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Public Nuisances

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of his land. The defendant may be carrying on his business in such a way as to emit dust, soot, noise, odors, etc.

However, the law of nuisance has been applied in situations which are entirely different from the traditional use. It may be applied where a defendant has committed a fraud on a plaintiff or has used an unfair business practice. For example, in the Illinois case of *Edelman Brothers, Inc. v. Baikoff*,[59] the court did not hesitate to apply nuisance law to a commercial fraud. There the plaintiffs were merchants in a Chicago neighborhood who sought to enjoin the defendants from interfering with their business. The defendants had been standing in front of the plaintiff's stores soliciting prospective customers away. The court granted an injunction and said that ". . . . where the injury resulting from the nuisance is, in its nature, irreparable as . . . loss of trade . . . equity will interfere by injunction. . . ."[60] The court further said: ". . . . [W]e are of the opinion that the bill states such facts as prima facie warrants relief by injunction against a private nuisance being committed by defendants to the injury of complainants in their trade or business."[61]

In most of the cases where nuisance law has been applied to commercial uses, the courts have discussed a public nuisance theory and not private nuisance.[62] It would seem, however, that a private individual could bring suit on behalf of others if he suffered special damages due to the commercial nuisance.

The law of private nuisance may also be expanded to cases of consumer fraud and thereby take on not only an expanded but beneficial use.

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PUBLIC NUISANCES

The term nuisance is applied to wrongs which arise when a person uses his property unreasonably or unlawfully and his conduct annoys, inconveniences or injures others.[1] Conduct that constitutes an actionable nuisance may be defined by statute,[2] or may depend on the facts of each case and not be capable of definition.[3] Nuisances are classified as either public or private. A public nuisance affects the public generally;[4] a private nui-

59 277 Ill. App. 432 (1st Dist. 1934).
60 *Id.* at 441.
61 *Ibid.*
62 See *Commercial Nuisance: A Theory of Consumer Protection*, 33 U. Chi. L. Rev. 590 (1966).

1 Gardner v. International Shoe Co., 319 Ill. App. 416, 49 N.E.2d 328 (4th Dist. 1943), *aff'd*, 386 Ill. 418, 54 N.E.2d 482 (1944).
2 See generally, Ill. Rev. Stat. ch. 100½, § 26 *et seq.* (1965).
3 Patterson v. Peabody Coal Co., 3 Ill. App. 2d 311, 122 N.E.2d 48 (4th Dist. 1955).
4 Kuhn v. Illinois Cent. Ry., 111 Ill. App. 323 (3d Dist. 1903).

sance interferes with the enjoyment by an individual or a determinate number of individuals of some right not common to the public.[5]

As a rule, only the state can secure relief from a public nuisance.[6] But if an individual suffers special damage different in kind from that suffered by the general public,[7] then the nuisance may be classified as both a public and private nuisance and the individual may be entitled to relief in his own right.

Public Nuisances Per Se

Public nuisances may be clasified as nuisances per se and nuisances in fact. Nuisances per se are those activities which are inherently nuisances under any circumstances, and nuisances in fact are those activities which, although not inherently nuisances, become so due to the manner in which they are carried out.[8]

In Illinois the General Assembly has enacted an enabling statute permitting municipal corporations to define a number of activities as public nuisances.[9] Municipal corporations may declare that it is a public nuisance:

1. To cause or suffer the carcass of any animal or any offal, filth or noisome substance to be collected, deposited or remain in any place, to the prejudice of others.
2. To throw or deposit any offal or other offensive matter, or the carcass of any dead animal, in any watercourse, lake, pond, spring, well or common sewer, street or public highway.
3. To corrupt or render unwholesome or impure the water of any spring, river, stream, pond or lake, to the injury or prejudice of others.
4. To obstruct or impede, without legal authority, the passage of any navigable river or waters.
5. To obstruct or encroach upon public highways, private ways, streets, alleys, commons, landing places, and ways to burying places.

. . . .

