

COMMON LAW TORT PRINCIPLE OF NUISANCE AS APPLIED IN BANGLADESH

LIAQUAT ALI SIDDIQUI

1. Introduction

Many of our present day inconveniences are based on the common law principle of nuisance. With the over increasing amenities and activities of modern life, the legal issue of nuisance is becoming more and more pivotal in determining the extent of various conflicting rights. Nuisance issues pose not only a question of balancing of various interests but a question of providing legal support for development works while ensuring personal rights. This paper intends to examine important relevant issues of the principle of nuisance including the rationale of the law of nuisance, how it balances among different conflicting interests, its present trends, its application in Bangladesh laws and the ways of improving the existing structure for better regulation of nuisance problems.

2. Common Law Principle of Nuisance

In this section we will briefly discuss the major features of the principle of nuisance so far developed by the common law Courts in England. The tort of nuisance has been considered as interference with the use and enjoyment of land by water, fire, smoke, smell, fumes, gas, noise, heat etc. Thus the defendant who has destroyed neighbors trees by causing poisonous fumes to be emitted from his land may be held liable in nuisance. An actionable nuisance is incapable of exact definition.¹ Nuisance are of two kinds— public and private. A public nuisance is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of a right belonging to him as a member of the public. A private nuisance, on

1. Pwllbach Colliery Co. Ltd. V. Woodman (1915) AC 634.

the other hand, is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of his ownership or occupation of land or of some easement, profit or other rights used or enjoyed in connection with land².

A public nuisance is a criminal offence³. It becomes a civil wrong and actionable as such when a private individual has suffered particular damage other than and beyond the general inconvenience and injury suffered by the public⁴.

A nuisance to be public, what number of people should be affected, is not certain. A requisite number are affected if the nuisance is so widespread in its range or so indiscriminate in its effect that it would be unreasonable to expect one person to take preventive legal measures as opposed to the community at large⁵. A person is held liable for private nuisance, when the consequence of his acts or omissions extend to the land of his neighbor by (A) causing an encroachment on his neighbor's land when it closely resembles trespass i.e. projecting cornice over his neighbor's garden so as to cause rain water to flow thereon, or (B) causing physical damage to his neighbor's land or building or vegetation upon it, i. e. digging a hole in his own land so as to cause the surface of his neighbor's land to subside, or (C) unduly interfering with his neighbor in the comfortable and convenient enjoyment of his land e.g. causing smoke or noxious fumes to pass on to the plaintiff's property, making unreasonable noises or vibration. It is said that in nuisance of the first two kinds, liability for nuisance is established by proving the encroachment or the damage to the land as the case may be; but for the third kind, there is no absolute standard to be applied⁶.

2. Clerk and Lindsell on Torts 1354 (1989)

3. Archbold's Criminal Pleading and Practice, paras 27-44[1988]. J.R. Spencer, 'Public nuisance—a critical examination' 48 Camb. L. J. 55 (1989)

4. Kodilnye, 'Public Nuisance and Particular Damage in the Modern Law' 6 Legal Studies 182 (1986)

5. A-G V PYA Quarries Ltd. (1957)2 QB169, (1957) 1 ALL ER 894.

6. Lindsell supra note 2, at 1357

It is a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. A particular action may be lawful in one circumstance but wrongful in another. The courts in deciding whether an interference can amount to an actionable nuisance have to strike a balance between the right of the defendant to use his property for his own lawful enjoyment and the right of the plaintiff to the undisturbed enjoyment of his property⁷. Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including for example, the time of the commission of the act complained of; the place of its commission; the manner of committing it, the effect of its commission that is, whether the effects are transitory or permanent, occasional or continuous; so that the question of nuisance or no nuisance is one of fact.⁸

No precise or universal formula is possible but a useful test is: what is reasonable according to ordinary usages of mankind living in a particular society. To send large volumes of heavy smoke over a field habitually used for sporting activities may well be accounted a nuisance. It is not necessary to prove injury to health. In considering the standard of comfort or convenience of living of the average man, the character of the neighborhood must be taken into account. A person who lives in the heart of a large manufacturing town cannot reasonably expect the same purity of air, a freedom from noise as in a secluded country district. But still one can complain of an increased volume of noise, if it is so substantial as considerably to detract from the standard of comfort previously prevailing⁹.

