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WHAT (IS) A NUISANCE? *ANTRIM TRUCK CENTRE LTD V ONTARIO (MINISTER OF TRANSPORTATION)*

JW Neyers* and Jordan Diacur**

1. Introduction

In a recent article, McBride suggests that our ability to understand, apply, and converse profitably about the law of tort was largely destroyed by a “catastrophe at some point in the twentieth century.”¹ His argument is that, for reasons as yet unknown,² our institutional memory – which once guarded and passed down an intuitive and largely unspoken sense of what tort law is and how it works – began to erode swiftly at some point in the last sixty years and has by now all but disappeared from contemporary judicial decisions. This catastrophe has been so complete that (as will be seen) even when modern judges are presented with evidence of the prior understanding they either miss its significance or mistake it as code for other things (such as evidence of the need for rigorous balancing or the implementation of hidden policy agendas). The argument of this case comment is that the recent Court of Appeal for Ontario decision in *Antrim Truck Centre Ltd v Ontario (Minister of Transportation)*³ is evidence that

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¹ Nicholas J McBride, “Rights and the Basis of Tort Law” in Donal Nolan and Andrew Robertson, eds, *Rights and Private Law* (Oxford: Hart Publishing, 2011) 331 at 332.

² McBride (*ibid*, at 333, n 12) speculates that one of the causes of the catastrophe was the increased interest in legal academic circles with questions concerning the powers of the state and “what form the relations between the State and its citizens should take. As a result very little interest was paid to tort law – which was very much concerned with relations between citizens.” We suspect that the rise of legal realist and functionalist analyses of law – analyses that malign or ignore traditional legal concepts and methodology but were dominant in academic discussions of private law until fairly recently – might also bear some of the responsibility; see Ernest Weinrib, “Can Law Survive Legal Education?” (2007) 60 *Vand L Rev* 401.

³ 2011 ONCA 419, 332 DLR (4th) 641 [*Antrim*].

this catastrophe has seriously and negatively affected the law of nuisance.⁴ Because of its clouded understanding, we submit that the Court of Appeal erred in at least three ways. First, the Court missed an important threshold step in the test for liability in private nuisance (one that would have been obvious to judges of an earlier age) and therefore it applied an incomplete test to the facts of the case. Second, it did not properly distinguish between rules sourced in private nuisance and those derived from the law of public nuisance (a failure that would have resulted in the overcompensation of the plaintiff but for the third error). Third, the Court engaged in an unwarranted balancing of private and public interests that deprived the plaintiff of an award of damages which were duly owed under the relevant statute.

What is this aforementioned intuitive and unspoken idea that has been lost? It is that tort law is about the protection of rights and that concomitantly there is no liability for *damnum absque injuria* (a loss that does not follow from a violation of a legal right).⁵ In the words of one pre-catastrophe judge, in order to succeed in an action for private nuisance “the act complained of must be both tortious and hurtful.”⁶ As McBride notes, this “rights-based view of tort law would have seemed commonplace at the start of the twentieth century. But nowadays... it seems strange and unfamiliar.”⁷ This comment is an attempt to make explicit this once orthodox understanding of tort law, to make it less strange and more familiar, and to suggest how *Antrim* should have been decided had this understanding of nuisance not been lost. In order to make these points, this comment will describe the *Antrim* litigation, summarize the decision of the Court of Appeal, analyze the three errors made by the Court, and explain what the answers should have been had the traditional law been applied correctly.

2. *The Decision*

The facts of the *Antrim* litigation were as follows. Jack and Gail Cameron were the owners of Antrim Truck Centre Ltd (the plaintiff) which ran a truck stop on Highway 17 in the hamlet of Antrim at the westernmost edge of the City of Ottawa. The business was a successful one, grossing revenue

⁴ In order to avoid confusion, the use of the term nuisance in this comment should be taken to refer to both private and public nuisance. When differentiation is necessary, we will use the terms private nuisance and public nuisance.

⁵ For a book-length defence of this idea, see Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007).

⁶ *Shuttleworth v Vancouver General Hospital* (1927), 38 BCR 300 at para 6, [1927] 2 DLR 573 (SC).

⁷ McBride, *supra* note 1 at 335.

of over \$15,000,000 dollars in 2003, its final full year of operation at the Highway 17 location.⁸ Over the years, as the result of numerous accidents caused by its overuse, Highway 17 earned the nickname “the killer highway.”⁹ In order to increase capacity and end these dangerous conditions, the Minister of Transportation (MTO) decided to construct a new section of four-lane highway, connecting to an existing stretch of Highway 417 running through downtown Ottawa.¹⁰ This did not involve simply upgrading Highway 17. Instead, a new route was selected which bifurcated Highway 17 to the east of Antrim and then ran roughly 500 metres to the south.¹¹ After six weeks of construction the re-alignment was completed in September 2004.¹² The paved stretch of Highway 17 in front of the Truck Centre was merged with Grant’s Side Road, an unpaved farm access lane.¹³ Instead of sitting on the main thoroughfare, as it had before, the plaintiff found itself some two kilometres away from the nearest interchange of the 417, and its customers were now required to exit at Regional Road 20 and then turn onto an essentially dead-end segment of Highway 17.¹⁴ As a result of the decreased traffic and loss of visibility this entailed, business suffered and the plaintiff was forced to sell its property in Antrim and relocate to a more viable location fifteen kilometres away in Arnprior, Ontario.¹⁵ It claimed operational losses, disturbance damages and relocation costs amounting to \$8,224,671.¹⁶

The *Antrim* litigation was brought as an Ontario Municipal Board (OMB) action rather than as an action against the province for nuisance in the Superior Court of Justice.¹⁷ This was due to the fact that a nuisance claim would have been destined to fail since the construction of Highway 417 and the concomitant realignment of Highway 17 were agreed by all parties to have been conducted in circumstances that would have engaged the defence of statutory authority,¹⁸ a complete defence to a nuisance claim.¹⁹ Instead of nuisance, therefore, the OMB action was brought for

⁸ *Antrim*, *supra* note 3 at para 11.

⁹ *Ibid* at para 1.

¹⁰ *Ibid*.

¹¹ *Ibid* at para 14.

¹² *Ibid* at para 15.

¹³ *Ibid*.

¹⁴ *Ibid* at para 16.

¹⁵ *Ibid* at para 17.

¹⁶ *Ibid* at para 3. See also *Antrim Truck Centre Ltd v Ottawa (City)*, [2009] OMBD No 1 at para 36 [*Antrim OMB*].

¹⁷ *Antrim OMB*, *ibid*.

¹⁸ *Antrim*, *ibid* at para 38.

¹⁹ See *Ryan v Victoria (City)*, [1999] 1 SCR 201 [*Ryan*]; *Susan Heyes Inc (cob Hazel & Co) v Vancouver (City)*, 2011 BCCA 77, 329 DLR (4th) 92 [*Heyes*]; and the discussion in section 3 C) below.

“injurious affection” under the Ontario *Expropriations Act*.²⁰ According to section 1(b) of the *Act*, injurious affection means:

where the statutory authority does not acquire part of the land of an owner,

- (i) such reduction in the market value of the land of the owner, and
- (ii) such personal and business damages,

resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute

Thus, according to the leading judicial decision on the matter,²¹ to succeed in an action for injurious affection under section 1(b), the following legal tests must be met by the plaintiffs:

- a) The damage must result from an act rendered lawful by statutory powers of the person performing such act (the statutory authority rule).
- b) The damage must be such as would be actionable under the common law, but for the statutory powers (the actionable rule).
- c) The damage must be occasioned by the construction of the public work, not its use (the construction-not-the-use rule).²²

At the OMB, the key issue was whether the “actionable rule” had been made out. The OMB decided that it had. Member Jackson reasoned, on the basis of decisions such as *R v Loiselle*,²³ and *Re City of Windsor and Larson*,²⁴ that the realignment would have amounted to a private nuisance (but for statutory authority) in that it had substantially interfered with the plaintiff’s right of access to the highway. Once that determination had been made, the result of a balancing of the public and private interests at stake was not in doubt: a “serious impairment”²⁵ had occurred, and compensation was warranted. The OMB awarded \$393,000 in damages, which were calculated as follows: \$58,000 for business losses and \$335,000 for the diminution in market value of the plaintiff’s land.²⁶ The claims for

²⁰ *Expropriations Act*, RSO 1990, c E26.

²¹ *St Pierre v Ontario (Minister of Transportation and Communications)*, [1987] 1 SCR 906 at 909 [*St Pierre*].

²² *Antrim*, *supra* note 3 at para 21, citing *St Pierre*, *ibid*.

²³ [1962] SCR 624 [*Loiselle*].

²⁴ (1980), 29 OR (2d) 669, 114 DLR (3d) 477 (Div Ct) [*Larson*].

²⁵ *Antrim OMB*, *supra* note 16 at para 54.

