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MUNICIPAL LIABILITY: THE TORT OF NUISANCE: FLOODS, FIRES, SPILLS, SEWER BACKUPS AND BAD VIBRATIONS

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Introduction

The tort of nuisance - a protection against being “unlawfully annoyed, prejudiced or disturbed in the enjoyment of land”² - is an old tort pre-dating the evolution of the tort of negligence which has grown to cover most liabilities. Nuisance continues to maintain its vigour, especially where a negligence claim is not available, or if available, not easy to prove. Floods, fires, spills, sewer backups and bad vibrations provide a steady flow of claims in nuisance. The potential number of nuisance claims in an increasingly complex society has grown, not diminished, in recent years. The attractive feature of a claim in nuisance for a plaintiff is that once the nuisance is established, defences are few and liability is close to strict.

There are two causes of action in nuisance: private nuisance and public nuisance.³ A private nuisance will interfere with a person’s use, enjoyment and comfort in their land, whereas a public nuisance interferes with rights and interests shared by the public. A fuel spill which closes a highway is a public nuisance. If the spill migrates to a farmer’s field, then it also becomes a private nuisance. A municipality may face claims for either tort in the same action. Liability will depend on a factual inquiry into the nature and extent of the interference.

In 1989, there was a valiant, but unsuccessful, attempt led by Justice La Forest in the Supreme Court of Canada to rewrite the law of nuisance by abolishing the defence of statutory authority and substituting a general test of whether it was reasonable in the circumstances to award compensation.⁴ The attempt failed and Justice Sopinka’s opinion, which affirmed the traditional

2 Salmond, *Law of Torts*, 17th ed., by R.F.V. Heuston, London: Sweet & Maxwell, 1977, p. 50.

³ Section 99 of the Environmental Protection Act, R.S.O. 1990, c. E.19, contains a statutory right of action for public nuisance, as discussed below.

⁴ *Tock v. St. John’s Metropolitan Area Board*, [1989] 2 S.C.R. 1181.

approach to the tort of public nuisance and its defences, eventually prevailed and was confirmed by the court in 1999 in *Ryan v. Victoria (City)*.⁵

By confirming the traditional words to describe public nuisance, the court did not provide an easy formula for determining if an actionable nuisance exists. Justice Major stated for the court:

Whether or not a particular activity constitutes a public nuisance is a question of fact. Many factors may be considered, including the inconvenience caused by the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the general practice of others and the character of the neighbourhood.⁶

The court was far more helpful in providing a definitive test for the defence of statutory authority, the central issue in the case and a frequent issue in cases involving municipalities. Justice Major stated:

Statutory 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.

...

In the absence of a new rule, it would be appropriate to restate the traditional view, which remains the most predictable approach to the issue and the simplest to apply. That approach was expressed by Sopinka J. in *Tock*, at p. 1226:

The defendant must negative that there are alternative 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 practical difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.⁷

⁵ [1999] 1 S.C.R. 201.

⁶ *Ibid*, para. 53.

⁷ *Ibid*, paras. 54-55.

In some instances a statute provides a specific immunity for nuisance, but those statutes are subject to politics. Constituents tend to take a dim view of a government avoiding compensation after a catastrophe on the basis of statutory immunity.⁸ A statutory immunity is distinct from a permissive statute which authorizes the undertaking of certain activities. These latter statutes raise the defence of statutory authority.

For the parties, whether establishing the nuisance or a defence to it, the route will be a factual inquiry into a number of nebulous factors that are hard to prove and to apply in the tough cases. Fortunately for the courts, many nuisances are straightforward and the courts usually have no difficulty in imposing liability for floods, fires, spills, sewer backups and bad vibrations.

What is a Nuisance?

Fortunately for municipalities, not all annoyances will constitute a legal nuisance, such that the court will remedy the situation with an injunction or damages. In *Tock v. St. John's Metropolitan Area Board*⁹, Justice La Forest explained the problem well, although his solution was not adopted:

The assessment of whether a given interference should be characterized as a nuisance turns on the question, simple to state but difficult to resolve, whether in the circumstances it is reasonable to deny compensation to the aggrieved party. The courts have traditionally approached this problem of reconciling conflicting uses of land with an eye to a standard based, in large part, on the formulations of Knight Bruce V.-C. in *Walter v. Selfe* (1851), 4 De G. & Sm. 315, 64 E.R. 849, and Bramwell B. in *Bramford v. Turnley* (1862), 3 B. & S. 66, 122 E.R. 27, at pp.83-84 and at pp. 32-33 respectively. There it was observed that the very existence of organized society depended on a generous application of the principle of “give and take, live and let live.” It was therefore appropriate to interpret as actionable nuisances only

⁸ In *Bavelas v. Copley*, [2001] B.C.J. No. 387 (C.A.), the British Columbia Court of Appeal upheld the Municipality's defence under the *Municipal Act*, S.B.C. 1994 c.52, which provided that no action could be brought against the municipality with respect to the construction, maintenance, operation or use of a drain or ditch. The section was subsequently repealed.

