Public Nuisance and Standing to Sue

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PUBLIC NUISANCE
AND STANDING TO SUE

BY WILFRED ESTEY*

I  Introduction: Definitional Problems in Nuisance

Few words in the legal vocabulary are bedevilled with as much obscurity and confusion as nuisance. Once tolerably precise and well-understood, the concept has eventually become so amorphous as well-nigh to defy rational exposition. Much of the difficulty and complication surrounding the subject stems from the fact that the term nuisance is today applied as a label for an exceedingly wide range of legal situations, many of which have little in common with one another. Far from susceptible of exact definition, it has become a catch all for a multitude of ill-assorted sins . . . and a list of . . . rag ends of the law.1

Much of the reason for this obfuscation is apparently historical. In the sixteenth century, the courts first allowed a private suit to redress damages suffered as a result of a public nuisance on the ground that the plaintiff had suffered damages over and above those suffered by the rest of the community.2 This was done despite the heedings of earlier courts that the defendant in such a situation might be punished several times over for a single wrongdoing. Up until this time public nuisances were always crimes,3 relatively minor in nature whose common thread was interference with the exercise of some public right.4 The intrusion of public nuisance into the field of tort law resulted in the application of one legal term, nuisance, to two conceptually different causes of action. Private nuisance, broadly speaking, refers to an invasion of some interest of an owner in the use and enjoyment of his land, whereas public nuisance refers to a catch-all of miscellaneous offences, not necessarily related to the enjoyment of land, involving some discomfort or inconvenience to the general public in the exercise of what is usually referred to as a public right.

One writer has described the concept of public nuisance in this way:

Public nuisance has a schizophrenic character. Basically it refers to a rather motley group of criminal or quasi-criminal offences which involve actual or potential interference with the public conveniences of welfare . . . Since a public nuisance may be committed and its effects may be felt almost anywhere, it has no obvious connection with interference with interests in land.5

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3In fact one textbook author has stated: “no case has been found of tort liability for a public nuisance which was not a crime.” William L. Prosser, Handbook of the Law of Torts (4th ed. St. Paul, Minnesota: West Publishing Co., 1971) n. 60 at 586.

4For a succinct historical review of the tort of nuisance see Fleming, supra, note 1 at 339-340.

The courts have grappled with a working definition of public nuisance as well and probably the best that can be said is that a public nuisance "is a nuisance which is so widespread in its range or so indiscriminate in its effect that it is not reasonable to expect one person on his own responsibility to put a stop to it, but that it should be taken in the responsibility of the community at large." Thus a public nuisance is an act not sanctioned by law which causes inconvenience or damage to or interferes with the reasonable comfort of a class of Her Majesty's subjects in the exercise of a right common to all. The analysis which a court undertakes to determine whether a public nuisance exists is usually twofold: (1) is there a public right common to all that is being interfered with in some way and (2) is the interference affecting a sufficient number of persons to constitute it a public nuisance. The term "public rights" here must necessarily be given a broad interpretation: it encompasses a broad spectrum of rights or interests ranging from the right to fish in the public waters, the right to navigate public waters free from obstruction and the right to travel a public highway unimpeded, to a host of less well-defined interests such as the right of freedom from interference with public health, public morals, public comfort or the breach of a public right created by statute. In other words, a public nuisance must interfere with some interest common to all. Once this has been proved it is not necessary to show that every possessor of that interest is affected. Otherwise proof of a public nuisance would be an exercise in futility.

8A.-G. for B.C. v. A.-G. for Can. (1913), 15 D.L.R. 308 (J.C.P.C.) at 315 per Lord Haldane; A.-G. for Can. v. A.-G. for Que. (1921), 56 D.L.R. 358 (J.C.P.C.) at 361 per Lord Haldane; and see McRae v. British Norwegian Whaling Co. Ltd., [1927-31] Nfld. L.R. 274 (Nfld. S.C.) per Kent J.: "it is an established principle that the right to fish in the sea and public navigable waters is free and open to all. It is a public right that may be exercised by any of the King's subjects and for any interference with it the usual remedies to vindicate a public right must be employed."
11A.-G. for Ontario v. Orange Productions, supra, note 7, where on the basis of past experience nudity, sexual intercourse in public, drunkenness, obscene language, noise, dust, smoke, traffic jams, loss of water supply, danger to safety and danger to public health were all anticipated at an upcoming rock concert. Thus the producers of the concert were enjoined from staging it.
12Id.
13A.-G. v. P.Y.A. Quarries, supra, note 6, where the discomfort resulted from dust and vibration from the working of a rock quarry. See Prosser, supra, note 3 at 583-85 where the author has collected cases on each of the aforementioned areas.
15"It is obvious . . . that it is not a prerequisite of a public nuisance that all of Her Majesty's subjects should be affected by it; for otherwise no public nuisance could ever be established at all," per Romer L.J. in A.-G. v. P.Y.A. Quarries Ltd., supra, note 6 at 900.
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rights enjoyed by a sufficiently large number of persons to constitute a class of the public. These questions are always questions of fact. Moreover, once the scope of the class is defined it is not then necessary to show that every member of the class is affected, only a representative sample. Further to the problem of proof, it is apparently sufficient to show an accumulation of private nuisances:

in general however a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence. In other words, a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances.\(^6\)

Pollution is nearly always a public nuisance.\(^7\) This is so because some public right, such as the right to fish, is usually being interfered with or the right to breathe relatively clean air is being abrogated by noxious odours and some class of the public is inconvenienced. Thus, it is fairly easy to show that pollution of a stream is a public nuisance once it is shown that more than a few riparian owners are affected. And it has been suggested in several cases that everyone is entitled to a sufficient supply of untainted air, in an amount necessary for his reasonable use.\(^8\) Again, any interference with this right would be termed a public nuisance.

Public nuisance can also be a criminal offence. Section 165 of the Criminal Code of Canada states that:

(1) Everyone who commits a common nuisance and thereby
   (a) endangers the lives, safety, health, property or comfort of the public, or
   (b) causes physical injury to any person,
       is guilty of an indictable offence and is liable to imprisonment for two years.

(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby
   (a) endangers the lives, safety, health, property or comfort of the public, or
   (b) obstructs the public in the exercise of any right common to all subjects of Her Majesty in Canada.

It should be pointed out that resort to this remedy has been rare in Canada despite the breadth of its language and its apparently untrammelled scope.\(^9\)

\(^{16}\) Id., at 906.