3. Recent trends in the common law of nuisance

It appears that the medieval common law courts were very strict in safeguarding the natural rights of individuals from being interfered by

7. Sedleigh-Denfield V. O'Callaghan (1940) A. C. 880.

8. Stone V. Bolton (1949) 1 ALL ER, 237.

9. Sturges V. Bridgman (1879) 11. Ch.D. 852. Smith V. Gwynes (1920) 89 L.J. Ch. 368.

wrongful acts. Thus in *William Aldred's case*¹⁰, the defendant erected a hog sty near the plaintiff's house. The sty allegedly fouled the air in the house and cut off plaintiff's light. At the Norfolk Assizes damages were assessed whereupon the defendant appealed to the King's Bench, arguing: i) that there was no *damnum* to the plaintiff in the corrupted air because the law should not favor delicate wishes; one ought not to have so delicate a nose, that he can not bear the smell of hogs, ii) that the blocking of windows was permitted by a local custom and iii) that the building of the house for hogs was necessary for the sustenance of man.

Court of King's Bench, dismissed the appeal and upheld the award of the Norfolk Assizes. The court stated that any injury to the plaintiff's enjoyment of his land was actionable so long as the injury pertained to a matter of necessity such as wholesome air or light. Purely aesthetic damage, however, was beyond the scope of the action, and also the court delineated the rule of "*sic utere tuo ut alienum non laedas*" meaning so use your own property as not to injure your neighbors¹¹. This rule responded directly to the defendant's allegation that social utility justified some interference. Thus, given actionable damage, the defendant could not ask the court for balancing social utility. The '*sic utere tuo*' rule prohibiting court from balancing the social utility of an alleged nuisance against the injury to the plaintiff was not seriously challenged in England until the middle of the 19th century. According to Brenner¹², the case that introduced the change was *Hale V. Barlow*¹³, where Justice Willes subjected the common law right of having air uncontaminated and unpolluted to some qualifications.

10. K. B. 1611.

11. This famous Latin maxim was derived from Ulpian and is related to the general Roman principle: *expelit reipublicae ne sua re quis male utatur* (it is for the public good that no one should misuse his own property). See, Baker, J., *An Introduction to English Legal History* 354 (1979)

12. Brenner, *Nuisance, Law and the Industrial Revolution*, 3. *J Legal Studies*, 403 (1974).

13. *Hale V. Barlow*, 4. *Com. B* (n.s.) 334.

In *St. Helen's Smelting Co., V. Tipping*¹⁴, a case on air pollution, the facts were: the noxious fumes and vapors from the defendant's copper smelting works extensively damaged the trees and shrubs and bothered occupants of the plaintiff's estate situated one and a half miles away from the defendant's factory. The court held that it was a nuisance and awarded damages. The House of Lords restricted the balancing of utility doctrine to the personal sensibilities with a strict *sic utere tuo* rule retained for material injury to property¹⁵

A reading of different English private nuisance cases would reveal that in some cases the court has made the defendant strictly liable for his unlawful act by applying the strict liability principle and in some cases asserted that the duty is based on reasonable foreseeability test and made the defendant liable for negligence by applying the test whether he would have foreseen the danger of damage. All nuisance cases are not the results of defendant's negligent action rather sometimes they occur as deliberate interferences in which the defendant has miscalculated the amount of interference which the law allows as between neighbor's. It has been proposed that: there are no two separate categories of nuisance, one fault based and the other strict, but one principle that the defendant is liable if his interference with his neighbor's land is of sufficient gravity to constitute a nuisance in law and if he is responsible for that interference in the sense that he knew or ought to have known of a sufficient likelihood of its occurrence to require him to take steps to prevent it¹⁶.

Against the above formulation of the duty, it is observed that: it manifestly excludes strict duty from a role within the scope of actionable nuisance. The case law may have moved in that direction, but it would be premature to say that such a proposition has been

14. 11 Eng. Rep. 1483 H. L. (1865).

15. Daniel R. Coquillette; *Mosses from an old Manse; Another Look at Some Historic Property Cases About the Environment*, 64 *Cornell Law Review*, 782, (June, 1979)

16. Winfield, *Tort*, 386.

accepted by the judiciary as an all inclusive principle of nuisance¹⁷. However in a recent case of Eastern countries *Leather V. Cambridge Water Co*¹⁸, the House of Lords has held that foreseeability of harm is a prerequisite for the recovery of damage in the law of private nuisance. Thus the courts increasing use of foreseeability test in nuisance cases has made it less hopeful in proving the liability of the defendant.

