*VISUAL POLLUTION: UNAESTHETIC USE OF LAND AS NUISANCE**

There has in recent years been an increasing amount of public concern regarding the rapid disappearance of natural land areas of great aesthetic quality. The visual amenities provided by the natural environment are more than mere luxuries; they are necessary for the fulfillment of many of man's spiritual, psychological and emotional drives.[1]

Despite this growing recognition of the importance of aesthetic appreciation in our daily lives, there has not been a concomitant degree of interest shown in the development of legal mechanisms to protect the aesthetic qualities of our environment. Current Canadian economic and political realities[2] have obviously been stumbling blocks to any major attempts at comprehensive legislation designed to incorporate aesthetic values into decision-making processes concerning land. Indeed, there is no guarantee that any such legislation, once enacted, would be effectively implemented and consistently enforced.[3]

Environmental groups and certain individual landowners, realizing that immediate action is required, have been moving to fill this legislative gap through the assertion of their private rights. It is the duty of the legal profession to ensure that they are provided with the tools to carry out their purpose. It is with this goal in mind that the following discussion explores the extent to which the common law device of private nuisance can be used to preserve and protect the visual amenities of land.

The private nuisance action is concerned with 'interference with an occupier's interest in the beneficial use of his land'.[4] This interest has been explained as follows:[5]

> The interest in the beneficial use of land, protected by the action of nuisance, is a broad and comprehensive notion. It includes not only the occupier's claim to the actual use of the soil for residential, agricultural, commercial or industrial purposes, but equally the pleasure, comfort and enjoyment which a person normally derives from occupancy of land. Accordingly, harmful interference may be manifold: It may consist of physical damage to land, buildings and chattels thereon, through vibrations, flooding, fire, and the like; or in disturbance of the comfort, health, and convenience of the occupant by offensive smell, noise, smoke, dust, or even the use of an adjoining residence for prostitution. Thus, certain sophisticated interests of personality which, standing alone, receive only limited protection by our law are more amply vindicated, if asserted in the title of the free use and enjoyment of land, where such factors as personal taste and sensibilities are accorded fuller protection . . . .

The central issue in any private nuisance action is not merely whether there has been an interference with this 'natural right' to reasonable enjoyment of one's property,[6] but more importantly whether

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[1] *See* McHarg, *Design with Nature*, (Garden City: Natural History Press, 1969) at 19; Maslow and Mintz, *Effects of Esthetic Surroundings* (1956), 41 J. of Psyc. 247; Wohlwill, *The Physical Environment: A Problem for a Psychology of Stimulation* (1966), 22 J. of Social Issues 29.

[2] It has been argued that the underlying reason for this secondary position given to aesthetics revolves around the fact that our economic system acknowledges only that which can be quantified. *See* for example Loeffler, *Open Space, People and Urban Ecology* (1973), 35 Ekistics 121 at 123. This has obvious effects upon political efforts in this area.

[3] *See* McLaren, *The Common Law Nuisance Actions and the Environmental Battle—Well-Tempered Swords or Broken Reeds?* (1972), 10 Osgoode L.J. 505 at 506-507.

[4] Fleming, *The Law of Torts*, (4th ed. Sydney: The Law Book Co., 1971) at 344. *See also* McLaren, *supra*, n. 3 at 516.

[5] Fleming, *supra*, n. 4 at 344-345.

[6] *See* Cheshire, *The Modern Law of Real Property*, (11th ed. London: Butterworths, 1972) at 512: "This is an expression often used to describe a right that is one of the ordinary and inseparable incidents of ownership

this interference is an unreasonable one. The test is an objective one and has been expressed as follows:[7]

> The standard for deciding whether a particular use of land exposes others to an unreasonable interference is objective, in the sense that it has regard to the reactions of normal persons in the particular locality, not to the idiosyncrasies of the particular plaintiff. The law does not indulge mere delicacy or fastidiousness . . . . This same principle applies also where the uses to which the plaintiff puts his land are abnormally sensitive, because it would be unfair to allow him thus unilaterally to enlarge his own rights at the expense of another's.