\(^{19}\) See for example, The King v. The Toronto Railway Co. (1905), 10 O.L.R. 26 (C.A.) where the defendant company was charged and convicted of criminal common nuisance on the ground that they were negligently operating some of their street cars thereby endangering the lives and safety of the public. To the same effect see Union Colliery Co. v. The Queen (1900), 31 S.C.R. 81 where the company maintained a bridge in a negligent fashion, resulting in a serious accident and death to several passengers. And see Re Rex v. County of Lambton (1926), 30 O.W.N. 290 (H.C.) where the defendant corporation was indicted on the ground that it had shown "a shocking neglect of the highway" rendering it dangerous for all those who attempted to pass on it.
II Public Nuisance and Standing to Sue

Generally speaking, whenever public rights are infringed the Attorney-General as public representative and official guardian of these rights is the only one capable of bringing suit to remedy these wrongs. In the criminal field, it is only in specific and rather limited circumstances that a private individual can prosecute another for an allegedly criminal act. And even then, a private prosecutor can only proceed with the knowledge and under the control of the Crown. Similarly in the civil field, it is usually the Attorney-General who has the sole responsibility for redressing a public nuisance or the breach of a statutory duty running to the community at large; that is, one not enacted for the benefit of any one particular individual. The analogy between a crime and a nuisance is not wholly apt however: the whole of Her Majesty's subjects are said to be affected by a crime and the Attorney-General therefore sues as their representative whereas, as we have already seen, not everyone is affected by a public nuisance, only those who come within its ambit.20 Thus,

it is not merely because the public is affected that the Attorney-General sues in cases of public nuisance but because the thing complained of injures all those who come within the range of the offending act, and it is because that act injures all those who come within its range that the public in general are said to be injured. The act itself must be of such a nature as to cause injury, not because it is declared to be illegal, but because of its character. The act itself may be perfectly legal and it may be an unfortunate combination of circumstances which constitutes it a nuisance. And in all cases of public nuisance an individual who is specially damnified can recover damages quite apart from the right of the Attorney-General to restrain the nuisance on behalf of the public.21 Thus, the general principle is that a private person cannot seek relief when he is injured by a public nuisance. Only the Attorney-General, representing the class of the public affected, is the proper person to sue.22 This rule avoids a potential multiplicity of actions that could result if all the members of the affected public were permitted to sue.23 In the result, the private individual's usual remedy is to act as a relator to the Attorney-General, that is to inform

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20 See supra, note 15 and accompanying text.

21 A.G. for Ontario v. Canadian Wholesale Grocers Assoc. (1922), 52 O.L.R. 536 (H.C.) at 547. In this case the Attorney-General was suing on behalf of the public for a declaration and an injunction to restrain defendants from carrying on what was allegedly an unlawful trade combination contrary to s. 498 of the Criminal Code of Canada. The court denied the relief sought on the ground that this would increase the penalties the law had prescribed for such conduct. Thus unless property rights were affected, no public or private right of action existed. An injunction will not therefore issue to restrain an illegal act affecting the public in general merely because it was illegal. This decision was upheld on appeal: (1923), 24 O.W.N. 187.

22 Cairns v. Canadian Refining & Smelting Co. (1913), 5 O.W.N. 423 (H.C.) at 424 which was reversed at 6 O.W.N. 562 (C.A.) on the facts only; St. Lawrence Rendering Co. v. Cornwall, [1951] O.R. 669 per Spence J. at 673.

23 Walsh v. Ervin, [1952] V.L.R. 361 (S.C. Vict.) at 368 per Shall J.: "... it is to avoid the multiplicity of actions which might result if many members of the public sued, without proof of actual damage, in respect of such infringement of their right, that the law requires in such a case the Attorney-General must sue on behalf of all."; and see Fillion v. New Brunswick International Paper Company, supra, note 17 at 26 per Baxter J.: "... it is inexpedient that there should be a multiplicity of actions and ... where a nuisance or injury is common to the whole public the remedy is by indictment but ... no private right of action exists unless there is a special or particular injury to the plaintiff."
the Attorney-General of what is alleged to be a public nuisance. The Attorney-General's ability to act however is not contingent upon the existence of a relator: he has the power to act on his own initiative and fill an ex officio information. Indeed, this is a common practice. However, the Attorney-General may well decline to act at the relation of a private individual. It is only in rare circumstances that a private individual may maintain the action adding the Attorney-General as a party defendant. The usual rule is that the Attorney-General's discretion here is unimpeachable and not subject to judicial review:

The discretion of the Attorney-General to decide in what cases it is proper for him to institute proceedings with respect to public nuisances is absolute. Among the many authorities which could be cited in support of this principle I content myself with reproducing a passage from the speech of the Earl of Halsbury in London County Council v. A.-G., [1902] A.C. 65 at 168: 'My lords, one question has been raised, though I think not raised here—it appears to have emerged in the Court below—which I confess I do not understand. I mean the suggestion that the Courts have any power over the jurisdiction of the Attorney-General when he is suing on behalf of a relator in a matter in which he is the only person who has to decide those questions. It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter. But if he did it would not go to his jurisdiction; it would go I think to the conduct of his office and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a Court of law to intervene? If there is excess of power claimed by a particular public body and it is a matter that concerns the public it seems to me that it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in that respect or not... [T]he initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to participate in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General. I make this observation upon it, though the thing has not been urged here at all, because it seems to me to be very undesirable to throw any doubt upon the jurisdiction or the independent exercise of it by the first law officer of the Crown.

Similarly, the courts are loathe to interfere should the Attorney-General decide to take action where the efficaciousness of that decision has been doubted. This rule does not apply solely to the discretion residing in the Attorney-General to decide whether to sue or not at the relation of a private citizen but derives from the well-established principle of law that questions of ministerial administration are conferred on the ministers of the Crown and no court can interfere with either the exercise of that discretion (so long as no

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25 Turtle v. City of Toronto (1924-25), 56 O.L.R. 252 (C.A.) at 276; see discussion, infra, notes 51-52 and accompanying text.

26 Grant v. St. Lawrence Seaway Authority, [1960] O.R. 298 per Aylesworth J.A. at 303; see also McLeod v. White, supra, note 22 at 355.

27 A.-G. v. Bastow, supra, note 14 at 500-501: "it is plain that this court is not concerned with the reasons which have seemed good to the Attorney-General in causing him to bring this action. . . . [T]he Attorney-General is the person who is primarily responsible for the enforcement of the law, he is the first law officer of the Crown and I think that, if he considers it necessary to come into the court by way of a relator action to ask for the assistance of the court in enforcing obedience to a clear provision of the law, the court, although retaining its discretion ought to be very slow to say that the Attorney-General ought to have exhausted other remedies before he came to the court."
legislative provisions are breached) or the mode in which the discretion should be exercised.\footnote{28}{Theodore v. Duncan, [1919] A.C. 696 (J.C.P.C.) at 706; Orpen v. Attorney-General (1924), 56 O.L.R. 327 (H.C.), 530 (C.A.) at 337; Attorney-General for Ontario v. Toronto (1904), 8 O.L.R. 440 (Exch. Div.) at 444.}

