REVISITING THE HUNTER V. CANARY WHARF CASE- THE NUANCES OF PRIVATE NUISANCE

By Mercy K Khaute[1]

ABSTRACT

The peculiarity of nuisance as tort that gives it an interesting position in the law is the open question whether the tort seeks to protect property itself or protect an individual's right to enjoyment of the property. Development of laws coupled with the complexities of claims necessitates understanding the contours of the tort of nuisance, the position on the right to sue and who can sue. This paper seeks to analyze the tort of private nuisance through the case of Hunter v. Canary Wharf. The paper begins with a brief discussion on the origin and nature of the tort. Followed by a discussion on the case of Hunter v. Canary Wharf. The third part of the paper is an analysis on who can sue, followed in the fourth part, an attempt to answer the question on if the right to sue should be extended, navigated through a brief cross jurisdictional study. The fifth part is a discourse on the position of private nuisance with regards to the right to privacy. The paper concludes with the author's observations.

Keywords: Private Nuisance, Torts, Right to Privacy

INTRODUCTION

I. Nuisance- origin and nature

The tort of nuisance appears to have a double edge existence and though its origin appears to be obscure, jurist have claimed it to varied sources which may be compartmentalised into three forms[2]. From the 12th C, an actionable claim laid against any act in order to protect the rights over landed properties, pretty much dominated by the wealthy merchants whose ambition was to safeguard their land holdings and ownership rights especially with the extension of township projects that required activities in the subterranean regions[3]. At this point, claims could be brought about only by a free holder against another freeholder which one may say lead to the origination of the modern parlance of an action against the intervention of one's easement or profit privilege[4]. The second source of origin may be attributed to the powers of the Crown that enable it to

[1] Mercy K Khaute, Assistant Professor, Faculty of Law, University of Delhi.
[2] Vennell, M. A., "The essentials of nuisance: a discussion of recent New Zealand developments in the tort of nuisance" 4 *Otago* LR 56 (1977) .
[3] J.F.Brenner, "Nuisance Law and the Industrial Revolution' 3 *Journal Legal Studies* 403 (1973)
[4] *Sedeigh-Denjied* v. *O 'Callaghan* [1940] AC 880, 902 (HL).

provide remedies to such grievances of interferences within the neighbourhood in particular on the highway which then was more famously known as "common nuisance". Further on, this may rightfully be attributed to the third source of origin - the present day nuisance; where the tort of interference by a known or unknown person onto one's property gradually developed as private nuisance. The familiar feature common to these sources are the issue arising and pertaining to land.

Based on the nature of interferences the tort of nuisance maybe divided into three forms- the first kind where there is a direct encroachment on the neighbour's land. The second where the encroachment leads to an injury of the encroached property while the third is an encroachment not of the physical property but of the rightful enjoyment of and on one's land. In encroachments of the first and second kind, the right to sue would rest with the owner or the occupier with an exclusive right to possession whereby the remedies are provided by way of injunction, (unliquidated) damages or abatement. The harm caused in such cases in general leads to the diminution of the value of the land- a loss suffered most by the rightful owner of the property.

The tort of private nuisance arises when the act of a person irrespective of being legal, the consequences of such legal act causes disturbances to his neighbour's property in three ways- enrichment which may seem similar to trespass, damage to the physical structures or plantations in the neighbour's property and or unduly interfering with the convenience and comforts on the defendant's land.

While the tort of nuisance, in recent times have been looked upon as an environmental tort par excellence particularly in the North American region where it occupies a remarkable position reflecting the revival of private rights to property as a channel of protecting the environment[5]. The matter is uncomplicated where the parties have a rightful interest over the property, any lacking in a claim of nuisance was not discouraged even on the lines of environmental protection which may have not be physically obtrusive. The challenge to sue arose when claims were made by non-owners such as the spouse of the landowner or his children, the scope of nuisance as a tort usually remained an open question and the courts are compelled to resolve the tension by first aligning "how" the scope of nuisance should be defined. It was in this attempt that the decision in the Hunter v. Canary Wharf Ltd.[6] serves to be one of the most notable instances on group action for private nuisance, that the House of Lords returned the tort to its historical position whereby the tort originally sought to protect the interest that's subsist on land. The case restored, as jurist say the tort of nuisance and its