To actually determine this question of reasonableness in any one situation the Court engages in a process of balancing a number of elements: gravity of the harm to the complainant, utility of defendant's conduct, the character of the neighbourhood, and the use to which plaintiff puts his land.[8]

Does this right to 'reasonable enjoyment and use of one's land' include the right not only to mere physical enjoyment but to mental and aesthetic enjoyment as well? More specifically, can it be argued that the right to prospect or view, though according to certain authority incapable of being an easement,[9] is a part of an owner's natural right of reasonable enjoyment[10] of his property? If this be so, then an action in private nuisance could lie for interference with such a right. This argument is best expressed as follows:[11]

> What, then, of the right of prospect or view . . .? This is incapable of being an easement; but so are the natural rights of a landowner. May the right to view now be a part of the composite natural right to reasonable comfort? If so then the normal law of nuisance would apply, with the restriction that the aesthetic inconvenience must be such as seriously to upset the average Briton; above that level, malice of the defendant would be relevant to show the unreasonableness of the discomfort. The weight of authority is strongly against this view, but most of the decisions state that the right to a view cannot be the subject of an easement, not that it is not part of a natural right.

In this manner it might be argued that an occupier of land could sue in nuisance to prevent his view of the surrounding landscape from being destroyed by neighbouring development or general unsightliness.[12]

The courts have considered this issue, but it is only in the older decisions that there has been a clear rejection of the possibility of an action in nuisance for interference with the view from one's land.[13] For example, in the 1752 case of *Attorney-General* v. *Doughty* the Lord Chancellor held that:[14]

[such as the right to support of land] though its exercise requires an adjacent owner to forbear from doing something on his own land that otherwise he would be free to do. The epithet 'natural' serves to distinguish such rights from easements, which do not automatically accompany ownership but must be acquired . . . ." *See also* Catala and Weir, *Delicts and Torts: A Study in Parallel* (1964), 38 Tulane L. Rev. 221 at 244.

[7] Fleming, *supra*, n. 4 at 350.

[8] *See* however the following comments of McLaren, *supra*, n. 3 at 346: "None of these criteria are categorical imperatives which demand subservience of the judge. They are both malleable and dispensible, the judge having the discretion to emphasize, to de-emphasize, to include or to exclude as the details of the factual situation and the broad social implications of responsible land use influence him. . . ."

[9] *See* Megarry and Wade, *The Law of Real Property*, (3rd ed. London: Stevens & Sons, 1966) at 809; Gale, *The Law of Easements*, (14th ed. London: Sweet & Maxwell, 1972) at 26; 12 *Halsbury's Laws of England* (3rd), 1334.

[10] *See supra*, n. 6.

[11] Catala and Weir, *supra*, n. 6 at 248.

[12] Aside from the question as to whether a right to view is part of the natural right of reasonable enjoyment of one's land, note that a number of recent cases have recognized 'loss of amenities and natural beauty' as a separate head of damage. *See* for example *Wise* v. *Kaye*, [1962] 1 All E.R. 257 (C.A.) at 264; *Lockwood* v. *Brentwood Park Investments Ltd.* (1970) 10 D.L.R. (3d) 143 (N.S.S.C.).

[13] *Aldred's Case* (1610) 77 E.R. 816 at 821; *Attorney-General* v. *Doughty* (1752) 28 E.R. 290.

[14] *Attorney-General* v. *Doughty*, *supra*, n. 13 at 290.

> I know no general rule of common law, which warrants that, or says, that building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns; and I must grant injunctions to all the new buildings in this town . . . .

In response to these older decisions, it can be argued that aesthetic qualities of land are of greater importance and value today than they were a few centuries ago.

The more recent cases which have considered the matter seem to have left open the possibility for recognition of a right to view actionable in nuisance. In the case of *McBean* v. *Wyllie*[15] for example, the plaintiff sought an injunction to prevent the completion of a large frame warehouse which the defendant was erecting on land leased by him from a railway company. This land adjoined that of plaintiff's property and both properties overlooked a river. Plaintiff claimed, *inter alia,* that: (1) defendant's building shut off her view of the river and injured the value of her property; (2) the building increased her risk of fire; and (3) the erection of the building created a nuisance. It is significant that Mr. Justice Richards in dismissing the action never actually equates the claim of the plaintiff in nuisance with the claim regarding the cutting off of a view of the river. When reference in the judgment is made to the nuisance action, the discussion centers around possible smells and trespassers and not around the obstruction of the view at all.[16] Indeed, there is even some suggestion in the judgment that had the plaintiff, on purchase of her property, had no knowledge or warning whatsoever that a warehouse would eventually block her view, she might have been able to succeed in her injunction to stop the obstruction. Mr. Justice Richards at page 139 of the judgment states:[17]

> The fact of the warehouse cutting off a view of the river cannot in itself be actionable. The plaintiff, having bought her property with knowledge that it adjoined a railway line, had reason to expect that warehouses might be built on the right of way.

