Nuisance

"There is perhaps no more impenetrable jungle in the entire law than that regarding the word 'nuisance.' "—W. Page Keeton et al., PROSSER AND KEETON ON TORTS § 86 (5th ed. 1984).

People want to use land for different things. Here we are interested in conflicts that arise between neighboring property owners. My lifelong dream of making my own smoked salmon in a smokehouse in my backyard may be incompatible with my neighbor's desire for odorless living. We each own our respective land. What then?

One solution is to engage in private governance. We might strike a deal, and the law of covenants, which we will discuss soon, lets us bind our successors in ownership to the arrangement. Alternatively, the state might resolve our dispute via regulation—the government may declare my facility illegal via zoning law or air quality regulation, effectively picking a winner between competing interests.

The law of nuisance takes a different tack. It also involves picking a winner, but turns the choice over to a court. The court's role, however, is not explicitly regulatory. Rather, it is there to determine whether the complained-of act is contrary to someone else's property rights. Stated another way, if my smokehouse is a nuisance, your property rights *already* preclude its operation. The nuisance action merely clarifies that I violated your property rights (and that my property rights did not extend to the action in question). In essence, the court is determining whether a boundary has been crossed. But from another perspective, nuisance looks a lot like regulation. A judicial regulator (rather than a politically accountable agency) takes a look at the facts and decides whose interests ought to prevail. We might look at nuisance questions from either view, which complicates the doctrine.

A. The Problem of Nuisance Definition

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Restatement (Second) of Torts* § 821D (1979). What does that mean? Nuisance law is a history of courts trying to come to grips with a fairly vague exhortation. Judges sometimes invoke the maxim *sic utere tuo ut alienum non laedas*. "[O]ne

must so use his own rights as not to infringe upon the rights of another. The principle of *sic utere* precludes use of land so as to injure the property of another." Cline v. Dunlora S., LLC, 726 S.E.2d 14, 17 (Va. 2012).

That's intuitive, but unhelpful. Back to the backyard smokehouse. If my ownership of land includes the right to emit smoke, I interfere with my neighbor's ability to enjoy her home. But if her property right includes the ability to shut me down, then her preferred property use interferes with *my* ability to use my property as I see fit. The harms are reciprocal. Appeals to *sic utere* beg the question. That said, there is something intuitively appealing about the maxim, and perhaps you have a strong intuition (based on what?) that factories "cause" harm in a way that homes do not. How far do intuitions of harm go?

B. Adjudicating Nuisance

Although some acts are treated as per se nuisances (typically illegal activities) courts must generally engage in contextual assessments of harm to determine whether a nuisance exists in fact (also referred to as a nuisance *per accidens*).

Sans v. Ramsey Golf & Country Club, Inc.
149 A.2d 599 (N.J. 1959)

FRANCIS, J.
An injunction was issued by the Chancery Division of the Superior Court against defendant Ramsey Golf and Country Club, Inc., barring the further use of the men's and women's third tees of its golf course. The Appellate Division affirmed ….

The issue presented is a novel one. The facts which created it are not seriously in dispute. The physical setting which forms its background is the product of the ingenuity of a real estate developer.

[The defendant operated a residential and country club development with a nine-hole golf course.] The development tract contained three small lakes, one of which, called Mirror Lake, became the water hazard hole about which this controversy centers.…

In 1949 the plaintiffs, husband and wife, purchased a lot in the development. Naturally, they were aware of the existence of the golf course, and they became members of the

club. They commenced construction of a home on the lot in 1950, after which they acquired two adjoining parcels. One side of their property adjoins the fairway of the second hole. The rear line of the three lots is near Mirror Lake but does not run to the water. It is separated from the edge of the lake by a strip of land varying in width from 11 to 40 feet, which is owned by the golf club.

In 1948 the present third women's tee was built. Its location was designed to create a short par 4 water hole.… [T]he tee had been in continuous use since its installation, although the plaintiff Ralph Sans testified that he did not notice it until 1950 when his home was being built. Subsequently, apparently in 1949, a separate men's tee was built for this hole about 30 feet farther from the northerly edge of the lake. The purpose was to lengthen the water hazard for the men. Both tees are on golf club property. According to Sans, the men's tee is 'roughly' 50 to 60 feet from the southerly corner of the rear of his house; the women's tee is closer.

In order to reach the third tees from the second green, the golfers walk along the 11 to 40-foot-wide path (owned by defendant and described above) separating plaintiffs' rear lawn from the lake.

Plaintiffs moved into their new home in June or July of 1951, and have lived there since that time. They have two children, who were 10 and 11 years of age when the case was heard. As the membership of the club grew, play on the golf course increased, and the players' use of the third tees and the path to reach them became annoying and burdensome to plaintiffs. They began to complain to defendant's officials, and thereafter and until this suit was brought, they sought to effect the relocation of the tees to the north of the northerly line of the lake. Such a change is feasible. In fact, when a stay of the restraint issued by the trial court was denied, a new temporary tee was built and has been in use pending the determination of this appeal. The objection of defendant to adopting it permanently is that an attractive short par 4 water hole is transformed into an ordinary par 3 one on a nine-hole course which already has three par 3 holes.