[5] E.Brubaker, " Property Rights in defence of Nature" London: *Earthscan*, (1995).
[6] [1997] AC 677.

application to normal position which critics opinion leads to inhibiting the role of nuisance in environmental jurisprudence which is quite evidently visible in the practise under the common law of the United Kingdom where the relationship of man and land is strictly limited to proprietary interests and none other[7].

II. Hunter v. Canary Wharf Ltd.

The case of *Hunter* v. *Canary Wharf Ltd*. had been instrumental in the development of the law on private nuisance[8]. This litigation was in a way a result of the environmental degradation that was due to the redevelopment of the London Docks. Around 600 plaintiffs brought an action against the defendant's construction leading to the interruption of the peaceful enjoyment of their property caused by the disruption of television signals and excessive dust. It was the claim of the plaintiffs that in a case as theirs, irrespective of them not having property interest or claims on the land, the right to sue exists so long as the property was occupied by them as home. This claim to sue, lead to two divergent opinions that was based on the classic approach whereby the purpose of nuisance was to protect property while the second opinion endorsed by Justice Cooke was the need to evolve the tort to accommodate the growing expectations of ordinary citizens in an evolving society.

The Canary Wharf Tower that stands 250m high is a landmark on London's Docklands that was erected in the year 1989. Ever since the erection of this stainless steel tower, there had been numerous litigation right. In the present suit for damages, majority of the petitioners were the spouses and children of the plaintiffs who had property interest in the areas in and around the tower. Owing to the height of the tower, it cast shadow over the Isle of Dogs leading to the interference of electro-signals disrupting TV signals. A relay was constructed on the spec of the building in early 1991. It was for the court to consider two questions- one, if the existence of a tall building that interferes and leads to disturbed TV signals will be actionable as tort of nuisance and second, the nature of right that enables to sue in a tort for private nuisance.

[7] John Wightman, " Nuisance. The Environmental Tort? Hunter v. Canary Wharf in the House of Lords", *The Modern Law Review*, Vol. 61, No. 6, pp 870-885 (1998).
[8] Nicola Daly, 'Hunter v Canary Wharf, an analysis of the house of Lords decision on the right to sue in private nuisance', *Victoria University of Wellington* (Sep 1997).

The same set of plaintiffs had sued for excessive dust caused by construction of the Lime house on Link Road. The Court heard the case concurrently as both the suits essentially were of similar nature whereby the locus stands to sue was a pertinent question that the court had to determine.

A. The television case

Judge Havery Q.C. at the outset opined that any obstruction to the reception of television signals that disabled the citizens from viewing the TV does constitutes an actionable claim for nuisance but, what is important is that there must be established the right of exclusive possession of the land to enable the plaintiffs to sustain their claim for damages. This decision was over ruled by the Court of Appeal on both counts. Pill LJ., delivering the judgment noted that no claim was sustainable merely on the ground that the building was standing on the line of sight in the mid way of the television transmitter and such other properties. A claim for interference to the use and enjoyment of one's property failed to lie though the occupation of such property as a place of residence simply provided a substantial linkage that may enable the occupier to lay a claim for private nuisance. The decision of the court was upheld by House of Lords on the ground that no action for nuisance is sustainable but the majority decision of the Court did not agree to the Court of Appeal's decision on the "right to sue". While Lord Cooke had dissented with the majority on such ground and agreed with the Pill, LJ' decision.