If the claim for the obstruction of view in this case is not considered part of the nuisance claimed by the plaintiff, then precisely what is it? It would seem that the claim for obstruction of view is in fact a nuisance action as well, even though not referred to as such in the judgment. As indicated by the above quote from the case, Mr. Justice Richards never really denies the possibility of a nuisance action for obstruction of view.

In the later case of *Morris* v. *Dominion Foundries Ltd.,*[18] the plaintiff claimed damages and an injunction for an alleged nuisance caused by the defendant in the establishment of a scrap-yard adjacent to the plaintiff's property. The interferences claimed by plaintiff were summarized in the statement of claim as follows:[19]

> The said operations of the defendant company have seriously interfered with the comfort and enjoyment of the plaintiff in her home and with the use of her property and still do. Furthermore the said operations have caused serious illness to the plaintiff resulting in irreparable damage to her health. . . . Furthermore, the property of the plaintiff has been greatly damaged by the vibrations . . . and by the dust and smoke and rust deposited thereon as a result of the defendant's said operations, and by reason of such vibrations, rust, dust, steam and smoke and the noise caused by the defendant's said operations the said property has been greatly depreciated in value.

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[15] (1902) 14 Man. L. R. 135 (K.B.).

[16] *Id.* at 139.

[17] *Id.*

[18] [1947] 2 D.L.R. 840 (Ont. H.C.).

[19] *Id.* at 842.

The court denied the request for an injunction but granted damages to the plaintiff for interference with plaintiff's right to the enjoyment of her property. After having dealt with the evidence as to vibrations, noise, smoke and dust, Mr. Justice Barlow made reference to the visual aspects of the defendant's operations in the following manner:[20]

> The scrap-yard may be an eyesore, but this is not something which can be taken into consideration. The defendant has the right to put anything it likes upon its own land, so long as there does not travel off the land something like noise, dust, smoke, or smell which causes discomfort to the neighbours. The fact that the scrap-yard is something that is not pleasant to look at gives no cause of action.

There are two reasons why this statement cannot be said to stand for the proposition that no nuisance can lie for the unsightly or unaesthetic use of land.

First, Mr. Justice Barlow relies on the 1682 case of *Knowles* v. *Richardson*[21] for this statement. Some mention has already been made above in regard to the changing attitudes towards aesthetic values and the possible inappropriateness of these early decisions.

Second, this statement must be read in conjunction with a preceding statement of Mr. Justice Barlow at page 844 of his judgment:[22]

> It is alleged that there has been a diminution in the value of the properties. Some evidence was taken, subject to objection, as to the value before the scrap-yard, and the present value. . . . I am, however, of the opinion that this evidence ought not to be considered as the true test of diminution of value. The true test is a sale or an abortive sale of the property. Not only is there no evidence as to this, but the plaintiff says quite definitely that she will not sell the properties. There is therefore no evidence upon which I can make any finding as to diminution in value: . . . .

What seems to be troubling Mr. Justice Barlow in this case is not so much the issue as to whether or not 'visual pollution' constitutes an actionable nuisance, but rather that there was insufficient evidence as to the diminution in the value of the plaintiff's property. It would be interesting to know the manner in which the learned justice would have treated this problem of aesthetics had there been a 'sale or an abortive sale of the property' with clear evidence that the visual aspects of the scrap-yard alone had affected this sale.

Finally, the following facts are significant in this case and may well serve to distinguish it from past and future cases on this issue: (1) the neighbourhood in which the plaintiff lived was an industrialized one;[23] (2) the noise, dust, smell and other interferences were only partly the result of the operation of the scrap-yard since numerous other activities were carried on in the area;[24] and (3), the court did not consider plaintiff to be an 'average normal human being'.[25]

The courts have the difficult task in these nuisance cases of balancing competing value systems while at the same time attempting to apply some test of 'reciprocal reasonableness in the use of land'.[26] Such a balancing process breaks down when the court must deal with a neighbourhood undergoing rapid change, as many clearly are. How can a

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[20] *Id.* at 845.

[21] (1682) 2 Keble 642, 84 E.R. 404.

[22] *Morris* v. *Dominion Foundries Ltd.*, *supra*, n. 18.

[23] *Id.* at 843.

[24] *Id.* at 845.