Plaintiffs' complaint charged that the location of the tees and the manner and incidents of their use by defendant and its members constituted a private nuisance as to plaintiffs. The trial was conducted on the latter basis.

Proof was adduced that in the golf season play begins on the third tees as early as 6 A.M. and continues throughout the day until twilight. On week-ends and holidays the activity is more intense. Sans spoke of an 'endless stream of golfers' using the path just in back of his house.…

When Sans bought his first lot in 1949, the one on which his home was later constructed, he did not see the tee or tees in question. And there is no proof that anyone called them to his attention. It does appear that a certain brochure respecting the development had been given to him. A similar one was introduced in evidence. It contained what appeared to be an aerial color view of the tract, including the course. Although the tees were indicated, none was depicted on plaintiffs' side of the lake.

According to plaintiffs, the constant movement of the players to and from the tee in close proximity to their rear lawn and house was accompanied by a flow of conversation which became annoying and burdensome to them. It awakened them and their children as early as 7 in the morning and it pervaded their home all day long until twilight. Moreover, they have a consciousness that everything they say in or around the house can be heard out on the path and so they are 'under a constant strain and constant tension.' They 'never feel relaxed or free at home'; '(w)e never know when there is someone in our back yard.' Occasionally, a low hook or slice or heeled shot of a golfer carries upon their lawn. Then, by means of a trespass, the ball is retrieved. Sometimes it is played from that position. Apparently there are no out-of-bounds stakes in the area. The combination of difficulties makes it impossible to sit outside and 'enjoy supper.'

At times there are as many as 12 persons waiting to use the ladies' and men's tees. On a short course containing three par 3 holes, such backing up of playing groups, particularly at a 260-yard water hole, might well be expected. This gathering adds to the conversation, and the voices can be heard in the house. While silence is the conventional courtesy when a golfer is addressing his ball and swinging, the ban is relaxed between shots, and presumably the nature of the comments depends in some measure upon the success or failure of the player in negotiating the hazardous water.

But an even more serious objection involves plaintiffs' children. They have no freedom of play on their back lawn. Golfers tell them not to play there and constantly admonish them to be quiet. If they move their activities to the north side of the property, they

are endangered by balls being driven on the second fairway. This exposure has constantly worried Mrs. Sans. The children have a dog. On one occasion they were cavorting in the rear of the house and the dog was barking. A golfer instructed them to keep it quiet, and when they were unable to do so he walked on plaintiffs' property and knocked the animal unconscious with a club-even though one of the children pleaded with him not to do it. Complaint about the incident to one of defendant's officials met with the response that 'The dog had no right to be there.' At times the players allow their own dogs to accompany them around the course, and they have attacked plaintiffs' dog when it was on the rear lawn.

On the basis of the evidence, which stands without substantial dispute, plaintiffs claim that the third tees in their present location constitute a private nuisance and that their use should be enjoined. Defendant denies that the facts in their total impact warrant that conclusion. Further, it claims that plaintiffs bought their lots, built their home and moved into the area with full knowledge of the existence and use of the golf course and therefore assumed any annoyances and inconveniences incident to the playing of the game.

The circumstances here are unique. A situation where a person buys or builds a home adjoining a wholly independent, unrelated and existing conventional type golf course is quite dissimilar. The basic theme of this development was residence. The recreational facilities, including the golf course were subordinate. Their purpose and existence were to make the area a desirable one in which to dwell.

Thus the heart of the project was and is the home. The pastime facilities were intended to be no more than an aid to the enjoyment of the home, as the veins facilitate the functions of the heart. An avoidable and readily curable ailment in one vein should not be permitted to impair the central organ. Especially is this true when the remedy calls for a comparatively simple adjustment which will not materially impair the physical structure in its entirety.

The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land. The elements are myriad. The law has never undertaken to define all of the possible sources of annoyance and discomfort which would justify such a finding. Pollock, Torts (1887), 260, 261. Litigation of this type usually deals with the conflicting interests of property owners and the question of the reasonableness of the

defendant's mode of use of his land. The process of adjudication requires recognition of the reciprocal right of each owner to reasonable use, and a balancing of the conflicting interests. The utility of the defendant's conduct must be weighed against the quantum of harm to the plaintiff. The question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of the neighbor's land or operation of his business. Prosser, Torts (2d ed. 1955), 410. As the Court of Appeals of Ohio put it in Antonik v. Chamberlain, 81 Ohio App. 465, 78 N.E.2d 752, 759 (1947):

> 'The law of nuisance plays between two antithetical extremes: The principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor.'