Regardless of whether or not the Attorney-General decides to sue, a private individual may still desire redress for any damage he has suffered. Unfortunately, his standing to sue in such a situation is restricted to fairly narrow circumstances: "as the general principle is usually stated, an individual cannot sue alone for relief in respect of a nuisance to a public highway unless he has sustained some particular damage, in the sense of some substantial injury, direct and not merely consequential, beyond that suffered by the public generally."\footnote{29}{Walsh v. Ervin, supra, note 23 at 368.} An alternative formulation of the general rule has been suggested by the New Brunswick Supreme Court: in an action involving a public nuisance, the action shall be brought by the Attorney-General unless a private individual can prove that (1) the interference with the public right is concomitantly an interference with a private right of his or (2) a statute has given him a special protection or benefit which has been invaded or (3) he can show that he has suffered some particular direct damage over and above that incurred by the rest of the community.\footnote{30}{McLeod v. White, supra, note 24 at 358, citing Halsbury's Laws of England (2nd ed.), vol. 26 at 13-15. For proposition (1) see Marriott v. East Grinstead Gas & Water Co. [1909] 1 Ch. 70 per Swinfen Eady J. at 78; A.-G. v. Logan [1891] 2 Q.B. 100 per Wills J. at 104 and per Vaughan Williams J. at 105; Lyon v. Fishmongers Company (1876), 1 A.C. 662 (H.L.) per Lord Cairns at 671-72; and for proposition (2) see Mayor of Devenport v. Plymouth, Devenport Tramways Co. (1884), 52 L.T. 161 per Chitty J. at 163 and per Bowen L.J. at 164; and for proposition (3) see Fillion v. N.B. International Paper Co., [1934] 3 D.L.R. 22 (N.B.C.A.) at 26; McRae v. British Norwegian Whaling Co. Ltd. [1927-31] Nfld. L.R. 274 (Nfld. S.C.) at 282-83; Grant v. St. Lawrence Seaway Authority, [1960] O.R. 298 at 303; Canada Paper Co. v. Brown (1922), 63 S.C.R. 243 per Anglin J. at 256. This requirement of special damage has persisted from the very first case that allowed a private individual to recover damages for a public nuisance: see note 2, supra.} To constitute particular or special damage to the plaintiff, the injury must differ in nature, not merely in degree from that suffered by the rest of the community.\footnote{31}{Turtle v. City of Toronto, (1924-25), 56 O.L.R. 252 (C.A.) at 277; St. Lawrence Rendering Co. v. The City of Cornwall, [1951] O.R. 669 at 673.} The rationale offered by the courts for this rather harsh requirement is that if this were not the case, their task of defining the requisite degree of damage to allow for relief in any given case would give rise to insuperable difficulties. It is submitted however that in the past our courts have been particularly adept at analyzing the facts of any given case and fashioning a remedy where the plaintiff has shown that he has suffered some injury deserving of redress at law. In this situation then it seems preferable for the courts to open their doors to a plaintiff who claims to have been injured by a public nuisance and grant him the opportunity at least of showing that he has suffered sufficient damage, albeit only different in degree from the rest of the community, to warrant compensation from the defendant. This is not the law however. Until some public right is interfered with (for example, the obstruction of a public highway), the mere fact that the plaintiff suffers some inconvenience...
in that he is unable to pass upon the highway is not sufficient to grant him a separate cause of action.\textsuperscript{32}

To make matters worse, Canadian courts have exhibited a marked reluctance to extend the reach of "special damage". Thus, it is apparently not sufficient for a claimant to show that his business has been interfered with by some sort of public nuisance for this is not a direct but a "consequential" damage resulting from the nuisance.\textsuperscript{33} This appears to be a peculiarly Canadian approach for the American courts have been more liberal in allowing recovery for this type of injury: "[Pecuniary loss as a difference in kind] has been considered sufficient where the plaintiff has an established business making a commercial use of the public right with which the defendant interferes. . . . There are several cases in which commercial fisheries making a localized use of public waters have been allowed to recover for pollution where the ordinary citizen deprived of his occasional piscatorial Sunday pleasure could not do so."\textsuperscript{34} However, where the plaintiff has suffered personal harm to his property the courts have had no difficulty in finding damage different in kind.\textsuperscript{35} But, as far as defining with any degree of precision the scope of the "special damage" requirement, it is impossible to be dogmatic.

III Recent Canadian Case Law on Public Nuisance:

It will be useful for the purpose of analyzing the legal issues already discussed to focus on three public nuisance cases from Eastern Canada, the most recent being a judgment of the Chief Justice of the Newfoundland Supreme Court. This Maritime trilogy is typical of the approach of Canadian courts in this area. The judgment is, for the most part, characterized by pedantic and unimaginative reasoning. While social conditions and public attitudes have changed, the law has remained static.

The seminal case is \textit{McRae v. British Norwegian Whaling Co. Ltd.}\textsuperscript{36} The plaintiff, a commercial fisherman, brought his action against the defendant who had built a whaling factory only 1000 yards away from the plaintiff's premises. McRae alleged that the company polluted the waters in the area and thus interfered with his fishing business. He also alleged that the air was contam

\textsuperscript{32}\textit{Walsh v. Ervin}, [1952] V.L.R. 361 (S.C. Vict.) at 368: "for the legal right of passing and repassing is the same in all members of the public and it is to avoid multiplicity of actions which might result if many members of the public sued, without proof of actual damage, in respect of such infringement of their right that the law requires that in such a case the Attorney-General must sue on behalf of all."


\textsuperscript{34}Prosser, \textit{supra}, note 3 at 590-91. See for example, \textit{Hampton v. North Carolina Pulp Co.} 27 S.E. 2d 538 (1943) (S.C.N.C.) at 545 per Seawell J.; \textit{Carson v. Hercules Powder Co.} 402 S.W. 3d 640 (1966) (S.C. Ark.) per Bland J. at 642: "The Arkansas Pollution Control Commission . . . found that the appellee did pollute the waters creating a public nuisance and rendering the waters harmful and detrimental to fish and other aquatic life . . . By polluting the water . . . appellee prevented the operation of [plaintiff's] business for the years 1963, 1964 and 1965 and by doing so became directly liable to appellee for any damage to his business and loss of profits."

\textsuperscript{35}Prosser, \textit{supra}, note 3 at 588-89; MacLaren, \textit{supra}, note 5 at 331-32.

inated by offensive smells and that his drinking water was rendered unsafe. The court held that because the right to fish in the sea and in navigable waters is a right common to all Her Majesty's subjects, interference with it can only be restrained by the Attorney-General unless a private individual can show direct particular, and substantial damage. As we have already noted, the court concluded that the interference with the plaintiff did not meet these requirements because the plaintiff suffered with everyone else in the community (albeit to a greater degree). Thus the action for the public nuisance was dismissed although it was held that the plaintiff could succeed in his private nuisance action to redress the damages to his drinking water. The distinction the court made was this: the plaintiff's right to fish is a public right, for which damage could not be recovered by the plaintiff in a private action because he could not prove "particular direct and substantial [damage], over and above the injury thereby inflicted upon the public in general"; but, the plaintiff's right to drinking water was a private proprietary right, one not shared by the general community, and based on an individual right to drink the water accruing to the plaintiff as a user over a number of years. Thus an injunction issued to restrain the contamination of the drinking water which amounted to a private nuisance and the noxious odours and smells which also invaded a private proprietary right of the plaintiffs in that the discomfort resulting therefrom "caused a nuisance to the plaintiffs in the enjoyment of their property." The action based on the public nuisance was dismissed.

