

IS THE TORT OF PUBLIC NUISANCE STILL A USEFUL TOOL FOR THE PLAINTIFFS' PERSONAL INJURY BAR?

By William E. McNally, Barbara Cotton and Pamela Fischer¹

I. INTRODUCTION

In a hypothetical situation plaintiff's counsel is acting for the estate of a deceased who was killed while driving on a highway in Alberta. A passing vehicle was in a serious state of disrepair and a piece of metal from the defendant driver's vehicle dislodged and shot through the window of the deceased, penetrating her skull. Clearly an action can be commenced in negligence, but plaintiff's counsel is intrigued by the idea of commencing an alternate action in public nuisance. The attraction of a claim in public nuisance is the perceived possibility of gaining an advantage through the imposition of strict liability.

Does an action for public nuisance remain a useful tool for the plaintiffs' personal injury bar?

II. OVERVIEW

Bottom line: it would seem that an alternate action for public nuisance in such circumstances would not be of significant assistance in the majority of situations, and a claim for the tort of public nuisance is now of very limited usefulness. This is because, since the seminal decision of *Overseas Tank Ship (U.K.) Ltd. v. Miller S.S. Co. Pty., The Wagon Mound (No. 2)*,² it has been established that although negligence is not an essential element in nuisance, nevertheless some fault is almost always necessary and fault generally involves foreseeability.³ Indeed, the Alberta Court of Appeal in *Abbott v. Kasza*⁴ has said that with respect to vehicles using a highway there is no longer any distinction between actions framed in negligence and those framed in nuisance as foreseeability is an essential element in determining liability in both actions.

The Supreme Court of Canada has appeared to give new life to the viability of an action in public nuisance in *Ryan v. Victoria (City)*,⁵ but in this case the defendant was also found liable in negligence as well. This case would therefore not seem to undermine the earlier statements of the

courts following *Wagon Mound No. 2* that foreseeability and fault are requisite elements of nuisance, thus rendering the two actions of negligence and public nuisance within the context of a motor vehicle accident largely indistinguishable.

There appear to be some obscure situations in which public nuisance does remain a useful cause of action even in the absence of a finding of negligence and there may be other nuances, which will be discussed at the end of this paper, but these situations would seem to be only of limited assistance to the plaintiffs' personal injury bar.

III. PUBLIC NUISANCE

A. Definition

Public nuisance is not a well understood tort as it can arise within various contexts and is thus difficult to pin down. Allen M. Linden in *Canadian Tort Law*⁶ describes it as follows:

“Nuisance is a field of liability. It describes the type of harm that is suffered, rather than a kind of conduct that is forbidden. In general, a nuisance is an unreasonable interference with the use and enjoyment of land by its occupier or with the use and enjoyment of a public right to use and enjoy public rights of way. For the most part, whether the intrusion resulted from intentional, negligent or non-faulty conduct is of no consequence, as long as the harm can be categorized as a nuisance . . .

Underlying the present law of nuisance is the Latin maxim *sic utere tuo ut alienum non laedas* (use your own property so as not to injure that of your neighbour's).”

It is clear that it is possible to bring a private tort action for a public nuisance if the claimant has suffered special damage as a result of it, with special damage not being used in the traditional sense of calculable pecuniary loss but rather as “particular” damage, that is, a special loss suffered by an individual which is not shared by the rest of the community.⁷

The leading definition of public nuisance is that articulated by the Supreme Court of Canada per Major J. in *Ryan v. Victoria (City)*.⁸ In this case the plaintiff was injured when he was thrown from his motorcycle while attempting to cross railway tracks running down the centre of a street in downtown Victoria. The front tire of his motorcycle became trapped in a “flangeway” gap running alongside the inner edge of the street-grade tracks. The motorcyclist sued both the city and the railway companies which owned and operated the tracks. The railways were found liable both in negligence and in nuisance. Major J. stated:

“The doctrine of public nuisance appears as a poorly understood area of the law. “A public nuisance has been defined as any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or convenience.”: See *Klar, supra* at p. 525. Essentially, “[t]he conduct complained of must amount to ... an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference . . .

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 . . .”⁹

B. Can it be argued that a patently defective vehicle on a highway is a public nuisance?

Although not clear, it seems that there is some scope for an argument that a patently defective vehicle on a highway is a public nuisance.

