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Private Nuisances

Carolyn Krause

NOTES AND COMMENTS

SYMPOSIUM: THE LAW OF NUISANCES IN ILLINOIS

PRIVATE NUISANCES

This section of the three-part symposium will present a discussion of the law of private nuisances in Illinois. There will be a definition of the term, pointing out the confusion which is involved with the use of the word "nuisance." From there will follow a discussion of the historical development of private nuisances in this state and of the recent Illinois cases in the area of private nuisances. A discussion of the effect which zoning regulations have on common law private nuisances will be denoted. The conclusion will delve into possible new areas where the common law of private nuisance may expand.

PRIVATE NUISANCE DEFINED

The Restatement of the Law of Torts,[1] in its introduction to the law of private nuisances, states that the term "nuisance" is used in several senses. While it should be avoided even in a discussion directed to the legal profession, nevertheless, the term is constantly used by the courts, though it seems to be incapable of being precisely defined.

The term nuisance is often used by the courts as a catch-word without further consideration of the actual tort involved. Part of the reason for the uncertainty prevalent with respect to the meaning of the word stems from the fact that, rather than delineating a type of tortious conduct, nuisance is a field of tort liability. The emphasis is not on any particular kind of conduct, but on the interests invaded.

A broad definition was used in the case of *Hall v. Putney*,[2] wherein the court stated: "The term 'nuisance' extends to everything that endangers life or health, gives offense to the senses, violates the law of decency, or obstructs the reasonable and comfortable use of property."[3] A more precise definition, confined to a private nuisance, was given in a recent case:[4] ". . . . A private nuisance is an individual wrong arising from an unreasonable, unwarrantable or unlawful use of one's property producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage."[5]

The definition of private nuisance includes a classification of nuisances.

1 Restatement, Torts ch. 40, Introduction (1939).
2 291 Ill. App. 508, 10 N.E.2d 204 (2d Dist. 1937).
3 *Id.* at 511, 10 N.E.2d at 207.
4 Merriam v. McConnell, 31 Ill. App. 2d 241, 175 N.E.2d 293 (1st Dist. 1961).
5 *Id.* at 245, 175 N.E.2d at 295.

In the early case of *Laugel v. City of Bushnell*,[6] the court so indicated this in the following language:

> Nuisances may thus be classified: First, those which in their nature are nuisances per se or are so denounced by the common law or by statute; second, those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, managed, etc.; third, those which in their nature may be nuisances but as to which there may be honest differences of opinion in important minds.[7]

This classification results in a distinction between nuisances per se and nuisances in fact. A nuisance per se is an illegal act regardless of where it takes place.[8] In the case of a nuisance in fact, it is necessary to look at the area in which it takes place[9] or the manner in which it is carried out.

Not only is a distinction drawn by the courts between nuisance per se and nuisance in fact, some courts discuss whether a private nuisance is based on strict liability, negligence or intent.

In *Laflin-Rand Powder Co. v. Tearney*,[10] the defendant was held liable for a private nuisance on the basis of strict liability. The plaintiff had sought damages for an injury to his dwelling house, resulting from an explosion of a powder magazine located upon the defendant's land. Lightning had struck the magazine. The Illinois Supreme Court affirmed the lower court's judgment for the plaintiff, and said that the powder magazine,

> . . . . was so situated with reference to the dwelling house of the plaintiff, that it was liable to inflict serious injury upon her person or her property in case of an explosion. It was a private nuisance and, therefore, the defendant was liable whether the powder was carefully kept or not.[11]

Negligence may be the basis of a private nuisance action. In *Illinois Cent. Ry. v. Grabill*,[12] the defendant erected cattle pens next to the plaintiff's land. The court stated that the defendant was negligent since it did not control the noise and dust which interfered with the plaintiff's enjoyment of his land. Similarly, another court[13] has said: ". . . . [P]laintiffs have

6 197 Ill. 20, 63 N.E. 1086 (1902).

7 *Id.* at 26, 63 N.E. at 1088.