⁹ *Supra* note 4.

those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes. In effect, the law would only intervene to shield persons from interferences to their enjoyment of property that were unreasonable in the light of all the circumstances.¹⁰

The courts have repeatedly held that the principal relevant factors for an inquiry into whether an interference is “unreasonable” are:

1. The nature of the locality;
2. The severity of the harm;
3. The sensitivity of the plaintiff; and
4. The utility of the defendant’s conduct.¹¹

The courts may also consider the intensity of the interference, difficulty involved in lessening or avoiding the risk, the duration of the interference, the time of day or week in which the interference took place, the defendant’s intention, and the nature of the conduct. This lengthy list of factors is not exhaustive and the courts are free to look at a wide array of circumstances in each individual case.

While the “utility of the defendant’s conduct” is a helpful factor for municipalities, it is but *one* factor that the court will consider in its analysis. Although a nuisance arises out of a useful or necessary public enterprise, that is not sufficient, by itself, to justify the interference as “reasonable.”

¹⁰ *Ibid*, para. 16.

¹¹ See for example *Mandrake Management Consultants Ltd. v. Toronto Transit Commission*, [1993] O.J. No. 995 (C.A.).

The extent of the utility is significant. In both *Mandrake Management Consultants Ltd. v. Toronto Transit Commission*,¹² a case concerning vibrations from the subway, and *Sutherland v. Canada*,¹³ a case concerning noise from an international airport, the courts found that while the elements for a private nuisance had been established, the respective government bodies could rely on the defence of statutory authority, as they were doing what they were authorized to do in the way they were authorized to do it.

The Defence of Statutory Authority

Municipal actions are generally prescribed by statute, and therefore, municipalities may instinctively take confidence that they are acting according to law. However, as noted above by the Supreme Court of Canada, statutory authority has proven to be “at best, a narrow defence to nuisance.”¹⁴ The traditional rule is that liability will not be imposed if the activity is authorized by statute *and* the defendant can prove that the nuisance is the *inevitable* result of this exercise of authority.¹⁵ This standard of “inevitability” is onerous and many authorized government actions will fail to meet the test.

In *Ryan v. Victoria*¹⁶, the appellant was injured when he was thrown from his motorcycle while attempting to cross some railway tracks when his motorcycle became trapped in a “flangeway” gap running along the inner edge of the tracks . The statute, which provided for the placement of the

¹² *Ibid.*

¹³ [2002] BCCA 416.

¹⁴ *Ibid.*, para. 63.

¹⁵ *Ibid.*

¹⁶ *Supra* note 5.

flangeways, did so to a minimum standard only and the railway company's decision on placing the tracks was held to be a matter of discretion and not the "inevitable result" of following the regulations. The defence of statutory authority was not available and the railway company was liable in public nuisance.

*Tak v. St. John's Metropolitan Area Board*¹⁷ is another example where the defence failed. In *Tak*, the appellant's house was flooded from a sewage backup after heavy rains. It was determined that the flooding was caused by a blockage in the sewage system operated by the municipal board. Again, the defence of statutory authority was not sufficient to protect the municipality from liability. While blockages may occur in a sewage system, no particular blockage is likely the inevitable consequence of operating the system.

To succeed with the defence of statutory authority is difficult but not impossible. As noted above, in *Sutherland v. Canada (Attorney General)*,¹⁸ noise from an airport was held to constitute a private nuisance, however, the defendants established the defence of statutory authority:

...there was clear statutory authority for the location, construction and operation of the North Runway, and the noise nuisance suffered by the plaintiffs was the inevitable result.¹⁹

Other Defences

¹⁷ *Supra* note 4.

¹⁸ *Supra* note 13.

¹⁹ *Ibid*, para.117.

The defence of statutory authority is distinct from a statutory prohibition against actions against the public body or “statutory immunity.”²⁰ Statutory immunity requires “express language in the statute such as a provision specifying that no action for nuisance may be brought for any damage caused.”²¹

Some other potential defences include contributory negligence, consent and acquiescence, prescription and third person intervening act. These defences only tend to arise in the rarest of circumstances. The contention that the defendant’s actions were “first in time” and that the plaintiff “came to the nuisance,” thereby authoring its own misfortune *is not a defence*.²² It may, however, be a factor the court will consider in its factual assessment of the nuisance.