As a starting place in this argument one might note the importance of unimpeded public passage on the highways articulated in the leading case of *Chessie v. J.D. Irving Ltd.*¹⁰ In this case a snowmobiler was injured while traveling on a frozen river after dark when his snowmobile struck a wharf which extended thirty feet out from the shore. In the result the snowmobiler was unsuccessful in establishing public nuisance, but in the course of the judgment Laforest J.A. stated:

“That is why, no doubt, counsel for Chessie tried to assimilate snowmobiling over the ice on a navigable river to the right of the public to pass and repass on a highway. For the latter right has long been stringently enforced by the court; any interference with it will be jealously scrutinized . . .

It would be odd if the law were otherwise. The obvious importance of highways as a mode of transportation has merited recognition from the earliest times. What is more, the ordinary highways are largely dedicated to that use alone; competing uses are obviously few and subsidiary.”

Although there was early English authority that there could be nuisance on the highway without negligence¹¹ this principle was watered down and an element of fault imposed as a requirement for public nuisance for obstruction of the highways. Thus, in *Maitland v. Raisbeck*¹² per Lord Greene M.R. it was stated:

“. . . Every person who uses the highway has to exercise due and proper care. He has a right to use the highway and, if something happens to him which in fact causes an obstruction to the highway but is in no way referable to his fault, it is quite impossible, in my view, to say that *ipso facto* and immediately a nuisance is created. It would be obviously created if he allows it to be an obstruction for an unreasonable time or in unreasonable circumstances, but the mere fact that it has become an obstruction could not turn it into a nuisance. It must depend on the facts of each case as to whether or not a nuisance is created. If that were not so, it seems to me that every driver of a vehicle on the road would be turned into an insurer in respect of latent defects in his own machine. It might be a latent defect in the engine or the wheels which might cause the car or lorry to break down and remain stationary on the highway.”

It is indicated in this passage of Lord Greene M.R. that latent defects in a vehicle would likely not give rise to public nuisance. Query then whether patent defects can give rise to an action for public nuisance.

It is clear that public nuisance can arise if a danger is created on the highway as well as an

obstruction. It has been pointed out that this dual concept of creating a danger and an obstruction on a highway has been incorporated into the *Criminal Code* offence of public nuisance.¹³ The leading case establishing that one can be liable in public nuisance for creating a danger on the highway is *Trevett v. Lee*¹⁴ a decision of the English Court of Appeal per Evershed M.R. In this case the defendant had run a small pipe in order to procure water by way of gravity across the road in front of his house. The plaintiff had tripped over this hose pipe and was injured. She sued in both negligence and nuisance. In the result she was not successful but it was made clear in the judgment, relying on *Salmond on Torts* (11th ed.) that public nuisance could comprise either obstructing a highway or rendering it dangerous.

This concept was more fully expanded on in the next leading case of *Morton v. Wheeler*¹⁵ wherein Denning L.J. was concerned with danger arising from some “sharp, fearsome-looking spikes” bordering the highway. In an oft-applied passage Denning L.J. stated:

“As all lawyers know, the tort of public nuisance is a curious mixture. It covers a multitude of sins. We are concerned today with only one of them, namely a danger in or adjoining a highway. This is different, I think, from an obstruction in the highway. If a man wrongfully obstructs a highway, or makes it less commodious for others (without making it dangerous) he is guilty of a public nuisance because he interferes with the right of the public to pass along it freely. . . . Danger stands, however, on a different footing from obstruction.”

And further:

“But how are we to determine whether a state of affairs in or near a highway is a danger? . . . This depends, I think, on whether injury may reasonably be foreseen. If you take all the cases in the books, you will find that if the state of affairs is such that injury may reasonably be anticipated by persons using the highway, it is a public nuisance . . . but if the possibility of injury is so remote that he (the reasonable man) would dismiss it out of hand, saying “of course, it is possible, but not in the least probable”, then it is not a danger.¹⁶

This concept of a public nuisance arising from danger on the highway was also adopted in the leading case of *Dymond v. Pearce and others*.¹⁷