²⁶ *Ibid* at paras 57-60.

disturbance damages and relocation costs were dismissed because “in the absence of an expropriation of all or part of the land of an owner”²⁷ the plaintiff was precluded from seeking them.

The decision of the OMB was upheld on appeal to the Ontario Divisional Court.²⁸ Wilson J, speaking for the Court, confirmed that an obstruction of access does not have to be complete in order to ground a claim for private nuisance.²⁹ Instead it was enough that the “construction of the public works in close proximity to the lands so changed their situation as to greatly reduce if not eliminate their value for the uses to which they had been put prior to the construction.”³⁰ Given that Highway 17 was a shadow of its former self, the Court found that the OMB’s conclusion that the MTO had committed an actionable private nuisance (but for the statutory authority) was entirely justified. The Court agreed with the contention of the MTO that there needed to be a balancing done between the harm to the plaintiff and the utility of the defendant’s conduct but agreed with the plaintiff that the OMB had “conducted the appropriate weighing of the public and the private interest and its findings are reasonable and supported by the evidence.”³¹

The Ontario Court of Appeal overturned the decisions of the Divisional Court and OMB. Three grounds for appeal were raised, but two of these (which are not relevant to this comment) were dismissed.³² The central question quickly became whether the test for private nuisance had been properly applied by the OMB. Epstein JA, for the Court, began by laying that test out. She held that it “commands a two part analysis,”³³ namely that an interference with the plaintiff’s land, or its use and enjoyment of its land, must be both “*substantial* and *unreasonable*.”³⁴ Showing deference to the discussion of substantiality in the lower courts, she did not dispute that there had in fact been a substantial interference with access in this case.³⁵ Rather she focused her decision on unreasonableness, and the four factors which assist in measuring it: the

²⁷ *Ibid* at para 36.

²⁸ *Antrim Truck Centre Ltd. v. Ontario (Minister of Transportation)*, 2010 ONSC 304, 318 DLR (4th) 229 (Ont Div Ct) [*Antrim Div Ct*].

²⁹ *Ibid* at para 93.

³⁰ *Ibid* at para 94; this is a quotation from *St Pierre*, *supra* note 21 at para 11.

³¹ *Antrim Div Ct*, *supra* note 28 at para 110.

³² The other two grounds of appeal raised were the proper standard of review and the applicability of the “construction-not-the-use” rule; see *Antrim*, *supra* note 3 at paras 50-72 and 145-49 for the discussion and dismissal of these two grounds.

³³ *Antrim*, *ibid* at para 80.

³⁴ *Ibid* [emphasis in original]. This is a quotation from Fleming, *The Law of Torts*, 9th ed (Sydney: The Law Book Company, 1998) at 466.

³⁵ *Antrim*, *supra* note 3 at paras 119-23.

severity of the interference; the character of the area; the utility of the defendant's conduct; and the sensitivity of the plaintiff.³⁶ While doing so, she addressed the question of whether the balancing of these factors, and more specifically a balancing of the seriousness of the interference with the reasonableness of the defendant's conduct, is truly a part of nuisance law.³⁷ In the end, she decided that finding some sort of balance was in keeping with "the primary function of the law of nuisance," which she described as mediating "the defendant's interest in using its property as it pleases and the plaintiff's interest in the unfettered use and enjoyment of her land."³⁸ The remainder of her reasons were given over to determining if the substantial interference in this case had been unreasonable. Moving through the list of four factors, she briefly pointed out that the lower courts had ignored the character of the area and the potential sensitivity of the Truck Centre to traffic changes, before coming to the crux of her decision: the enormous public utility created by replacing this particular section of Highway 17. As she bluntly put it, "the highway was built to save lives."³⁹ As Epstein JA stated:

When the interference to Antrim's access, while significant but clearly far from complete, is measured against the reasonableness of the MTO's use of its land, in an area through which a highway already ran, for the purpose of protecting the public from danger, the conclusion must be that Antrim has not made out a case in nuisance.⁴⁰

In the end, since they had not given proper scope to this issue of public utility, both the OMB and the Divisional Court decisions had "failed to balance" and their decisions could not stand.⁴¹ As a proper assessment of the public interest was sufficient to defeat the private nuisance claim, it also negated the plaintiff's claim in injurious affection (which was wholly built upon the alleged private nuisance because of the "actionable rule"). Even though it was rendered irrelevant by her decision to allow the appeal, Epstein JA took the time to explain that the plaintiff's cross-appeal on the quantum of damages would have also failed. Since there had been no actual expropriation of land, the quantum of damages had been correctly limited by the OMB "to the reduction in the market value of the land injuriously affected and personal and business damages."⁴²

³⁶ *Ibid* at paras 83-92.

³⁷ *Ibid* at paras 93-109.

³⁸ *Ibid* at para 108.

³⁹ *Ibid* at para 140.

⁴⁰ *Ibid* at para 144.

⁴¹ *Ibid* at para 143.

⁴² *Ibid* at para 152.

3. The Analysis

A) The Correct Test for Private Nuisance

As mentioned in the introduction, the Court of Appeal's decision in *Antrim* makes at least three related errors. The first error is that the Court misses an important first (but often neglected⁴³) step in its analysis of private nuisance. As will be recalled, the Court says that a private nuisance is "a substantial and unreasonable interference with a [plaintiff's] land or his use or enjoyment of that land" and that each of substantial interference and unreasonableness are separate but related inquiries.⁴⁴ Prior to determining questions of substantiality and unreasonableness, however, the pre-catastrophe cases make it clear that the courts first have to determine whether the plaintiff has a right to the amenity, the absence of which the plaintiff claims is the nuisance. This flows from the fact that a person's right to land, like his or her right to bodily integrity, is exclusionary. These rights stop others from interfering with our bodies and our land, but they do not compel others to provide us with things that would make these rights more useful or more enjoyable.⁴⁵ Consequently, just as a person's right to bodily integrity does not require anyone to rescue him or her or provide him or her with food (hence there is no liability in the common law for failing to perform an easy rescue, even when failure to do so leads to death),⁴⁶ a person's right to his or her land does not compel others to allow things to reach this land or require them to use their land in a way that pleases the plaintiff (hence there is no right to a view⁴⁷). In the vast majority of private nuisance cases that involve emanations onto the plaintiff's land (such as fumes, smells, noise, vibrations, steam and so on⁴⁸) neglecting the

⁴³ There is perhaps no greater evidence of the catastrophe that has affected private nuisance than the fact that none of the leading Canadian tort texts makes mention of this first step or the fundamental distinction between emanations and preventions, except (perhaps ironically) the non-specialist and student-focused Philip H Osborne, *The Law of Torts*, 3rd ed (Toronto: Irwin Law, 2011) at 384-87.

⁴⁴ *Antrim* at para 79. The quotation is from John Murphy, *Street on Torts*, 12th ed (Oxford: Oxford University Press, 2007) at 419. See the discussion of the "two part analysis" in section 2, above.

⁴⁵ See e.g. Peter Benson, "Misfeasance as an Organizing Normative Idea in Private Law" (2010) 60 UTLJ 731.

⁴⁶ See *Childs v Desormeaux*, [2006] 1 SCR 643. In the language of the classic cases, this would merely be *damnum absque injuria*.

⁴⁷ *St Pierre*, *supra* note 21 at para 13: "From the very earliest times, the courts have consistently held that there can be no recovery for the loss of prospect," citing *William Aldred's Case* (1610), 9 Co Rep 57 b, 77 ER 816; *Foli v Devonshire Club* (1887), 3 TLR 706.

⁴⁸ See e.g. *Walker v McKinnon Industries Ltd*, [1951] 3 DLR 577 (PC Can) [*Walker*] (sulphur fumes); *Drysdale v Dugas* (1896), 26 SCR 20 [*Drysdale*] (odour and

first step will not lead to the wrong conclusion. The plaintiff's claim is simply to exclude the emanation from entering his or her land and the only right needed to make this analysis work is the bare right to the property in question.⁴⁹ In contrast, where the claim is that the nuisance is constituted by the defendant preventing something entering onto the plaintiff's land (such as water or light) or otherwise engaging in an activity that is not an emanation (such as removing the support of the adjacent soil), the plaintiff must, in addition to proving his or her entitlement to the land, prove that he or she has a right to receive that amenity either *ex jure naturae* (as a natural incidence of the ownership of the soil)⁵⁰ or has acquired it via prescription or grant.⁵¹ In these types of cases, then, applying the Court of Appeal's overly simplistic test would potentially lead the court to come to the wrong conclusion⁵² – effectively giving the plaintiff an easement (which the law of property says does not exist) without consent of the owner to be burdened and without payment to him or her.⁵³

noise); *Dufferin Paving and Crushed Stone Ltd v Anger*, [1940] SCR 174 (vibrations); *Chandler Electric Co v HH Fuller & Co* (1892), 21 SCR 337 [*Chandler*] (steam).

⁴⁹ For a similar view, see Donal Nolan, "A Tort against Land: Private Nuisance as a Property Tort" in Nolan and Robertson, *supra* note 1, 457 at 463: "most private nuisance cases concern [situations] ... where the existence of protection against the type of interference in question is a given."