Defendant's members have the right to the ordinary and expected use of the golf course. Plaintiffs have the correlative right to the enjoyment of their property. The element of reciprocity must be emphasized because the parties' interests stem from a common source and are more mutually interdependent than in the usual case. The Appellate Division properly suggests the pertinent inquiry to be 'whether defendant's activities materially and unreasonably interfere with plaintiffs' comforts or existence, 'not according to exceptionally refined, uncommon, or luxurious habits of living, but according to the simple tastes and unaffected notions generally prevailing among plain people."

In the unusual circumstances of this case, the activities of defendant are manifestly incompatible with the ordinary and expected comfortable life in plaintiffs' home and the normal use of their property. The evaluation of the conflicting equities must be made in the factual framework presented. And any relief granted must result from a reasonable accommodation of those equities to each other in the light of the evaluation. In our judgment, the facts considered in their totality demonstrate that plaintiffs' interests are paramount and demand reasonable protection. The trial court and the Appellate Division felt that a proper balance of equitable convenience could be achieved by requiring defendant to relocate the ladies' and men's third tees. Such relief, in our opinion, does not represent a burden disproportionate to the travail which would

be suffered by plaintiffs and their family through the perpetuation of the present method of play on the course.

Judgment affirmed.

Notes and Questions

1. Do you think the court reached the right decision as a matter of law and/or policy? Can you think of a solution that would be more fair and just?

2. Suppose you were the developer of a golf course community. That is, you were developing a large tract of land to include both a golf course and houses along the course. Such developments are very popular, especially among the wealthy, who enjoy looking out their window onto beautifully groomed fairways and greens. It is inevitable in such developments that someone's house will be near the tee-off areas (tees). How could you plan your golf course to avoid litigation such as that in *Sans*?

3. Why does the opinion mention the incident in which a golfer clubbed the Sans's dog unconscious? Is clubbing a dog a nuisance or some other tort?

4. Could the Ramsey Golf & Country Club have sued the Sans family for nuisance? Do you think they would have won?

5. Suppose the Ramsey and Sans families owned the neighboring houses. The Ramseys did not keep up their house. Weeds grew in the yard. The paint was peeling. A shed in the back was occasionally used by neighborhood drunks and homeless as a place to congregate and sleep. Bats took up residence in the attic and screeched at night. If the Sans sued the Ramseys for nuisance, would they prevail? What would be the just and fair resolution of this conflict?

6. **Threshold harms.** One way courts avoid getting too involved in nuisance cases is by requiring significant harm before engaging in the balancing of equities. Restatement (Second) of Torts § 821F (1979) ("There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be

suffered by a normal person in the community or by property in normal condition and used for a normal purpose.");

> Before plaintiffs may recover the injury to them must be substantial. By substantial invasion is meant an invasion that involves more than slight inconvenience or petty annoyance. The law does not concern itself with trifles. Practically all human activities, unless carried on in a wilderness, interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. Each individual in a community must put up with a certain amount of annoyance, inconvenience or interference, and must take a certain amount of risk in order that all may get on together. But if one makes an unreasonable use of his property and thereby causes another substantial harm in the use and enjoyment of his, the former is liable for the injury inflicted.

Watts v. Pama Mfg. Co., 256 N.C. 611, 619, 124 S.E.2d 809, 815 (1962) (citing *Restatement (First) of the Law of Torts*, Vol. 4, s. 822, Comments g. and j.).

7. **Restatement standards.** The *Restatement (Second) of Torts* standard for a private nuisance is an activity that invades another's interest in the use and enjoyment of land where the invasion is either "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." *Restatement (Second) of Torts* § 822 (1979). We will focus on the first prong, intentional conduct that a court nonetheless finds unreasonable. Section 826 sets forth two tests. The invasion is unreasonable if "the gravity of the harm outweighs the utility of the actor's conduct" or if "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible."[1]

[1] The *Restatement* likewise provides standards for assessing the gravity of the harm to the plaintiff, including factors like degree, duration, character, ability to avoid, and nature of the plaintiff's activity (e.g., social value and local suitability). § 827. As the list indicates, they leave room for subjective interpretation. Likewise, the assessment of the defendant's conduct includes considerations of social value, suitability to the location, and ability to avoid or prevent. § 828.

8. **"Coming to" a nuisance.** One way to adjudicate between competing interests is through first-in-time, first-in-right principles. Generally, whether the plaintiff came to the nuisance (i.e., acquired its property interest *after* the commencement of the allegedly unreasonable activity by the defendant) is treated as a factor to be considered in balancing the equities, and not as a bar to a nuisance suit. Why do you think that is? Are there circumstances in which you think coming to a nuisance ought to bar a suit? Likewise, compliance with zoning ordinances is a non-dispositive factor in the defendant's favor.

9. **Idiosyncratic harms.** The harm giving rise to nuisance liability must be "of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." *Restatement (Second) of Torts* § 821F (1979). This creates difficulty for a range of asserted, but unproven, harms. *See, e.g.*, San Diego Gas & Electric Co. v. Superior Court, 55 Cal. Rptr. 2d 724, 752 (1996) (rejecting nuisance claim based on fear of powerline electromagnetic fields). What about technological change? American law generally rejects the notion that one has a right to light from adjacent properties. But what if one has a solar panel? Prah v. Maretti, 321 N.W.2d 182, 191 (Wis. 1982) (allowing nuisance claim by owner of a solar heated home to proceed).