Statutory Environmental Nuisances

The primary environmental statute in Ontario is the Environmental Protection Act²³ (the “EPA”). Its purpose “is to provide for the protection and conservation of the natural environment.”²⁴ In the event of an offence under the EPA, the EPA provides for both quasi-criminal penalty and quasi-civil recovery. There are three main ways in which the provisions in the EPA may directly affect a nuisance proceeding involving a municipality, whether the municipality is making a claim in nuisance or facing one.

²⁰ *Bavelas v. Copley*, [2001] B.C.J. No. 387 (C.A.).

²¹ *Ibid*, para.30.

²² See *Sturges v. Bridgman*, [1895] A.C. 587 (H.L.).

²³ R.S.O. 1990, c.E.19.

²⁴ *Ibid*, s.3(1).

First, certain compensatory provisions in the EPA negate the need for a common law action in nuisance. Section 99 provides for compensation in circumstances of pollutant spills and is an example of such a provision²⁵:

(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,

(a) for loss or damage incurred as a direct result of,

(i) the spill of a pollutant that causes or is likely to cause an adverse effect,

(ii) the exercise of any authority under subsection 100(1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or

(iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;

(b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,

from the owner of the pollutant and the person having control of the pollutant.

This right to compensation may be enforced by bringing an action in a court of competent jurisdiction.²⁶

Subsection (3) exempts an owner of a pollutant if the owner can establish that all reasonable steps were taken to prevent the spill of the pollutant or that the spill was wholly caused by acts of war, terrorism or hostility of a foreign country, a natural phenomenon of an exceptional, inevitable and irresistible character, or an act or omission with the intent to cause harm by another person.

²⁵ Note: See also s.103 (with respect to Corporations).

²⁶ *Ibid*, s.99(5).

The foregoing exemptions do not relieve the owner of the pollutant from liability for loss or damage that is a direct result of neglect or default of the owner in carrying out a duty imposed or an order or direction made under this part of the EPA. Further, an owner will still be liable for cost and expense incurred in attempting to prevent, eliminate and ameliorate the adverse effect and/ or to restore the natural environment.

Like an action for common law nuisance, the statutory right to compensation is enforceable by an action in a court of competent jurisdiction and does not depend upon a finding of fault or negligence.²⁷

Second, as previously discussed, there are certain statutes that provide a statutory defence to a claim in nuisance (i.e. the *Farm Practices Protection Act*²⁸). The EPA operates *notwithstanding* such statutory “immunity”. In other words, statutory immunity from a claim in nuisance does not preclude prosecution under the EPA,²⁹ unless the immunity-granting statute expressly provides otherwise.³⁰

Lastly, the EPA also operates in relation to nuisance by way of evidence for the nuisance claimed. If the act is regulated by the EPA, a breach of EPA standards may be relevant to determining whether or not the circumstances complained of constituted a legal nuisance. The statutory provisions of the EPA are not determinative of the issue, however, but have been held to provide “a useful standard to measure the evidence.”³¹

²⁷ *Ibid*, s.99(5) and (6).

²⁸ R.S.O. 1990, c.F6.

²⁹ R.S.O. 1990, c.E.19.

³⁰ See for example *Pyke v. Tri Gro Enterprises Ltd.*, [1999] O.J. No.3217 (Ont. S.C.J.).

³¹ *340909 Ontario Ltd. v. Huron Steel Products (Windsor) Ltd.*, [1990] O.J. No.997 (Ont. C.A.).

Putting Things Into Perspective

In order to gain a clearer perspective on how the law of nuisance can affect municipal operations, the following discussion will apply the law to some short hypothetical fact scenarios.

SCENARIO #1: The Paintings in Heavyrainfall

Ted and Mary had recently purchased an old Victorian style home, located in a rural area in the municipality of Heavyrainfall. After one particularly wet and dreary morning, Ted and Mary were horrified to discover that the basement of their house was flooded due to a sewage backup. The basement temporarily housed Ted and Mary's prized art collection. Luckily, the height of the water had not reached the paintings. Later that same day, however, Ted and Mary were dismayed to discover that the paintings were in fact damaged. An expert in Victorian paintings explained that the damage was likely caused by toxic fumes that emanated from the dirty water throughout the day. Ted and Mary have brought an action against Heavyrainfall for damages.