The House of Lords by majority held that unlike in the case of *Bridlington Relay Ltd.*[9] where in emissions out of a substation interfered with the television signal reception, opined that interference with the electromagnetic waves by erecting physical structures between the transmitter and the receiver of the signals is not the same situation whereby the interference by itself takes the shape of electromagnetic radiation, which are harmful to human health. The blocking of view by the neighbours' building that may be taller than the plaintiff's property does not automatically gives rise to a cause of action. The court through Lord Goff held that it is almost an inevitable necessity to prove the the obstruction was solely a result of the effect arising out of the defendant's property as the law does not recognise in the absence of right to prospect. The TV signal interference is not the same as the sight of prostitutes and clients entry and exit to and fro the defendant's land was upheld to be actionable by the Court in the case of *Thompson- Schwab* v. *Costaki*[10]. While Lord Hoffman navigated his reasoning in the light of easement rights and drew his opinion on the basis of Lord Blackburn's explanation of easement rights in particular to that of right to light and air. However the distinction with TV signals is that,

[9] *Bridlington Relay Ltd.* v. *Yorkshire Electricity Board* [1965] Ch 436
[10] [1956] 1 WLR 335

light and air rights could be perspectively acquired as these elements affected only the neighbours[11] who resided in the immediate vicinity while in TV signals, the obstruction could not be said to be confined to one area as it affected not only the immediate residents but many more. It was not a possibility as a right of prescriptive to receive uninterrupted TV signals.

Lord Cooke in his dissenting opinion took the traditional nuisance test of reasonable user whereby he held that obstruction if caused by a malicious intent should certainly be actionable in law. Lord Cooke drew a relativity between obstruction of TV signal with the deliberate noise that was created solely with the intention of causing discomfort to the plaintiff[12] and to disrupt the plaintiff's occupation of fur farming[13]. The situation in hand resembled that of *Bradford* v. *Pickles*[14] the deliberate extracting of water excessively to deplete water from the plaintiff's property did not give rise to actionable claim since there could be no right to obtain water even if there was or absence of malice of the defendant's act. Justice Cooke further held that if one must confine nuisance as sole arising from land or its use, then the presence of malice will never be a determinant factor in deciding cases of nuisance.

In the words of Lord Cooke's, the Majority took the approach that achieved 'a major advance in the symmetry of the law of nuisance'. Yet excessive emphasis on such symmetry could be detrimental to decision making that seeks to attain fairness and positive outcome for all persons. Decisions must be based on relativity to the current situations and not merely on deductions alone and this results in reaffirming that private nuisance actionability is solely based on one's right to property.

III. The right to sue- interest in land or actual possession

While the primary objective of torts is to ensure that no legal injury is suffered by the neighbour owing to the act or failure to act by the defendant. The limitation imposed on private nuisance to be confined to such activities on land appears to pose as a minor issue, for in the sphere of environmental issues most of the harms are undoubtedly those that arise from land. However situations like that of oil spills may compel one to question if at all, nuisance ought to emanate from one's land only[15].

[11] *Gillingham BC* v. *Medway (Chatham) Dock* [1993] QB 343.
[12] *Christie* v. *Davey* [1983] 1 Ch 216
[13] *Hollywood Silver Fox Farm Ltd.* v. *Emmett* [1936] 2KB 468.
[14] [1985] AC 587
[15] *Southport Corporation* v. *Esso Petroleum Co Ltd* [1956] AC 218

On the crucial question of who can sue, the Court took into account the case of *Malone* v. *Laskey*[16], where the plaintiff suffered serious injuries owing to the activities of the defendant's land which caused vibration on the land occupied by the plaintiff causing the breakage of a bracket that supported the water tank in the plaintiff's premises. The plaintiff's claim for damages was rejected by the court as it was argued that she had no interest in the land and merely occupied it through a licence granted to her husband's employer. The majority had held that at most what the plaintiff could do is to sue for negligence as the ambit of the law on negligence was now amplified by the Donoghue v. Stevenson case which had expanded the duty of care doctrine. Interestingly accordingly to Lord Simmons in *Read* v. *J Lyons & Co Ltd.*[17] had pointed out that negligence is a more favourable action in tort as it is based on fault and hence protects a variety of interests. Drawing from such line of argument one may say that in private nuisance it is pertinent that legal interests must be established for actionable claims[18].

