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Recent Case: Private Nuisance - Abatement and Injunction - Disparity of Economic Consequences [*Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S. 312 (1970)]

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PRIVATE NUISANCE — ABATEMENT AND INJUNCTION — DISPARITY OF ECONOMIC CONSEQUENCES

Boomer v. Atlantic Cement Co.,
26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

Historically, private nuisance actions have been primarily individual efforts to vindicate a plaintiff's property rights.[1] But with the growing public concern over air and water pollution, these common law actions have taken on a broader significance. They are relevant in the fight against pollution because they provide an additional technique for bringing pressure upon industrial pollutors. In *Boomer v. Atlantic Cement Co.*,[2] landowners brought an action to enjoin Atlantic from contaminating the air, claiming that the emissions of dust and raw materials caused by its plant operations had impaired the use and enjoyment of their respective properties. The trial court found that a nuisance existed and that the plaintiffs had suffered substantial damages, but refused to grant an injunction.[3] The appellate division affirmed that decision.[4] The court of appeals reversed and remanded the case to the supreme court with instructions to grant an injunction to be vacated upon payment to plaintiffs of permanent damages.

The New York standard for granting injunctive relief in private nuisance actions was first delineated in the case of *Campbell v. Seaman*.[5] The plaintiff in *Campbell* sought to enjoin the operation of a brick kiln on neighboring land, alleging that the sulphurous fumes from the kiln had destroyed the vines and trees he had planted around his house. In granting the injunction, the court stated that the determination whether a given use of property constitutes a nuisance will vary according to the circumstances of each case. The court noted that in situations where "the damage to one complaining of a nuisance is small or trifling, and the damage to one causing the nuisance will be large in case he be restrained, the courts will sometimes deny an injunction."[6] Thus, a court of equity will not

[1] *See* W. PROSSER, LAW OF TORTS §§ 87-90 (3d ed. 1964). In section 90, a private nuisance is defined as an interference with the right of use and enjoyment of one's land. A public nuisance is defined in section 89 as an act which interferes with an interest common to the general public.

[2] 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

[3] 55 Misc. 2d 1023, 287 N.Y.S.2d 112 (Sup. Ct. 1967).

[4] 30 App. Div. 2d 480, 294 N.Y.S.2d 452 (1968).

[5] 63 N.Y. 568 (1876).

[6] *Id.* at 586.

be bound by a set rule in determining whether injunctive relief is appropriate in private nuisance actions, but will evaluate each case on the individual equities involved.

This approach was taken in *Bently v. Empire Portland Cement Co.*[7] Despite a finding that the defendant's plant caused a nuisance which materially interfered with the plaintiff's enjoyment of her property, the *Bently* court denied injunctive relief on the ground that great injury would be inflicted on the defendant if the nuisance were restrained, while its continuance would cause the plaintiff only slight harm. This approach of examining the circumstances surrounding a nuisance and weighing the positions of the parties has been frequently adhered to by New York courts.[8]

Some of the more recent lower court decisions have begun to scrutinize the neighborhood in which the plaintiff's property is located. The location of the plaintiff's property in a commercial or industrial area, has been given as a reason for refusing to restrain the nuisance.[9] The clearest example of this approach is found in *Bove v. Donner-Hanna Coke Corp.*[10] In *Bove*, a resident of an industrially zoned section of Buffalo sought to enjoin the defendant from polluting the air around her house. The court reasoned that an injunction should be denied because the plaintiff had chosen to live in a congested area and had to accept the inconveniences incumbent thereto. In addition, the court stated that to enjoin an activity permitted by a local zoning ordinance would disregard the decisions of city officials who have the authority to determine the most advantageous zoning locations for such activity.

Another approach to nuisances in New York incorporates the principle that an injunction against a private nuisance will be granted when the plaintiff has demonstrated first, that such a nuis-

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[7] 48 Misc. 457, 96 N.Y.S. 831 (Sup. Ct. 1905).