8 People *ex rel.* Dyer v. Clark, 268 Ill. 156, 108 N.E. 994 (1915) (a disorderly house).

9 In *Bieretz v. Village of Montgomery*, 67 Ill. App. 2d 403, 214 N.E.2d 149 (2d Dist. 1966), the plaintiffs brought a declaratory judgment action challenging the validity of a zoning ordinance permitting funeral homes as permitted uses. The court held that a funeral home was not a nuisance per se since it was a legitimate business, but that a funeral home could be a nuisance in fact under particular circumstances. The court held that the ordinance was a reasonable exercise of the police powers and therefore valid.

10 30 Ill. App. 321 (1st Dist. 1890), *aff'd*, 131 Ill. 322, 23 N.E. 389 (1890).

11 131 Ill. 322, 325, 23 N.E. 389, 390 (1890).

12 50 Ill. 241 (1869).

13 Merriam v. McConnell, 31 Ill. App. 2d 241, 175 N.E.2d 293 (1st Dist. 1961). See

recovered damages, or defendants have been enjoined only where a human agency has intervened in a negligent, careless or willful way. . . ."[14] to create a nuisance.

Other cases have held that it is not necessary for a plaintiff to base his cause of action on negligence. In these cases, the action was based on intent: that is, the defendant, by his conduct, knew to a substantial certainty that an invasion of another person's right would result. In other words, the courts have held that the defendant intended to cause the interference.[15] In *Menolascino v. Superior Felt & Bedding Co.*,[16] the defendant operated a mattress factory in Chicago and had discharged waste which rendered the air unwholesome. The defendant contended that the plaintiff had to prove negligence to recover. The court stated that negligence need not be proved, and therefore ". . . . contributory negligence on the part of the plaintiff [is] not in issue. . . ."[17]

An attempt can be made to mold the above discussion into a concrete definition by listing the following as elements of a private nuisance:

a) a human element must cause the interference, not a natural element;[18]

b) the interference must violate a private person's right and not the public's right;[19]

c) the plaintiff's interest in the enjoyment of land must be invaded by the defendant's improper use of his land;[20]

d) the invasion need not be by a physical trespass, but must be unreasonable;[21]

e) the invasion may be based on strict liability,[22] negligence,[23] or intent;[24]

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also, *Fisher v. Pennsylvania R.R.*, 263 F.2d 781 (7th Cir. 1959), where the court dismissed the plaintiff's complaint because it contained no allegation of negligence.

14 Merriam v. McConnell, *supra* note 13, at 244, 175 N.E.2d at 295-96.

15 See, *e.g.*, Patterson v. Peabody Coal Co., 3 Ill. App. 2d 311, 122 N.E.2d 48 (4th Dist. 1954); Chicago & N. W. Ry. v. Hunerberg, 16 Ill. App. 387 (1885).

16 313 Ill. App. 557, 40 N.E.2d 813 (1st Dist. 1942).

17 *Id.* at 567, 40 N.E.2d at 818.

18 Merriam v. McConnell, 31 Ill. App. 2d 241, 175 N.E.2d 293 (1st Dist. 1961).

19 "A private nuisance only violates private rights and produces damages to but one or a few persons." 39 Am. Jur. *Nuisance* § 8 (1942).

20 A private nuisance "exists only where one is injured in relation to a right which he enjoys by reason of his ownership of an interest in land." 39 Am. Jur. *Nuisance* § 8 (1942).

21 29 I.L.P. *Nuisance* §§ 8-12 (1957).

22 See Laflin-Rand Powder Co. v. Tearney, 30 Ill. App. 321 (1st Dist. 1890), *aff'd*, 131 Ill. 322, 23 N.E. 389 (1890).

23 Ill. Cent. R.R. v. Grabill, 50 Ill. 241 (1869).

24 Patterson v. Peabody Coal Co., 3 Ill. App. 2d 311, 122 N.E.2d 48 (4th Dist. 1954).

f) the nuisance is usually continuous,[25] but need not be; one act which is substantial can be called a nuisance;[26] and

g) the plaintiff must be damaged by the interference.[27]

Historical Development of Private Nuisances

A. *Early Developments*

The early cases in the area of private nuisances held that an owner of property was entitled to the absolute use, comfort and enjoyment of his land. No consideration was given to a defendant's interest in using his property for a legitimate purpose. The courts merely held that he could not use his property to interfere, in any way, with the plaintiff's enjoyment.