10. **Malice.** There is little utility to actions taken for the purposes of harming a neighbor, and the *Restatement* provides that such acts are nuisances when they cause harm to a property owner's interests. Restatement (Second) of Torts § 829.[2] "Spite fences" are often explicitly the subject of statutes. *See, e.g.*, N.H. Rev. Stat. Ann. § 476:1 ("Any fence or other structure in the nature of a fence, unnecessarily exceeding 5 feet in height, erected or maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance.").

11. **Private arrangements.** If a nuisance is a violation of a property right, it stands to reason that the right may have been transferred prior to the nuisance suit. *Cf.*

[2] The provision also treats acts contrary to "common standards of decency" as a nuisance, offering as an illustration a farmer who breeds animals in full view of a neighbor's family. *Id.* cmt. d.

DeSarno v. Jam Golf Mgmt., LLC, 670 S.E.2d 889, 890 (Ga. 2008) (distinguishing *Sans* and holding no trespass or nuisance claims were possible because "the easement in this case explicitly permitted the complained-of conduct and indeed exonerated the golf course owner from any liability for damages caused by the errant golf balls").

Note on Coase

The vagaries of nuisance standards reflect the difficulty of properly assigning the right (either to continue action or to enjoin the action). But perhaps all that really matters is the clarity of the property right. This was the suggestion of Nobel-Prize-winning economist Ronald Coase (1910-2013) in his famous article, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). The article concerned the previously encountered problem of externalities—costs or benefits of an action that are borne by someone other than the actor. When a factory emits smoke, for example, the smoke causes harms to others that the factory owner does not experience. They are external to his decision to operate, and therefore more likely to be produced than we might want. Externalities need not be negative. The factory might stimulate economic development, e.g., by attracting restaurants to open nearby to cater to its workers.

It has been argued that property rights emerge when the benefits of internalizing externalities outweigh the costs of establishing a property system. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). To return to the pasture held in common, suppose we make the land subject to private ownership. Giving property rights to a single party means that she will bear the cost of overgrazing (and thus take them into account before allowing that to happen, thereby internalizing the externality). She will likewise reap the benefits of improvements like an irrigation system, which without property rights would have been shared by too many to make the investment worthwhile.

But other externalities may remain. What happens when the smells of the pasture annoy the neighbors? Or if the land is used for fracking? Or a factory? How do we address the resulting harms to others? Regulation is a traditional answer to the problem of externality. The party causing the harm can either be made to pay or, if the harm is serious enough, cease the offending activity.

Enter Coase. He argued that the traditional approach, of trying to stop the harm, is question-begging in light of the reciprocity of harms:

> 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.

In other words, the issue is not stopping harm, but rather ascertaining whether the complained-of act does more harm than good. The market can help here, so long as property rights are clear and transaction costs are ignored. "It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production." *Id.* at 15.

So imagine a world in which there is only a smoke-producing factory (and its owner) and a house (and its owner, who has sued the factory for causing a nuisance). Suppose further that the homeowner values life without smoke at $50, and the factory owner values operating at $100. The nuisance suit then clarifies who has the relevant property right. If the homeowner wins, he now has the right to enjoin the factory owner. In a world without transactions costs, what happens next? We would expect the factory owner to pay the homeowner to release the injunction (as she values operation more than he values life without smoke). What if the activity is deemed to *not* be a nuisance? Then there is no deal to be had. The factory owner's property rights encompass the right to emit smoke, and she values it more than the homeowner.

One interesting consequence of our hypothetical scenario is that the initial allocation of property rights *does not matter* with regards to whether the factory operates. Absent transaction costs, operations continue no matter which property owner "wins" the right to harm the other.[3] Coase argued that

[3] To make sure you understand this point, repeat the exercise with reversed dollar values. You will see that the factory will *shut down* regardless of whether it is a nuisance.

> It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost.

Id. at 8. This insight is referred to as the *Coase Theorem*.[4] The theorem has a variety of expressions. It is the idea that absent transactions costs, parties will bargain to efficient outcomes concerning externalities regardless of the initial allocation of property rights. The implication for nuisance law is the suggestion that if transaction costs are low, it might not matter if the rights (e.g. the right to operate a smoke house or a golf course) were properly assigned in the first instance, as long as people can buy and sell the rights.