[8] *See* Roscoe Lumber Co. v. Standard Silica Cement Co., 62 App. Div. 421, 70 N.Y.S. 1130 (1901); Pelletier v. Transit-Mix Concrete Corp., 11 Misc. 2d 617, 174 N.Y.S.2d 794 (Sup. Ct. 1958); Frank v. Cossitt Cement Products Inc., 197 Misc. 670, 97 N.Y.S.2d 337 (Sup. Ct. 1950); Siviglia v. Spinelli, 190 Misc. 690, 75 N.Y.S.2d 120 (Sup. Ct. 1947); Kraatz v. Certain-Teed Prod. Corp., 20 N.Y.S.2d 13 (Sup. Ct. 1940).

[9] *See* Haber v. Paramount Ice Corp., 239 App. Div. 324, 267 N.Y.S. 349 (1933); Gerring v. Gerber, 28 Misc. 2d 271, 219 N.Y.S.2d 558 (Sup. Ct. 1961); Kay v. Pearliris Realty Co., 106 N.Y.S.2d 443 (Sup. Ct. 1951); Fiscaletti v. Long Island Quilting Co., 81 N.Y.S.2d 605 (Sup. Ct. 1948). Although the court of appeals has never used this rationale, it has affirmed its use by the appellate division. Haber v. Paramount Ice Corp., 264 N.Y. 98, 190 N.E. 163 (1934). *See also* Roberts, *The Right to a Decent Environment; E = MC²: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674, 677 (1970); Note, *Zoning Ordinances and Common Law Nuisance*, 16 SYRACUSE L. REV. 860, 861 (1965).

[10] 236 App. Div. 37, 258 N.Y.S. 229 (1932).

ance exists, and second, that the resultant damages are substantial. The court of appeals enunciated this principle early in this century in the case of *Whalen v. Union Bag & Paper Co.*[11] In *Whalen*, suit was brought by lower riparian landowners to enjoin the operator of a pulpmill from polluting their common stream. The appellate division had held that it was a balancing of the relative economic values of the parties' property interests that should determine whether an injunction would issue.[12] Because the defendant's financial investment was far greater than the plaintiffs', the court refused to issue an injunction. The court of appeals expressly rejected this argument, holding that such a balancing of the equities was inappropriate because it would unjustly prejudice the poor litigant. The *Whalen* court found that damages of $100 a year were substantial enough to entitle the plaintiffs to an injunction.

The *Boomer* majority premised that, in order for it to deny an injunction where substantial damage has been shown, on the ground of "the large disparity in economic consequences of the nuisance and of the injunction," *Whalen* must be overruled.[13] The majority did not discuss the "balancing of the equities" cases as a separate line of authority. It classified three balancing of the equities cases which had granted injunctive relief, *Campbell v. Seaman*,[14] *McCarty v. Natural Carbonic Gas Co.*,[15] and *Strobel v. Kerr Salt Co.*,[16] as cases following the *Whalen* rule. It then disposed of two balancing cases where an injunction had been denied, *McCann v. Chasm Power Co.*[17] and *Frostman v. Joray Holding Co.*,[18] by showing that the plaintiffs did not qualify for injunctive relief under the *Whalen* standard.

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[11] 208 N.Y. 1, 101 N.E. 805 (1913).

[12] Whalen v. Union Bag & Paper Co., 145 App. Div. 1, 129 N.Y.S. 391 (1912).

[13] 26 N.Y.2d at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.

[14] 63 N.Y. 568 (1876).

[15] 189 N.Y. 40, 81 N.E. 549 (1907). *McCarty* involved a furnace burning soft coal. The court found that the nuisance could be eliminated through the use of hard coal, which would impose no great burden on the defendant. Accordingly, the *McCarty* court restrained the use of soft coal. This case is clearly distinguishable from *Whalen*, and does not stand for the strict injunction standard.

[16] 164 N.Y. 303, 58 N.E. 142 (1900). In *Stroebel* the defendant, a salt manufacturer, had diverted the flow of the plantiff's common stream, and, by using the balance in its operations, had rendered the rest of it largely unfit for ordinary use. The court recognized that the defendant was entitled to reasonable use of the stream, even if that use resulted in some loss to the plaintiffs. The court found, however, that because of the injury to the plaintiffs, the defendant's use was unreasonable as a matter of law. Thus, the plaintiffs were entitled to a permanent injunction.