One of the most common and recurring factual problems, both historically and presently, arises when the defendant uses his land in a manner emitting dust, smoke and soot, thereby impairing the plaintiff's enjoyment of his land. A study of this one line of cases can illustrate past and present policy of the entire area of private nuisance. In *Wente v. Commonwealth Fuel Co.*,[28] the defendant had operated a coal hopper which emitted smoke and dust into the plaintiff's living quarters. The court granted an injunction, although stating that the defendant's business was a necessary one. ". . . . [T]he court will not balance public benefits or public inconvenience against the individual right."[29] Under similar circumstances in *Wylie v. Elwood*,[30] the court enjoined the defendant since the plaintiff's living quarters became uncomfortable as a result of dust and dirt. It is interesting to note that the courts issued injunctions in these situations by considering the injury as so great as not to be adequately compensable in damages.

The key question in the early cases was whether the plaintiff suffered any injury; not whether the defendant's use was reasonable by virtue of his ownership of the land. In *Cooper v. Randall*,[31] the court said:

> The issue was whether the mill was an injury to plaintiff's property. Even if a business be lawful in itself and is carried on with reasonable diligence to prevent it from becoming an injury

[25] *Supra* note 21.

[26] *Supra* note 22. In that case, an explosion of the defendant's powder magazine was held to be a private nuisance.

[27] In *Merriam v. McConnell*, 31 Ill. App. 2d 241, 175 N.E.2d 293 (1st Dist. 1961), the court said that a private nuisance is a wrong to a private person arising from an unreasonable interference with his land thereby producing such a material inconvenience or hurt that the law will presume a consequent damage. *Cf.* Lindblom v. Purity Ice & Refrigerating Co., 217 Ill. App. 306 (2d Dist. 1920).

[28] 232 Ill. 526, 83 N.E. 1049 (1908).

[29] *Id.* at 533, 83 N.E. at 1052.

[30] 134 Ill. 281, 25 N.E. 570 (1890).

[31] 53 Ill. 24 (1869). See also, Phelps v. Winch, 309 Ill. 158, 140 N.E. 847 (1923); Schmitz v. Ort, 92 Ill. App. 407 (3d Dist. 1909); and O'Connor v. Aluminum Ore Co., 224 Ill. App. 613 (4th Dist. 1922).

> to others, still the proprietor will be held responsible . . . to one who does receive injury therefrom as in rendering his dwelling uncomfortable as a habitation.[32]

Illinois case law is dotted with many cases illustrating the situations which have been held to be a nuisance.[33]

B. *Recent Developments*

The rule that the plaintiff had an absolute right to the enjoyment of his land was not a workable one. It was later acknowledged that the plaintiff's neighbors also had rights to the use of their land and that these rights had to be considered. The question to be decided, then, was whether the defendant's use of his property was a "reasonable one under the existing situation"? If the use was reasonable, then, although the plaintiff was inconvenienced, he could not recover.

The principal case which established the reasonable use theory, although expressed earlier,[34] was *Gardner v. International Shoe Co.*[35] The plaintiffs, who resided near the defendant's shoe company, sought to recover damages for the alleged improper conduct of the defendant's tannery and settling basin. The defendant, by operation of a sewerage pond, had emitted large quantities of chemicals, gases and odors, which the plaintiffs alleged had interfered with their use and enjoyment of their homes. The lower court granted damages to the plaintiffs. The appellate court reversed and pointed out that, although the odors may have been offensive and disagreeable, they were not injurious to the health of normal persons.

> . . . . [I]t cannot be held that a nuisance exists. The term nuisance is applied to that class of wrongs which arise from the *unreasonable . . . use* by a person of his own property and produces . . . material annoyance. . . .[36]

After discussing many cases, the court said that these cases:

> . . . . consider the burdens necessarily incident to life in urban and industrial community where the air is filled with unpleasant odors which are inevitable and unavoidable in the conduct of factories and industries in such a district and are a necessary incident of life therein.[37]

Mr. Justice Stone, in his dissent, said that if the majority opinion was

32 53 Ill. 24, 29 (1869).