4. Statutory Nuisance: Further Development in English Law

In order to avoid the common law nuisance regulation which is slow and expensive, the Environmental Protection Act, 1990 in England has provided a quick and easy remedy of statutory nuisance under sections 79-82.¹⁹

Under section 79 of the 1990 Act, the local authorities (districts and London boroughs) have the duty to inspect their areas from time to time and to investigate complaints from the inhabitants for statutory nuisance which includes inter alia, smoke emitted from premises, fumes or gases emitted from premises, any dust, steam, smell or other effluvia arising on industrial, trade or business premises, any accumulation or deposit, any animal kept, noise emitted all of which being prejudicial to health or nuisance or any other matter declared by any enactment to be a statutory nuisance.

Under section 80, where local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, the authority is under duty to serve an abatement notice requiring either (a) the abatement of the nuisance or prohibiting or restricting its occurrence or re-occurrence; (b) execution of such works and the taking of such steps as may be necessary for those purposes, and the notice shall specify the time or times within which the requirements of the notice are to be complied with.

17 Clerk & Lindsell on Torts 1371 (1989)

18. *New Law Journal*, 64-5 (January 1994)

19. Simon Ball and Stuart Bell: *Environmental Law*, 166 (1994)

Anyone served has a right of appeal to the magistrate's court against the notice within 21 days of the date of service. In practice, the notice provision gives the opportunity to environmental health officers to negotiate with the person causing or responsible for the nuisance. Once the 21 days have elapsed and there has been no appeal, an offence will be committed if the person acts in contravention of the notice. A fine of up to 20,000 pounds may be imposed. A person who commits an offence in the course of private activities, such as a noisy neighbor, in contravention of the notice may suffer a fine of up to 2,000 pounds. In the case of an offence committed by a trade or business the penalty leaps ten fold with a maximum penalty of 20,000 pounds²⁰.

An aggrieved person under section 82 of the Environmental protection Act may make a complaint to the magistrate's court. First of all, the aggrieved person is required to serve a notice on the person or premises concerned. In case of a noise nuisance three days' notice and in case of other nuisance 21 days' notice is to be served. The notice must specify the intention to bring proceedings and shall specify the matter which is the source of the complaint. Failing which a criminal action is brought to the magistrate's court, which if satisfied that the alleged nuisance exists may make an order either: (1) requiring the defendant to abate the nuisance, within the time specified in the order; (2) prohibiting a recurrence of the nuisance, and requiring the defendant, within a time specified in the order, to execute any works necessary to prevent the recurrence.

In addition, the court may impose a fine and a compensation order, and where a person contravenes any requirement or prohibition imposed by an order, a fine of up to 2,000 pounds may be imposed, together with a fine at a rate of 200 pounds a day for each day on which the offence continues after conviction. If the responsible person or the owner or the occupier of the premises cannot be found, under section 82 (13), the court may order the local

20 Murdie, *Akn Environmental Law and Citizen Action*, 117-8 (1993)

authority in whose area the nuisance occurs, to undertake work that the person responsible would have been ordered to undertake. A right of appeal exists for a person who has been served with an abatement notice²¹. Actions can only be brought on an individual basis for harm which is caused to the plaintiff or to interferences with personal property.

5. Common Law Principle of Nuisance as Applied in Bangladesh

Common law tort principle of nuisance is applicable in Bangladesh. Although the aspect of private nuisance has not been applied and developed to a significant extent, the aspect of public nuisance received statutory recognition nearly hundred years ago during the time of British India and since then has played an important role in the public system of control.

Public nuisance regulations have been codified in various substantial and procedural laws in Bangladesh like,

- 1) Code of Civil Procedure, 1908,
- 2) Bangladesh Penal Code, 1860,
- 3) Criminal Procedure Code, 1989,
- 4) General Clauses Act, 1897.

Both civil and criminal remedies are available in Bangladesh for an act of public nuisance. The remedies under the civil laws are two — one is under section 91 of the civil procedure code for no special damage and the second is by a private individual for a special damage suffered by him. There are three remedies under criminal laws. The first relates to prosecution under chapter xiv of the penal code, second provides for summary proceeding under criminal procedure code and third relates to remedies under local or special laws. The

21. See, Statutory Nuisance (Appeals) Regulations 1990 (s.i. 1990 no.2276 as amended by s.i. 1990 no. 483).

two kinds of remedies are concurrent and the pursuit of the one does not shut out the other.²²

Under section 91 of the code of civil procedure, 1908— [i] in the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted [a] by the Attorney-General, or (b) having obtained written permission of Attorney-General, two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act, [ii] nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions. Under section 93 of the code, with the government previous sanction, the collector or by such officer as the government may appoint, may exercise the power of Attorney-General under section. ⁹¹

