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From Injunctions to Damages: Analysis of the remedies applied by the English law of private nuisance based on the economic arguments of Ronald Coase

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INTRODUCTION TO REMEDIES FOR PRIVATE NUISANCE

Private nuisance has been described as "unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it".[1] There are only three remedies available for private nuisance in England: abatement, damages and injunction.[2] Injunction is the most common remedy for a continuing nuisance.[3] Damages exist as a remedy in two types: damages for the harm suffered in the past[4] and damages awarded for future nuisance in lieu of an injunction, established by the Chancery Amendment Act 1858.[5] When judges make decisions on nuisance cases they need to balance wider

[1] *Read v Lyons* [1945] KB 216, 236.
[2] Jenny Steele, *Tort Law* (3rd edn, OUP, Oxford 2014) 639.
[3] ibid.
[4] ibid.
[5] Chancery Amendment Act 1858, s 2.

social interests in land use, and the individual interests adversely affected by it, which is maintained by ascertaining a type of remedy to be applied in each particular case. Courts must consider whether to apply injunctions to protect the rights of individuals or estimate the monetary value of those rights and award damages instead.

This legal dilemma was analysed from an economic point of view by Ronald Coase in his work "The Problem of Social Cost".[6] Coase approached cases with a single goal in mind: "to maximise the value of production".[7] The English law of private nuisance, as opposed to certain foreign jurisdictions, has been traditionally somewhat consistent with Coase's arguments, even though courts may have used different, non-economic reasoning for their decisions. However, recently courts moved away from the past approach and became less congruous with Coase's arguments. Major reforms in legal thinking and courts' approach to cases may be necessary in order for the English law to be compatible with Coase's theories.

THE PROBLEM OF SOCIAL COST

A number of theories that connect economics to law have been suggested by the leading world economists, focusing on how legal rules may affect the economy in the most beneficial way. Arthur Pigou, an influential economist, developed a theory,[8] which states that if a factory causes £100 worth of damage per year to the environment of a nearby community, it should be taxed £100 per year by the government. Consequently, the factory shall stop causing the damage to avoid taxation if it will cost the factory less than £100 to employ environmentally friendly practices.

[6] Ronald Coase, 'Problem of Social Cost' (1960) 3 JL & Econ 1.
[7] ibid 15.
[8] Arthur Pigou, *The Economics of Welfare* (Macmillan, London 1920).

Coase, in his prominent paper, "The Problem of Social Cost",[9] disagreed with Pigou.[10] Considering the example above, according to Coase, if a factory is hurting the adjacent community, forcing the factory to repay the community creates a situation where the community is, instead, hurting the factory, and social efficiency is therefore lost. Negotiation over payment between people of the community and the factory should be considered instead. If relocating away from the factory costs the community only £50 then they should relocate and charge the factory £50. This illustrates the main argument of Coase's article: in cases of a nuisance, parties must bargain in order to diminish their nuisance to the lowest cost.[11]

Coase specified that such mutual lowering of costs may occur assuming there are no transaction costs and the rights over land are clearly assigned.[12] Coase suggested that for the social efficiency to be maintainable, it is very important for the courts to promote policy that allows socially efficient bargains to take place. Courts can do that by clear assignment of property rights and liabilities to a particular party in a particular situation.[13] Otherwise, parties would be inclined to litigate, thus using up more of society's resources than if they would have bargained. In this context, remedies such as injunctions suit Coase's theory more than damages. Damages, as with the example above, do not create incentive for parties to change their ways, make bargains and consequently mitigate social costs. On the other hand, injunctions provide clear rules on liability and property rights and are preferred by Coase in cases of nuisance.

Coase also insisted that less emphasis should be put on which party was at fault and which party caused the nuisance. He suggested that it is never just

[9] Coase (n 6).
[10] Ibid 2.
[11] Ibid 15.
[12] ibid 8.
[13] ibid 19.

one party that causes nuisance, all the parties necessarily contribute to it.[14] This issue of a causation was explained by an American economist David Friedman using a case[15] concerning a hotel and a swimming pool: if a newly-built hotel casts a shadow on a neighbouring swimming pool, the construction of both the pool and the hotel in their current locations equally contribute to the nuisance as, had the pool not been built in that location in the first instance, there would not have been a problem. Coase's argument is that courts should not side with only one party as both are causing nuisance. Courts should make a clear rule whether an activity can occur or not. This would incite both parties, and not just the one which the court says is at fault, to calculate the cost of nuisance in order to engage in bargaining and minimise it.