Analysis for Scenario #1

The physical damage to Ted and Mary's basement will likely be regarded as an "unreasonable interference with the plaintiff's use and enjoyment of land," and is therefore actionable. There have been several actions in nuisance resulting from sewage back-up and flooding and, in the absence of a proper defence, courts have found municipality sewage and drainage operators liable.³²

As previously discussed, the court will look to an array of factors in determining whether Heavyrainfall is liable, including the character of the locale, the nature and severity of the interference, the utility of the defendant's conduct, and the sensitivity of the plaintiff's use.

³² See for example, *Oosthoek v. Thunder Bay(City)* (1996), 30 O.R. (3d) 323 (C.A.); *Tock v. St. John's Metropolitan Area Board*, supra note 4; *Lake v. St. John's (City)* (1999), 191 D.L.R. (4th) 616 (Nfld. C.A.); and, *Medomist Farms Ltd. v. Surrey (District)*, [1990] B.C.J. No. 1499 (S.C.).

The cases which turn on the character or nature of a locale generally cite from the old English case *Sturges v. Bridgman* (1879):³³ “What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey.”³⁴ These cases generally deal with the intangible nuisances, (noise, odour, smoke) as opposed to cases of actual physical damage to land (flooding, fire).

An analysis of the nature and severity of the interference includes looking at the extent of the flooding, the damage to the paintings, any health effects on Ted and Mary from pollutants in the sewage water, and the detrimental effect to their use and enjoyment of the property. The assessment is on an objective standard, given the circumstances of the particular plaintiff.

As previously noted, the utility of the defendant’s conduct is one factor on which municipalities will tend to rely. Assuming Heavyrainfall can prove that the flooding was a result of normal, *non-negligent*, operation of their sewage system, this factor may lessen the extent of their liability in nuisance. However, it may be difficult to prove that such flooding is merely incidental to this public utility and will require expert evidence.

Abnormal sensitivity has been held to vitiate a nuisance or lessen the extent of liability for damages. For example, in *MacNeill v. Devon Lumber Co. (N.B.C.A.)*,³⁵ the court reduced the trial judge’s award in nuisance on the ground that the plaintiff’s pre-existing allergy to cedar wood dust (the subject matter of the nuisance) was an abnormal sensitivity for which they could not recover. Chief Justice Stratton cited Mr. Justice Linden from the third edition of his text *Canadian Tort Law*, at p.545:

³³ 11 Ch. D 852.

³⁴ *Ibid*, p.865.

³⁵ [1987] N.B.J. No. 926 (C.A.).

If the plaintiff's use of his property or his own physical or mental make-up is abnormally sensitive, he may be denied recovery for nuisance. This follows because the standard employed in determining whether the defendant's activity is an unreasonable interference is an objective one...

Arguably, Ted and Mary's paintings were *abnormally* sensitive to the effect of the fumes and this may lessen Heavyrainfall's liability in this respect.

SCENARIO #2: Subway Vibrations on Quayat Rd.

Sylant Consultants is the owner and occupier of 96 Quayat Rd. in the City of Toronto. The property is located adjacent to a subway entrance which accommodates traffic on the Bloor subway line. Sylant contends that by reason of the location of the subway and the passage of trains, a nuisance has been created, causing a disruption of Sylant's daily activities thereby affecting a significant loss of business.

Analysis for Scenario #2

The Ontario District Court dealt with a similar scenario in *Mandrake Management Consultants Ltd. v. Toronto Transit Commission*.³⁶ In that case, the plaintiff was a tenant in a building close to a subway station and operated an executive placement business. Noise and vibrations from the subway interfered with the plaintiff's business of interviewing clients. The court allowed the action and ordered the defendant to remove joints on the rails in an area known as the "frog" which caused the excessive rumbling and vibrations. The court did not assess the general damages in the amount sought by the plaintiffs, however, and fixed nominal general damages at \$5,000.

³⁶ [1990] O.J. No. 379 (C.A.).

A trivial interference will not be sufficient to constitute a nuisance. The court will ask:

...ought this inconvenience to be considered in fact as more than fanciful, one of more than mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among English people?³⁷

In *Mandrake*, the court held that the reasonable person would have found the situation intolerable. The noise and vibration caused by the subway created a disruption in the plaintiff's business and considerable discomfort to its occupants. This constituted a nuisance. The court ordered the "frog" removed and awarded damages.

In both our scenario and in *Mandrake* the character of the locale is similar: a busy downtown Toronto area. In *Mandrake*, the court characterized the locale as a mixed use area. The premises were located in a residentially-oriented area, which the court held raised a greater expectation of peace and tranquility.