[25] *Id.*

[26] *Kennedy* v. *The Queen in Right of Ontario* (1971) 13 D.L.R. (3d) 442 (Ont. H.C.) at 446.

court determine what is 'reasonable user' in such situations?[27] Further, how can a court determine what constitutes a 'reasonable or unreasonable interference' when the social concern for natural and aesthetic values, as opposed to purely economic values, is in a state of rapid flux?[28]

However, it is this very danger of the law of nuisance—the difficulty of a court in arriving at a general test for the 'reasonable use' of land—which lends flexibility to the private nuisance action and leaves open to a court the possibility of adopting and testing new value systems in its decision-making process. There is clearly no guarantee that a court will implement aesthetic values in this process, but with time and the growing recognition of these values by many of our institutions, such an adoption may occur.

The above discussed decisions indicate that the courts have not taken full advantage of this potential flexibility of the private nuisance action. Judicial treatment of alleged interferences with the aesthetic qualities of land is still very much tied to the social values of several hundred years ago. If this ancient common law remedy is to have any meaning in modern society, it must be used in a manner which reflects and incorporates the values and needs of that society.

'Visual pollution' or the destruction of a view can interfere with an individual's use and enjoyment of his property in a fashion similar to that of noise, vibration, polluted air or bad odors. Therefore, this type of interference should at least be accorded the same treatment by the law of nuisance as that provided for these other disturbances. This argument for some form of equal treatment in this area has been well expressed by one writer in the following:[29]

> And beauty, which the courts use as synonymous with aesthetics, really embraces all the senses; that which is beautiful can attract man by appealing to his senses, not only the sense of sight, but also those of hearing and smell. Therefore the latter two senses are properly included within the scope of aesthetics, and the courts in the cases relating to 'sound' and 'smell' nuisances have in fact been granting judicial relief on aesthetic grounds, their statements to the contrary notwithstanding. Thus it cannot logically be said, as a reason for excluding that which offends the sense of sight from the category of nuisances subject to judicial action, that aesthetic considerations form no basis for judicial interference. Place near a man's estate a perfumed ash heap. By the reasoning of the courts, it should remain—it is unsightly but there can be no interference on aesthetic grounds. Yet if the same ash heap gave off nauseating odors its continuance would be enjoined, and, as pointed out, the true basis, whether called by that name or not, would be an aesthetic one. Should not injunctions be granted against those things which offend the sense of sight alone, since all three, sound, smell, and sight, constitute aesthetics?

This 'preference' in the law of nuisance shown to the senses of hearing and smell may be partly explained by the fact that a landowner is unable to effectively protect himself from noise, smoke or bad odors. As for 'visual pollution', however, there is the possibility of a landowner defending himself by means of a fence, curtains, blinds, shrubbery, and so on.

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[27] *See* Fleming, *supra*, n. 4 at 350: "Unaided by legislation the courts have faced this task of 'judicial zoning' by rightly giving more weight to the demands of a stable, as distinct from a changing, society. The most delicate problems of adjustment arise where the locality is in a stage of transformation. Once its character is fixed, it is relatively easy to determine the appropriate standard of comfort. . . ."

[28] *See* generally Special Section, *Land Use: The Rage for Reform* (1973), 102, No. 15, Time Magazine 72; F. Bosselman and D. Callies, *The Quiet Revolution in Land Use Control*, (Washington: Council on Environmental Quality. 1972).

[29] Comment, *Injunction Against 'Sight' Nuisance* (1935-36) 2 U. Pitts. L. Rev. 191 at 193. *See also* D. Noel, *Unaesthetic Sights as Nuisances* (1939) 25 Cornell L.Q. 1.

The unfortunate consequence of such a rationale is the fact that one landowner is being forced to actually 'defend' himself from his neighbour's use and enjoyment of his land.

Finally, it seems peculiar that the legislatures should recognize various affronts to the sense of sight and seek to provide some protection from them, whereas, the law of nuisance has not done so.[30] In so doing, the legislatures have obviously placed some value upon a pleasant view. For the courts to ignore such a value is to create inconsistency in the law.

It has been argued above that the private nuisance action has some potential use for the preservation of the aesthetic qualities of land. There are however certain defects with this tool which may detract from its effectiveness for the above purpose.

