, in the absence of policies or principles which state otherwise.

Government policy is transformed into a tool of pollution control through regulation or taxation. Regulation may set certain minimum or maximum standards for emission or exposure. Such regulation is costly in terms of research

advice, bargaining with concerned parties, and particularly in enforcement. Fiscal policy tends to be an unwieldy instrument and may also be costly to implement.

The law of nuisance is a property right. Liability is place on the discharger and the plaintiff may pursue either an injunction to remove the interference or damages to compensate for the interference. In the case of an injunction, the status quo is preserved - the polluter is enjoined to desist from further pollution. The individual's right to freedom from interference is paramount.

The primacy of injunctive relief was stated by Sir Raymond Evershed in the case, Pride of Derby v. Bristish Celanese,

if A proves that his proprietory rights are being wrongfully interfered with by B and that B intends to continue his wrong, then A is prima facie entitled to an injunction and he will be deprived of that remedy only if special circumstances exist"

The primacy of injunctive relief is defended on the basis of the principle of private property, "the court is not a tribunal for legalizing wrongful acts by an award of damages" (P. McAuslan, Judicial regulation of land use with nuisance, 1975).

The granting of an injunction secures the rights of the polluted party. He cannot be required to surrender those rights other than by Act of Parliament. Once an injunction is granted, the costs of abating the pollution fall squarely on the polluter. In the case where the polluter is the least cost abater, this outcome will also bring about the optimal allocative solution.

The above situation must surely account for a large number of cases - particularly where emissions from one company are responsible for interfering with the amenity of a large number of separate householders, in a situation where "protection" from the emission is likely to be less than 100% (for instance where it might be achieved by the installation of double glazing; air conditioning; sound insulation). When transactions costs are included as part of the cost of abatement, then companies will tend to have advantages over individual households. The company is likely to have the advantages in terms of access to information about the production process and its alternatives as well as the monitoring of emissions. Companies also have a bargaining advantage over disparate, decentralized households.

Doubt is cast on the value of the injunctive remedy when the polluter is not the least cost abater. Justice Mellor stated (St. Helens Smelting Co. v. Tipping) that "works which emit noxious vapours MAY NOT do an actionable injury to another .... and ANY place where such an operation is carried on ... is not".

It is worth noting here that an injunction is not the only remedy available to the plaintiff. The plaintiff may seek, or be persuaded to seek, damages, i.e. compensation for the interference, in which case the least cost method of abatement can be employed; allocative efficiency achieved and the conflict be resolved.

The situation which most concerns economists from an allocative point of view, is one in which the plaintiff insists upon an injunction, despite being the least cost abater. I find it difficult to envisage a situation where the polluter is not the least cost abater, not least because I am inclined to attempt some evaluation under social cost of interference with the ecological cycle - rather than restricting social cost calculation to interference with the plaintiff alone. There can be but few cases where it is cheaper to protect the eco-system from pollution, than to restrict the pollution itself. That point aside, I find myself in sympathy with the plaintiff's

right to insist upon an injunction on several counts. First, the free market system is a system which favours individual rights above collective rights - defending the rights of the individual through property rules is therefore not out of step with free market thinking. Second. if the individual values his land/amenity above the bribe offered by the defendant to accept damages, an injunction may be the only way in which relief may be obtained. In other words, the individual should not be unduly penalized because his marginal utility exceeds the factor cost, and he has not the financial resources to exploit this. Finally, the defendant may plead undue sensitivity on the part of the plaintiff - giving the Court some flexibility in interpreting the reasonablesness of the plaintiff's case and whether or not, in the Court's view, the plaintiff has over-priced his marginal utility in an attempt to bluff the defendant.

Injunctive relief has one final advantage over an award of damages in the Court - it is relatively cheap. It involves no consideration of pollution costs or abatement costs either to the parties concerned, or to society at large which considerably reduces the information cost involved. Page-Wood V.C. (Attorney General v. Birmingham) stated "it is a matter of almost absolute indifference whether the decision will affect a population of 250,000 or a single individual carrying on a manufactury for his own benefit."

The Courts have further scope for introducing some flexibility into the injunctive remedy through the option of suspending injunctions. Injunctions may be suspended in a variety of circumstances, essentially this will provide time for the polluter to put his house in order - without incurring undue expenses because of the sudden imposition of an injunction.

The injunctive remedy may or may not produce an allocatively efficient outcome, depending on who is the least cost abater. The injunctive remedy may or may not produce a "just" outcome, depending upon one's ideas of "justice" - and the particular circumstance. It may be "just" to protect the rights of the individual above all else. It may be "just" to protect the rights of the individual above all else. It may be "just" to protect the disadvantaged. It cannot be "just" to allow the tort remedy to be "one vehicle whereby this urge (to wreak vengeance) may be assuaged" (Linden, quoted in Ogus And Richardson). Nor can it be "just" in Rawlsian terms to support the right of one individual at the expense of a similar liberty for others. The injunctive remedy will also have distributional implications - there will be a transfer of income away from the polluter, on the assumption that his output has been reduced and/or costs increased. Any transfer of wealth would be minimal and depend upon court costs. The injunction remedy faces many criticisms as a mechanism for controlling pollution.

The other remedy which a plaintiff might choose to pursue is that of damages. He may pursue damages under common law or equitable damages. The practice in assessing damage claims has been (according to Ogus and Richardson) to award the plaintiff a sum such that puts him in the position he would have been if the wrong had not been committed. Awards under common law have been based on the diminution in market value of the plaintiff's property - equitable damages require an assessment of likely future loss. The plaintiff is not being compensated for "aggravation", or subjective value unless damages are based on "reinstatement". The doctrine of mitigation requires that the plaintiff must accept the least costly method of redeeming his loss - while this may deter some from over-pricing their marginal utility, it will not reflect the price that would have been found under free market bargaining and will demonstrate a flow of resources away from the individual pollutee.

Damages are no substitute for free bargaining although pursuing property rights in this way may at least result in some compensation to the disadvantaged (always assuming that they are in a position to use the legal system in the first place) - in other words, less of a drain on their wealth than would otherwise be the case. Pursuing damages also has the advantage that it does not impede free bargaining or action by the least cost abater, whichever party it may be. It is possible to combine both damages and injunctions, where the injunction is suspended. This serves the purpose of upholding the "principle of property rights" while allowing bargaining to continue in the hope of an "efficient" outcome.

5.0 Conclusion

In conclusion, I feel that the law of nuisance, as practised today, is a mechanism for controlling pollution only within the general goals set out by government policy. Unless there is a determined effort to alter the way in which damage awards are calculated they can only serve to complement private bargaining, calculated they can only serve to complement private bargaining, not replace it. The emphasis has always been to return parties to the status they assumed prior to the pollution arising. The role of the law of nuisance is less than that quoted earlier, rather it is to reverse "any adverse change in the environment which the purchaser might not reasonably anticipate when he buys his interest in land". In other words, the law of nuisance can be expected to deal with deviations from the "norms" encompassed by government policy, but cannot necessarily be expected to result in pareto improvement, allocative efficiency or to accord with all notions of justice. The law of nuisance is however a relatively expedient expression of the principles underlying our "ideal" world.

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