As discussed, the standard of unreasonable interference in nuisance is objective. If a plaintiff's use of the property or his/ her own physical or mental make-up is abnormally sensitive, the plaintiff will be denied recovery for nuisance. The nature of the business in question will, therefore, affect a finding of nuisance. For example, the outcome may differ depending on whether Sylant Consultants operate a financial consulting business or a business of training in the art of meditation.

The operation of a subway system is essential to the citizens of Toronto and surrounding areas in their travel to and from downtown. This factor will necessarily affect the balance in the interests in favour of the defendant transit commission.

³⁷ *Walter v. Selfe* (1851), 4 De G. & Sm. 315 at 322.

SCENARIO #3: Manoore Inc. Stinks

Manoore Inc. operates a livestock farm in central Ontario. The farm operation requires the production of a large amount of manure, which it markets as fertilizer to local farms and nurseries. The fertilizer operation provides for approximately 50% of the farm's profits. Manoore Inc. attributes its profits to the superior quality of its manure, a product of a unique and patented diet regimen it has invented and implemented for its livestock. The fertilizer operation has resulted in horrible odours, causing Manoore Inc.'s neighbours to suffer from nausea, burning eyes, shortness of breath, difficulty sleeping, and an inability to enjoy the outdoors. The neighbours have brought an action against Manoore Inc. in nuisance. Manoore Inc. claims that it is immune from liability by operation of the *Farming and Food Production Protection Act*, 1998³⁸ (the "Act"). Manoore Inc. also relies on a decision from the Farm Practices Protection Board that ruled that Manoore Inc.'s activities constituted a "normal farm practice" pursuant to the Act.

The neighbours also bring an action against the Minister of Health (the "**Minister**") for failing to inspect the health effects of the alleged nuisance, despite several formal complaints launched over a year prior to this action being brought. Manoore Inc. cross-claims in this action, alleging that if it is found liable in nuisance, its damages should be limited to compensation for the discomfort and interference with the reasonable interference with the land and the Minister should assume any losses over and above this amount with respect to any potential health consequences.

Analysis for Scenario #3

³⁸ S.O. 1998, c.1.

Pyke v. Tri Gro Enterprises Ltd. [1999] O.J. No. 3217 involved an action by the residents of properties in an agricultural use zoned area. The defendants operated a mushroom farm. Odours emanated from the mushroom farm causing the plaintiffs severe discomfort, not dissimilar from the discomforts described in our fact scenario. The court allowed the action. The odours constituted a nuisance and the defendants were in breach of the EPA. This was not considered a “normal farm practice” under the farm practices legislation.

In our scenario, a decision of the Board has held that Manoore Inc.’s operations fall within the meaning of “normal farm practice” under the Act. If deference is given to the Board’s decision, Manoore Inc. would be statutorily immune from liability, pursuant to s. 2(1) of the Act, which provides: “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.” This is a complete defence to the action.

The action in negligence against the Minister would continue despite the defence, however, in light of the aforementioned defence, the Minister would not be liable for the damages that would have flowed from the nuisance claim. If, however, the defence was not available (as in *Mandrake*), the Minister’s alleged negligence may be a factor of liability for damages flowing from the nuisance.

SCENARIO #4: What a Nuisance! - The Nuff Blitz

During a particularly vicious political campaign, Eddy Nuff, a local MP candidate attempted to bolster votes by engaging in a new campaign initiative: The Blitz. This initiative involved inundating his riding with a myriad of promotional techniques, including incessant telephone calls, door-to-door pitches, marketing flyers and a 20 foot billboard in the town square. The residents of Eddy Nuff’s riding have brought an action in nuisance against the party, seeking an immediate injunction against

the initiative. The residents claim that the campaign has severely interfered with the enjoyment of their property. The non-stop phone calls and door-to-door pitches have caused several residents to temporarily move in with friends and family in neighbouring districts in order to avoid the constant annoyance of this political barrage. The flyers have polluted backyards and blown into the residents' drain pipes causing blockages. The billboard is claimed to be an unsightly and tacky monstrosity, obstructing the view of the beautiful town landscape.

Did you spot the following potential nuisances?

- ✓ incessant phone calls
- ✓ door-to-door pitches
- ✓ backyard pollutants
- ✓ clogged drainpipes
- ✓ obstructing billboard

Conclusion

Nuisance is about the facts. Courts try to apply legal theory to their common sense assessments of whether a particular nuisance is actionable but at the end of the day it is all about the facts. And what a “plain and sober” person might think of them.