33 See 29 I.L.P. *Nuisance* §§ 31-35 (1957) on particular acts, occupations and structures which may constitute a nuisance.

34 Metropolitan West Side Elevated R.R. v. Gold, 100 Ill. App. 323 (1st Dist. 1902).

35 319 Ill. App. 416, 49 N.E.2d 328 (4th Dist. 1943), *aff'd*, 386 Ill. 418, 54 N.E.2d 482 (1944).

36 319 Ill. App. 416, 433, 49 N.E.2d 328, 334-35 (4th Dist. 1943) (Emphasis added). The court was quoting from a Massachusetts case, Strachan v. Beacon Oil Co., 251 Mass. 479, 484, 146 N.E. 787, 790 (1925).

37 319 Ill. App. 416, 433, 49 N.E.2d 328, 335 (4th Dist. 1943).

correct, then there was such a thing as a wrong without remedy [contrary to the Illinois Constitution].[38]

It became apparent that a policy of compromise was settled upon, and the Illinois courts thereafter used the term "reasonable use." If the defendant's use of his land was reasonable, then the plaintiff, by necessity, had to accept the inconvenience and annoyance. This shift of policy developed because society had become industrial and it was believed that the public interest in the defendant's reasonable use of his land outweighed the inconvenience the plaintiff had to face. Thus, in *Ward v. Illiopolis Food Lockers*,[39] where the defendant operated a slaughter house, the plaintiffs, nearby residents, sought an injunction, contending that the defendant had caused a common law nuisance since the resulting noise and odors interfered with their peace and health. The appellate court reversed the lower court's judgment for the plaintiffs and, relying on the *Gardner* case,[40] said that there was no showing of such an unreasonable use so as to constitute a nuisance.

Other cases have arisen wherein cemeteries,[41] bowling alleys,[42] dance halls,[43] and theaters[44] have been held not to be an unreasonable use of property.

The contemporary view is clearly expresed in *Patterson v. Peabody Coal Co.*[45] There the defendant's coal mine was situated next to the plaintiff's land, and it had allegedly been emitting smoke and fumes onto the adjoining property. The court said:

> The earliest cases proceeded upon the theory that an owner of property was entitled to pure and unadultered air over his property. As we become more industrial and less pioneering and agricultural, courts were forced to recognize that industry could never develop or even live if exceptions were not made in the original . . . rules. The law thus developed that if industrial plants were located in places suitable to their business no action for nuisance would lie unless the interference with the use of land was substantial and unreasonable or unless the defendant was causing more interference than was necessary in the proper conduct of his business.[46]

The old rule, under which a plaintiff received unlimited enjoyment of his land, is now balanced against the public's interest in having necessary

38 Ill. Const. art. II, § 19.
39 9 Ill. App. 2d 129, 132 N.E.2d 591 (3d Dist. 1956).
40 *Supra* note 35.
41 Village of Villa Park v. Wanderer's Rest Cemetery Co., 316 Ill. 226, 147 N.E. 104 (1925).
42 Harrison v. People, 101 Ill. App. 224 (1st Dist. 1902).
43 Phelps v. Winch, 309 Ill. 158, 140 N.E. 847 (1923).
44 Stevens v. Morenous, 169 Ill. App. 282 (1912).
45 3 Ill. App. 2d 311, 122 N.E.2d 48 (4th Dist. 1954).
46 *Id.* at 315, 122 N.E.2d at 51.

and valuable businesses. If the defendant's use of his land is reasonable, then there is no nuisance. In answer to Justice Stone's dissent in the *Gardner* case[47] that everyone who suffers a wrong is entitled to a remedy, it may be stated that where the defendant's use is reasonable, the plaintiff's annoyance and injury is *damnum absque injuria.*

Zoning Regulations and Nuisances

It soon became apparent in the field of private nuisance law that industry and city growth could not survive if every invasion of an individual's property was enjoined. The law of private nuisances could not cope with the helter-skelter development of industry within a city. The need for regulated geographical areas led to zoning,[48] which provided for certain permitted uses in stated areas of a city.