First, it is possible for a defendant in a private nuisance action to raise the defences of prescriptive right, acquiescence on the part of the plaintiff or legislative authority.[31] Perhaps the most problematic of these defences for a plaintiff concerned with an interference of his visual enjoyment of his land is that of prescription. Professor John McLaren has explained this defence as follows:[32]

> It seems to be accepted in Canadian jurisprudence that it is possible to develop a prescriptive right to sustain a nuisance affecting the plaintiff's property, if the nuisance has continued without complaint for twenty years. Moreover there are judicial observations to the effect that the prescription defence would extend to cases in which the nuisance manifests itself in air, noise or water pollution.

Second, the high costs and long delays involved in private actions are a deterrent to any individual wanting to enforce his right to the use and enjoyment of his land.[33]

Third, the private nuisance action is for the most part a remedial mechanism.[34] Some form of unreasonable interference must actually occur before this tool can be implemented.

Fourth, a device which is no more than a mere incident of ownership or possession of land requiring litigation to have meaning is obviously a poor land-use planning tool[35] and a frail device for preventing the destruction of aesthetically pleasant surroundings.

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[30] Every country and province through the years has had laws to protect aesthetic values. Such laws are no less significant because they were, in many cases, based on the economic dimensions of these values. *See* for example The Wilderness Act, R.S.O. 1970, c. 498, s.2; The Wilderness Areas Act, S.A. 1971, c. 114, preamble; The Litter Act, S.A. 1972, c. 51, s.8(c); Unsightly Premises Act, S.P.E.I. 1966, c. 44. *See also* the by-laws of most municipalities in regard to litter, dumping, sign-posting, the overhead hanging of wires, etc.; but heed the words of J. Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal* (1955) 20 Law and Contemporary Problems 218 at 237: "Without frank judicial acceptance of beauty as a proper community objective attainable through the use of the police power, the maximization of all community values is impossible and ordinances attempting to prevent eyesores generally become makeshift and piecemeal devices." For the American position *see* L. Masotti & B. Selfon, *Aesthetic Zoning and the Police Power* (1969) 46 J. of Urban L. 773; D. Minano, *Aesthetic Zoning: The Creation of a New Standard* (1971) 48 J. of Urban L. 740.

[31] *See* McLaren, *supra*, n. 4 at 543-547.

[32] *Id.* at 543.

[33] *See* Estrin and J. Swaigen, eds., *Environment on Trial*, (Toronto: Canadian Environmental Law Association, 1974) at 248.

[34] Wilcox, *Aesthetic Considerations in Land Use Planning* (1970) 35 Albany L. Rev. 126 at 145: "The development of the common law will not solve the problem of aesthetic loss. 'A tree can be felled in less than an hour. It cannot be replaced within a generation.' The legislature, on the other hand, has the capability to move swiftly and decisively." These remedies are not however entirely remedial given the possibility of injunctive relief, especially under the law of nuisance. *See* most recently *Epstein* v. *Reymes* (1973) 29 D.L.R. (3d) 1 (S.C.C.) at 8: "The absence of physical injury or property damage does not affect the right to an injunction where there is conduct, not merely temporary, which materially interferes with the comfort and enjoyment of living in the locality."; *Comment* (1965) 43 Can. Bar Rev. 100 at 102.

[35] Milner, ed., *Community Planning*, (Toronto: Univ. of Toronto Press, 1963) at 3: "The law of nuisance is sometimes described as the earliest attempt at town planning law in England. It might be more accurate to describe nuisance as the earliest attempt at land use control, but there is, in truth, very little of either plan-

Despite these impediments to the use of the nuisance action for attacking visual pollution, it still remains as one of the few avenues (perhaps the only avenue) open to a concerned occupier of land. Instead of focusing attention on the deficiencies of this action, efforts should be directed towards: (1) making this form of action more accessible to the majority of occupiers of land by reducing the costs and time delays presently involved in its use; and (2) lobbying for the incorporation of aesthetic considerations into all land-use planning legislation at all levels of government.

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ning or controlling, in the sense of regulating, to be found in the law of nuisance. It is chiefly the settlement of disputes between individual landowners arising out of the asserted use of his land by one owner in such a manner that it annoys or harms an adjoining owner."; J. Kraus, *The Limits of Litigation* (1971), 1, No. 2, Alternatives 15 at 16: "There are also difficulties implicit in the traditional reluctance of courts in general to consider broad policy making solutions. Courts favor clear cut specific decisions which avoid the burden of continued re-examination to ascertain compliance. As an institution they have been molded to provide retribution for past injury, not to filter proposed alternatives to anticipated injuries." *See also* J. Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, (1967) Duke L. J. 1126 at 1155.