Another argument by Coase in favour of injunctions over payment of damages is that due to a wide range of variables and parties involved, the amount of damages is difficult to ascertain, which leads to inaccuracies in evaluation of harm. On the other hand, injunctions relieve courts of the need to make damage calculations, as parties themselves negotiate for the most profitable outcome.[16]

The final, and perhaps most important, point of Coase's theory is that regardless which party the rights are assigned to, the socially efficient outcome will occur in any case, as long as the assignation is clear enough to allow negotiations to proceed.[17] For instance, if the factory from the example above is said to be liable to the community, but production is worth more to the factory than it hurts the community, then the factory will pay to the community and continue with the production, hence the value of land use will rise. Equally, if the court decides that the factory is not liable to the

[14] ibid 13.
[15] *Fontainebleu Hotel Corp v Forty-Five Twenty-Five Inc* 114 So 2d 357 (1959).
[16] Basil Markesinis, *Tort Law* (7th edn, OUP, Oxford 2012) 447-451.
[17] Coase (n 6) 8.

community, the value of the land use will rise in the same way. As the damage done to the community is less than the factory's benefit from the production, there is a limited scope for the community to pay for the factory to stop production. On the other hand, if the rules are unclear and the factory's liability is not ascertained, both parties will choose litigation over negotiations and the value of the land use is unlikely to rise to the same level.

ENGLISH LAW OF PRIVATE NUISANCE AND RONALD COASE'S ARTGUMENTS

English courts, in case of a nuisance, traditionally preferred to impose injunctions, favoured by Coase. In the case *Sturges v Bridgman*,[18] noise from a confectioner's machinery was a nuisance for a doctor who had recently constructed a consulting room next to the confectionery. The Court decisively allocated liability to the confectioner and granted an injunction to the doctor. Coase argued that both the doctor and the confectioner caused the nuisance.[19] The doctor was the cause of nuisance as he chose to build a room next to the confectionery. According to Coase the causation is irrelevant. The court's decision to disregard as a defence the fact that the confectioner's machine existed prior to the doctor's room, is consistent with Coase's argument that both parties are equally causing the nuisance.

The court ruling could give both parties incentive for a bargain. The confectioner would pay the doctor a sum greater than the cost of relocation or building a wall. The confectioner, however, would only pay the sum if it would be less than the cost of stopping his machine or relocating. It does not matter if the court decides that the confectioner is not liable. Most likely, bargaining would still proceed. The doctor would pay the confectioner a sum less than the cost of the nuisance to his business caused by the machine. In

[18] [1879] 11 Ch D 852.
[19] Coase (n 6) 10.

both cases, social efficiency would be maximised.

In another English nuisance case *Bryant v Lefever*,[20] the Court of Appeal decided not to award damages in favour of a person suffering from nuisance. A man's chimneys started smoking every time he lit a fire because his neighbours had built the adjacent wall beyond the chimney's height. The court decided that the man himself caused the nuisance by lighting a fire and so his neighbours were not liable. Coase disagreed with the court by stating that the party who built the wall and the party that lit the fire had both contributed to the nuisance. To "attain optimum allocation of resources",[21] both parties, including the neighbours, should consider the cost of nuisance and bargain for the better deal. Even though neighbours are not liable, the man who owns the chimney will be willing to pay the sum that is worth establishing a smoke-free environment by removing the wall. This sum is the cost of keeping the wall for the wall- builder. Both parties are suffering costs and should negotiate to minimise them. The court made a negotiation possible by clearly stating that the wall-builders had a legal right to build it and the chimney owner did not have the legal right to a current of air.[22]