8. To erect, continue or use any building or other place for the exercise of any trade, employment or manufacture, which, by occasioning noxious exhalations, offensive smells or otherwise, is offensive or dangerous to the health of individuals, or of the public.
9. To advertise wares or occupation by painting notices of the same on, or affixing them to fences or other private property, or

5 Edelman Bros. v. Baikoff, 277 Ill. App. 432 (1st Dist. 1934).

6 Swain & Son v. Chicago, B. & Q. Ry., 160 Ill. App. 533 (2d Dist. 1911), *aff'd*, 252 Ill. 622, 97 N.E. 153 (1936).

7 Klumpp v. Rhoads, 362 Ill. 412, 200 N.E. 153 (1936).

8 City of Pana v. Central Washed Coal Co., 260 Ill. 111, 102 N.E. 992 (1913).

9 Wabash Ry. v. Sanders, 47 Ill. App. 436 (3d Dist. 1893).

> on rocks or other natural objects, without the consent of the owner, or if it is on the highway or other public place, without the permission of the proper authorities: Provided that nothing in this section shall be construed to prevent the municipal authorities of any town, city or village from declaring what shall be nuisances, and abating them within their limits.[10]

In addition to the quoted activities, the statute provides that buildings used for the manufacture or storage of high explosives or wells for the production of gas and oil are nuisances under certain conditions.[11]

Typically, while Illinois cities have adopted the provisions of Ill. Rev. Stat. ch.100½, § 26 (1965), some also have adopted the common law of Illinois. For example, the Municipal Code of the City of Chicago include the following provisions:

> In all cases where no provision is herein made defining what are nuisances and how the same may be removed, abated or prevented, in addition to what is declared such herein, the offenses which are known to the common law of Illinois as nuisances may, in case the same exist within the city limits or within one mile thereof, be treated as such, and proceeded against as is provided in this code, or in accordance with any other provision of law.[12]

Another problem now doubly covered by statute is garbage dumps. It is a misdemeanor to dump garbage within a city, village or incorporated town or closer than a mile from its corporate limits, except by authority of the city.[13] Furthermore, an Illinois court has held that a garbage dump may also be a public nuisance and abated as such.[14]

In addition, buildings used for certain unlawful purposes are public nuisances by statute. These purposes are:

1. Lewdness, assignation or prostitution.[15]
2. Unlawful use, sale or storage of narcotic drugs.[16]
3. Murder,[17] kidnaping[18] or abortion.[19]
4. Storing explosives[20] or selling or manufacturing certain weapons.[21]

10 Ill. Rev. Stat. ch. 100½, § 26 (1965).
11 Ill. Rev. Stat. ch. 100½, § 26 (6, 7, 10, 11, 12 and 13) (1965).
12 Municipal Code of the City of Chicago ch. 99, § 3 (1965).
13 Ill. Rev. Stat. ch. 100½, § 27 (1957). See Ill. Rev. Stat. ch. 100½, § 28 (1957). Dumping garbage on the property of another without the owner's permission is a public nuisance.
14 City of Chicago v. Fritz., 36 Ill. App. 2d 457, 184 N.E.2d 713 (1st Dist. 1962).
15 Ill. Rev. Stat. ch. 100½, § 1 (1915). Buildings used for prostitution and related offenses are also declared public nuisances by Ill. Rev. Stat. ch. 38, §§ 11-14, 15, 16 (1961).
16 Ill. Rev. Stat. ch. 100½, § 15 (1957).
17 Ill. Rev. Stat. ch. 38, § 9-1 (1961).
18 Ill. Rev. Stat. ch. 38, § 10-2 (1961).
19 Ill. Rev. Stat. ch. 38, § 23-1 (1961).
20 Ill. Rev. Stat. ch. 38, § 20-2 (1961).
21 Ill. Rev. Stat. ch. 38, § 24-3 (1961).

5. A "gambling place," defined as "any real estate, vehicle, boat or any other property whatsoever used for purposes of gambling."[22]

6. Selling alcoholic liquor in violation of any provision of the Illinois Liquor Control Act.[23]

7. Violation of civil rights[24] if the place is one of public accommodation or amusement.[25]

The practice of certain occupations and professions without a license or certificate is also a public nuisance. The statute regulating the practice of medicine is one example.[26] Other statutes cover the unauthorized practice of barbering,[27] chiropractory,[28] dentistry,[29] embalming,[30] funeral directory,[31] optometry,[32] plumbing,[33] and public accounting.[34]

When a lawful business is operated in violation of regulatory statutes, it may become a public nuisance. This category includes blood banks,[35] swimming pools,[36] buildings near airports,[37] diseased bees[38] and the discharge of pollutants into the atmosphere.[39]