However the courts have permitted de facto possession of property as sufficient permit to sue. In property law, particularly in cases of conversion wherein the plaintiff's title to the land needs to be reflected, the actual possession by the plaintiff is generally protected even against the rightful owner. There are situations where the plaintiff even in the absence of absolute title, is allowed to sue. This was clearly held out in the case of *Foster* v. *Warblington Urban Council*[19], where the plaintiff's oyster pond was affected by the acts of the defendants, hence sued for nuisance. Vaughan Williams LJ, in the Court's decision held that although the longevity of the plaintiff's occupation of the land is not the material basis yet the fact that there was actual possession is adequate to enable him to sue. The New Zealand court in the case of *Paxhaven Holdings Ltd.* v. *Attorney General*[20], Mahon J. had held that although the plaintiff was merely a licensee, the fact that he had the exclusive possession of the land upon which the stock grazed, the 'possessory right' itself was sufficient to give the plaintiff a status to sue in nuisance. Similarly the Supreme Court of Victoria, Australia, in *Mcleod* v. *Rub-A- Dub car Wash (Malvern)Pvt. Ltd.*[21], it was held that the cause of action for nuisance is sustainable even when the plaintiff were not the owners but occupied the premises of the property. An occupant had the right to sue for any damage caused due to nuisance.

[16] (1907] 2 KB 141.
[17] [1932] AC 562
[18] *Metropolitan Properties Ltd* v. *Jones*[1939] 2 All ER 202.
[19] [1906] 1KB 648.
[20] [1974] 2 NZLR 185.
[21](1972) Vic Unreported

IV. Should the right to sue be extended?- a cross jurisdictional view

The question on the right to sue arises in situations where the landownership belongs to one of the spouse while both of them reside together on the property. The issue then is if the spouse in whose name the property does not lie can sue as he/she equally suffers due to the act of the defendants. If one may question further, can the children and legal heirs approach the court for legal remedies in the absence of ownership to the property. Where should the limitation be drawn or rather on whom should the disability to sue be imposed upon?

An important case for reference at this juncture is the *Motherwell* v. *Motherwell*[22] where the Manitoba court held that to answer who can sue one must draw a distinction being the terms 'merely present' and how one would define 'in substantial occupation'. Eventually it is the physical occupation that would determine who can sue. Authoring the judgment Clement JA drew an inference of a wife who resided with her husband and children in their matrimonial home, but the ownership of the house was in the name of her husband. The defendants acts causes great distress. It would be absurd to disable her to sue for relief merely on the ground that title deed of the property was not in her name. However the Motherwell case appears not to answer in cases where the right to sue becomes a issue not among spouses but licensee who ought to prove exclusive possession.

Similarly in the *Khorasandjian* v. *Bush*[23] case, on the issue of right to sue, England's Court of Appeal adopted a departure from the traditional view on the matter and held that it is sufficient to prove to the court's satisfaction that the plaintiff was in occupation of the said property as residence. The daughter of the house brought an action for private nuisance on the grounds of harassment through telephone by an ex-friend whose calls were not welcomed. Dillon LJ delivered the judgment on behalf of the majority whereby he held that the cause of action for private nuisance was sustainable thus the requirement of establishing an interest on the land was no longer emphasised as an essential factor to maintain such cause of action. This decision enabled the spouses and relatives of the occupier of land to sue for private nuisance. It had been a much welcomed judgment which had witness endorsement by jurisdictions outside the UK as well.

[22] (1976) 73 DLR (3d) 62.
[23] [1993]QB 727

In one of the earliest case on private nuisance in India, *Land Mortgage Bank of India* v. *Ahmedbhoy Habibbhoy*[24], Sargent, C. J., delivering the judgement upheld the plea of the plaintiff on the ground that noise produced by the operation of the spinning and weaving machines on the defendant's property did cause much distress to the plaintiff's peaceful enjoyment of their property. Holding that noise from traffic and these machines were not the same besides the Plaintiff's over sensitivity not being an impediment in this case. Similarly the plea of private nuisance was granted in the *Sadasiva v. Rangappa*[25], where in the plaintiff was unable to attend to his obligations owing to the loud noise produced by the defendant's oil mill which was audible from two furlong away.