The Problem of Social Cost is one of the more cited and debated articles in legal history. One problem with characterizing the debate is that it involves not only Coase's work, but the various interpretations that may or may not be a fair representation of his ideas. *See, e.g.*, Robert C. Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 YALE L.J. 611 (1989) ("Coase's name is consistently attached to propositions that he has explicitly repudiated."). For present purposes, it is worth noting four reasons to be cautious in drawing normative lessons from Coase. First, as Coase himself emphasized, transactions costs are always present in the real world and often quite high. So if a factory is emitting smoke that falls on a neighborhood (rather than a single homeowner), bargaining costs may be large. The neighbors will face the difficulty of coordination (and the attendant problems of free riders and holdouts). Moreover, the health consequences of the factory may not be well known (i.e., there is a cost to simply having the information necessary for the neighborhood to know how highly it values freedom from smoke). Second, even if property rights allocations matter less than we think with respect to the production of externalities, they remain important from the perspective of distributive justice. When a judge decides whether A must pay B, or vice versa, one becomes wealthier at the expense of the other. The Coase Theorem tells us nothing about who merits the windfall. Likewise, wealth matters with respect to how the gain or loss is experienced insofar as money has a diminishing marginal utility. So, someone with only $1000 to his name is likely to value an additional $1000 more than

[4] The term "Coase Theorem" to describe Coase's insight is generally ascribed to George Stigler.

would a millionaire. Third, unequal baseline distributions of wealth mean that many hypothesized transactions based on competing subjective valuations of entitlements may be impossible: what might it mean for a person with net financial worth of $10,000 to value their respiratory health at $100,000? Could such a person effectively bargain over another's right to pollute the air they breathe? Fourth, the proposition that initial allocations do not matter has been empirically challenged. It has been observed that people value what they possess more than what they do not. I may, for example, be willing to pay $50 to shut a factory down. But if my starting point is one in which the factory is not yet operating and I have a veto, I might demand $100 to release it. The "endowment effect" might mean that initial allocations therefore matter. For a colorful example of this effect in play over the right to recline an airline seat, see Christopher Buccafusco & Christopher Jon Sprigman, *Who Deserves Those 4 Inches of Airplane Seat Space?* SLATE (Sept. 23, 2014), available at http://www.slate.com/articles/health_and_science/science/2014/09/airplane_seat_reclining_can_economics_reveal_who_deserves_the_space.single.html).

All that said, Coase's article suggests that we keep in mind the value of property rights and the prospect that market mechanisms may sometimes be preferable to judicial allocations. Likewise Coase reminds us anew that law is not all. And, indeed, neither is the market. As we discussed in earlier chapters, social norms may play a powerful role in resolving usage disputes. These norms may be powerful enough to resolve disputes notwithstanding changes in the underlying legal regime. For a classic account of this dynamic, concerning payments by farmers for damage done by wandering cattle, *see* Robert Ellickson, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994).

C. Remedies

Nuisance plaintiffs usually seek injunctions. The ongoing harm of the nuisance suggests equitable relief, as damages for past harms would not address those that would follow if the nuisance continues. 9-64 POWELL ON REAL PROPERTY § 64.07. But because equity involves balancing, courts sometimes decline injunctions or offer more tailored remedies.

Boomer v. Atlantic Cement Co.

257 N.E.2d 870 (N.Y. 1970)

BERGAN, Judge.

Defendant operates a large cement plant near Albany. These are actions for injunction and damages by neighboring land owners alleging injury to property from dirt, smoke and vibration emanating from the plant. A nuisance has been found after trial, temporary damages have been allowed; but an injunction has been denied.

The public concern with air pollution arising from many sources in industry and in transportation is currently accorded ever wider recognition accompanied by a growing sense of responsibility in State and Federal Governments to control it. Cement plants are obvious sources of air pollution in the neighborhoods where they operate.

But there is now before the court private litigation in which individual property owners have sought specific relief from a single plant operation. The threshold question raised by the division of view on this appeal is whether the court should resolve the litigation between the parties now before it as equitably as seems possible; or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives.

A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government. In large measure adequate technical procedures are yet to be developed and some that appear possible may be economically impracticable.

It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require

massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley.

The cement making operations of defendant have been found by the court of Special Term to have damaged the nearby properties of plaintiffs in these two actions. That court, as it has been noted, accordingly found defendant maintained a nuisance and this has been affirmed at the Appellate Division. The total damage to plaintiffs' properties is, however, relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek.

The ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction. This theory cannot, however, be sustained without overruling a doctrine which has been consistently reaffirmed in several leading cases in this court and which has never been disavowed here, namely that where a nuisance has been found and where there has been any substantial damage shown by the party complaining an injunction will be granted.

The rule in New York has been that such a nuisance will be enjoined although marked disparity be shown in economic consequence between the effect of the injunction and the effect of the nuisance.

The problem of disparity in economic consequence was sharply in focus in Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805. A pulp mill entailing an investment of more than a million dollars polluted a stream in which plaintiff, who owned a farm, was 'a lower riparian owner'. The economic loss to plaintiff from this pollution was small. This court, reversing the Appellate Division, reinstated the injunction granted by the Special Term against the argument of the mill owner that in view of 'the slight

advantage to plaintiff and the great loss that will be inflicted on defendant' an injunction should not be granted. 'Such a balancing of injuries cannot be justified by the circumstances of this case', Judge Werner noted. He continued: 'Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction'.

