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Environmental Law: Nuisance: Air Pollution and the Doctrine of Comparative Injury

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Beyond its immedate impact of upholding tax exemptions on religious properties, the importance of *Walz* lies (1) in its recognition of benevolence in neutrality and (2) its adoption of the continuing, official surveillance test. The general nature of these rules quite likely will reduce the importance in future decisions of the more sweeping and specific utterances found in the *Everson* Rule. Adoption of the *Walz* Rules undoubtedly adds a new, significant, and substantial element to church-state questions which means that many hard decisions face the court in applying these principles to questions in the area of the religious freedoms.

VINCENT K. HOWARD

RECENT DECISIONS: NUISANCE

As the concern for environmental protection mounts, interest in the use of the private nuisance action as an antipollution weapon has increased.[1] Two recent cases may have an impact on the continuing usefulness of this method of air pollution control. One, a Wisconsin Supreme Court Case, has reaffirmed the appropriateness of an award of damages in a private nuisance action regardless of any counterveiling social utility of the polluter's enterprize. The other, handed down by the prestigious New York Court of Appeals, has severely limited the utility of such an action when court-ordered abatement is the only effective remedy.

Nuisance: Air Pollution and the Doctrine of Comparative Injury: In *Jost v. Dairyland Power Cooperative*,[1] the Wisconsin Supreme Court allowed money damages in a nuisance action without balancing the gravity of the harm against the social utility of the offending conduct.

Jost was an action for damages only, brought by three farmers against their local electric utility for injury to their crops and land caused by sulphurous gases emitted into the atmosphere by the power company's plant. The jury found these emissions to be both a continuing nuisance and the cause of the injury suffered by the plaintiffs and set the total damage to the plaintiffs' crops at $1,080. The jury also found a $500 loss of market value to one of the plaintff's farms.

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[1] Recent commentary on the private remedies to environmental pollution includes the following: Schuck, *Air Pollution as a Private Nuisance*, 3 Natural Resources Law 475 (1970); Note, *Role of the Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. LAW REV. 107 (1968);
Comment, *Private Remedies for Water Pollution*, 70 COLUM. LAW REV. 734 (1970); Comment, *Private Legal Action for Air Pollution*, 19 COLUM. LAW REV. 480 (1970); Note, *Water Quality Standards in Private Nuisance Actions*, 79 YALE LAW J. 102 (1969).

[1] 45 Wis. 2d 164, 172 N.W.2d 647 (1969).

Since the nuisance was found to be continuing, the supreme court ruled that the injury to the land was permanent. Therefore the supreme court held it was error not to have found market value loss to all of the plaintiffs, and a new trial was ordered to determine the dimunition of market value.[2] The supreme court also held that since the defendant was found to have continued the offending conduct knowing of the nature of the injury it was inflicting, the invasion was intentional and that freedom from negligence was no defense to the action.[3]

Perhaps the most interesting aspect of the case was the trial court's exclusion of evidence of the social utility of the defendant-electric company's conduct. The supreme court, in reviewing this exclusion, relied on *Pennoyer v. Allen* for the proposition that all businesses which as a necessary result of their operations, contaminate the atmosphere should be located in such a place as not to cause harm to others.[4] But if not so located, no rule of law could be found which permits an enterprise which has caused injury to others to escape liability in damages because of its superior social and economic importance.[5] The court reasoned that:

> To contend that a public utility, in the pursuit of its praiseworthy and legitimate enterprise, can, in effect, deprive others of the full use of their property without compensation, poses a theory unknown to the law of Wisconsin, and in our opinion would constitute the taking of property without due process of law.[6]

In holding that the doctrine of comparative injury is not used in Wisconsin in damage suits the supreme court declared :"We conclude that injuries caused by air pollution or other nuisance must be compensated irrespective of the utility of the offending conduct as compared to the

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[2] *Id.* at 177, 172 N.W.2d at 654. *See* McCORMICK, DAMAGES § 127 (1935); Hasslinger v. Hartland, 234 Wis. 201, 212, 290 N.W. 647, 652 (1940).