[17] 211 N.Y. 301, 105 N.E. 416 (1914).

[18] 244 N.Y. 22, 154 N.E. 652 (1926).

The majority's refusal to recognize any nuisance rule besides that enunciated in *Whalen* may have been a strategic move. The majority obviously wanted to set out a new nuisance rule which would prohibit injunctions when the economic loss to the defendant would be much larger than that to the plaintiff, even though proportionately the damage might be the same to each. By setting up *Whalen* as the authority in New York, it was able to give reasonable grounds for adopting a new rule. Enjoining a defendant with an investment of $45 million because a plaintiff can show "substantial" damages of $100 annually is a rather harsh approach. A court could very reasonably refuse to follow such a rule. But the balancing of the equities test could not be circumvented so easily. Under that rule, a plaintiff with substantial damages according to *Whalen* might still be denied an injunction if his injury were slight and the defendant's large. But the plaintiff would not be denied an injunction if his injury were large in proportion to the total value of his property, even if the economic loss to the defendant were much greater. This is a reasonable rule. It is unfair to allow a defendant to destroy or seriously impair the use of a plaintiff's property simply because the defendant has more money invested in his own property. Rather than facing the balancing of the equities rule and expressly displacing it with its "economic disparity" rule, the *Boomer* majority chose to ignore it and simply overrule *Whalen*.

The *Boomer* majority fashioned a remedy modeled after that granted in the "inverse condemnation" cases.[19] Those cases involved actions against public utilities which had infringed upon individual property rights. Because the public interest was clearly on the side of the utility and the defendant had the power of condemnation, the invasion was allowed, and the plaintiff was repaid the value of the incursion upon his land.

The majority in *Boomer* relied on these inverse condemnation cases for authority to frame the same kind of relief. The plaintiffs were granted an injunction with the provision that it should be vacated upon payment of the permanent damages they had sustained.[20]

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[19] *See* Northern Ind. Pub. Serv. Co. v. Vesey, 210 Ind. 338, 200 N.E. 620 (1936); Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801 (1936); Westphal v. City of New York, 177 N.Y. 140, 69 N.E. 369 (1904); City of Amarillo v. Ware, 120 Text. 456, 40 S.W.2d 57 (1931). *See also* Van Allen v. New York R.R., 144 N.Y. 174, 38 N.E. 997 (1894); American Bank Note Co. v. New York Elev. R.R., 129 N.Y. 252, 29 N.E. 302 (1891); Lynch v. Metropolitan Elev. Ry., 129 N.Y. 274, 29 N.E. 315 (1891); Pappenheim v. Metropolitan Elev. Ry., 128 N.Y. 436, 28 N.E. 518 (1891).

[20] This form of relief, although new to the court of appeals, has been granted by the

The *Boomer* approach, like the inverse condemnation cases, results in a forced sale to the defendant of an easement to pollute the air surrounding the plaintiffs' land.

In dissent, Judge Jasen objected to the majority's extension of the inverse condemnation doctrine to a case involving a private defendant. He pointed out that the underlying rationale for allowing such relief was that because the defendant was a public utility, it was clearly in the public interest that it should continue to operate. In *Boomer*, the defendant's activity was solely for private gain. The extension of the right of inverse condemnation to private industry in this case violated, rather than furthered, the public interest because it allowed the continued polluting of the air by a private party whose operation had no counterbalancing benefit for society.

The dissent also argued that the extension of the inverse condemnation doctrine to a private party raised a serious question of an unconstitutional taking of the plaintiffs' property rights. It is well established that property may be condemned only for public purposes.[21] The relief granted in *Boomer* effects a judicial transfer of a "servitude" of the plaintiffs' land to the defendant for its own private purposes. The creation of such a servitude has been held unconstitutional even though the property owner was fully compensated.[22]

One dimension of the relief granted in *Boomer* which the court did not discuss is its tax consequences. There is authority that a taxpayer can deduct the cost of a civil liability resulting from the conduct of his business as an "ordinary and necessary" business expense under section 162 of the Internal Revenue Code.[23] In *Ditmars v. Commissioner*,[24] the manager of a stockbrokerage was permitted to deduct the costs of defending a suit for mismanagement of a trust. The Court of Appeals for the Second Circuit held that because the litigation expenses arose from the conduct of the taxpayer's business, he was entitled to a deduction under section 162. And in *Helver-*

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appellate division. Haber v. Paramount Ice Corp., 239 App. Div. 324, 267 N.Y.S. 349 (1933), *aff'd on other grounds*, 264 N.Y. 98, 190 N.E. 163 (1934).