⁵⁰ Besides the right to access discussed below in section 3 B), the two most common natural rights are: (1) "the inherent right of a riparian owner to have a stream of water 'come to him in its natural state, in flow, quantity and quality'" (*Groat v Edmonton*, [1928] SCR 522 at 733 [*Groat*], citing *Chasemore v Richards* (1859), 7 HLC 349 at 382); and (2) the right to the lateral support of neighbouring land (*Cleland v Berberick* (1916), 36 OLR 357 (CA); *Dalton v Angus* (1881) 6 App Cas 740 (HL)). The natural right to lateral support does not, however, extend to providing support to the buildings on the land. This right is one which must be acquired by prescription or grant; see *Gallant v FW Woolworth Co*, [1971] 1 WWR 336 (SKCA).

⁵¹ See *Earl Putnam Organization Ltd v Macdonald* (1978) 21 OR (2d) 815 (CA) where the plaintiff's suit alleging a nuisance through deprivation of lights was dismissed on the basis that it could not prove such an acquired right. As the Court noted at fn 7, "a landowner may so build on his land so as to prevent any light from reaching his neighbour's window, unless the neighbour has acquired an easement by way of prescription or by an express or implied grant." As a result of s 33 of the *Real Property Limitations Act*, RSO 1990, c L.15 it is no longer possible to acquire a right to light through prescription in Ontario, although "this section does not apply to any such right acquired by twenty years use before the 5th day of March, 1880."

⁵² For a similar view, see Nolan, *supra* note 49 at 463; Nicholas McBride and Roderick Bagshaw, *Tort Law*, 3rd ed (Harlow: Pearson Longman, 2008) at 371-72.

⁵³ For a similar view, see Richard W Wright, "Private Nuisance Law: A Window on Substantive Justice" in Nolan and Robertson, *supra* note 1, 489 at 510. This concern with creating incoherence with the rules of property was one of the reasons why their Lordships did not find that the interference with television reception was an actionable nuisance in *Hunter v Canary Wharf Ltd*, [1997] AC 655 (HL) (see especially Lord Hope

This potential to err can be seen most starkly when the simplified test is applied to two otherwise straightforward decisions of the Supreme Court of Canada (decisions of which the modern test is, of course, meant to be a synthesis). The first of these cases is *Orpen v Roberts*.⁵⁴ The appellant sued the defendant Roberts for constructing an apartment building so close to an adjacent road as to be in breach of a by-law requiring a mandated set-back of 25 feet. She sought an injunction on the grounds that the proximity of this building to her home would materially reduce the value of her property⁵⁵ and would therefore constitute a nuisance. Her claim was dismissed by the lower courts, and the construction of the building ultimately went ahead. Thus, by the time her case reached the Supreme Court of Canada, Orpen's claim was for an injunction ordering the enforcement of the by-law and the removal of the building, as well as damages. As Duff J said for a majority of the Court:

For the purposes of this judgment it will be assumed that there was an infraction of the by-law. It is not disputed that the existence of the respondent's apartment house, situated as it is upon the twenty-five foot strip bordering on Carlton Street, does prejudicially affect the appellant in respect of the amenities and the value of her property; and the question to be determined, therefore, is whether, being so specially damaged, she has a title to judicial relief.⁵⁶

The Supreme Court of Canada was of the opinion that she did not have such a title. In other words, despite suffering what was assumed to be substantial interference with her use and enjoyment of her land – which was obviously unreasonable in light of the fact that the positioning of the defendant's building was actually illegal – she could not make a claim in private nuisance. As there was no emanation onto her property, she had to prove the existence of another right that had been infringed in order to succeed; as Duff J noted, she would have to show that the statute created a “negative easement . . . over the property within the area where the by-law operates.”⁵⁷ And this she could not do since the relevant legislation determined that the right to enforce the by-laws was vested in the city and

where he stated at 727: “I do not think that it would be consistent with principle for such a wide and novel restriction to be recognized. If that is so for easements, then the same result must follow so far as a remedy in nuisance is concerned.”) Cf *Nor-Video Services Ltd v Ontario Hydro* (1978) 84 DLR (3d) 221 (Ont HCJ).

⁵⁴ [1925] SCR 364 [*Orpen*].

⁵⁵ While the case is unclear on this point, based on the context and the Court's discussion of *Tompkins v Brockville Rink Co* (1899), 31 OR 124, this reduction in value was likely due to the increased risk of fire, the loss of view and the increased cost of fire insurance; see *Orpen*, *ibid* at 369.

⁵⁶ *Orpen*, *ibid* at 369.

⁵⁷ *Ibid* at 370.

created no private right of action in the plaintiff.⁵⁸ Unfortunately, her loss was just another example of *damnum asbque injuria*. As Idington J noted in his concurring reasons, if “that conclusion [ie that there is no right of enforcement vested in the appellant], coupled with the apparent refusal herein of the city to assist the appellant in maintaining its by-law, renders the enactment of such a by-law rather farcical I cannot help it.”⁵⁹

The second of these cases is *McBryan v Canadian Pacific Railway Co.*⁶⁰ The defendant McBryan owned a farm in British Columbia, bordering the South Thompson River. For many years, his land adjoined that of another farmer, Shaw, whose farm was further inland and slightly uphill. Shaw was in the habit of irrigating his farm during the summer, and the runoff naturally flowed down over McBryan’s land and into the river. To protect his crops and topsoil from this runoff, McBryan built a dam on his own land. Sometime later, the Canadian Pacific Railway Co (CPR) purchased a strip of land between the two farms and built a rail line. The dam on McBryan’s land stayed in place after the rail line went in. It had the effect of forcing Shaw’s irrigation runoff back onto CPR’s strip of land. For years, CPR did not complain, because the amount of water was relatively small. However, in 1895, Shaw used a greater than normal amount of water for irrigation which overwhelmed McBryan’s original dam. Consequently, McBryan raised the dam to the extent necessary to prevent flooding on his land. As a result of these actions, the quantity of water trapped on the rail line was large enough to cause damage to the track. CPR sued McBryan for compensation and an injunction requiring him to remove the dam and thereby prevent a recurrence of the flooding. CPR was awarded both remedies by the Supreme Court of British Columbia and McBryan appealed to the Supreme Court of Canada. The Court unanimously held that, while there had been a substantial and reasonably foreseeable interference (hence in modern parlance an unreasonable interference) with CPR’s property, there was no liability since CPR’s ownership of its land did not give it a right to discharge water onto the land of McBryan. As Sedgewick J stated:

It is, I think, a universal principle that a man may do what he likes with his own, provided that in so doing he does not interfere with some legal right of his neighbour. In the present case, as I have stated, there was no natural watercourse, there was not even an artificial watercourse, and in so far as the defendant’s lands were damaged it was a pure act of trespass on the part of Shaw from which the defendant had a clear right to protect himself by all lawful means irrespective of any consequences which might happen to other parties. To prevent the defendant under the circumstances,

⁵⁸ *Municipal Institutions Act*, RSO 1914, c 192, s 406(10).

⁵⁹ *Orpen*, *supra* note 54 at 376.

⁶⁰ (1899), 29 SCR 359.

when he saw his lands being flooded and his property washed away, from interposing a barrier at the boundary of his property and sending the water back the way it came, would, I think, be most unreasonable. To compel him to cross over and perhaps trespass upon the railway lands in order that he might erect a similar barricade on Shaw's land would be even more so. And I cannot see why, when he did nothing more than protect himself ... the company can compel him to pay the damages they sustained, particularly when they had ample means of redress from the originator of the mischief, and could as easily have protected themselves from injury as the defendant had done. It seems to me, with great deference, that any other contention is manifestly erroneous.⁶¹

Thus, in so far as the test of private nuisance applied by the Court of Appeal in *Antrim* (1) does not cohere with the general understanding of our right to land being exclusionary; (2) would create incoherence with the law of property by recognizing natural rights that the law says does not exist (such as the right to receive water or light) if applied seriously; and (3) would have extreme difficulty accounting for the results of the Supreme Court of Canada's binding decisions in *Orpen* and *McBryan*, we suggest that the test for nuisance employed in *Antrim* is overly simplified. As Locke J stated in *Grandel v Mason*, "nuisance involves damage but damage alone is not sufficient to give rise to a right of action. There must be some right in the person damaged to immunity from the damage complained of."⁶² Thus, in the future, courts need to return to the orthodox analysis, applied in leading cases of high authority such as *Canadian Pacific Railway Co v Albin*,⁶³ *St Pierre v Ontario (Minister of Transportation and Communications)*,⁶⁴ *Tate & Lyle Food & Distribution Ltd v GLC*,⁶⁵ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*,⁶⁶ and *Fontainebleau Hotel Corp v Forty-Five Twenty-Five Inc*⁶⁷ – one that first asks whether the plaintiff has a private right to the amenity, the absence of which the plaintiff claims is the nuisance, before going on to the question of whether the interference with that right was objectively substantial and hence unreasonable.