This list does not include all possible per se public nuisances. Even though certain conduct may not be specifically defined by statute to be a nuisance, it may be held to be a public nuisance in fact and abated as such.[40]

Public Nuisances in Fact

Public nuisances in fact, as distinguished from public nuisances per se, are those activities which become nuisances because of the circumstances under which they occur, and which might not be nuisances at all under other circumstances.[41] Most cases involving public nuisances in fact result

22 Ill. Rev. Stat. ch. 38, § 28-3 (1961).
23 Ill. Rev. Stat. ch. 43, § 178 (1934).
24 As defined in Ill. Rev. Stat. ch. 38, § 13-2 (1961).
25 Ill. Rev. Stat. ch. 38, § 13-3 (1961).
26 Ill. Rev. Stat. ch. 91, § 16u.1. (1961).
27 Ill. Rev. Stat. ch. 16¾, § 14.92 (1965).
28 Ill. Rev. Stat. ch. 91, § 16u.1. (1959).
29 Ill. Rev. Stat. ch. 91, § 71a. (1965).
30 Ill. Rev. Stat. ch. 111½, § 73.24c. (1951).
31 *Ibid.*
32 Ill. Rev. Stat. ch. 91, § 105.24 (1951).
33 Ill. Rev. Stat. ch. 111½, § 116.63 (1953).
34 Ill. Rev. Stat. ch. 110½, § 53 (1957).
35 Ill. Rev. Stat. ch. 111½, § 610-101 (1965).
36 Ill. Rev. Stat. ch. 111½, § 94 (1931).
37 Ill. Rev. Stat. ch. 15½, § 48.11 (1945).
38 Ill. Rev. Stat. ch. 8, § 124 (1965).
39 Ill. Rev. Stat. ch. 111½, § 240.3 (1963). See Illinois Air Pollution Control Act, Ill. Rev. Stat. ch. 111½, § 240.2 *et seq.* (1963), for definitions of air pollution and air contaminants.
40 Hall v. Putney, 291 Ill. App. 508, 10 N.E.2d 204 (2d Dist. 1937).
41 City of Pana v. Central Washed Coal Co., 260 Ill. 111, 102 N.E.2d 992 (1913).

when a person uses his property in a manner which, although otherwise legal, is inconsistant with the rights of others in the community.

This test is illustrated by *Swift v. People ex rel. Powers*[42] in which the plaintiff sought by mandamus to force the Mayor of the City of Chicago to issue a liquor license. The court held that although a saloon was a lawful business, it was a public nuisance in a residential neighborhood and denial of the license was justified.

Applying the same test, the court in *Village of Plymouth v. McWherter*[43] found that the breeding of animals was lawful but became a public nuisance when conducted within the public view and hearing.

Although a private nuisance case, *Gardner v. International Shoe Co.*[44] has been extensively cited by courts in deciding public nuisance cases. An analysis of public nuisances in fact would, therefore, be incomplete without an examination of this case. The defendant, which operated a tannery, maintained an open sewerage pond, built at the direction of the Sanitary Board of Illinois, into which it emptied waste and chemicals from its tannery and waste from its toilets. These materials were allowed to settle and the liquid therefrom allowed to flow into the Mississippi River. The plaintiffs, who lived near the tannery claimed that the odors from the pond were "unclean and irritating". Holding for the defendant, the court said:

> . . . there was no proof of injury to the health of any of the plaintiffs, or that the plant or pool . . . were improperly operated . . . . In addition the defendant . . . established . . . the commercial character of the neighborhood, which was clearly relevant in determining the plaintiff's right to recover.[45]

The court, in the *Gardner* case, noted two situations in which public nuisances in fact are commonly held to exist in Illinois cases: (1) if the defendant has failed to act carefully and prudently and failed to utilize all available devices and techniques to minimize the discomfort and injury to others; and (2) if the defendant has in fact caused damage to health or property. As a result, if a person uses his land in a manner inconsistent with the nature of the neighborhood in which it is located, the court may find that a public nuisance exists.[46] This factor taken by itself, however, is generally insufficient to support a finding of a nuisance in fact.[47]

In *City of Chicago v. Fritz*,[48] the court found that the defendant used

42 63 Ill. App. 453 (1st Dist. 1896).