The specific argument that a defendant can be liable in public nuisance for bringing a patently defective vehicle onto the highway and thereby causing injury to the plaintiff can be based on *dicta* of Fletcher Moulton L.J. in *Wing v. London General Omnibus Company*.¹⁸ This case is most frequently applied for its comments with respect to the principle of *res ipsa loquiter*. In this case a “motor omnibus” belonging to the defendants, in which the plaintiff was a passenger, skidded upon a road. The road surface was greasy because of rain. It ran into an electric light standard and the plaintiff leaped out of the vehicle, injuring herself. She sued in negligence and in nuisance, and it was held at the trial that the defendants were clearly not negligent. It was further held that there was no evidence to establish that the defendants were liable in nuisance. Fletcher Moulton L.J. stated, however:

“This cause of action is of the type usually described by reference to the well-known case of *Rylands v. Fletcher*. For the purposes of to-day it is sufficient to describe this class of actions as arising out of cases whereby excessive use of some private right a person has exposed his neighbour’s property or person to danger. In such a case should accident happen therefrom, even through the intervention of an event for which he is not responsible, and without negligence on his part, he is liable for the damage. The best known cases of this type are associated with the use by a person of land belonging to him, as when a man collects a large volume of water on his land, or carries on some dangerous manufacture there. But I have no doubt that analogous causes of action exist when a member of the public makes undue and improper use of the right which he enjoys in common with all others of using the public highways for traffic. If a man places on the street vehicles so wholly unmanageable as necessary to be a continuing danger to other vehicles, either at all times or under special conditions of weather, I have no doubt that he does it at his peril, and that he is responsible for injuries arising therefrom, even though there has been no negligence in the management of his vehicle. It is not necessary to decide whether a state of things which would entail such consequences might not also be stopped by legal process on the ground that putting or keeping the vehicles on the road

was a nuisance. I incline to the opinion that such is generally, though not universally, the case . . .”¹⁹

Notwithstanding this seemingly helpful *obiter* of Fletcher Moulton L.J. the case has been interpreted as establishing that liability will only arise in negligence as a result of operating vehicles on a highway.²⁰

There is further, more tangential, case law to develop an argument that the bringing of a patently defective vehicle on a highway is a public nuisance.²¹ In one helpful case a plaintiff was injured during a soap-box derby conducted by a service club when an eleven year old boy lost control of his car and drove it into a group of spectators. Although the soap-box car itself was not patently defective, and the accident arose from the “failure of nerve of the child”, it is an interesting example of public nuisance based on the creation of danger on a highway.²²

C. Does Public Nuisance in the Circumstances Remain a Useful Tool?

Notwithstanding that an argument could possibly be developed that the bringing of a patently defective vehicle onto the highway was a public nuisance, such an argument would seem to be rendered of little effect because of the imposition of the requirements of foreseeability and fault, usually equated with negligence, onto the tort of public nuisance.

At one time it was thought that the tort of public nuisance was a strict liability offense, and thus its attraction for the plaintiffs’ bar. A series of early cases did indeed impose liability in nuisance in the absence of negligence, but these cases would seem to have been overshadowed by the holding in *Overseas Tank Ship (U.K.) Ltd. v. Miller S.S. Co. Pty., The Wagon Mound (No. 2)*.²³ In this case Lord Reid stated that although negligence was not an essential element in nuisance nevertheless fault of some kind was almost always necessary and fault generally involved foreseeability.

This view was adopted in Alberta. Following the *Wagon Mound* case the Alberta Supreme Court [Appellate Division] held that a farmer could be liable for nuisance for creating a smoke hazard on the highway only if he was liable in negligence.²⁴ In 1976 the Alberta Supreme Court, Appellate Division seemingly definitively stated that the law of negligence and public nuisance relative to vehicles on a highway had merged in *Abbott v. Kasza*.²⁵ This case involved obstruction of the highway. Clement, J.A., for the majority, stated:

“The claim against the appellants was laid in the alternative in nuisance. I am of opinion that in respect of vehicles using a highway there is now left no distinction between a cause of action alleging obstruction of the highway and one framed in negligence, and that our jurisprudence is not enriched by seeking to maintain any distinction between them in today’s society. McDonald, J., relied, amongst other authorities, on a passage in the judgment of Lord Reid in *The “Wagon Mound” (No.2)*, *supra*, at pp. 639-40 and for convenience I repeat the portion which I think epitomizes the conclusion he reached:

“The present case is one of creating a danger to persons or property in navigable waters (equivalent to a highway) and there it is admitted that fault is essential - in this case a negligent discharge of the oil.”