⁶¹ *Ibid* at 367-68.

⁶² *Grandel v Mason*, [1953] 1 SCR 459 at 477.

⁶³ (1919), 59 SCR 151 at 159 (nuisance requires an "interference with a right which the owner was entitled to use in connection with his property").

⁶⁴ *Supra* note 21 (no right to a view).

⁶⁵ [1983] 2 AC 509 (HL) [*Tate & Lyle*] (no private right that a river have a certain depth); this case is discussed in JW Neyers, "*Tate & Lyle Food & Distribution Ltd v GLC*" in C Mitchell and P Mitchell, eds, *Landmark Cases in the Law of Tort* (Oxford: Hart Publishing, 2010).

⁶⁶ [1937] 58 CLR 479 (HCA) (no right of privacy or ownership in a spectacle arises *ex jure naturae*).

⁶⁷ 114 So 2d 357 (Fla Ct App 1959) (no right to light).

B) *Confusing Private Nuisance and Public Nuisance*

At this stage in the analysis, one might be forgiven for thinking that the first section of this comment is overwrought, on the ground that it is implicit in the Court of Appeal's reasoning that a right was present. After all, had not both the OMB and the Divisional Court found that the plaintiff's right to access had been substantially interfered with? This brings us to the second problem with the Court of Appeal's decision, namely that it was unable to differentiate between private and public nuisance in areas where the two torts functionally overlap. What is the conceptual difference between them? In a nutshell: a private nuisance is an interference with a *private right* over, or in connection with, land; a public nuisance is an interference with a *public right* shared equally with every member of the community, such as a right to pass and repass on highways and navigable rivers.⁶⁸ The other major difference between the two causes of action (other than the nature of the rights involved) is that a person can only sue in public nuisance if he or she has suffered "special damage," damage which differentiates his or her loss from the loss suffered by the rest of the community.⁶⁹ At one time this difference would have been well understood, but as a result of a series of decisions starting with *Larson* and a profound misunderstanding of the laconic decision of the Supreme Court of Canada in *Loiselle*, Canadian courts have merged the two torts in access cases. This has led them to assert that a substantial deprivation of the public right to use a highway is actionable in private nuisance since it can unreasonably interfere with the use and enjoyment of an occupier's land by hindering access.⁷⁰

Given this unwarranted union, one must go back to basics in order to understand how to resolve this issue in *Antrim*. At common law, it is clear that a property owner enjoys a private right of access to a public highway *ex jure naturae* as a legal incident of his or her ownership of the adjacent land. As was stated by the Supreme Court of Canada in *Toronto Transit Commission v Swansea (Village)*:

There is no difficulty upon the question of the right at common law of an owner of land adjoining a public highway. He is entitled to access to such highway at any point at which his land actually touches such highway for any kind of traffic which is

⁶⁸ *Ryan*, *supra* note 19 at para 52; *Chessie v JD Irving Ltd* (1982), 22 CCLT 89 (NBCA); *Tate & Lyle*, *supra* note 65; *Vancouver (City) v Burchill*, [1932] SCR 620.

⁶⁹ *Ryan*, *ibid*; *Hickey v Electric Reduction Co of Canada* (1970), 21 DLR (3d) 368 (Nfld SC) [*Hickey*]. For an in-depth discussion of special damage, see Gilbert Kodilinye, "Public Nuisance and Particular Damage in the Modern Law" (1986) 2 LS 182.

⁷⁰ See e.g. *Heyes*, *supra* note 19.

necessary for the reasonable enjoyment of his premises . . . This is a right of property that was well settled at the common law. . . . When he reaches the public highway and travels upon it, the private owner becomes then one of the public using the highway and subject to all the duties and obligations that rest upon the public generally, but it is his private right to be fully and freely permitted at all points of his private property to have freedom of access to the adjoining public highway.⁷¹

As other cases make clear, an owner has no such right if his or her land does not abut the public highway – the right is lost “if a strip of land, however narrow, belonging to another . . . intervenes.”⁷² Thus, according to these cases as long as proprietors could get whatever vehicle they chose on and off of their land and onto the public highway there would be no violation of the private law right of access. Consequently, there would be no liability in private nuisance in a case like *Antrim* where the complaint is that changes farther afield have made the public highway system less convenient for the uses that the owner wishes to put his or her private property. This flows from the fact that no private right would have been interfered with. It would be another example of *damnum absque injuria*.

Did the Supreme Court of Canada’s decision in *Loiselle* change the law and expand the private law right of access? *Loiselle* purchased a piece of property in Melocheville, Quebec, in 1948.⁷³ For a decade, this property had direct access to Highway 3, which ran from Montreal to Valleyfield just south of the St Lawrence River. *Loiselle*’s principal residence was soon located there, along with his flourishing garage and gas station business. In 1957, however, a portion of the St Lawrence Seaway was excavated only 80 feet from the edge of *Loiselle*’s land. This canal severed Highway 3, and turned the section of the road that abutted *Loiselle*’s property into a cul-de-sac ending at the waterway. Traffic that once passed his business was now re-routed to the east of his land, passing through a tunnel some 1500 feet away. Since none of his land had actually been expropriated or damaged, *Loiselle* sued for injurious affection, claiming that his commercial property had been harmed by the traffic diversion and the resulting drop in sales. Abbott J held that the courts below had correctly determined that *Loiselle* was entitled to compensation in the amount of \$18,018.32 (for the depreciation in the value of his land attributable to the works) because:

it seems obvious that had the Seaway Authority or any other person, without statutory authorization constructed a canal and blocked the main highway adjacent to

⁷¹ [1935] SCR 455 at 457.

⁷² *Empringham Catering Services Ltd v Regina (City)*, 2002 SKCA 16 at para 11, 217 Sask R 138.

⁷³ See *Loiselle*, *supra* note 23 at 626 for a recounting of these facts.

respondent's property, the latter – aside from any other remedies which might have been open to him – would have had a valid claim in damages under the general law. The learned trial judge so found and in my respectful opinion he was right in so doing.⁷⁴

To what area of the general law is Abbott J referring? Relying solely on this short exposition one might assume that the answer is private nuisance, as the court did in *Larson*⁷⁵ and *Antrim*.⁷⁶ But if one examines the next paragraph and the reasons of the trial judge, it is clear that Abbott J was referring to a line of nineteenth-century British cases (later imported into Canadian law⁷⁷) which awarded damages for injurious affection on the basis that the “actionable rule” for injurious affection was satisfied by the tort of public, rather than private, nuisance.⁷⁸ The leading decisions in that line of cases were *Ricket v Directors of the Metropolitan Railway Company*⁷⁹ and *Metropolitan Board of Works v McCarthy*.⁸⁰

The facts of *Ricket* were as follows. Ricket was a publican in London operating under the sign of the “Pickled Egg” near the workhouse at Clerkenwell.⁸¹ Under statutory authority granted to the directors of the railway company, the most convenient route of highway access to Ricket's pub was blocked by the defendants for twenty months during the construction of a rail line in the vicinity. While steps were taken to provide alternate access, Ricket claimed that his business had been injuriously affected by the detours attendant upon the construction process.⁸² As with the current Ontario statute, in order to succeed the plaintiff was required to

⁷⁴ *Ibid* at 627.

⁷⁵ *Supra* note 24 at 481-82 where the Court states:

In the present case, where the median strip has been referred to as interfering with turning access to the same extent as if it were a 20-foot wall in height, a private right of access has been interfered with. I see no difference in principle between a barrier that allows access for traffic from one direction only and the creation of a cul-de-sac road that has substantially the same effect.

⁷⁶ *Supra* note 3 at para 103:

Nuisance is not mentioned in either *Larson* or *Loiselle*. While it is not unreasonable to assume that the basis for finding common law liability in those cases was [private] nuisance, neither contains a consideration of [private] nuisance principles.

⁷⁷ See e.g. *R v MacArthur*, [1904] 34 SCR 570 [*MacArthur*]; *Re Taylor and Corporation of the Village of Belle River* (1910), 2 OWN 387, 17 OWR 815 (CA); *Toronto (City) v JF Brown* (1917), 55 SCR 153.

⁷⁸ For a similar view, see *Re St Pierre and Minister of Transportation & Communications* (1983), 43 OR (2d) 767 at 770-71, 2 DLR (4th) 558 (CA).

⁷⁹ (1867), LR 2 (HL) 175 [*Ricket*].

⁸⁰ (1874), LR 7 HL 243 [*McCarthy*].

⁸¹ *Ricket*, *supra* note 79 at 176.