Shortly thereafter, the New Brunswick Court of Appeal reviewed the law in this area in an almost identical factual situation. In Fillon v. New Brunswick International Paper Company the plaintiff complained that the defendant's mill polluted the waters of the Restigouche River where he conducted his commercial fishing operation causing him $2800 in damages resulting from interference with his business. The court held that the licences granted to the plaintiff did not give him an exclusive right to fish in any particular part of the river and thus did not constitute a "several fishery." The plaintiff was thus left with his rights as a member of the public. Once the court was able to come to this conclusion it had no difficulty disposing of the claim. Because the plaintiff had no proprietary right in the dead fish, the court concluded that the damage he suffered differed from that suffered by the community merely in degree, not in kind. There was in other words no difference in the quality of the plaintiff's damage and hence there was no foundation for a private action to enjoin the public nuisance. The court also discarded the negligence branch of the plaintiff's case and dismissed the action.

Thirty-six years later the Newfoundland Supreme Court traversed the same ground in Hickey v. Electric Reduction Co. Unfortunately, the court

37 See supra, notes 33 and 34 and accompanying text.
39 A "several fishery" refers to the situation where one has been granted an exclusive right to fish in a given place, either with or without the property in the soil: see Malcolmson v. O'Dea (1862-64) 10 H.L.C. 591 at 617-618 per Willes J. The plaintiff in the Fillon case had no several or separate right of fishery, i.e., one carved out of the public right, as one had not been granted him and thus his only right to fish was as a member of the public.
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showed no creativity and merely fashioned the traditional remedy. The plaintiff, Hickey, was a commercial fisherman who alleged that the defendant company had discharged poisonous material into Placentia Bay, “poisoning the fish and rendering them of no commercial value.” The court reviewed various definitions of public nuisance and concluded that what was before the court “was not a nuisance peculiar to the plaintiffs, nor confined to their use of the waters of Placentia Bay. It was a nuisance committed against the public.”

Since the right to fish in the sea and in public navigable waters is a public one, Hickey was thrust back onto the special damage requirement imposed on private plaintiffs who seek redress for a public nuisance. Citing extensively from McRae and Fillion, the court concluded that this was a public nuisance from which the plaintiff derived no private right of action as he had suffered no special damage. The crucial point of the case is the manner in which the court dealt with the special damage requirement. The court reiterated the general proposition that a private individual must prove that he has suffered “peculiar” damage, damage which is direct and not consequential before he can sue successfully in public nuisance:

It is not enough for the plaintiffs to show that their business is interrupted or interfered with, by the public nuisance, to enable them to maintain a private action against the defendants in respect thereof, for such interruption or interference is not a direct but merely a consequential damage resulting to them from the nuisance.41 (Emphasis added)

Although the Chief Justice had no difficulty concluding from this that the right which the plaintiff complained of was being interfered with was one common to the whole community, the illogic of Kent's statement must have troubled Chief Justice Furlong for he went on to deal with the requirement of direct damages. Relying on a negligence case, SCM (U.K.) Ltd. v. W. J. Whittall & Son Ltd.,42 the learned judge held that the proposition that economic loss without direct damage is not usually recoverable at law was as applicable in nuisance as it was in the law of negligence. In the result, the action was dismissed.

It will be useful to analyze this decision further. There are two issues involved here with respect to the question of damages: (1) did the plaintiff suffer a special damage sufficient to allow the court to grant him relief, that is, damage different in kind from that suffered by the rest of the community, and (2) even if damage is proved (and the court must be referring to special damages) then is that damage a direct result of defendant's conduct, i.e., damage that is not too remote to be recoverable. As far as the question of remoteness is concerned, there is a distinction between material loss and economic loss. With respect to the first proposition, the law as set down by Kent J. in the McRae case and adopted by Furlong C.J. in Hickey must now be taken to be that interference with business is “not a direct but merely a consequential damage” (emphasis added) resulting from the nuisance and thus does not constitute a sufficient ground for recovery by a private individual in a public nuisance action.

Unfortunately Chief Justice Furlong did not elaborate on what he meant by “consequential” damage in the public nuisance context. Two interpretations are possible. First, consequential might include a remoteness factor. Con-
sequential damages may be simply too remote to permit the plaintiff to recover. If this is its meaning, it is merely a restatement of the general proposition that damages not proximately caused by the tortfeasor's conduct are not recoverable. But if the court meant this, it should not have suggested that economic losses resulting from an interference with business are per se consequential and therefore not recoverable. Whether or not damages are direct or consequential can only be determined by evaluating the facts of each case, not by looking to see what type of damage was suffered.

Alternatively "consequential" could refer to damages that are different in degree but not in kind. This is the more likely interpretation. If this is the proper definition, it is merely a restatement of the special damage requirement. Whatever the correct interpretation, however, it should not preclude the possibility that damages resulting from an interference with business are recoverable if they are shown to be different in kind from those suffered by the rest of the community. The law is not so dogmatic as to prohibit an inquiry by the courts into whether damages flowing from the interruption of one's business are damages of a different nature than those suffered by the rest of the community and thus recoverable at law by a private plaintiff. Indeed such a statement flies in the face of clear authority to the contrary.43

Finally, the direct/consequential distinction is specious and only clouds the real issue of whether the plaintiff suffered damage different in kind from the rest of the community. The bald statement that interference with business is never sufficient to ground a cause of action for a private individual short circuits any inquiry by the courts into the special damage requirement and is contrary to the law in other jurisdictions.

The Ontario Court of Appeal held that where a plaintiff's steamship business is interfered with by a defendant who had dammed up a navigable river the plaintiff's damages are special and not common to the rest of the public.44 According to the court it is always a "question of fact whether the injury complained of specially affects the plaintiff or a limited few..." Here the plaintiff's business was tied up for a considerable time resulting in daily losses, injury to the goodwill of the business and a diminution in earnings, all of which were deemed recoverable. The plaintiffs brought a similar action against another defendant who had obstructed their navigation of the same river by erecting a boom across it.45 This amounted to a public nuisance as well because it interfered with the plaintiff's right to navigate a public highway. Interference with the plaintiff's business was sufficient to grant him standing to sue and substantial damages were awarded to him even though the plaintiff could not show the actual extent of his damages.