[3] 45 Wis. 2d at 173-174, 172 N.W.2d at 652. The court relied on PROSSER, LAW OF TORTS § 88 (3d ed. 1964) and the RESTATEMENT OF TORTS, § 822 (1939). See also RESTATEMENT OF TORTS § 825 (1939); Pennoyer v. Allen, 56 Wis. 502, 512, 14 N.W. 609, 613 (1883); Brown v. Milwaukee Terminal R. Co., 199 Wis. 575, 588-589, 224 N.W. 748, 227 N.W. 385, 386 (1929); Bell v. Gray-Robinson Construction Co., 265 Wis. 652, 657, 62 N.W.2d 390, 392-393 (1954); Walley v. Patake, 271 Wis. 530, 541, 84 N.W.2d 130, 136 (1956). Had the invasion been based on negligent instead of intentional conduct, due care would have been a defense. See Schiro v. Oriental Realty Co., 272 Wis. 537, 546, 76 N.W.2d 355, 359-360 (1956).

[4] 56 Wis. 502, 512, 14 N.W. 609, 613 (1883). A lawful business may be conducted in such a manner as to constitute a nuisance either because of its location or because of the effect of its operation. Sohns v. Jensen, 11 Wis. 2d 449, 460, 105 N.W.2d 818, 824 (1960). Generally on the issue of whether the defendant's conduct was wrongful see the RESTATEMENT OF TORTS, § 822 (Tent. Draft No. 15, 1966(; PROSSER, LAW OF TORTS § 88, 90 (3d ed. 1964); Hasslinger v. Hartland, *supra* note 2, at 209-210, 290 N.W. 647, 650-651; Abdella v. Smith, 34 Wis. 2d 393, 399-400, 149 N.W.2d 537, 539-540 (1967); Dolata v. Berthelet Fuel & Supply Co., 254 Wis. 194, 198, 36 N.W.2d 97, 99 (1949); Holman v. Mineral Point Zinc Co., 135 Wis. 132, 136, 115 N.W. 327, 329 (1908).

[5] 45 Wis. 2d at 176, 172 N.W.2d at 653.

[6] *Id.* at 177, 172 N.W.2d at 653-654.

injury."[7] Therefore, the court found that the exclusion of evidence of the social significance of the defendant's activity was proper.[8] However, it was noted that, where injunctive relief is sought, the court will consider the comparative hardships which will result from the issuance or denial of the injunction.[9]

CONCLUSION

In *Jost*, the Wisconsin Supreme Court reaffirmed the principle that in actions for damages only, the issue of whether or not the defendant has committed a wrongful act will in no way depend on the utility of his activity.[10] Evidence of the social importance of the offending conduct could contribute to the danger that the jury will be influenced by extraneous matters such as the effect their decision will have on the community's electric rates. While not a radical departure from existing law in Wisconsin, the clear decision in *Jost*—that in nuisance actions solely for damages the plaintiff will be compensated for injuries by the pollution-nuisance without regard for the social utility of the defendant's conduct—should provide some measure of relief to injured parties and some comfort to the environmentalists.

W. CRAIG OLAFSSON

Private Nuisance: Abatement of Air Pollution In Boomer v. Atlantic Cement Company, Inc:[1] Landowners brought a private nuisance action to enjoin the operation of a neighboring cement plant from polluting the air through the emission of dust and raw materials and the conducting of excessive blasting in the operation of its plant. The landowners also sought damages for the nuisance. The lower court found that a private nuisance did exist and that it had caused the plaintiffs substantial injury. The Court of Appeals accepted both findings.[2] The heart of the appeal was the contention by the cement company that an award of permanent damages, and not an abatement order, was the proper remedy. Noting the Cement Company represented an invest-

[7] *Id.* at 177, 172 N.W.2d at 654.
[8] *Id.* at 176, 172 N.W.2d at 653.
[9] *Id.* at 177, 172 N.W.2d at 654. See Dolata v. Berthelet Fuel Supply Co., *supra* note 4, at198-199, 36 N.W.2d at 99; Holman v. Mineral Point Zinc Co., *supra* note 4, at 137, 115 N.W. at 329; Abdella v. Smith, *supra* note 4, at 398-400, 149 N.W.2d at 539-540.
[10] 45 Wis. 2d at 177, 172 N.W.2d at 654. The rule was first propounded in Wisconsin in 1883 in Pennoyer v. Allen, *supra* note 3.

[1] 309 N.Y.S.2d 312 (1970).
[2] *Id.*, at 315.
[3] The court found that the rate of technical advances in the reduction of particulate contamination was beyond the control of the defendant, and in fact depended on the total resources of the industry. To demand that this defendant either discover a technical solution within a short time or cease operation, reasoned the court, would be both unrealistic and unfair. Accordingly, the court ordered the trial to issue an injunction which was to be vacated upon payment by the defendant of such permanent damages as the lower court would find.