⁸² *Ibid* at 177.

prove that the defendants had committed an actionable tort. Their Lordships held, agreeing with the decision of Erle CJ in the Exchequer Chamber,⁸³ that no tort had been committed. Although several reasons were marshalled for this conclusion, the primary justification was that the damages were “too remote to be the subject of an action.”⁸⁴ As Lord Chelmsford LC explained:

Upon a review of all the authorities, and upon a consideration of the sections of the statutes relating to this subject, I have satisfied myself that the temporary obstruction of the highway, which prevented the free passage of persons along it, and so incidentally interrupted the resort to the Plaintiff's public house, would not have been the subject of an action at common law ... his damage was not of such a nature as to entitle him to compensation; the interruption of persons who would have resorted to his house but for the obstruction of the highway, being a consequential injury to the Plaintiff⁸⁵

Although to modern eyes the mention of remoteness and consequential loss would seem to be an allusion to factual concepts (such as physical and temporal closeness) or concerns of policy (such as the prevention of indeterminate liability),⁸⁶ it is clear that this is not what their Lordships had in mind. Instead, their point was that Ricket could not sue because the damages he suffered were not the consequence of *his* right to use the public highway being violated by the actions of the defendant; instead the damages were the consequence of *his customers'* right to use the public highway being interfered with.⁸⁷ They had title to sue; he did not. Once again, Ricket's loss was an instance of *damnum absque injuria*. As Walton J explained in *Anglo-Algerian Steamship Company Ltd v The Houlder Line Ltd*,⁸⁸

The true meaning and effect of what Lord Chelmsford said on this point is, I venture to think, made quite clear by reference to the reasoning of Erle CJ, which Lord

⁸³ (1865) 5 B & S 156. See Lord Chelmsford LC's agreement in *Ricket*, *supra* note 79 at 188. Lord Cranworth's agreement is at 199.

⁸⁴ *Ricket*, *ibid* at 188.

⁸⁵ *Ibid* at 196.

⁸⁶ See e.g. Beth Bilson, *The Canadian Law of Nuisance* (Toronto: Butterworths, 1991) at 58 where she argues: “It could be that the concern which leads to the demand ... that damage be direct is not a concern over remoteness, as such, but is a manifestation of the anxiety over keeping recovery for economic loss under control” See also Lewis Klar, *Tort Law*, 4th ed (Toronto: Thomson Carswell, 2008) at 723; *Hickey*, *supra* note 69 at para 16.

⁸⁷ See Stevens, *supra* note 5 at 186-87 for a similar view. As a result, there is nothing “obscure” or “shrouded in mystery” about what is meant by direct or consequential in public nuisance; *cf* Kodilinye, *supra* note 69 at 193-94.

⁸⁸ [1908] 1 KB 659.

Chelmsford followed. It there appears that the grounds upon which the Chief Justice held that the plaintiff could not have recovered in an action at law on the case were, that he had not been, in the language of the Chief Justice, “obstructed in the exercise of any right vested in him”; that the damage of which he complained was damage to his business in consequence of other persons being obstructed in the exercise of their rights on the public highway...⁸⁹

As Walton J made clear, however, *Ricket* “would have no bearing in a case” where the complaint was direct – that is, where the loss suffered by the plaintiff was consequent on the violation of the plaintiff’s own right to use the public highway.⁹⁰

As noted above, the primary restriction on such a direct claim in public nuisance (that is, where one alleges the loss flows from the violation of one’s public right) is that the plaintiff must prove that he or she has suffered special damage. The leading case dealing with this issue, in this context, is *McCarthy*. McCarthy regularly made use of the nearby Whitefriars Dock on the River Thames to carry on his building supply business. The construction of the Thames Embankment, a massive public works project managed by the defendants and authorized by statute, involved the placement of a solid granite wall along the foreshore of the river in order to prevent flooding and reclaim marshy land. The embankment had the effect of “permanently stopping up and destroying the Whitefriars Dock”⁹¹ and thereby cutting off all access to the river from the street adjoining McCarthy’s place of business. This resulted in an immediate £1900 diminution in the value of McCarthy’s property.⁹² Suing for this amount in injurious affection, the plaintiff won in the Court of Common Pleas and this judgment was affirmed on appeal to the Exchequer Chamber. The House of Lords unanimously supported the award as well, on the basis that public nuisance could satisfy the “actionable rule” and that the tort of public nuisance had been made out as the plaintiff had suffered special damage. As Lord Penzance explained:

If, then, the lands of any owner have a special value by reason of their proximity to any particular highway, surely that owner will suffer special damage in respect of those lands beyond that suffered by the general public if the benefits of that proximity are withdrawn by the highway being obstructed. And if so, the owner of such lands appears to me to fall within the rule under which an action is maintainable, though the right interfered with is a public one.

⁸⁹ *Ibid* at 664-65.

⁹⁰ *Ibid* at 665.

⁹¹ *McCarthy*, *supra* note 80 at 245.

⁹² *Ibid* at 244-45.

It was asked in argument where are the claims to compensation to stop if the rule be so applied? The answer I think is, that in each case the right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitrator that a special value attached to the premises in question by reason of their proximity to, or relative position with, the highway obstructed, and that this special value has been permanently destroyed or abridged by the obstruction.⁹³

Later cases made clear that the *McCarthy* understanding as to special damages could not apply where the diminution in value was so widespread as to demonstrate that the plaintiff's damages were no longer distinctive. As the Supreme Court of Canada noted in *R v MacArthur*, "It was never intended that where the execution of works, authorized by Acts of Parliament, sentimentally affected values in the neighbourhood, all such property owners could have a claim for damages."⁹⁴

As a result of these cases, the rules relating to claims of public nuisance based on the closing and rerouting of highways were relatively clear. In order to succeed the plaintiff had to prove that his or her land had suffered a permanent diminution in value that was consequential on the violation of the plaintiff's right to use the highway affected. The plaintiff could not sue for business losses (such as from diminished sales or loss of custom) because such losses were too remote, being consequential on the violation of the rights of the plaintiff's customers rather than rights vested in the plaintiff him or herself. It is clear that Abbott J had these principles in mind in *Loiselle* and that he also applied them correctly as to liability and quantum:

The learned trial judge found that the construction of the canal and the diversion of the highway had adversely affected respondent's land as a commercial property and there is ample evidence to support that finding. He fixed the damages at \$18,018.32. This amount included a sum of \$5,280.90 for depreciation of respondent's residence on the basis that the garage building and residence were interdependent. Under ordinary circumstances, it would seem unlikely that the construction of the canal and the diversion of the highway would diminish the value of land for residential

⁹³ *Ibid* at 263-64. See also *Caledonian Railway Co v Walker's Trustees* (1882), 7 App Cas 259 (HL) at 303, where Lord Watson explained the principle as follows:

When an access to private property by a public highway is interfered with, the owner can have no action of damages for any personal inconvenience which he may suffer, in common with the rest of the lieges. But should the value of the property, irrespective of any particular uses which may be made of it, be so dependent upon the existence of that access as to be substantially diminished by its obstruction, then I conceive that the owner has, in respect of any works causing such obstruction, a right of action ...

⁹⁴ *Supra* note 77 at 576-77.

purposes. However we do not have to consider that aspect of the matter here, since counsel for appellant made no special point of the house⁹⁵

What should the result in *Antrim* have been if the Court of Appeal had correctly applied the principles in *Loiselle*? In regard to the \$335,000 awarded by the OMB for the diminution in the market value of the plaintiff's land, it seems quite clear that this can be justified as special damage for public nuisance under the analysis given in *McCarthy* and subsequent cases. This loss is recoverable since it flows from the violation of the plaintiff's right to pass and repass over Highway 17 in the exact state it existed prior to the MTO's extensive changes (which for the purposes of an injurious affection claim must be understood to have been made without statutory authority). In regard to the \$58,000 that the OMB awarded as business damages for loss of custom, it is clear on these same principles that these losses are too remote in the sense used by the Court in *Rickett*. These losses flow from the infringement of the customers' right to use the public highway (not from the plaintiff's) and are therefore unrecoverable. Although it is commonly assumed that since the *Expropriation Act* definition expressly now allows for "personal and business damages"⁹⁶ these are recoverable in every claim of injurious affection,⁹⁷ this is not the case. As section 1(b) makes clear the relevant statutory authority or agency is only liable for "such personal and business damages" as "the statutory authority would be liable for if the construction were not under the authority of a statute." Thus, as these damages would not be recoverable in the tort of public nuisance, they cannot be recovered under the statute. It is therefore imperative for courts to be clear which cause of action is being advanced in order to meet the "actionable rule" needed to succeed in a claim of injurious affection. If the tort is public nuisance then no damages should be given for business losses in the form of lost custom (since such losses flow from the violation of another's rights) but if the claim is in private nuisance, business losses may be awarded if they are consequential on the violation of the plaintiff's rights over or in connection with his or her land.⁹⁸

⁹⁵ *Loiselle*, *supra* note 23 at 628.

⁹⁶ Prior to the passage of *The Expropriations Act*, SO 1968-69, c 36, the plaintiff suing for injurious affection had, in addition to the three requirements outlined above in section 2, also to prove that the damage was "an injury to the land itself and not a personal injury or an injury to business or trade;" see *Authographic Register Systems v Canadian National Railway Co*, [1933] Ex CR 152; *Loiselle*, *supra* note 23 at 627.