In *Shaikh Is-mail v. Venkatanarasimhulu*[26], the loud noise produced by devotees during religious ceremonies on the defendant's property which was leased out for such ceremonies, amounted to nuisance and the plaintiff was held entitled to injunction against such noise especially during sleeping hours.

The Madhya Pradesh High Court in *Dhannalal And Anr.* v. *Thakur Chittarsingh Mehtapsingh*[27], in deciding an appeal against the decision of the Additional District Judge which was reaffirmed by the Civil Judge, Justice B.K. Chaturvedi, held it necessary to draw a clear distinction between what constitutes public as against private nuisance. Referring to Winfield on Tort[28] pointed out that nuisance by definition lacks exact description however the inference one can draw is that, the acts that constitutes public nuisance are all unlawful while in private nuisance it may not necessarily be a case of unlawful act(s) but certainly acts done on the defendant's property that results in damage or discomfort and inconvenient enjoyment of the plaintiff's property. This is not to say that the surroundings of the property may not be considered as the nature of the neighbourhood[29] is also a significant test to determine the complaint of the plaintiff. A local standard of the locality should thus be maintained which will undoubtedly be variant. Placing reliance on the case in *Biharilal* v. *James Maclean*[30],the Court permitted the appeal on the ground that there was no substantial interference established by the plaintiff, that caused him discomfort with regards to the peaceful enjoyment of his property. Essentially what the Courts in India look into is the nature of action of the defendant complained against rather than who can sue.

[24] ILR 8 Bom 35
[25] AIR 1919 Mad 1185
[26] AIR 1936 Mad 905.
[27] AIR 1959 MP 240
[28] Sixth Edition, (Chapter 18, page 536)
[29] *Colls v. Home and Colonial Stores, Ltd.*, (1904) AC 179 at p. 185
[30] AIR 1924 All. 392

The Revised Code of Washington (RCW) 7.48.130 defines public nuisance as any act that affected the entire community although the damage of such affect may vary, while Code 1881 § 1237 states that private nuisance would be all such not include within the contours of public nuisance. Code 1881 § 606 states that an action for nuisance may be brought by the owner of the property, or any patrons or employees personal enjoyment of the property is adversely lessened by the nuisance caused by the defendant.

V. Is private nuisance violative of privacy?

Quite remarkably the question on if private nuisance can amount to invasion of the claimant's privacy was examined in the recent case of *Fearn* v. *Board of Trustees of the Tate Gallery*[31] in the UK court. The Tate Modern art gallery constructed a viewing platform on the tenth floor of it's new building called the Blavatnik to offer viewers a panoramic sight in all four directions. The claimants resided in a jury apart which was situated some 35meters aways but exposed their living areas to the public when they would come to the tenth floor on the Blavatnik building. When brought to the nonie of the gallery proprietors, several notices and reminders were given to the public to abstain from staring into the claimant's property yet often, it was found that several members of the public would stare and click pictures of the interior decorations of the claimant's living areas, which according to the claimants were not just nuisance but also intrusion of their privacy. The trial court judge had held the act of the public and complaint of the claimants sustainable stating that such amounted to 'material intrusion' into their privacy since at times the visitors to the Blavatnik building would sum up close to 300, who further posted pictures of the lavish interiors of the Claimants on various social media platforms. Justice Manne of the High Court [32] had held that there is no doubt that the tort of privacy is capable to protect the privacy of claimants but the essential question one needs to take into consideration is the characteristic of the locality- if it is an area open to tourist activities or one that is exclusively residential where entry is strictly on permit. As the design of the claimants' residential buildings were designed with such intention to offer idyllic sightseeing to the tourists, it may wise to upholding their viewership as intrusive of privacy. The flats were in particular sensitive to such curious observations all the more due to the "winter gardens" that open into the living room.