Zoning laws, however, cannot legalize a private nuisance; that is, if there is an industrial plant next to an individual's land which is emitting smoke and soot and the area is zoned industrial, the zoning ordinance will not preclude the individual from contending that the plant is a private nuisance. However, the zoning ordinance is one of the factors considered in deciding whether a private nuisance exists.[49]

When zoning regulations first developed, courts treated nuisance law and zoning as somewhat synonymous, in that both were interested in protecting the public welfare. For example, in *City of Chicago v. Reuter Bros. Iron Works, Inc.*,[50] the court said that the duty required by a zoning ordinance meant that the holder of a use permit should so conduct his business as not to commit a common law nuisance.

This view ignored the fact that zoning regulations are broader than private nuisance law in that they follow a citywide plan and are concerned with benefitting the whole city. The common law private nuisance concept is only concerned with a property use which is in existence and harmful to the plaintiff.[51]

The case of *City of Aurora v. Burns*[52] noted this distinction between nuisance and zoning:

> The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent,

47 319 Ill. App. 416, 49 N.E.2d 328 (4th Dist. 1943), *aff'd,* 368 Ill. 418, 54 N.E.2d 482 (1944).

48 Zoning describes the use which can be made of land in particular areas in a municipality.

49 See *Zoning and the Law of Nuisance,* 29 Fordham L. Rev. 749 (1961).

50 398 Ill. 202, 75 N.E.2d 355 (1947).

51 *Supra* note 49.

52 319 Ill. 93, 149 N.E. 784 (1925).

> or at least to reduce, the congestion, disorder and danger which often inhere in unregulated municipal development.[53]

The Illinois cases now give much weight to the fact that the defendant's activities are permitted in the zoned area. In *Patterson v. Peabody Coal Co.*,[54] the defendant's coal washer had been operated in an area zoned for industry. The plaintiff sought to enjoin the defendant's business. The court stated that the area had been set apart for industry by the municipality, and that even though the plaintiff had suffered an injury, industry could not survive if every invasion of private interests were grounds for an injunction. Since zoning attempts to provide the best use of land in the entire municipality, this purpose ". . . . would be frustrated if private nuisance actions could deny to industry a place in the community in which to operate in a reasonable manner."[55]

In *Bauman v. Piser Undertaker Co.*,[56] the plaintiffs, who were residents in the immediate area where the defendant had planned to construct a funeral home, claimed that it would constitute a nuisance causing mental depression and annoyance. The area where the funeral home was to be built was zoned to permit such a use. The court denied the plaintiff's request for an injunction and in several instances pointed to the fact that the area was zoned for business. The court said that a funeral establishment was a lawful and indispensable business which must be located somewhere in the city and noted the fact that the establishment would be on an active street and only on the edge of a predominately residential area.[57]

Zoning regulations have produced an expanding effect on the law of private nuisance, whereas the influence of nuisance law on zoning law has been restricted. There is one area, however, where nuisance law may have an effect on zoning law. When an area is zoned for a particular use it may already contain uses which do not conform. These "nonconforming uses" cannot be removed immediately unless compensation is paid. Whether or not the law of nuisance can, in turn, be used to abate preexisting nonconforming uses is a possibility.[58]

Private Nuisance and Commercial Fraud

The facts in a nuisance case traditionally show the defendant using his land in a manner so as to interfere with the plaintiff's peaceful enjoyment

53 *Id.* at 94-5, 149 N.E. at 788.

54 3 Ill. App. 2d 311, 122 N.E.2d 48 (4th Dist. 1954).

55 *The Effect of Zoning Ordinances on the Law of Nuisances*, 54 Mich. L. Rev. 266 (1955).

56 34 Ill. App. 2d 145, 180 N.E.2d 705 (1st Dist. 1962).

57 See Bieretz v. Village of Montgomery, 67 Ill. App. 2d 403, 214 N.E.2d 149 (2d Dist. 1966), where, under similar facts, the court said that the zoning ordinance which permitted funeral homes in the plaintiffs' area was presumed valid and that it was a matter for the legislature as to where a funeral home should be located and not a matter for the courts.

58 *Abatement of Prior Nonconforming Uses: Nuisance Regulation and Amortization Provisions*, 31 Mo. L. Rev. 280 (1966).

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.

CAROLYN KRAUSE

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).