[21] *In re* Tuthill 163 N.Y. 133, 57 N.E. 303 (1900); *see* Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896); Wikinson v. Leland, 27 U.S. (2 Pet.) 627 (1929); Saso v. State, 20 Misc. 2d 826, 194 N.Y.S.2d 789 (Sup. Ct. 1959).

[22] *In re* Tuthill, 163 N.Y. 133, 57 N.E. 303 (1900); *see* cases cited note 21 *supra.*

[23] INT. REV. CODE OF 1954 § 162(a). *See* Commissioner v. Heininger, 320 U.S. 467 (1943); Kornhauser v. United States, 276 U.S. 145 (1928).

[24] 302 F.2d 481 (2d Cir. 1962).

ing v. Hampton,[25] a federal court held that a judgment against a landlord for fraudulent rescission of a lease was deductible as an ordinary and necessary business expense. Because the suit against Atlantic resulted from the operation of its plant, Atlantic should be entitled to a deduction for the litigation and judgment expenses arising out of *Boomer*.[26] If Atlantic is allowed such a deduction, any deterrent impact of the *Boomer* decision will be seriously impaired. Industrial polluters, like Atlantic, will then know that they can deduct litigation expenses and damage payments suffered in nuisance actions from ordinary income.

There were three aspects of the possible alternative remedies in *Boomer* which troubled the majority. First, if it merely denied an injunction, the defendant would be left vulnerable to successive damage suits by the plaintiffs. Second, under the dissent's proposal of an injunction to be stayed for 18 months, the defendant would be placed in a peculiarly vulnerable position. As the 18 months ran out there would be increased pressure on the defendant to settle, and the plaintiffs could demand an increasingly higher settlement figure. Third, the court felt that emission control was an industry-wide problem, and that it would be inequitable to close down the defendant alone because no effective emission control system had been developed. The majority believed that replacing injunctive relief with permanent damages achieved the most equitable and realistic resolution of the controversy. The plaintiffs will be compensated for their loss, industrial pollutors will be encouraged to eliminate nuisances by the threat of being held for permanent damages, unequal punishment of pollutors was avoided, and a final resolution of the dispute was achieved.

Environmentalists will take issue with the court's reasoning. The deterrent impact of the threat of permanent damages can be viewed as inconsequential in light of the deductibility of the damages and the litigation expenses. In addition, the loss of injunctive relief

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[25] 79 F.2d 358 (9th Cir. 1935).

[26] *But cf.* Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958). The Supreme Court would not permit Tank Truck Rentals to deduct fines incurred in the operation of its business as ordinary and necessary business expenses because it would subvert Pennsylvania law, and thus was against public policy. Similarly, it might be argued that Atlantic should not be allowed a deduction because its operation violates the public policy embodied in the New York Air Pollution Control Act. N.Y. PUB. HEALTH LAW § 1265 (McKinney Supp. 1970). A distinction has been drawn, however, between tort judgments, where the tortious conduct was violative of public policy, and judgments which are penal in nature, like that in *Tank Truck Rentals*. Only penal judgments have been disallowed. *See* Tyler, *Disallowance of Deductions on Public Policy Grounds*, 20 TAX L. REV. 665, 684 (1965).

eliminates the most effective sanction which can be brought to bear on industrial pollutors. Private nuisance actions are viewed by environmentalists as a determined second front to governmental action. This second front should be encouraged rather than impaired. Accordingly, the *Boomer* decision, which has framed relief that effectively "licenses" air polluters from the civil liability standpoint, represents a set back for environmentalists.