In another case,[23] described by Coase, also concerning a current of air, the court concluded that the public house owners did have a right to a current of air, which flows from their cellar to a well, situated in the defendant's yard. Hence, the defendant had no legal right to close the well and prevent the ventilation. The court decided that the right existed by the "doctrine of lost grant" as the ventilating shaft had been known to the defendant for many years.[24] Coase pointed out that the reasoning behind the "doctrine of lost

[20] [1878] 4 CPD 172.
[21] Coase (n 6) 13.
[22] *Bryant* (n 20) 181.
[23] *Bass v Gregory* [1890] 25 QBD 481.
[24] ibid 484.

grant" is absolutely irrelevant.[25] What matters is the clear allocation of right, which did happen, but how the court came to that conclusion does not. For Coase, it was important to identify what was more socially efficient to have: a closed well with associated reduction in harm to the neighbourhood and increase in the cost of beer, or the opened well with associated increase in harm and reduction in the cost of beer.[26] Courts and economists might come to the same conclusion, but through different reasoning.

Until 2014, the decisions of courts in nuisance cases were influenced by *Shelfer v City of London Electric Lighting Co*,[27] which set out a strict and limited criteria for awarding damages in lieu of injunction.[28] This made English law more consistent with Coase's approach, as rules clearly stated whether an activity can occur or not.

In a more recent case, *Dennis v Ministry of Defence*,[29] Mr Dennis sued the government due to the fact that soon after he purchased a house the Royal Air Force (RAF) established a base nearby causing significant noise nuisance. The court stated that an injunction could not be given, as it was in the public interest that the RAF training would continue, but Mr Dennis was awarded damages of almost £1 million. This is contrary to Coase's approach as he would have allowed the parties to bargain and reach their own conclusion based on the value of their costs.

The latest Supreme Court case on nuisance, *Coventry v Lawrence*,[30] further drifts from an approach that limits damages as a remedy, with all five

[25] Coase (n 6) 14.
[26] ibid 15.
[27] [1895] 1 Ch 287.
[28] ibid 322.
[29] [2003] EWHC 793.
[30] [2014] UKSC 13.

judges ruling that the *Shelfer*[31] criteria should no longer be strictly applied. This new damages-favouring approach of English courts is more in line with some American cases, namely *Boomer v Atlantic Cement Co Inc*[32] and *Spur Industries v Dell E Webb*.[33] Both of these cases took a very different position to *Shelfer* and, as opposed to injunctions, the courts awarded damages and "special injunctions". *Boomer* has similarities with the English cases *Tamares v Fairpoint Properties*[34] and *Lunn Poly Ltd v Liverpool and Lancashire Properties*.[35] Each of these cases discusses whether the sum payable in damages could be larger than the cost of nuisance to the claimant in order to compensate the claimant's "lost opportunity for injunction".[36] In English cases, the sum was calculated by a hypothetical fair negotiation between the parties, carried out by the court itself. It is clear that the idea of negotiation to come up with the appropriate sum is similar to Coase's idea of bargaining between the parties to achieve the most cost-effective solution. In case of the former, however, a court would do it instead of the parties, making the calculation much more artificial and unlikely to achieve the same maximum social efficiency.

CONCLUSION

Historically English law favoured injunctions, as evident from the 19th century cases described by Coase and the criteria developed by *Shelfer*. Courts tended to make clear rules on which party has a legal right to carry out what activity. This approach would be approved by the followers of Coase, who would argue that this ensures courts create a balance between the wider social rights and the rights of the individual affected, as it would require

[31] *Shelfer* (no 27).
[32] 309 NYS 2d 312 (1970).
[33] 108 Ariz 178 (1972).
[34] [2007] EWHC 212.
[35] [2006] EWCA Civ 430.
[36] Steele (no 2) 645.

parties to negotiate over the nuisance, until there is a mutual satisfaction for everyone involved. As a party would only give up their injunction and allow the nuisance to continue for the price that is right for that party, interest of all parties is taken into consideration and all parties are better off in the end. Recently, however, there has been a shift towards favouring damages in lieu of injunction as a remedy of choice, which makes the English law at this point in time less compatible with the arguments proposed by Coase in his article "The Problem of Social Cost".

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