The court of Appeal held that in the tort of private nuisance, intrusion to the right of privacy can not be maintainable. Interestingly Sir Terence Etherton M.R[33] opined that there must be a distinction draw between

[31] [2020] EWCA Civ 104; [2020] Ch. 621.
[32] [2018] EWHC 246 (Ch)
[33] [2020] 2 W.L.R. 1081 at [53]

the act of overlooking into the neighbours from new windows in the locality and overlooking from the viewing platform of Tate, though in his opinion the primary issue appears to be the same. Additionally the Court of Appeal noted that to uphold the invasion of privacy under the European Convention of Human Rights under article 8, Tate Gallery not being a "public authority" , no cause of action could be maintainable under article 6 of the Convention. In the absence of any authority even by Convention, that holds the mere overlooking into one's living space as breach of art.8, could lead to the distorting the tort of private nuisance to a large extent particularly in such situations where by the claimant may be a licensees who have no *locus standi* to sue for private nuisance and in other cases where there was no expectation of privacy added to it the sensitivity of the plaintiff which may be a peculiar situation in itself[34].

On analysis, it may be feasible to state that the right not to be overlooked by the neighbours is more appropriate to place it in the context of right arising from ownership of property through easement.on similar lines. The High Court of Australia in the case of *Victoria Park Racing and Recreation Grounds Co Ltd.* v. *Taylor*[35], held that there was no legal right violated when the defendants broadcasted a live on a radio commentary and in the process the plaintiff's racecourse was visible though continuously surveilling through aerial camera and photographs could be actionable in nuisance[36]. What is important are the measures adopted by the occupier of a property to minimise the effects of such interference which causes him discomfort to the enjoyment of the property[37].

VI. In conclusion

In private nuisance, the elementary consideration that the courts take into account is the factor of continuity which places the harm suffered as peculiar, the harm complained about implies that the interference has caused negative impact on the plaintiff for over a certain duration of time. Transitory interferences will fail the test of private nuisance. The harm caused spreads over time and space causing the plaintiff distress arising out of his connection with the said land, not necessarily as the owner of the land but as mere occupier. If however, the owner of the land permits the usage of his land for such social activities which may be free of cost, it

[34] Austen Garwood-Growers, 'Improving Protection against the indirect interference against the use and enjoyment of Home-Challenging the legacy of Hunter v. Canary Wharf using the European Convention on Human rights and Human Rights Act 1998', *Nottingham Law Journal*, Vol. 11 (1), (2002).
[35] (1937) 58 C.L.R. 479
[36] *Bernstein* v. *Skyviews & General Ltd* [1978] Q.B. 479
[37] *Bank of New Zealand* v. *Greenwood* [1984] 1 N.Z.L.R. 525 at 532

appears more appropriate for the licensee to sue for any harm which certainly becomes distinct from a case where the use of land is permissible upon the payment of a certain sum of money to the owner.[38] While in the tort of negligence, single act causing harm in one instance is adequate for a cause of action to arise. Often, owing to the territorial extend of nuisance, environmentalist have referred to nuisance as environmental harms[39].

Any relaxation to the need of establishing proprietary interest on the land seeking damages, may lead to the blurring between the lines of private and public nuisance[40], the latter which requires larger number of persons to be affected[41]. What marks private nuisance distinct is the recovery of damages upon proving the damage as peculiar in contrast to what the public suffers. The ability to seek remedies in the form of injunction or special damage may disappear with the dilution of the proprietary interests on land which further on may affect the policy making decisions of the authorities eventually affecting non proprietary interests with regards to the use of land. [42]

[38] *Miller* v. *Jackson*, [1977] QB 966ß
[39] Supra note 6 at 880
[40] Wilfred Estey, 'Public Nuisance and Standing to Sue',*Osgoode Hall Law Journal*,10.3 : 563-582 (1972).
[41] AG V PYA Quarries [1957] 2 QB 169
[42] H. Marlow Green 'Common Law Property Rights and the Environment: a Comparative Analysis of Historical Development in the US and England and a Model for the Future' (1997), Cornell international Law Journal, 541.