Thus the unconditional injunction granted at Special Term was reinstated. The rule laid down in that case, then, is that whenever the damage resulting from a nuisance is found not 'unsubstantial', viz., $100 a year, injunction would follow. This states a rule that had been followed in this court with marked consistency.

There are cases where injunction has been denied. McCann v. Chasm Power Co., 211 N.Y. 301, 105 N.E. 416 is one of them. There, however, the damage shown by plaintiffs was not only unsubstantial, it was non-existent. Plaintiffs owned a rocky bank of the stream in which defendant had raised the level of the water. This had no economic or other adverse consequence to plaintiffs, and thus injunctive relief was denied.… Thus if, within Whalen v. Union Bag & Paper Co., Supra which authoritatively states the rule in New York, the damage to plaintiffs in these present cases from defendant's cement plant is 'not unsubstantial', an injunction should follow.

Although the court at Special Term and the Appellate Division held that injunction should be denied, it was found that plaintiffs had been damaged in various specific amounts up to the time of the trial and damages to the respective plaintiffs were awarded for those amounts. The effect of this was, injunction having been denied, plaintiffs could maintain successive actions at law for damages thereafter as further damage was incurred.

The court at Special Term also found the amount of permanent damage attributable to each plaintiff, for the guidance of the parties in the event both sides stipulated to the payment and acceptance of such permanent damage as a settlement of all the controversies among the parties. The total of permanent damages to all plaintiffs thus found was $185,000. This basis of adjustment has not resulted in any stipulation by the parties.

This result at Special Term and at the Appellate Division is a departure from a rule that has become settled; but to follow the rule literally in these cases would be to close down

the plant at once. This court is fully agreed to avoid that immediately drastic remedy; the difference in view is how best to avoid it.

One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance; another is to grant the injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property present and future caused by defendant's operations. For reasons which will be developed the court chooses the latter alternative.

If the injunction were to be granted unless within a short period—e.g., 18 months—the nuisance be abated by improved methods, there would be no assurance that any significant technical improvement would occur.

The parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant. If there were no improved techniques found, there would inevitably be applications to the court at Special Term for extensions of time to perform on showing of good faith efforts to find such techniques.

Moreover, techniques to eliminate dust and other annoying by-products of cement making are unlikely to be developed by any research the defendant can undertake within any short period, but will depend on the total resources of the cement industry nationwide and throughout the world. The problem is universal wherever cement is made.

For obvious reasons the rate of the research is beyond control of defendant. If at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles.

On the other hand, to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed.

The nuisance complained of by these plaintiffs may have other public or private consequences, but these particular parties are the only ones who have sought remedies and the judgment proposed will fully redress them. The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court.

It seems reasonable to think that the risk of being required to pay permanent damages to injured property owners by cement plant owners would itself be a reasonable effective spur to research for improved techniques to minimize nuisance.…

The damage base here suggested is consistent with the general rule in those nuisance cases where damages are allowed. 'Where a nuisance is of such a permanent and unabatable character that a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery' (66 C.J.S. Nuisances s 140, p. 947). It has been said that permanent damages are allowed where the loss recoverable would obviously be small as compared with the cost of removal of the nuisance.…

Thus it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation. The theory of damage is the 'servitude on land' of plaintiffs imposed by defendant's nuisance. (See United States v. Causby, 328 U.S. 256, 261, 262, 267, 66 S.Ct. 1062, 90 L.Ed. 1206, where the term 'servitude' addressed to the land was used by Justice Douglas relating to the effect of airplane noise on property near an airport.)

The judgment, by allowance of permanent damages imposing a servitude on land, which is the basis of the actions, would preclude future recovery by plaintiffs or their grantees.

This should be placed beyond debate by a provision of the judgment that the payment by defendant and the acceptance by plaintiffs of permanent damages found by the court shall be in compensation for a servitude on the land.

Although the Trial Term has found permanent damages as a possible basis of settlement of the litigation, on remission the court should be entirely free to ex-examine

this subject. It may again find the permanent damage already found; or make new findings.

The orders should be reversed, without costs, and the cases remitted to Supreme Court, Albany County 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.

JASEN, Judge (dissenting).
I agree with the majority that a reversal is required here, but I do not subscribe to the newly enunciated doctrine of assessment of permanent damages, in lieu of an injunction, where substantial property rights have been impaired by the creation of a nuisance.

It has long been the rule in this State, as the majority acknowledges, that a nuisance which results in substantial continuing damage to neighbors must be enjoined. To now change the rule to permit the cement company to continue polluting the air indefinitely upon the payment of permanent damages is, in my opinion, compounding the magnitude of a very serious problem in our State and Nation today.

In recognition of this problem, the Legislature of this State has enacted the Air Pollution Control Act declaring that it is the State policy to require the use of all available and reasonable methods to prevent and control air pollution.

The harmful nature and widespread occurrence of air pollution have been extensively documented. Congressional hearings have revealed that air pollution causes substantial property damage, as well as being a contributing factor to a rising incidence of lung cancer, emphysema, bronchitis and asthma.