43 152 Ill. App. 114 (3d Dist. 1909).

44 319 Ill. App. 416, 49 N.E.2d 328 (4th Dist. 1943), *aff'd*, 386 Ill. 418, 54 N.E.2d 482 (1944).

45 386 Ill. at 432-33, 54 N.E.2d at 488.

46 Phelps v. Winch, 309 Ill. 148, 140 N.E. 847 (1923) (dance pavilion); Harrison v. People, 101 Ill. App. 224 (1st Dist. 1902) (bowling alley).

47 Village of Villa Park v. Wanderer's Rest Cemetery Co., 316 Ill. 226, 147 N.E. 104 (1925) (cemetery).

48 36 Ill. App. 2d 457, 182 N.E.2d 713 (1st Dist. 1962).

his property carelessly and improperly. The defendant operated a garbage dump that was constantly afire. Smoke, odors and ashes blew into adjacent residential areas and across nearby roads. The court found the dump to be an actual danger to the health of persons living nearby and a menace to traffic. The defendant's dump was full, reeking and hazardous as contrasted to the carefully designed and operated settling pond in the *Gardner* case.

In *Patterson v. Peabody Coal Co.*,[49] the defendant operated coal driers which occasionally caught fire by spontaneous combustion. Fumes and odors from the fires invaded neighboring properties. The court held that the defendant's coal driers were not a public nuisance and said:

> . . . the evidence showed that the defendant did all in its power to prevent . . . and extinguish the fire when it started . . . . The plaintiff failed to prove any lack of care on behalf of the defendant in its occurrence. Therefore, this type of invasion is controlled by the *Gardner* case.[50]

A similar conclusion was reached in *Ward v. Illiopolis Food Lockers Inc.*[51] The defendant operated a slaughterhouse, food lockers and a meat market within the corporate limits of the Village of Illiopolis. Because the owner used all available means to prevent noise and odors, in addition to complying with all sanitary and regulatory requirements of the state, the court held the manner in which the corporation used its property did not constitute a public nuisance.

In deciding the *Ward* case, the court also discussed the second basis for finding the existence of a public nuisance: actual danger to health or property. It found that the plaintiff had failed to prove the existence of such a danger and implied that if he had, it might have found a nuisance to exist even if all applicable laws and regulations had been complied with.

In *City of Chicago v. Spaulding*,[52] the court reached a contrary result. The defendant operated an animal feed producing plant near a residential area. Odors from the plant nauseated nearby residents to the point that they could not eat. The defendant contended that the neighborhood was largely industrial and therefore industrial odors should not be considered a public nuisance. In holding that a public nuisance existed, the court said that if conditions detrimental to public health are created, the nature of the neighborhood is irrelevant.

Damage to property may also sustain the allegation that a public nuisance exists. In *Wiley v. Elwood*,[53] a railroad maintained a coal shed on

[49] 3 Ill. App. 2d 311, 122 N.E.2d 48 (4th Dist. 1954).
[50] *Id.* at 317, 122 N.E.2d at 52.
[51] 9 Ill. App. 2d 129, 132 N.E.2d 591 (3d Dist. 1956).
[52] 15 Ill. App. 2d 407, 146 N.E.2d 401 (1st Dist. 1957).
[53] 134 Ill. 281, 25 N.E. 570 (1890).

its right-of-way in a thickly populated part of the city of Joliet. The inhabitants of houses nearby sustained damage to their furniture and other household goods from coal dust produced by the operation of the shed. In granting the relief demanded by the plaintiffs, the court said that property damage alone could support the action.

The reader should note that both the *Ward* and *Wiley* cases were not true public nuisance cases since neither was brought in the name of the public. In the *Ward* case, the plaintiff alleged that the defendant's slaughterhouse was a public nuisance but failed to allege or prove any special damage which would give them a right to relief in their own right. The court stated that had a public nuisance been found to exist, they would still have been required to dismiss the action because of the plaintiffs' failure to bring it in the name of the public.

In the *Wiley* case, the plaintiffs claimed that the defendant's coal shed was a public nuisance, but further alleged that they sustained special damages. Under these circumstances, they had a right to relief without being required to bring the action in the name of the public.