⁹⁷ John A Coates and Stephen F Waqué, *New Law of Expropriation*, vol 1 (Toronto: Carswell, 2010) at 10-154.24, § 2.3; Michael Williams Senzilet, *Compensation for Injurious Affection Where No Land is Taken* (LL M thesis, University of Ottawa, 1987) [unpublished] at 68.

⁹⁸ See e.g. *Walker*, *supra* note 48 (awarding damages for interference with flower business consequent on a finding of private nuisance); *Chandler*, *supra* note 48

C) *The Balancing Process Inherent In The Law Of Private Nuisance*

Having examined the difficulties that flow from applying an oversimplified test of private nuisance and from failing to correctly distinguish between private and public nuisance, we now turn our attention to perhaps the gravest error in *Antrim*, namely the claim by the Court that the law of private nuisance requires a balancing between the harm suffered by the plaintiff (the substantial interference) and the social utility of the defendant's conduct (the reasonableness of that interference). Such a view is misguided, for five reasons.

The first reason why this view of nuisance is misguided is that, if taken seriously, it would mean that there could almost never be a successful nuisance claim, or a claim in injurious affection built upon nuisance, against a government for an important public works project. As the Newfoundland Court of Appeal stated in *Airport Realty Ltd v Newfoundland (Minister of Works, Services, and Transportation)*:⁹⁹

[T]here is no requirement that substantial interference and reasonableness be balanced, one against the other, to determine which has the greater weight. It would be ludicrous, for example, to argue against the reasonableness of the St. Lawrence Seaway in *Loiselle*, the overpass over the rail line in *Jespersion's Brake & Muffler* or the highway realignment to an expanding airport in a growing city in *Gerry's Food Mart*.¹⁰⁰

The existence and success of so many of these claims, both traditional and modern, against important public works projects (as were each of *Loiselle*, *Jespersion's*, *Gerry's Food Mart* and *Airport Realty*) means that the *Antrim* court's understanding of the law must be wrong.¹⁰¹

A second reason to doubt this aspect of *Antrim* is that it runs counter to the overwhelming academic and judicial consensus that reasonableness is not a separate element in the private nuisance inquiry but rather something that informs and frames the substantial interference

(awarding damages for interference with warehousing business consequent on a finding of private nuisance).

⁹⁹ 2001 NFCA 45, 205 Nfld & PEIR 95 (Nfld CA).

¹⁰⁰ *Ibid* at para 39, citing *Jespersion's Brake & Muffler Ltd v Chilliwack (District)* (1994), 88 BCLR (2d) 230 (CA) [*Jespersion's*] and *Gerry's Food Mart Ltd v St John's (City)* (1992), 104 Nfld & PEIR 294 (Nfld CA) [*Gerry's Food Mart*].

¹⁰¹ See also *Willis v Halifax (Regional Municipality)*, 2010 NSCA 76, 295 NSR (2d) 190 (CA) (damages awarded against municipality for operation of sewage treatment facility); *Sutherland v Canada (Attorney General)*, 2002 BCCA 416, 215 DLR (4th) 1 (BCCA) (Vancouver International Airport found to be a *prima facie* private nuisance).

requirement. As the Supreme Court of Canada noted in *St Lawrence Cement Inc v Barrette*, “nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct.”¹⁰² Similar views are expressed by Pun and Hall,¹⁰³ Nolan,¹⁰⁴ Wright,¹⁰⁵ Bilson,¹⁰⁶ Linden and Feldthusen,¹⁰⁷ and Klar.¹⁰⁸ What is it then that reasonableness adds to substantial interference? It reminds the court of two things: to begin with, that the question of whether the interference is substantial is to be answered from an objective standpoint of the reasonable user;¹⁰⁹ next, that this objective assessment does not take place in a vacuum but rather needs to be done in light of the character of the neighbourhood where the plaintiff has chosen to purchase his or her land.¹¹⁰ As the old phrase goes, “what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey.”¹¹¹ Therefore, while there is no doubt that some sort of balancing is done in private nuisance, this balancing is not between the social utility of the uses (with the most highly valued use trumping the use of the other).¹¹² The balancing is instead done between the competing uses of property owners to ensure that all have some use of their land and that no one owner can unilaterally sterilize or expropriate the uses of another.¹¹³ This is what animates and explains references to “give and take,

¹⁰² 2008 SCC 64 at para 77, [2008] 3 SCR 392 [*St Lawrence Cement*].

¹⁰³ Gregory S Pun and Margaret I Hall, *The Law of Nuisance in Canada* (Markham: LexisNexis, 2010) at 4, 57.

¹⁰⁴ *Supra* note 49 at 460-61.

¹⁰⁵ *Supra* note 53 at 505-506.

¹⁰⁶ *Supra* note 86 at xi, 37 and 44.

¹⁰⁷ Allen M Linden and Bruce Feldthusen, *Canadian Tort Law*, 8th ed (Toronto: LexisNexis Canada, 2006) at 559.

¹⁰⁸ *Supra* note 86 at 725-26.

¹⁰⁹ *Robinson v Kilvert* (1889), 41 Ch Div 88 (CA); *Eastern & South African Telegraph Co v Cape Town Tramways Co*, [1902] AC 381; *Noyes v Huron and Erie Mortgage Corporation*, [1932] OR 426 (HC).

¹¹⁰ Nolan, *supra* note 49 at 470.

¹¹¹ *Sturges v Bridgman* (1879) LR 11 Ch D 852 at 865.

¹¹² Thus Bilson, *supra* note 86 at 32, is wrong to claim that private nuisance is a means by which owners ... can obtain an evaluation or vindication of their proprietary interests in comparison with those of their neighbours. The court in a nuisance case must decide which neighbour's use of the occupied property should be allowed to prevail ...

¹¹³ For similar views, see GHL Fridman *et al*, *The Law of Torts in Canada*, 3rd ed (Toronto: Carswell, 2010) at 169; and Klar, *supra* note 86 at 725.

live and let live”¹¹⁴ that appear in the traditional case law – not concerns of social utility or public benefit.¹¹⁵

A third reason why this view of the law is misguided is that it sits awkwardly alongside other doctrines in the law of nuisance and similar torts. For example, if it is true that substantial interference and reasonableness are to be balanced, why is it that a long line of authority holds that social utility is largely irrelevant when the nuisance is alleged to be physical damage to the land (as opposed to an interference with the use and enjoyment of that land)?¹¹⁶ As the Court held in *Royal Anne Hotel Co v Ashcroft (Village)*:

[W]here the conduct of the defendant has caused actual physical injury to the plaintiffs’ land the mere fact that such conduct may be of great social utility, for example construction and maintenance of a sewer, will not attract greater licence or immunity.¹¹⁷

Given that the right at issue (the right to land) and the cause of action (private nuisance) are the same, and given that many physical interferences with land can be much less bothersome and interfere less with one’s plans than other non-physical interferences, it would seem profoundly odd if there were separate rules for each of these branches of private nuisance.¹¹⁸

¹¹⁴ *Antrim*, *supra* note 3, citing *Tock v St John’s Metropolitan Area Board*, [1989] 2 SCR 1181 at 1191 [*Tock*].

¹¹⁵ See the discussion of public benefit by Baron Bramwell in the classic decision of *Bamford v Turnley* (1862) 3 B & S 66. After discussing the “rule of give and take, live and let live” which he supported (at 84) his Lordship said:

It is for the public benefit that there should be railways; but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site; and accordingly, no one thinks it would be right to take an individual’s land without compensation, to make a railway. It is for the public benefit that trains should run, but not unless they pay their expenses. If one of these expenses is the burning down of a wood of such value that the railway owners would not run the train and burn down the wood if it were their own, neither is it for the public benefit that they should if the wood is not their own.

See also *Drysdale*, *supra* note 48 at 25.

¹¹⁶ See e.g. *Groat*, *supra* note 50; *Portage La Prairie (City) v BC Pea Growers Ltd*, [1966] SCR 150 [*BC Pea Growers*]; *Schenck v Ontario (Minister of Transportation and Communications)*, [1987] 2 SCR 289 [*Schenck*]; *Tock*, *supra* note 114. See also the discussion in *Klar*, *supra* note 86 at 727.

¹¹⁷ (1979), 95 DLR (3d) 756 (BCCA) at para 14.