In an earlier case,46 a fisherman living on a navigable stream was employed by some of his neighbours to use his sail boat to bring them supplies and provisions. In addition to this he used other boats to ply his fishing trade. The defen-

43See text infra, accompanying notes 44-46 and supra, note 34.
44Rainy River Navigation Co. v. Ontario (1914), 17 D.L.R. 850 (Ont. C.A.).
dant corporation wholly obstructed access to the stream by leaving log booms at the mouth, covering the entire surface of the river. The plaintiff alleged that both his fishing business and his trading business were seriously interfered with. The defence was of course that the plaintiff had not proved particular damage over and above that suffered by the rest of the community. The Court of Appeal held that the plaintiff’s business was interfered with by this public nuisance which could not be justified as a reasonable use of the river and this “constitutes that damage peculiar to the plaintiff beyond that suffered by the rest of the lieges which entitles him to maintain the action.” Special damages were again a question of fact. Relying on English and American authorities, the Ontario Court concluded that damage to a trade or calling could satisfy the special damage requirement and awarded the plaintiff damages.

It is interesting to note that the Ontario cases expressly approved of and relied on the English case of *Rose v. Miles,* a case which Furlong C.J. disposed of most unsatisfactorily by saying, “I hold the view that that judgment was applicable only to the particular facts of that case.” In *Rose v. Miles* the defendant moored a barge across a public navigable creek, thus obstructing the creek and preventing the plaintiff from navigating his barges laden with merchandise along it. In the end he was forced to carry his merchandise over land at considerable expense. Again the defence was that the plaintiff had not shown any particular injury sustained as a result of the obstructions. The court, however, held that the particular damage was proved because of the expenses he had incurred in carrying out his trade: “if this be not a particular damage, I scarcely know what is.” For no satisfactory reason, Furlong C.J. refused to follow this case in *Hickey* on the ground that the judgment was applicable only to the particular facts of the case.

The *Hickey* case leaves us with the general proposition that interference with business from public nuisance does not constitute a direct damage and therefore does not meet the special damage requirement needed to maintain a private cause of action. But as we have seen this view is not shared by other courts. Economic losses have often been recovered through a private action in public nuisance. Given this apparent conflict, what is the present state of the law? How direct must damages be before they can be recovered? Is economic loss, by itself, too remote to be recovered? A flaw in the reasoning of the *Hickey* case suggests that the Ontario view is not only the better one for purposes of environmental protection, but the correct one at law.

The defence argued before the trial judge in *Hickey* that the damages claimed by the plaintiffs were too remote in law. For this position they relied on the *SCM (U.K.)* case, a negligence case. Furlong C.J. felt the case was important to the issue of public nuisance and extracted from it the proposition that economic loss without direct damage is not usually recoverable at law.

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47 Id., per Osler, J.A.
48 *Bell v. Corporation of Quebec* (1879), 5 A.C. 84 at 100 per Sir Montague Smith.
49 See *supra,* note 34 for examples of recent American authorities.
51 Id. per Dampier, J.
However, Denning L.J. who wrote the SCM (U.K.) Ltd. opinion restricted his conclusions to "actions for negligence, where the plaintiff has suffered no damage to his person or property but has only sustained economic loss. . . ." Lord Denning's conclusion was based on common sense and public policy rather than logic. The court did not want a contractor who had negligently cut a power cable to be liable to thousands of factory owners whose profits had not been diminished as a result. Common sense and public policy militated against burdening one contractor with the whole loss when the sensible course would be to shift the burden to the community affected. The court merely purported to lay down the rule that economic loss in negligence actions usually should be regarded as too remote to be recoverable. The defendant, therefore, was liable to the plaintiff for the material damages and "the loss of profit truly consequent thereon" but not for any other economic loss. It is clear from the judgment that the holding in the case was to be confined to negligence cases.

Indeed this should be the case. In public nuisance cases, the private plaintiff at the very least has suffered a certain interference with some right which he enjoys with the rest of the public; however, this is not the case with negligence actions where no invasion of a public right is involved. The policy reason for refusing to make the defendant liable in the SCM (U.K.) Ltd. case was that the court did not want to make the tortfeasor an insurer for economic loss for all those who are within the ambit of his negligent conduct. But this function is already performed in public nuisance cases by the special damage requirement which was created by the courts to ensure that the wrongdoer not be punished a hundred times for the same cause. The plaintiff must show that the damage he suffered was direct and of a kind different in nature than that suffered by the rest of the community. If the rest of the community all suffer economic losses to their businesses, the plaintiff's damage would cease to be special. It would then be for the Attorney-General to sue, for this is the rationale behind the special damage requirement. There are cases in the law of public nuisance where relief has been disallowed to a plaintiff on the ground that the alleged damage is too remote, but this has not precluded recovery for economic loss where the damage is a direct result of the tort. To use Lord Denning's expression the direct/indirect or direct/consequential distinctions are "illusory" and serve only to cloud the issues. It is submitted that the court should try to determine whether the damage is direct, not too remote, peculiar to the plaintiff and of a type that is different in kind from that suffered by the rest of the community. This inquiry should be undertaken with respect to all types of loss, material and economic. Finally, on the question of distinguishing between remote and direct damages, Lord Denning perceptively concluded:

Seeing these exceptional cases one may well ask: 'How are we to say when economic loss is too remote or not? Where is the line to be drawn?' Lawyers are continually asking the question. But judges are never defeated by it. We may not be able the draw the line with precision but we can always say on which side of it any particular case falls . . . . But, by building up a body of case law, we shall give guidance to practitioners sufficient for all the ordinary cases that arise.

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53 See Fleming, supra, note 1 at 342, n. 29.
54 Id., n. 30. And see supra, text accompanying notes 44-46.
The bulk of authority supports the proposition outlined above. It is submitted that although the *Hickey* case seems to suggest a contrary conclusion it should be regarded as wrongly decided and as against the trend of current authority. Fleming correctly states the law in the following passage.

According to one view, the plaintiff's injury must have been different not merely in degree, but in kind, from that shared by the general public and this depends on whether he has incurred pecuniary loss. The more liberal approach is to allow recovery so long as the plaintiff's hardship and inconvenience was appreciably more substantial, more direct and proximate, without necessarily differing in its nature. Accordingly, he may complain of mere delay and inconvenience, provided it was 'particular' to him, i.e., exceeded in degree what was suffered by others . . . There is the undoubted modern tendency to reject the elusive distinction between difference in kind and in degree and to allow recovery if the obstruction causes more than mere infringement of a theoretical right which the plaintiff shares with everyone else.\(^{56}\)

### IV An Alternative to the Private Suit

A private plaintiff who cannot fulfil the special damage requirement imposed by the court is thus left with the remedy of informing the Attorney-General of the alleged nuisance. The Attorney-General then in his discretion may or may not bring a relator action. The exercise of this discretion is not subject to judicial review. Although the courts have occasionally showed a willingness to allow a private individual to bring an action on his own adding the Attorney-General as a party defendant,\(^{57}\) the best opinion is that the courts will adopt a very restrictive approach to this method of proceeding in an attempt to preserve the discretionary power of the Attorney-General.\(^{58}\) Therefore, once the Attorney-General refuses to act, a private individual cannot commence an action in his stead.