Public nuisance is not defined in the civil procedure code. Perhaps it is used in the same sense as it is used in section 268 of the Bangladesh penal code which reads; a person is guilty of public nuisance, who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage. The General Clauses Act [x of 1897] has taken the same view: public nuisance shall mean a public nuisance as defined in the penal code.²³

Public nuisance is a criminal offence and punishable under sections 269, 270, 277, 278, 283, 284, 285, 286 and 290 of the penal code. Thus negligent act likely to spread infection of disease

22. Criminal Law Journal, 462. (1976)

23. See. 3, Cl 48, Sec, 4(2), The General Clauses Act, 1897.

dangerous to life, malignant act likely to spread infection of disease dangerous to life, making atmosphere noxious to health etc. are offences under the code. But guilty intention is a prerequisite for punishing an offence under the code. The amount of fine provided under the code is nominal in consideration to the gravity of environmental problems. Thus the provisions are inadequate for an effective environmental protection.

Chapter x, sections 132A to 143 of the criminal procedure code, 1898, deal with public nuisance. The provisions of this chapter do not apply to a metropolitan area. The remedies for public nuisance provided under criminal procedure code are meant to be exercised under extraordinary circumstances where recourse to ordinary law is not possible owing to urgency of the matter. It is applied where the public is likely to be put to great inconvenience and will suffer an irreparable injury if the obstruction or nuisance is not removed. Where the alleged obstruction is an old one, the matter is one to be decided by civil court²⁴. Criminal procedure code provisions are used in case of nuisance of recent origin, not an old one.²⁵

A magistrate can act on a police report or on receipt of an information from any source including his personal observation. If a magistrate acts on an information, he acts suomoto. A private person has no right to insist that magistrate should pass order under section 133. Whether any order should be passed is a matter of discretion of the magistrate.²⁶

A public right is not dependent on the number of individuals enjoying it. It is a right enjoyed by members of unascertained mass of the public²⁷. A place in order to be public, must have access by right, permission, usage or otherwise²⁸. When pollution is itself a public

24. A. I. R. 1948 Pat. 210, 27 Cr. L. J. 27.

25. 21 D.L.R. 557.

26. A.I.R. 1931 ALL 785; 59 Cr. L. J. 148.

27. A.I.R. 18 PAT. 76

28. 1973 Cr. L. J. 1527.

nuisance it does not cease to be so only because one person has complained about it.²⁹

Summary proceeding under criminal procedure code is as follows. A competent magistrate under section 133 of the code on receipt of a police report or other information and taking other evidence, if considers that any act of public nuisance should be removed, may make a conditional order requiring the concerned person to remove, desist, prevent etc. the same or to appear before the court to show cause;³⁰ if he does not perform such an act or appear and show cause, he shall be liable to the penalty under section 188 of the penal code;³¹ if he shows cause against the order, the magistrate shall take evidence in the matter, and if satisfied that the order previously made is not reasonable, no further proceeding shall be taken, if not satisfied shall make the order absolute.³²

If the alleged person denies the existence of any public right in support of the way, river, channel or place, the magistrate after inquiry if satisfied that reliable evidence in support of the denial exists, shall stay the proceeding until the matter of right is decided by a competent civil court, if not satisfied shall proceed according to section 137.³³ Then the magistrate shall give notice to the concerned person to act according to the direction or will be liable to penalty under section 188 of penal code. If still disobeyed, the magistrate may cause it to be performed, and may recover the costs in different prescribed ways.³⁴ If a magistrate considers that immediate measures should be taken to prevent imminent danger he may issue necessary injunction orders, in default, he may use other

29. 1968 Cr. L. J. 396.

30 Sec.133.

31 Sec.136.

32 Sec.137.

33 Sec.139a.

34 Sec.140.

means to obviate such danger.³⁵ A magistrate may even order any person not to repeat or continue a public nuisance under section 143.

6. Comparative Study

Under the codified law of nuisance in Bangladesh suit for damages and injunction may be instituted in civil matters and in criminal matters fine and imprisonment to a limited extent may be imposed. In England on the other hand, most of the civil suits for damages in nuisance cases are decided by common law although increasingly now a days statutory laws are being passed to cover the damages even in civil matters. Under the statutory nuisance system criminal action can be brought in magistrate courts at the instance of attorney general, local authority and aggrieved persons. Opposite to this, in Bangladesh the criminal action in public nuisance cases depends absolutely on the will of a magistrate. An aggrieved person cannot of his own status bring an action. The scope of bringing legal actions is thus limited. In civil matters only the attorney-general or two or more persons having obtained written permission of the attorney-general may institute a suit. It is argued that in order to prevent the multiplicity of suits in public-interest litigations the scope of filing suits has been restricted to the attorney-general and his authorized persons. The provision under the code of criminal procedure even does not apply in metropolitan areas.