¹¹⁸ As *Bilson*, *supra* note 86, remarks, the distinction between these two types of private nuisance “has little merit” (at 35) and is in some circumstances “arbitrary” (at 37). The Court in *Antrim*, *supra* note 3, hints at this problem in a footnote (para 107, fn 1) but seems to obliquely suggest that the solution is to allow balancing in all areas of nuisance: “The issue of the extent to which, if at all, balancing is required when the nuisance claim

Another example of ill fit is provided when one compares the reasoning of *Antrim* with the defence of statutory authority. According to a long line of precedent, “[s]tatutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the ‘inevitable result’ or consequence of exercising that authority.”¹¹⁹ This narrowness¹²⁰ is said to be justified by the principle that in

determining whether an authorized activity is to be relieved of ordinary tort liability, the statute authorizing the activity must be given a strict construction. The Legislature is not to be deemed to have taken away the legal remedies of private persons and their right to compensation for injury to their legally recognized interests unless a contrary intention is clearly manifested by the legislation.¹²¹

If the Court in *Antrim* is right, however, the narrow defence of statutory authority and the presumption against expropriating people’s rights can be totally by-passed by simply analyzing reasonableness (shorn of these limitations) in the liability stage of the nuisance inquiry. If *Antrim* truly

being advanced is based on actual damage to the plaintiff’s property is currently before this court and is under reserve” (referring to the appeal of *Smith v Inco Ltd*, 2010 ONSC 3790, 52 CELR (3d) 74 (Ont Sup Ct)). In the end, the Court of Appeal in *Smith v Inco Ltd*, 2011 ONCA 628, 107 OR (3d) 321 (Ont CA) did not find the facts of that case an appropriate vehicle to decide whether social utility should be balanced against the substantialness of the damage to the plaintiff’s property (para 48). The court did note, however, that the distinction between the two types of private nuisance “has been repeatedly applied by the courts in this province” (para 47) and that traditionally property “damage is taken as an unreasonable interference without the balancing of competing factors” (para 45).

¹¹⁹ *Ryan*, *supra* note 19 at para 154, citing *Lord Mayor, Aldermen and Citizens of the City of Manchester v Farnworth*, [1930] AC 171 (HL) at 183; *BC Pea Growers Ltd*, *supra* note 116; and *Schenck*, *supra* note 116.

¹²⁰ For example, in order for something to be found to be the inevitable result of exercising the authority,

[t]he defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

See *Tock*, *supra* note 114 at 1226 (*per* Sopinka J) approved unanimously in *Ryan*, *supra* note 19 at para 55.

¹²¹ *Schenck*, *supra* note 116, cited with approval in *Heyes*, *supra* note 19 at para 80. See also *Pyke v TRI GRO Enterprises Ltd* (2001), 55 OR (3d) 257 (CA) at para 76, 204 DLR (4th) 400 [*Pyke*].

represents the law, then governments are better off proceeding with large public works projects without any statutory authority and arguing reasonableness and public benefit if and when they are sued. The fact that the reasoning deployed in *Antrim* leads to such a radical result indicates that something has gone wrong in the underlying analysis.

The same disquiet is felt if the *Antrim* process of reasoning is transposed to the tort of trespass (which deals with direct interferences with land, rather than with the indirect interferences dealt with by private nuisance).¹²² What would the reaction of a court be if a defendant argued that, although it had extended its factory onto neighbouring land without the owner's permission, this was not a trespass "because doing so would create lots of new jobs, and the land in question was derelict and socially useless"?¹²³ Prior to the catastrophe outlined in the introduction, the defendant surely would have been laughed out of court, and we suspect that a similar reaction would still be produced today.¹²⁴ In fact, as Wright points out, to behave in such a way is still "more likely to lead to a punitive damage award than a finding of reasonableness."¹²⁵ Yet if this is true of trespass (that is, that social utility is irrelevant), why should it not be true of nuisance, given that, as Pun and Hall point out, trespass and nuisance are "conceptual companions" and "necessary counterparts"?¹²⁶

A fourth problem with *Antrim*'s use of reasonableness and social utility is its lack of underlying jurisprudential support. Although almost every modern discussion of nuisance asserts that an examination of social utility is a necessary step in the private nuisance analysis (either under the head of substantial interference or of reasonableness), when one examines the authorities on which this claim is based, it can be seen that these are all either manifestations of other principles or are readily distinguishable. For example, in the recent Supreme Court of Canada decision in *St Lawrence Cement*, the Court stated that whether an activity is a substantial interference is to be "assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and *the utility of the activity* ..."¹²⁷ As authority for this proposition, the Court relied on the Linden and Feldthusen treatise¹²⁸ which in turn relies on two lines of

¹²² For a discussion of this distinction, see Pun and Hall, *supra* note 103 at 11-15; Nolan, *supra* note 49 at 479-82.

¹²³ Nolan, *supra* note 49 at 482.

¹²⁴ For a similar view, see McBride and Bagshaw, *supra* note 52 at 376-77.

¹²⁵ *Supra* note 53 at 502-03.

¹²⁶ *Supra* note 103 at 4.

¹²⁷ *St Lawrence Cement*, *supra* note 102 at para 77 [emphasis added].

¹²⁸ *Supra* note 107 at 569.

authority for support. The first line of cases holds plaintiffs liable in private nuisance for otherwise lawful conduct where such conduct is done “wantonly and maliciously.”¹²⁹ The leading case is *Hollywood Silver Fox Farm Ltd v Emmett*.¹³⁰ In that case, the defendant sent his son to fire a shotgun near a neighbour’s fox-breeding pens in order to spoil the mating season (during which fox vixens are very excitable) and to damage his neighbour’s business. This was done ultimately in order to induce the plaintiff to remove a large sign (which it had previously refused to do) that advertised the fox farm and which the defendant thought threatened his plan to subdivide his land into a housing estate. Although the oversensitivity of the plaintiff’s use would normally have been fatal to its claim, the Court found for the plaintiff. As the judge held, there is no absolute right to create noise, and where such noise is made to “vex and annoy” it may still be found to be a private nuisance and enjoined.¹³¹

While this line of cases is commonly held up as importing concerns of social utility into nuisance law this is not the case. As Wright points out, malicious conduct is prohibited as a matter of law irrespective of its social utility – “[n]o one even thinks of comparing the utility the defendant gains from his or her malicious conduct with the disutility suffered by the plaintiff.”¹³² For example, on the facts of *Hollywood Silver Fox Farm* itself it seems very likely that the plaintiff’s building estate would have promised more public utility than the defendant’s fox-fur pelts. If not social utility, what then is the principle that animates these decisions? It is simply that persons cannot use their rights with the express intention of frustrating others’ use of their rights.¹³³ As Ripstein has pointed out, if one of the functions of a legal system is to delineate the scope of our rights so that they are not necessarily in conflict, a mature legal system would, as a matter of course, prohibit the conduct in *Hollywood Silver Fox Farm* in order to prevent this kind of conflict from systematically arising.¹³⁴

¹²⁹ *Ibid* at 581.

¹³⁰ [1936] 2 KB 468 [*Hollywood Silver Fox Farm*]. See also *Christie v Davey*, [1893] 1 Ch D 316.

¹³¹ *Hollywood Silver Fox Farm*, *ibid* at 475.

¹³² Wright, *supra* note 53 at 503, n 62.

¹³³ For a similar view, see Pun and Hall, *supra* note 103 at 82.

¹³⁴ See Arthur Ripstein, “Motive and Intention in Tort Law” (public lecture delivered at the Faculty of Law, University of Western Ontario, 3 November 2010) [text on file with the authors] where he states:

But the means of interfering with another person’s specific use of his or her own means is not the means that could be available to everyone. Its availability as a means, that is, defendant’s possible use of it as a means to achieve any end whatsoever, depends upon its incompatibility with plaintiff’s capacity to use his or her own means. Its efficacy for any end depends on that incompatibility. It is a means that are of necessity inconsistent with the use of means more generally. All

The second source of authority relied upon by Linden and Feldthusen is *St Pierre*. In that case, the Supreme Court of Canada stated:

All highway construction will cause disruption. Sometimes it will damage property, sometimes it will enhance its value. To fix the Minister with liability for damages to every landowner whose property interest is damaged, by reason only of the construction of a highway on neighbouring lands, would place an intolerable burden on the public purse. Highways are necessary ...¹³⁵

The difficulty with relying on this statement in *St Pierre* is that it is *obiter dicta*.¹³⁶ It was pronounced after the Court had already decided against the plaintiff for the entirely orthodox reason that since the plaintiffs could not prove that they had a right violated their private nuisance claim automatically failed (the only possible right involved, other than the right to their land, was the illusory “right” to a view). If anything, *St Pierre* is authority for the traditional two-step process for nuisance outlined earlier (*viz*, examining the threshold issue of whether or not there is a right, before any examination of substantial interference)¹³⁷ rather than for the two-step process employed by the court in *Antrim*. Even *Mandrake Management Consultants Ltd v Toronto Transit Commission*,¹³⁸ which the Court of Appeal relied upon extensively in *Antrim*, is easily explainable on the orthodox basis that as the plaintiff’s use of its property was objectively extra-sensitive its private nuisance claim was destined to fail.¹³⁹ In addition, it is arguable, once again, that the Court’s whole discussion of private nuisance in *Mandrake Management* is *obiter dicta*, this time on the basis that the Court found as a preliminary matter that the plaintiff had failed to prove that the defendants had actually caused the noise and

of this makes not reference to the content of any end, whether of defendant or of plaintiff. It is not a purpose that is inconsistent with purposiveness as such; it is instead that the use of frustration of another’s use of means as a means is inconsistent with the usability of means as such. Put differently, it is not that you cannot make the frustration of another’s purpose your purpose; chess players and other competitive athletes do that all the time. It is that you cannot use your means in a way that is necessarily inconsistent with others using theirs. You can use them in a way that is possibly or even actually so; but you cannot use them in a way that is necessarily so.