At first blush it may seem that a class action\(^{59}\) might be a possible solution for a private individual wishing to bring an action to restrain a public nuisance.

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56 Fleming, *supra*, note 1 at 341.

57 *Turtle v. City of Toronto*, (1924-25), 56 O.L.R. 252 (C.A.) at 277. “[The plaintiff's] only remedy is to procure the Attorney-General to bring an action with the present plaintiff as relator, or should the Attorney-General decline, then possibly by adding the Attorney-General as a party defendant in the action as has even been done in some cases.”

58 *Grant v. St. Lawrence Seaway*, [1960] O.R. 298 (C.A.). In this case the plaintiff requested the Attorney-General to act on the relation of the plaintiff to commence an action but the Attorney General refused to so act. The plaintiff then began this action relying on the *Turtle* case. The Court of Appeal disapproved of the statement sanctioning this procedure in *Turtle* and held that the discretion of the Attorney-General was absolute and not to be circumvented by the device of adding him as a party-defendant. Per Aylesworth J.A. at 304: “To seek to add [the Attorney-General] as a defendant in an action such as this which he has refused to institute is nothing more or less than an attempt to flout the exercise of the discretion vested in him . . .”

59 A class or representative action is permissible when one person sues on behalf of several other persons who have a common interest and common grievance, or a community of interest in the subject matter of the suit. The relief sought must be beneficial in nature; an action for damages cannot be brought through the vehicle of the class action as it is assumed that damages are personal and not applicable to the rest of the class. See *Ontario Rules of Practice*, Rule 75; *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*, [1910] 2 K.B. 1021 (C.A.); *Duke of Bedford v. Ellis*, [1901] A.C. 1 (H.C.); *May v. Wheaton* (1917), 41 O.L.R. 369; *Allen v. Gagliardi*, (1971), 15 D.L.R. (3d) 380 (B.C.S.C.), aff'd (1971), 16 D.L.R. (3d) 355 (C.A.).
without having to submit the question to the discretion of the Attorney-General. But Canadian courts have been quick to strike this approach down.\(^6\) Again the courts are concerned about private plaintiffs circumventing the authority of the Attorney-General by asserting that he—the plaintiff—represents all the members of the public who are affected by the alleged nuisance.\(^6\) The rationale for disallowing class actions is that a class action requires a community of interest in a given subject matter in the class of people whom the plaintiff purports to represent. In a public nuisance, either each member of the class has suffered substantially the same injury in which case the Attorney-General is the proper person to sue, or a member has suffered special injury in which case the community of interest requirement is not met and the individual can then sue on his own.

In my judgment, an action either for damages for a nuisance or for an injunction to restrain a nuisance cannot be brought in a representative capacity. Though there may be many others who may sustain or fear damage from the nuisance it is clear that the injury or threatened injury must be peculiar to each person alone or to his own property. A class or representative action is permissible, speaking broadly, only in cases where all those whom the plaintiff claims to represent are in the same interest (by which is meant not merely a like or similar interest) as the plaintiff . . . This is very clearly brought out in Markt & Co. Ltd. v. Knight Steamship Co. Ltd. (1910), 2 K.B. 1021 . . . As Lord Justice Fletcher Moulton says at p. 1039: 'The essential condition of a representative action is that the persons who are to be represented have the same interests as the plaintiff in one and the same cause or matter. There must therefore be a common interest alike in the sense that its subject must be the same' . . . There is no such community of interest here. In this case each person whom the plaintiff claims to represent has a distinct or separate cause of action against the defendant for the special injury and damage, if any, which that person may sustain by reason of the alleged nuisance or threatened nuisance. It is only because of that special injury that the individual can sue at all. To the extent that the injury affects each one as a member of the public relief can be obtained only if the suit of the Attorney-General.

Therefore, except in the circumstance where an individual can prove special damage the Attorney-General is the proper party plaintiff because whenever any public right is infringed the Attorney-General is the proper public representative.

This, however, is not without some advantages. Historically, the Crown as parens partrae acted as the legal representative of the Crown and was the official designated to go before the courts to prevent the violation of the public's rights.\(^6\) And this is so with respect to a provincial Attorney-General even if the alleged invasion of rights results from the breach of a federal statute or

\(^6\)St. Lawrence Rendering Co. Ltd. v. City of Cornwall, [1951] O.R. 669 at 673: "the municipality cannot succeed in its counterclaim by alleging a class action in that it acts on behalf of all the citizens of a municipality . . . A class action for nuisance is not maintainable."


\(^6\)Id., at 653-54. See also Turtle v. City of Toronto (1924), 56 O.L.R. 252 per Mulock C.J.O. at 254 and per Orde J.A. at 277-78; McLeod v. White (1955), 37 M.P.R. 341 (S.C. N.B.-Ch. Div.) per McNair C.J. at 359.

\(^6\)People's Holding Co. v. A.-G. for Quebec, [1931] S.C.R. 452; A.-G. v. The Niagara Falls International Bridge Co. (1873), 20 Grant's Ch. 34 (Ont. Ct. of Ch.).
Public Nuisance

from the acts of a creature of federal statute.\textsuperscript{64} The courts will not question the Attorney-General's decision to sue or not. He is the sole judge of that. Nor will the courts express any opinion as to the way in which the Attorney-General's discretion should be exercised.\textsuperscript{65} His discretion in these matters is completely unfettered. Once the Crown has commenced an action, generally speaking, it is bound by the rules of practice and procedure like any other litigant. However, as Anglin J. points out in the \textit{Toronto Junction Recreation Club} case, there are several exceptions to this rule: the Crown may not be ordered to give discovery, it may not be made to give an undertaking with respect to damages on an inter-locutary injunction, nor can the Crown be nonsuited and the Crown may be exempt from payment of costs. \textquote{As a plaintiff, therefore, the Crown by no means puts itself in all respects in the plight of a subject-litigant.}\textsuperscript{66} Moreover, a counter-claim cannot be pleaded against the Crown as of right\textsuperscript{67} and a counter-claim cannot be set up at all in answer to an information filed by the Crown.\textsuperscript{68} Also, the Crown is apparently not bound by \textit{The Statute of Limitations}. Furthermore, where a statute is being breached the Attorney-General is not confined to the remedies prescribed in the statute but can bring suit for any remedy he sees fit especially when the prescribed remedy is insufficient.\textsuperscript{69} The Attorney-General need not show any invasion of a proprietary right, only that some public right has been infringed. Thus, where a public right is infringed the Attorney-General in an action against the alleged offender is not bound to pursue any particular remedy, even if the right is a statutory one and the statute prescribes a certain remedy for its breach. This acquires relevance in a pollution context. When the penalties contained in a statute prove to be inadequate or inappropriate the Attorney-General can go beyond the bounds of the statute and seek the type of relief more commensurate with the nature of the offence.