Most recent public nuisance cases have referred to statutes. For example, in both the *Fritz* and *Spaulding* cases, the court pointed out that the conduct complained of constituted both a public nuisance in fact as well as a violation of statute (a public nuisance per se).

Private Person's Right to Relief

The general rule is that a private citizen cannot maintain an action to restrain a public nuisance. However, if an individual has been particularly and uniquely damaged in a way which is different from the injury to the public at large, he may be able to maintain an action in his own right.[54] The "special damages" must be different in kind, not merely in degree. The difference has been explained as follows:

> If a trench be dug across a public street, every person in the community who has occasion to use the street will be delayed and inconvenienced. The loss of time in going around such obstruction would be common to everyone. One person might be delayed only a few seconds, while another, traveling by a different mode of conveyance, might be delayed much longer, and the nature of the business being done might be such that in one case the damage would be nominal while in the other it might be considerable, but in all these cases the damages would differ only in degree and not in kind; but if another person, attempting to use the highway in the exercise of reasonable care, falls into the trench and receives personal injury, or if his horse should fall into the ditch and re-

54 Swain & Son v. Chicago, B. & Q. R.R., 252 Ill. 622, 97 N.E. 247 (1912). The state, however, would not be required to prove an injury to enjoin a nuisance. Stead v. Fortner, 255 Ill. 468, 99 N.E. 680 (1912).

ceive an injury, clearly an action would lie for special damage to his person or property.[55]

In *Swain & Son v. Chicago, B. & Q. Ry.*,[56] the defendant built a bridge over the Illinois River at a height too low for plaintiff's steamboats to pass under it. The court, holding for defendant, said the injury alleged by the plaintiff—being unable to freely navigate the river—differed only in degree from that suffered by the general public, all of whom suffered under the same hardship.

On the other hand, in *Joos v. Illinois National Guard*,[57] the court held that the plaintiff, a private citizen, had proved sufficient special damage to maintain an action in his own right. The National Guard had a rifle range adjacent to the plaintiff's farm. The bullets were a danger to all landowners in the vicinity. But, because the plaintiff occupied the property directly behind the rifle range, he was unable to get people to work on his farm because they were afraid they might be hit by stray bullets. This was held to be "special damage" sufficient to permit him to bring a private action for abatement of a public nuisance.

Additional illustrations of "special damage" can be found where the plaintiff's property suffers physical damage or a substantial decrease in value. In *Wiley v. Elwood*,[58] the court said that the fact that coal sheds, as maintained and used, constituted a public nuisance did not prevent a private person living nearby from maintaining an action against their owners to recover damages for injuries suffered when coal dust fell on his furniture, food and clothing.

In *Carstens v. Wood River*,[59] the plaintiff owned property suitable only for residential use directly opposite a city park. The court held that although the proposed use of the park as a recreation center, including a swimming pool, bathhouse and refreshment pavilion, might constitute a public nuisance, the plaintiff's proof that it would greatly depreciate the value of his property and render it unsuitable for residential use, on account of noise lasting late into the night, was sufficient "special damage" for him to maintain a bill to enjoin the proposed use of the park.

These decisions illustrate the circumstances under which Illinois courts have held that private persons may maintain actions to abate public nuisances. The essential prerequisite is that the plaintiff prove an injury to some private right which he does not share with the public in general. If he can do so, then he has alleged sufficient standing to maintain an action in his own name, although his injury is caused by a public nuisance.

55 Swain & Son v. Chicago, B. & Q. R.R., *supra* note 54, at 627, 97 N.E. at 248-9.
56 *Ibid.*
57 257 Ill. 138, 100 N.E. 505 (1913).
58 134 Ill. 281, 25 N.E. 570 (1890).
59 332 Ill. 400, 163 N.E. 816 (1928).

In addition to situations in which a plaintiff can allege and prove special damages (such as those described above), a private person has a statutory right to maintain an action to abate certain public nuisances.[60] In these cases he is not required to prove special damages. The statute provides that:

> A private person may after 30 days and within 90 days of giving the Attorney General and State's Attorney of the county of nuisance written notice by certified or registered mail of the fact that a public nuisance as described in Section 37-1 of this Act, commence an action pursuant to Section 37-4 of this Act, provided the Attorney General or State's Attorney of the county of nuisance has not already commenced said action.[61]

If a plaintiff can show neither special damages nor a statutory right to relief, he does not have a cause of action to abate a public nuisance. Relief will depend upon public action as it is explained in the following section.