But how are we to determine whether a state of affairs in or near a highway is a danger? This depends, I think, on whether injury may reasonably be foreseen. If you take all the cases in the books, you will find that if the state of affairs is such that injury may reasonably be anticipated to persons using the highway it is a public nuisance (per Lord Denning, M.R. in *Morton v. Wheeler* . . .)

So in the class of nuisance which includes this case foreseeability is an essential element in determining liability . . .

The facts of this case will determine whether or not there has been negligence, and so we come out by the same door where we went in.”

The same conclusion has recently been reached by the High Court of Australia.²⁶

Is there room for an action in public nuisance in the absence of negligence, notwithstanding

the comments of the Alberta Supreme Court [Appellate Division], in view of the new vigour given to the tort of public nuisance in *Ryan v. Victoria (City)* by the Supreme Court of Canada? It must be noted that the Supreme Court of Canada found the railways liable in negligence as well as nuisance, and so, on the face of it, *Ryan v. Victoria (City)* would not seem to undercut the conclusions of the Alberta Supreme Court [Appellate Division].

An interesting case from New Zealand has suggested that there may indeed be room for the tort of public nuisance in the absence of negligence in very limited circumstances, however. In *A.G. & A.H. Thompson Ltd. v. Brechelt*²⁷ the defendant suffered from a major depressive illness and had developed an increasing preoccupation with suicide. On the day of the incident giving rise to the litigation, the defendant drove to a certain point on the highway, intending to commit suicide by throwing himself under a truck. After parking his car he ran out in front of the first plaintiff's truck. The plaintiff, however, took evasive action and collided with an oncoming car owned by the second plaintiff. Both motor vehicles were rendered uneconomic to repair. The plaintiffs claimed damages for their loss in both nuisance and negligence.

It was held that the defendant could not be liable in negligence because of his state of mind. The foreseeability requirement in negligence was held to be subjective, and, given that the defendant was suffering from a severe mental illness, he could not have foreseen the harm that he would be causing to the plaintiffs. On the other hand, it was held that the foreseeability requirement in public nuisance was objective. The following passage from *Morton v. Wheeler* was applied:

“There is a real distinction between negligence and nuisance. In an action for private damage arising out of public nuisance, the Court does not look at the conduct of the defendant and ask whether he was negligent. He looks at the actual state of affairs as it exists or adjoining the highway, without regard to the merits or demerits of the defendant. If the state of affairs is such as to be a danger to persons using the highway . . . it is a public nuisance. Once it is held to be a danger, the person who created it is liable unless he can show sufficient justification or excuse.”

Judge R.L.B. Spier held that it was objectively reasonably foreseeable that if a person ran out in front of a vehicle the driver of that vehicle was likely to take evasive action which could well result in a collision. He therefore concluded:

“I consider: (i) the plaintiffs have proved all the necessary elements of the tort of nuisance; (ii) there is no authority that permits a subjective assessment of foreseeability in the tort of nuisance; (iii) the defendant has failed to show any available justification or excuse for his actions; and (iv) the defendant’s mental state at the time of the accident does not relieve him from liability in nuisance.”

Judgment was given to the plaintiffs accordingly.

R.A. Buckley in *The Law of Nuisance*²⁸ has suggested that there may further be a difference in the onus of proof as between negligence and public nuisance, and thus still another viable basis of distinction between the remedies. He states:

“*Onus of proof.* It seems unlikely that the conflicting approaches apparently revealed by these various dicta do in truth reflect any fundamental differences of opinion as to the substantive law. One possible solution to the problem of reconciling the cases is to be found in the dictum of Denning L.J. in *Southport Corpn. v. Esso Petroleum Co. Ltd.*²⁹ His Lordship said:

“One of the principle differences between an action for public nuisance and an action for negligence is the burden of proof. In an action for public nuisance, once the nuisance is proved and the defendant is shown to have caused it, then the legal burden is shifted onto the defendant to justify or excuse himself.”

On this view, once an obstruction or dangerous situation has been created on the highway the person who caused it will be liable unless he can prove that what occurred did so without his fault . . .”

Thus Buckley seems to suggest that, although fault will be taken into account in considering whether the tort of public nuisance is established, the burden is not on the plaintiff to establish fault, but rather on the defendant to deny it.