The specific problem faced here is known as particulate contamination because of the fine dust particles emanating from defendant's cement plant. The particular type of nuisance is not new, having appeared in many cases for at least the past 60 years. It is interesting to note that cement production has recently been identified as a significant source of particulate contamination in the Hudson Valley. This type of pollution, wherein very small particles escape and stay in the atmosphere, has been denominated as the type of air pollution which produces the greatest hazard to human health. We

have thus a nuisance which not only is damaging to the plaintiffs,[5] but also is decidedly harmful to the general public.

I see grave dangers in overruling our long-established rule of granting an injunction where a nuisance results in substantial continuing damage. In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.

It is true that some courts have sanctioned the remedy here proposed by the majority in a number of cases, but none of the authorities relied upon by the majority are analogous to the situation before us. In those cases, the courts, in denying an injunction and awarding money damages, grounded their decision on a showing that the use to which the property was intended to be put was primarily for the public benefit. Here, on the other hand, it is clearly established that the cement company is creating a continuing air pollution nuisance primarily for its own private interest with no public benefit.

This kind of inverse condemnation may not be invoked by a private person or corporation for private gain or advantage. Inverse condemnation should only be permitted when the public is primarily served in the taking or impairment of property. The promotion of the interests of the polluting cement company has, in my opinion, no public use or benefit.

Nor is it constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use. This is made clear by the State Constitution which provides that '(p)rivate property shall not be taken for *public use* without just compensation' (emphasis added). It is, of course, significant that the section makes no mention of taking for a *private* use.

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[5] There are seven plaintiffs here who have been substantially damaged by the maintenance of this nuisance. The trial court found their total permanent damages to equal $185,000.

In sum, then, by constitutional mandate as well as by judicial pronouncement, the permanent impairment of private property for private purposes is not authorized in the absence of clearly demonstrated public benefit and use.

I would enjoin the defendant cement company from continuing the discharge of dust particles upon its neighbors' properties unless, within 18 months, the cement company abated this nuisance.

It is not my intention to cause the removal of the cement plant from the Albany area, but to recognize the urgency of the problem stemming from this stationary source of air pollution, and to allow the company a specified period of time to develop a means to alleviate this nuisance.

I am aware that the trial court found that the most modern dust control devices available have been installed in defendant's plant, but, I submit, this does not mean that *better* and more effective dust control devices could not be developed within the time allowed to abate the pollution.

Moreover, I believe it is incumbent upon the defendant to develop such devices, since the cement company, at the time the plant commenced production (1962), was well aware of the plaintiffs' presence in the area, as well as the probable consequences of its contemplated operation. Yet, it still chose to build and operate the plant at this site.

In a day when there is a growing concern for clean air, highly developed industry should not expect acquiescence by the courts, but should, instead, plan its operations to eliminate contamination of our air and damage to its neighbors.

Accordingly, the orders of the Appellate Division, insofar as they denied the injunction, should be reversed, and the actions remitted to Supreme Court, Albany County to grant an injunction to take effect 18 months hence, unless the nuisance is abated by improved techniques prior to said date.

Notes and Questions

1. Do you think the court reached the right decision as a matter of law and/or policy? Can you think of a solution that would be more fair and just?

2. What if paying the damages required by the court would cause the factory to go out of business? Would that change the legal analysis or the result that you think is fair and just? In performing the legal analysis, consider the *Restatement* provision quoted above in Note #7 after the *Sans* case.

3. How would the damages in *Boomer* be calculated?

4. Suppose the judge in *Boomer* read the article by Coase discussed above and decided that it was not worth her time to figure out whether the cement plant was a nuisance, whether an injunction should issue, or whether damages were appropriate, because an efficient outcome would obtain regardless. So the judge flipped a coin to resolve the case. The defendant called "heads," and the coin landed on heads, so the judge ruled there was no nuisance and thus no injunction or damages. Do you think the parties will bargain to an efficient solution? Why or why not?

5. Suppose Boomer installs solar panels on his one story house. Atlantic then builds a factory that casts shade on the solar panels for most of the day. If Boomer sues Atlantic for nuisance, who do you think will win? If you think Boomer would win, what do you think the remedy would or should be – an injunction or damages? Suppose the court issued an injunction ordering Atlantic to move its factory, and the injunction was affirmed on appeal, what do you think would happen next?

6. Suppose that, when Atlantic built its factory, the surrounding land was completely undeveloped. Over time, however, the nearby city grew and houses were built closer and closer to the factory. Would that change the legal analysis in *Boomer*? Does it change your view of the fair and just outcome? In analyzing possible legal or equitable solutions to the dispute, consider the four rules set out by Calabresi and Melamed and discussed in the last three pages of this handout.