It therefore, appears that in Bangladesh the power of bringing pollution matters to a court of law is limited to a few individuals and dependent on their sweet will. People in general are not allowed to go to a court for taking necessary actions. The whole nuisance related problem issues would be put to a big threat if the chosen few officials fail to appreciate the gravity of a problem in time. There might be some other reasons for their non action including negligence and corruption. That is why the modern trend is to extend the scope of

35. Sec.142.

right of suing and to allow the citizens to go to the court with minimum requirement of standing. Even in India section 91 of the *Code of Civil Procedure* has been amended in order to remove the restrictions on the citizens' right to go to the court for the purpose of effective nuisance and pollution control. The law commission recommended the revision of section 91 in the following words:

"section 91(1) authorizes the filing of a suit in respect of a public nuisance by the advocate-general, or by two or more persons who have obtained the written consent of the advocate-general. It appears to us that the advocate-general should not be troubled with such questions. It is enough if the leave of the court is obtained. In the coming years, problems of pollution of water and air and the emergence of new and unknown hazards to health are likely to require considerable attention. And, until a full-fledged environmental law takes shape, section 91 could serve a useful purpose in combating these kinds of nuisance".³⁶

So now in India section 91 has been amended and any two persons with the leave of the court, even though no special damage has been caused, may institute a suit for declaration and injunction or such other appropriate relief.³⁷

In different states of America (Michigan, Florida, Minnesota etc.), legislations have been passed in order to provide many others in addition to attorney-general, the right of approaching the court for public nuisance cases.³⁸

The favorable aspect of the public nuisance regulation in Bangladesh is that unlike common law it has been codified and for bringing an action an individual does not require to suffer any special damage other than the public in general. It has been favorable for environmental pollution control in Bangladesh, due to its.

36. Fifty- Fourth Report of the Law Commission of India on the Code of Civil Procedure, 65 (1908).

37. Code of Civil Procedure (Amendment) Act, 1976.

38. Thomas J. Schoenbaum, Ronald H. Rosenberg: *Environmental Policy Law— Problems, Cases, and Readings*, 36-7 (New York, 1991).

Also civil litigation in Bangladesh is costly, time consuming and troublesome. The criminal remedies provided under the penal code and criminal procedure code are also not effective in the sense that the whole process depends upon the will of the magistrate and the fine scheme provided for the punishment of the offender is nominal and therefore does not operate as an effective deterrent in public nuisance and environmental pollution cases.

7. Conclusion

The recent trend of the courts in England to apply foreseeability test in nuisance cases, pose increasing difficulties in balancing conflicting interests of different entities. One way of justifying court's position is that in order to safeguard the greater interests of the society it outweighs the personal discomforts by applying the foreseeability test while safeguards the infringement of substantial personal rights by applying strict duty test in proper cases. However, the common law principle of nuisance has failed adequately to respond to the needs of modern environmental pollution cases. This is one of the reasons why in England statutory nuisance system has developed and common law nuisance system has been avoided in the Environmental Protection Act of 1990. In pollution cases even damages are being provided under statutory laws in order to avoid the uncertainty of the common law.

So far Bangladesh law is concerned, it appears that the common law nuisance principle is mostly codified. Probably the legislators of British India, keeping the peculiar socio-legal circumstances of this subcontinent in mind, thought it wise to codify the law of nuisance for British India which was a common law relief in England.

The scope of controlling environmental pollution under public nuisance regulation is limited in Bangladesh and there is ample scope for improving the existing codified public nuisance system in Bangladesh. In both civil and criminal public nuisance matters the procedure should be simplified and summary procedure should be developed. Certain structural changes should be brought about in

order to allow other relevant authorities, institutions, persons to bring action in a court of law for nuisance matters.

Many public nuisance matters can now be litigated within the broad mandate of the Bangladesh Environment Conservation Act, 1995. However, prior permission of the Department of Environment is required for filing any case under the Act. The Act primarily provides an administrative mechanism to remove public nuisance in the form of environmental pollution. While the liability for the public nuisance offences under the penal code is fault-based, under the Environment Conservation Act, the liability of such offences is strict.