Public Right to Relief

To this point, stress has been primarily placed on the private individual's right to relief. But public nuisances are wrongs against the entire community. Therefore, the use of this remedy by public authorities requires discussion.

Whenever a public nuisance is found to exist, the state has a right to relief without the necessity of proving special damages.[62] A public nuisance by definition causes injury to the public. When a public nuisance is found to exist, injury to the general public is presumed to exist. Actions to abate public nuisances are usually brought by the attorney general or a state's attorney in the name of the public.

The nuisance approach, however, is not always an effective remedy. The reader will recall the *Gardner* case, in which the plaintiffs alleged that the defendant's tannery settling pond was a nuisance, and the *Ward* case, in which the plaintiffs claimed that a slaughterhouse within the city limits was a nuisance. Although both *Gardner* and *Ward* were actions brought by private individuals, an action brought by a public authority would have

60 Ill. Rev. Stat. ch. 38, § 37-1 (1965). The following offenses from Ill. Rev. Stat. ch. 38 (1961), are included: murder § 9-1, kidnaping § 10-2, aggravated kidnaping § 10-2, prostitution § 11-14, soliciting for a prostitute § 11-15, pandering § 11-16, keeping a place of prostitution § 11-15, theft § 16-1, possession of explosives § 20-2, abortion § 23-1, sale or manufacture of certain weapons §§ 24-1(a)(1), (7), unlawful sale of firearms § 24-3, gambling § 28-1, keeping a gambling place § 28-3, and concealing or aiding a fugitive § 31-5. Also note that pursuant to the Illinois Uniform Narcotic Drug Act, any place resorted to for the purpose of unlawfully selling, serving, storing, giving away or using narcotic drugs may be enjoined as a nuisance by any citizen of the county in which such conduct takes place. Ill. Rev. Stat. ch. 100½; § 16 (1957).

61 Ill. Rev. Stat. ch. 38, § 37-5 (1965).

62 Swain & Son v. Chicago, B. & Q. R.R., 160 Ill. App. 533 (2d Dist. 1911), *aff'd*, 252 Ill. 622, 97 N.E.2d 247 (1912).

been equally unsuccessful in showing that a nuisance existed in either case. The conduct complained of fell within a "grey" area. It was not quite a nuisance but it did cause considerable discomfort and annoyance to the plaintiffs. Public authorities can often more effectively prevent uses of this nature through comprehensive zoning ordinances than by bringing nuisance actions. Tannery settling ponds, slaughterhouses and similar uses can be prohibited in areas where they would cause discomfort to nearby residents.

On the other hand, the *Fritz* case, in which the defendant operated a garbage dump, demonstrates the effectiveness of the nuisance remedy as opposed to zoning. The dump was located *outside* the corporate limits of the city. Its existence could not be eliminated by zoning, but Illinois Revised Statutes ch. 100½, § 27 (1957), authorizes municipal authorities to abate such dumps within one mile of corporate boundaries. The nuisance approach proved most successful under the circumstances.

In control of land use and other areas of regulation, the public nuisance approach may appear cumbersome and obsolete when compared to comprehensive zoning and regulatory licensing. However, public authorities should recognize those situations where the nuisance approach may be the only available remedy.

PAUL KOMADA

REMEDIES AND DEFENSES

Having discussed the nature of public and private nuisances, it is appropriate now to examine the remedies available for both types of nuisance, and the defenses thereto. The presentation of this subject matter will be divided into remedies against a private nuisance, remedies against a public nuisance, and defenses to both classifications. It must be kept in mind, however, that it is difficult to give a case-by-case factual presentation in the above manner because in most instances the determination of whether an alleged nuisance is private or public is not made until the remedy has already been selected and the case is at trial.

PRIVATE NUISANCES

Action at law for damages. As defined in an earlier section of this symposium, to constitute a private nuisance to an individual landowner, the interference with the use of his land caused by the neighbor's use of his land must result in injury which differs in kind and not merely in degree from that suffered by the public at large. If this is the case, then the person suffering the injury can maintain an action at law for the damages suffered. Thus, the remedy available, to a large extent, is dependant upon the nature of the damage suffered by the aggrieved party.