Moreover, problems of proof for the Crown are simplified. Where there is evidence that the defendant's conduct amounts to a public nuisance and thus interferes with the rights of the public, the Attorney-General may then intervene and seek an injunction even though there is no evidence of actual injury to the public.\textsuperscript{70} And the contempt sanction standing behind this remedy is indeed a serious one.\textsuperscript{71} Thus, all that need be proved is a public nuisance which tends

\footnotesize{
\textsuperscript{64}Id.
\textsuperscript{66}Id., at 442 and the cases cited therein.
\textsuperscript{67}A.-G. for Ontario v. Russell (1921), 44 O.L.R. 103 (Ont. H.C.) per Orde J. at 110.
\textsuperscript{68}A.-G. v. Grey Motors Ltd. (1928), 2 K.B. 78 per Rowlatt J. at 80: \textquote{I think it right to point out that at the back of the apparently hard rule that there can be no set off in this case against the Crown there lies in this fact that the subject can not make good a claim against the Crown except in a particular way and my decision merely shows that he cannot get around that by refusing to pay a debt to the Crown and then asserting his claim by setting it off.}
\textsuperscript{69}Allstadt v. Gartner (1899), 31 O.R. 495 (Ch. Div.) per Boyd C. at 497.
\textsuperscript{70}A.-G. v. Shrewsbury (Kingsland) Bridge Co. (1882), 21 Ch. Div. 752 at 755 per Fry, J.
\textsuperscript{71}See the dissent of O'Halloran J.A. in \textit{A.-G. of British Columbia v. Carven} [1938] 4 D.L.R. 17 (B.C.C.A.) and the cases cited therein.
}
to and has the potential to injure the public and the injunction will be granted. Again, this is of major importance in the pollution context. Should the Attorney-General be able to show the existence of some pollution that amounts to a breach of a statute then an injunction will be granted without the necessity of proving damages: "... this is an information by the Attorney-General against a public body, to enforce the terms of a public act of Parliament. Now ... it is not necessary for the Attorney-General to show any injury at all. The Legislature is of opinion that certain acts will produce injury, that is enough."

Although it is lamentable that a private individual in many circumstances is unable to acquire standing to sue on his own behalf or on behalf of a class of the affected members of the public, the Attorney-General, because of the several procedural and substantive advantages accruing to him ex officio, might be more effective in terms of seeking the most appropriate relief. He is not strictly bound by many of the rules of practice, nor confined to any particular remedies, nor bound to prove damages before he can seek an injunction, all constraints which must be borne by private litigants. This flexibility accorded to the Crown's law office may often times result in it being more advantageous to have him seek relief on behalf of all Her Majesty's subjects than to have a private litigant attempt to surmount the difficult standing to sue requirements imposed by the courts in public nuisance actions.

V Remedies

Once a plaintiff has established the existence of a public nuisance, there are basically three remedies available to him. Probably the most important and most effective form of relief from the plaintiff's point of view is an injunction. The granting of an injunction, an equitable remedy, is always a discretionary matter. Section 19 of the Ontario Judicature Act\(^{73}\) prescribes that a court should grant an injunction where it is just and convenient to do so. The weight of authority seems to be that this provision has expanded somewhat the jurisdiction of the court to grant an injunction over that exercised by the chancery courts where the remedy originated, as long as the injunction is issued to protect rights recognized by law or equity before the passing of the Act.\(^{74}\)

Generally speaking the prerequisites for an injunction are the absence of an adequate remedy at law and the presence of substantial harm where it appears that such harm is not about to terminate.\(^{75}\) While an injunction is usually the most effective form of relief available to a plaintiff, it concomitantly possesses

\(^{72}\)A.-G. v. Cochermouth Local Branch (1874), 18 Eq. 172 per Jessel M.R. at 178. The importance of this ability of the Crown to succeed upon proving that some illegal act has been committed without addressing the proof of damage is underlined in this case because the court, in an action tried at the same time as one brought by the relator (the local board of a town eight miles downstream from the defendant-polluter), dismissed an action for nuisance, based on the same facts, because the relator-plaintiff was unable to bring forth sufficient scientific evidence of the nuisance. Thus the bill for nuisance was dismissed but the injunction sought by the Attorney-General was granted.

\(^{73}\)R.S.O. 1970, 228, s. 19(1).


the potential of substantial harm to the defendant. In the result, the analysis a court usually follows is to weigh the advantage to be gained by the plaintiff against the inconvenience to be thrust upon the defendant.\textsuperscript{76} To this end, all the surrounding circumstances are reviewed. Nonetheless, the general rule still seems to be that once a right recognized at law is shown to exist and interference with that right is proved, an injunction should issue especially where damages are not adequate compensation.\textsuperscript{77} The effect of granting or refusing the injunction upon the community at large will also be considered. Thus, if the disparity between the advantage to be gained by the plaintiff and the harm to be suffered by the defendant and/or the rest of the community (through, for example, the closing down of an industry)\textsuperscript{78} is substantial, the injunction may well be refused.\textsuperscript{79} Because this remedy is discretionary the motives and conduct of both the plaintiff and defendant are relevant factors to be considered. An injunction will be most important for a plaintiff seeking to abate pollution, since it is usually as important to him to have the pollution cease as it is to be recompensed in damages. Moreover it is not necessary to wait for actual injury to occur to bring an action for injunction. Proof of a threat or intention to do an act which, if carried out, would result in a cause of action may be sufficient to move the court to exercise its discretion in favour of the claimant.\textsuperscript{80} As has already been noted, this is not the case in criminal law: an injunction will not issue to restrain a contemplated crime even if the Attorney-General acts as plaintiff where no public or private right is in danger of being violated by the anticipated misconduct.\textsuperscript{81} Finally, an injunction can only be sought by a private plaintiff if he can show special damage to himself (actual or threatened) over and above that suffered by the rest of the community.\textsuperscript{82}

Although relief by injunction has been denied where the relative economic hardship that would be incurred by the parties mitigates against it or the interest of the public is best served by refusing to grant it, this does not mean that relief by way of damages will be denied as well. Thus, damages and an injunction should be sought together.\textsuperscript{83} Generally speaking, damages will be granted