7. **Preemption.** State and federal legislation offers the prospect of more comprehensive regulation than case-by-case nuisance adjudication. Once these regulations are in place, defendants often claim they preempt resort to private

nuisance remedies. *See* 9-64 POWELL ON REAL PROPERTY § 64.06 (collecting examples of successful and unsuccessful preemption defenses). Should compliance with, for example, a federal clean air regime provide immunity to a local nuisance suit based on air pollution? Is federal regulation best seen as a ceiling or a floor for environmental standards?

On this question, note that federal environmental laws are often criticized for interfering with "property rights." But to the extent they limit the availability of local nuisance law, might they also be seen as interfering with the property rights of would-be nuisance plaintiffs?

Note on "Property Rules" and "Liability Rules"

When should a court award damages and when is an injunction appropriate? One of the most famous takes on the problem is found in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). The authors outline a framework for the protection of entitlements, distinguishing "property" and "liability" rules.

> An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. It is the form of entitlement which gives rise to the least amount of state intervention: once the original entitlement is decided upon, the state does not try to decide its value. It lets each of the parties say how much the entitlement is worth to him, and gives the seller a veto if the buyer does not offer enough. Property rules involve a collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement.
>
> Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule. This value may be what it is thought the original holder of the entitlement would have sold it for. But the holder's complaint that he would have demanded more will not avail him once the objectively determined value is set. Obviously, liability rules involve an additional stage of state intervention: not only are entitlements protected, but their transfer or destruction is allowed on the basis

> of a value determined by some organ of the state rather than by the parties themselves.

Id. at 1091.[5] We might think of an injunction against trespass as an illustration of a property rule. The trespasser must keep out unless the property owner agrees to let her enter. Contract damages are an example of a liability rule. If one is willing to pay damages, one is free to breach. As the examples suggest, property rules are associated with, well, property rights, while liability rules are associated with contract remedies. But there are exceptions in both subjects. For example, some states allow for private condemnation of rights of way to provide access to landlocked privately owned land. The owner of the property has no ability to say no to another's entry into his land, but is limited to a compensation remedy. Conversely, under certain circumstances a contract may be enforced by specific performance.

Calabresi and Melamed spend some time on the question of how entitlements are assigned in the first instance (i.e., is the factory a nuisance or does its owner have the right to pollute), but for present purposes we will focus on the question of deciding how to protect an entitlement once assigned. In a vacuum, property rules let parties decide for themselves how to value entitlements, but in the real world, transaction costs get in the way. Holdouts and freeriders may interfere with the coordination of multiple purchasers or sellers of entitlement (e.g., when multiple neighbors live near an offending factory). When negotiation costs exceed the entitlement's value, it will remain with the party to whom it was assigned, regardless of overall efficiency. In such cases, a liability rule might be preferable.

As applied to nuisance, the authors observe:

> Traditionally . . . the nuisance-pollution problem is viewed in terms of three rules. First, Taney may not pollute unless his neighbor (his only neighbor let us assume), Marshall, allows it (Marshall may enjoin Taney's nuisance). Second, Taney may pollute but must compensate Marshall for damages caused (nuisance is found but the remedy is limited to damages). Third, Taney may pollute at will and can only be stopped by Marshall if Marshall pays him off (Taney's pollution is not held to be a nuisance to Marshall). In our terminology rules one and two

[5] And some entitlements, as the authors discuss, are inalienable.

> (nuisance with injunction, and with damages only) are entitlements to Marshall. The first is an entitlement to be free from pollution and is protected by a property rule; the second is also an entitlement to be free from pollution but is protected only by a liability rule. Rule three (no nuisance) is instead an entitlement to Taney protected by a property rule, for only by buying Taney out at Taney's price can Marshall end the pollution.
>
> The very statement of these rules in the context of our framework suggests that something is missing. Missing is a fourth rule representing an entitlement in Taney to pollute, but an entitlement which is protected only by a liability rule. The fourth rule … can be stated as follows: Marshall may stop Taney from polluting, but if he does he must compensate Taney.

Id. at 1115-16 (footnotes omitted). In a low-transaction cost world, Calabresi and Melamed would use property rules, and assign the entitlement based on whether or not the polluter is the low-cost risk avoider. In such cases improper allocations have distributive consequences, but transactions would at least ensure economic efficiency. (Do you see why?)

> The moment we assume, however, that transactions are not cheap, the situation changes dramatically. Assume we enjoin Taney and there are 10,000 injured Marshalls. Now even if the right to pollute is worth more to Taney than the right to be free from pollution is to the sum of the Marshalls, the injunction will probably stand. The cost of buying out all the Marshalls, given holdout problems, is likely to be too great, and an equivalent of eminent domain in Taney would be needed to alter the initial injunction. Conversely, if we denied a nuisance remedy, the 10,000 Marshalls could only with enormous difficulty, given freeloader problems, get together to buy out even one Taney and prevent the pollution. This would be so even if the pollution harm was greater than the value to Taney of the right to pollute.

Id. at 1119. In such situations, the "rule four" possibility would increase the range of options in a nuisance case. If circumstances made a liability remedy appropriate, a court would be free to assign the entitlement to either party as efficiency or distributional concerns warranted. *Id.* at 1120.