¹³⁵ *St Pierre*, *supra* note 21 at para 13.

¹³⁶ For a similar view, see *Jesperson’s*, *supra* note 100 at paras 30-32. See also Coates and Waqué, *supra* note 97 at 10-154.24, § 2.3.

¹³⁷ See *supra*, section 3 A).

¹³⁸ (1993), 102 DLR (4th) 12 (Ont CA) [*Mandrake Management*].

¹³⁹ *Ibid* at 22, where the Court states: “If noise and vibrations from subway trains are deleterious influences, it may well be that the plaintiffs have no cause of action because 15 Bedford Road is more than ordinarily sensitive to them.”

vibrations that it claimed was the nuisance.¹⁴⁰ Thus, as the leading cases usually said to underpin the courts' reliance on social utility either stand for other principles or are *obiter* statements used to buttress findings arrived at using orthodox analysis (quite apart from social utility), there is no real warrant for Epstein JA's conceptual move in *Antrim*.

A fifth and final reason why the process of reasoning employed in *Antrim* is problematic is that such a process is profoundly undemocratic.¹⁴¹ In taking it upon itself to decide what is in the public interest, the court, as Nolan points out, is making two mistakes:

The first mistake is the failure to appreciate that the appropriate forum for arguments regarding social welfare is not the private law court but the legislature. Only the most diehard libertarian would deny that sometimes private rights must give way to the public interest, but ... the power to make such decisions [is given] to legislators who are democratically accountable for their actions. The second mistake is the erroneous assumption that the judiciary are in a position to assess where the interests of the masses lie, or which outcome will maximise overall welfare.¹⁴²

¹⁴⁰ *Ibid* at 16, where Galligan JA held:

On basic principle, it would seem to me that the plaintiffs had to prove that the defendant did something to cause the onset of their problems. If they failed to do so, in my opinion they failed to satisfy the basic onus of proof which rested upon them. ... While I would be prepared to allow this appeal on the narrow ground that the plaintiffs have not proved their case, in deference to the very substantial submissions which were addressed to the court on other issues I would prefer to address those issues.

¹⁴¹ As is noted by Peter Birks, "Equity in Modern Law: An Exercise in Taxonomy" (1996) 26 West Aust L Rev 3 at 97, such open resort to social policy is a violation of the "democratic bargain":

The terms of that bargain are, on the part of the demos, that some of its power shall be ceded to unrepresentative experts whose expertise consists in the interpretation of the law, and on the part of those experts that they will not usurp the functions of the representative legislature. The difficulty in drawing the line is great, but not so great as to render the bargain void for uncertainty.

He continues at 98:

The legitimacy of expert law-making in a sophisticated democracy depends on the truth of the assertion that the interpreters are and must be both masters and servants of a complex system of reasoning. Why are they not elected? The answer must be that they are doing something different from the legislator and something that cannot be done by just anybody on the Clapham bus. They are restrained in their creativity by the system of reasoning which they serve, and they are qualified for the work which they do, not as chosen representatives but by hard-won mastery of the specialized rationality.

¹⁴² Nolan, *supra* note 49 at 487.

Might modern judges want to arrogate to themselves this ability to trump private rights because they fear that the zealous pursuit and protection of these rights might frustrate public works projects that are necessary for the overall good of society?¹⁴³ The *obiter dicta* from *St Pierre* quoted above are, we think, evidence of this fear. With respect, however, the courts need to remember that nothing that they say or do in a private law case can ever stop a public works project. The legislature has almost unlimited powers within its constitutional heads of power to make sure that a project can go ahead (if it truly is in the public interest). The legislature can expropriate property and pay compensation. It can expropriate property without compensation if such compensation would place “an intolerable burden on the public purse.”¹⁴⁴ The legislature can also give people statutory immunity for the creation of nuisances¹⁴⁵ or statutorily authorize an activity. Moreover, if the courts misinterpret this grant of statutory authority, the legislature can intervene to retroactively deem the public work in question to have been constructed, maintained and operated under such authority.¹⁴⁶ Similarly, if claims of injurious affection become too burdensome to the public purse or overwhelming in number, the rules regarding these claims can be changed (as they have in the past) since injurious affection actions are entirely the creature of statute.

In our view, the attitude of pre-catastrophe judges to the division of powers between private law courts and legislatures is to be preferred.¹⁴⁷ As Stewart J put it in *Stephens v Village of Richmond Hill*:

It is quite natural and proper that [government officials] ... should insist upon the importance of the welfare of the people at large, but I conceive that it is not for the judiciary to permit the doctrine of utilitarianism to be used as a make-weight in the scales of justice. In civil matters, the function of the Court is to determine rights between parties. It investigates facts by hearing “evidence” (as tested by long-settled rules) and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal... .

¹⁴³ The view of pre-catastrophe courts was, however, decidedly different: see *KVP Co v McKie*, [1949] SCR 698 at 701: “The rights of riparian owners have always been zealously guarded by the Court.”

¹⁴⁴ *St Pierre*, *supra* note 21 at para 13.

¹⁴⁵ See e.g. *Farming and Food Production Protection Act, 1998*, SO 1998, c 1, s 2(1) which states that a “farmer is not liable in nuisance to any person for a disturbance resulting from an agricultural operation carried on as a normal farm practice” (considered judicially in *Pyke*, *supra* note 121).

¹⁴⁶ See e.g. *The Public Health Amendment Act*, SO 1956, c 71, s 6(3) passed in response to *Stephens v Village of Richmond Hill*, [1956] 1 DLR (2d) 569 (Ont CA).

¹⁴⁷ For a similar view, see Fridman, *supra* note 113 at 178.

It is the duty of the State (and of statesmen) to seek the greatest good for the greatest number. To this end, all civilized nations have entrusted much individual independence to their Governments. But be it ever remembered that no one is above the law. Neither those who govern our affairs, their appointed advisers, nor those retained to build great works for society's benefit, may act so as to abrogate the slightest right of the individual, save within the law. It is for Government to protect the general by wise and benevolent enactment. It is for me, or so I think, to interpret the law, determine the rights of the individual and to invoke the remedy required for their enforcement.¹⁴⁸

4. Conclusion

In conclusion, the Court of Appeal's decision in *Antrim* erred in at least three ways. First, the Court applied the wrong two-step test for private nuisance. Instead of starting its analysis with the concepts of substantial interference and reasonableness, the Court should first have examined if the plaintiff had a right to the amenity the absence of which the plaintiff claims was the nuisance. If, and only if, this question was answered in the affirmative should the Court have proceeded to the question of whether the interference was objectively substantial in light of the community standard and hence a private nuisance. Second, the Court failed to distinguish the private law right of access (which arises *ex jure naturae*) and which is protected in the tort of private nuisance, from the right to pass and repass over the highway which is protected by the tort of public nuisance (provided that the plaintiff suffers special damage). Third, the Court decided that the MTO's "reasonable" decision in creating a new highway outweighed the plaintiff's otherwise valid claim for damages on the basis that balancing social utility and harm are an integral part of the law of private nuisance. Had the Court properly focused on the rights (the *injuria*) involved rather than the losses sustained by either the plaintiff or the public purse (the *damnum*), it would have come to the conclusion that the plaintiff could maintain an injurious affection action in the amount of \$335,000. This result flows from the fact that the actions of the MTO would have, but for the relevant statutory authority, constituted a tort actionable under the common law. This tort was *not* the tort of private nuisance, as all levels of decision makers had assumed, but rather the tort of public nuisance – a tort for which the plaintiff could have sued because it had suffered the requisite special damage. The fact that the Court of Appeal could not reach this relatively simple conclusion (even when the relevant authority was cited to it) is evidence of the catastrophe that has befallen our tort law. As this comment has attempted to show, the only way forward (at least in the

¹⁴⁸ *Stephens v Village of Richmond Hill*, [1955] 4 DLR 572 at 578-79 (Ont HC). See also *Groat*, *supra* note 50 at 534: "public works must not be so executed as to interfere with private rights of individuals."

immediate future) is to return (metaphorically) to past decisions of high authority where the “rights-based view of tort law would have seemed commonplace.”¹⁴⁹ As Wilson J correctly stated in *Tock v St John’s Metropolitan Area Authority*:

The early principles, it seems to me, are rooted in common sense and logic. There is no need to throw the baby out with the bath water. Let us rather return the law to where it once was.¹⁵⁰

We wholeheartedly agree.

¹⁴⁹ McBride, *supra* note 1 at 335.

¹⁵⁰ *Tock*, *supra* note 114 at para 85.