\textsuperscript{77}Walker v. McKinnon Industries, [1951] 3 D.L.R. 577 (J.C.P.C.) at 581 per Lord Simonds.
\textsuperscript{78}See for example, Black v. Canadian Copper Co. (1917), 12 O.W.N. 243 (H.C.) where farmers complained that smoke from nearby refineries in Sudbury was damaging their crops. On the effect of granting an injunction Middleton J. made the following comment at 244: “Mines cannot be operated without the production of smoke from the . . . smelters . . . there are circumstances in which it is impossible for the individual to assert his individual rights as to inflict a substantial injury upon the whole community. If the mines should be prevented from operating, the community should not exist at all . . . The consideration of this situation induced the plaintiff's counsel to abandon the claims for injunctions. The Court ought not to destroy the mining industry—nickel is of great value to the world—even if a few farms are damaged or destroyed; but in all such cases, compensation, liberally estimated, ought to be awarded.”
\textsuperscript{80}Watson v. Jackson (1914), 31 O.L.R. 481 (C.A.) per Riddell J. at 503.
\textsuperscript{81}A.-G. for Ontario v. Canadian Wholesale Grocers Association (1922), 52 O.L.R. 536 (H.C.). See note 17, supra, and accompanying text.
\textsuperscript{82}Prosser, supra, note 3 at 625.
\textsuperscript{83}Turtle v. City of Toronto (1924-25), 56 O.L.R. 252 (C.A.) at 276 per Masten J.A.
instead of an injunction where the latter would be overly oppressive to the defendant or where the plaintiff's injury is adequately compensable in money damages. In the context of pollution, however, damages will not usually go to the root of the problem because they do not go to remove the nuisance. They provide however both an alternative and a corollary to an injunction. The private plaintiff must prove his damages before they are recoverable. As has been noted this is not necessarily required of the Attorney-General suing on behalf of the entire community. The damages alleged, however, must be both a direct result of defendant's conduct and reasonably foreseeable.

With respect to damages to property, damages will not be granted for depreciation in the potential selling price of the land, only for loss actually suffered. Moreover, damages will only be given for losses suffered up to the date of judgment. Thus, a successful argument by the plaintiff that offers for his property indicate that it has declined in value is precluded if no actual sale is made. And it is important to note that a property owner can recover damages for loss in rent caused by a nuisance.

There is no clear rule concerning when damages will be granted in lieu of an injunction. It is impossible to be dogmatic in this area as so much depends on the facts of the case and the discretion of the court. The best attempt at prescribing some sort of rule of thumb was made by A. L. Smith, L.J. in Shelter v. City of London Electric Lighting Co., wherein he stated:

> In my opinion, it may be stated as a good working rule that—
> (1) If the injury to the plaintiff's legal rights is small
> (2) and one which is capable of being estimated in money
> (3) and is one which can be adequately compensated by a small money payment
> (4) and the case is one in which it would be oppressive to the defendant to grant an injunction:

then damages in substitution for an injunction may be given.

There may also be cases in which, though the four abovementioned requirements exist, the defendant by his conduct . . . has disentitled himself from asking that damages may be assessed in substitution for an injunction.

It is impossible to lay down any rule as to what under the differing circumstances of each case constitutes either a small injury or one that can be estimated in money . . . , or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication.
Finally, a plaintiff may feel that resort to the law courts will not provide him with a sufficiently speedy and effective remedy with respect to the wrong allegedly being done to him. In such a situation he may rely upon self help or as it is commonly called, abatement. Resort to this remedy should only be had in emergency situations. This is because the courts have always looked upon this remedy with much disfavour and thus have very strictly controlled it and attended it in certain situations with some very serious consequences. The classic statement on this remedy is that of Lord Atkinson in *Logan Navigation Co. v. Lamarg Bleaching, Dyeing & Finishing Co.*,\(^9\) where he made the following comments:

> It has been well said that the abatement of nuisance is a remedy which the law does not favour and is not usually advisable and that its exercise destroys any right of action in respect of the nuisance. In *Earl of Lonsdale v. Nelson*, Best J. said: 'The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale and appeal to a court of justice.' In the abatement of nuisance unnecessary damages must not be done . . . Lord Campbell in *Dimes v. Petley* said: 'if there be a nuisance in a public highway, a private individual cannot of his own authority abate it unless it does him a special injury and he can interfere with it as far as is necessary to exercise his right of passing along the highway; . . . we clearly think that he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway if, in avoiding it he might have passed on with reasonable convenience.' Again where there are two ways of abating a nuisance, the less mischievous is to be followed, unless it would inflict some wrong on an innocent third party or the public and previous notice is given when necessary.

Thus where a person enters upon the property of a tortfeasor to abate a nuisance, he must act reasonably in all respects to ensure that no damage is done. More importantly, once the nuisance is abated, the abater loses his cause of action and is thus precluded from seeking any relief in damages. This, then, is the most compelling deterrent to the use of this remedy. Abatement is looked upon by the courts as a privilege, one which is not to be abused and which will be strictly controlled. Thus, because the rationale for abatement has always been the necessity of a speedy remedy in place of the rather cumbersome and slow judicial process, the remedy must be exercised within a reasonable time after first learning of the alleged nuisance. Abatement can be both with respect to actual harm and threatened harm.\(^2\) Questions of reasonableness and whether there should or should not be notice seem to turn on the particular facts of each case. Lastly, with respect to a public nuisance, a private individual cannot justify abatement unless it causes or threatens special damage to him above and beyond that suggested by the rest of the community and then he may only abate the nuisance to the extent required to protect his own interests.

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\(^9\) [1927] A.C. 226 at 244-45.

\(^2\) See *Lemmon v. Webb* [1894] 3 Ch. 1, [1895] A.C. 1 where it was held that the defendant was justified in cutting down some branches from plaintiff's trees overhanging defendant's property even though the harm was merely threatened and not actual.
VI Conclusion

The private individual's ability to sue with respect to a public nuisance is circumscribed with a variety of limitations. However, if he has suffered damage to his person or property he still has recourse to action for trespass, negligence and private nuisance. Nonetheless, there will still be situations where these torts will not be applicable. A plaintiff then of necessity must resort to bringing an action in public nuisance. In spite of the obvious plight of the plaintiff, a review of recent Canadian case law suggests that one should not be optimistic about any liberalization of approach by our courts with respect to the grounding of a private action for public nuisance. Our judges apparently feel themselves strictly bound by principles and doctrines established centuries ago. This is especially relevant for those concerned with the quality of our environment and the role our legal system can play with respect to this problem. Our courts have displayed a marked level of insensitivity toward our changing social attitudes that now demand that pollution problems be dealt with in a meaningful way. The remedies available through the legal system have not kept pace with society's current attitude towards the severity of the "wrong". Several states in the United States, apparently frustrated by the common law's inability to respond to the problem, have resorted to legislative solutions. Perhaps we will soon be following the American lead.

93 Several statutes have been passed to provide for public actions to restrain a public nuisance. See, for example, Florida Statutes Annotated, s. 60.05 (1969); Wisconsin Statutes Annotated, s. 280.02 (1958) where a private individual with leave of the court in a relator action can sue to abate a nuisance and the private individual need not show special damages: Michigan Compiled Laws (Ann.), s. 14.528.