Buckley concludes, however: “Nevertheless the preservation of such a difference in one isolated area of civil liability ultimately seems difficult to support in principle.”

IV. CONCLUSION

Thus it would seem that the tort of public nuisance has been overshadowed by the tort of negligence except to a very limited extent and no longer remains a useful tool for the plaintiffs' personal injury bar. The Alberta Supreme Court [Appellate Division] clearly indicated in 1976 that it no longer felt that the tort of public nuisance was viable within the context of a motor vehicle accident. Although there has been some suggestion that the tort of public nuisance has been revived by the Supreme Court of Canada in *Ryan v. Victoria (City)*, upon a close examination of this case the Supreme Court of Canada has merely expressed the boundaries of the tort in generalities and has in no way undermined the previous authority which has held that the elements of foreseeability and fault are now requisite elements of this tort. Small differences may remain between the torts, for example, whether there is a subjective or objective test for foreseeability. These small nuances are of little practical effect, however, and likely render the tort of public nuisance in the context of a motor vehicle accident of assistance as an alternate claim to negligence only within a very limited context.

ENDNOTES

1. William E. McNally is the senior partner of McNally Cuming, Calgary, Alberta and Pamela Fischer is an associate in that office; Barbara E. Cotton is the principal of Bottom Line Research & Communications, Calgary, Alberta.
2. [1966] 2 All. E.R. 709
3. Per Lord Reid at 715
4. (1976), 71 D.L.R. (3d) 581
5. [1999] 1 S.C.R. 201
6. Allen M. Linden, *Canadian Tort Law* (7th ed.) (Markham, Ontario: Butterworths Canada Ltd., 2001)
7. Allen M. Linden, *Canadian Tort Law* at pp. 519, 521, 522
8. [1999] 1 S.C.R. 201
9. This passage has been recently applied in *Danco v. Thunderbay (City)*, [2000] O.J. No. 1208, affirmed at [2001] O.J. No. 3442.
10. (1982), 140 D.L.R. (3d) 501
11. *Ware v. Garston Haulage Co. Ltd.*, [1943] 2 All. E.R. 558
12. [1944] 2 All. E.R. 272
13. Philip H. Osborne, *The Law of Torts* (2000) (Quicklaw)
14. [1955] 1 W.L.R. 113
15. *The Times*, 1 February 1956
16. For application of these principles in *Morton v. Wheeler* see *Bains v. Jasser*, [1983] B.C.J. No. 1020; *Lim Kar Bee v. Abdul Latif Bin Ismail* 1977 M.L.J. LEXIS S 243; *White v. Humphries and another* (1944), 1 M.V.R. 426 (Supreme Court of Western Australia)
17. [1972] 1 Q.B. 496
18. [1909] 2 K.B. 652

19. This passage has been applied in *Slattery v. Haley* (1922), 52 O.L.R. 95
20. Per Laskin J. (as he then was) (1944), 22 *Canadian Bar Review* 469 as follows:

“ . . . Yet it seemed to have been settled by *Wing v. London General Omnibus Co.*, the case of the skidding automobile, that the mere bringing of an automobile upon the highway does not give rise to liability for resulting harm in the absence of negligence in its operation . . . ”
21. *Ryan v. Youngs*, [1938] 1 All. E.R. 522; *Pitcher v. Martin*, [1937] 3 All. E.R. 918; *Spicer and another v. Smee*, [1946] 1 All. E.R. 489 and *Nottingham v. Aldridge and another (The Prudential Assurance Co. Ltd. Third Party)*, [1971] 2 Q.B. 739
22. *Chubaty and King v. McCulloch et al.* (1955), 17 W.W.R. 1
23. [1966] 2 All. E.R. 709
24. *Lickoch v. Madu*, [1973] 2 W.W.R. 127
25. (1976), 71 D.L.R. (3d) 581
26. *Brodie v. Singleton Shire Council*, [2001] HCA 29; 180 A.L.R. 145 per Gaudron, McHugh and Gummow J.J. :

“The time has now come...to treat public nuisance, in its application to highway cases, “as absorbed by the principles of ordinary negligence”...
27. (1996) NZDCR Lexis 65
28. R.A. Buckley, *The Law of Nuisance*(2nd Ed.) (London, Dublin, Edinburgh: Butterworths, 1996)
29. [1954] 2 All. E.R. 561