NUISANCE ABATEMENT: USE OF THE COMPARATIVE INJURY DOCTRINE

In *Boomer v. Atlantic Cement Co.*,[1] eight adjacent property owners brought an action based in "servitude on land"[2] alleging that dust and noise emanating from the defendant's cement plant and blasting operations damaged their property. Plaintiffs sought damages and asked that defendant be permanently enjoined from engaging in its operations. The trial court found that defendant's operations constituted a nuisance and that the plaintiffs had been substantially damaged. Upon such findings, the court allowed temporary damages for the injuries caused up to the time of the litigation but refused to grant an injunction due to the great disparity between the economic positions of the parties.[3] The court also found that the defendant maintained the most modern pollution-abatement devices available at the time of the litigation.

On appeal, the Court of Appeals of New York reversed and remanded with directions to grant the injunction conditioned on payment of permanent damages.[4]

Referring to their order allowing the conditional injunction, the court stated that although the real damage resulted from air pollution, the court had only limited power to grant relief. Thus the court denied an unconditional injunction, reasoning that:

> It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.[5]

The remedy in New York for a nuisance which causes substantial damage has traditionally been an unconditional injunction.[6] But the

1. 26 N.Y.2d 219, 257 N.E.2d 870 (1970).
2. *Id.* at —, 257 N.E.2d at 875.
3. *Id.* at —, 257 N.E.2d at 873. The plant and quarry operation constitute a $45 million investment and employ over 300 people.
4. *Id.* at —, 257 N.E.2d at 875.
5. *Id.* at —, 257 N.E.2d at 871.
6. *Id.* at —, 257 N.E.2d at 872, citing Whalen v. Union Paper Bag Co., 208 N.Y. 1, 101 N.E. 805 (1913), which authorized permanent damages as a condition to an injunction for a found nuisance where not "unsubstantial" damage

Boomer court refused to issue such an order because it felt the plant should not be closed down, and it therefore crystallized the available alternatives as: (1) allowing the injunction to become effective at a future date during which time the defendant could develop the requisite technical expertise and voluntarily abate the nuisance, or (2) allowing the nuisance to continue by conditioning the injunction on payment of permanent damages.[7]

In choosing the latter alternative, the court emphasized that the development of more efficient technical abatement procedures is the burden of the entire cement industry and that it would be unjust to penalize this one plant if "due regard be given to equitable principles."[8] In support of this position the majority cited a number of cases in which an injunction conditioned on payment of permanent damages was awarded for a found, substantially injurious, nuisance.[9] However, the dissent pointed out that these cases can readily be distinguished on the ground that they involved a public benefit and that the present case dealt exclusively with private litigants.[10] Furthermore, the majority went on to say that the permanent damages they awarded would preclude further recovery and that all monies paid would be compensation for such servitude on land.[11]

This court's holding, although a departure from established New York precedent, is consistent with the majority of courts which have allowed private air polluters to continue in their operations so long as the pollution is not unreasonable or unnecessary. This result has been accomplished by applying the doctrine of comparative injury. The doctrine, used as a judicial test, attempts to weigh the relative hardships accruing to the alleged polluter on the one hand and the

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is found. The court there enjoined a million dollar pulp mill employing 4500 persons which wilfully polluted plaintiff, a lower riparian farmer, causing $100 damage per year to the farm land.

7. *Id.* at ——, 257 N.E.2d at 874.

8. *Id.* at ——, 257 N.E.2d at 873.

9. *Id.* at ——, 257 N.E.2d at 874, citing: Kentucky Ohio Gas Co. v. Bowling, 264 Ky. 470, 95 S.W.2d 1 (1936); Northern Indiana Pub. Serv. Co. v. W.J. & M.S. Vesey, 210 Ind. 338, 200 N.E. 620 (1936); City of Amarillo v. Ware, 120 Tex. 456, 40 S.W.2d 57 (1931); Pappenheim v. Metropolitan El. Ry. Co., 128 N.Y. 436, 28 N.E. 518 (1891); Lynch v. Metropolitan El. Ry. Co., 129 N.Y. 274, 29 N.E. 315 (1891); Westphal v. City of New York, 177 N.Y. 140, 69 N.E. 369 (1904).

10. 26 N.Y.2d at ——, 257 N.E.2d at 876 (1970) (dissenting opinion).

11. *Id.* at ——, 257 N.E.2d at 875.

individual plaintiffs on the other.[12] For example, in a leading Tennessee case, *Madison v. Ducktown Sulfur & Iron Co.*,[13] property owners having aggregate valued property of $1,000 brought an action in nuisance for damages suffered as a result of the pollutive effects of defendant's $2 million mining operation. Plaintiffs alleged that the pollution caused by defendant made it impossible for them to raise crops. The court found for the defendant and denied the injunction by reasoning that greater hardship would result from shutting down the operation of the mine. The *Madison* holding apparently represents the majority position.[14]

Although *Boomer* is consistent with the majority of courts deciding similar cases, a growing number of courts have questioned the validity of the comparative injury doctrine and have awarded equitable relief to adjacent landowners,[15] even to the extent of prohibiting the entire operation.[16] A leading case is *Hulbert v. California Portland Cement Co.*,[17] where the owners of an $80,000 cement plant moved to stay an injunction against their operation by posting a bond for the full value of plaintiffs' property damaged by the plant's cement dust. In denying the motion, the Supreme Court of California stated: "[W]here the acts of a party, whether individuals or corporations, wealthy or poor, destroy the substance of complainant's estate, whether it be of great or of but little value, an injunction should be issued."[18] And in response to the defendant's comparative injury argument to stay the injunction, the court commented:

> [W]e cannot, under plain principles of equity, compel these plaintiffs to have recourse to their action at law only and take from

12. Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126. *See generally* Hansen v. Independent School Dist. No. 1, 61 Idaho 109, 98 P.2d 959 (1940); Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 P. 306 (1924); Storey v. Central Hide & Rendering Co., 148 Tex. 509, 226 S.W.2d 615 (1950); Hatch v. W.S. Hatch Co., 3 Utah 2d 295, 283 P.2d 217 (1955); Fraser v. City of Portland, 81 Ore. 92, 158 P. 514 (1916); York v. Stallings, 217 Ore. 13, 341 P.2d 529 (1959).

13. 113 Tenn. 331, 83 S.W. 658 (1904).

14. Juergensmeyer, *supra* note 12.

15. *See* Alonso v. Hills, 95 Cal. App. 2d 778, 214 P.2d 50 (1950); Schlotfelt v. Vinton Farmers' Supply Co., 252 Iowa 1102, 109 N.W.2d 695 (1961); Hawarden v. Betz, 182 Iowa 808, 164 N.W. 775 (1917); Guttinger v. Calaveros Cement Co., 105 Cal. App. 2d 383, 233 P.2d 914 (1951).

16. *See* Crushed Stone Co. v. Moore, 369 P.2d 811 (Okla. 1962).

17. 161 Cal. 239, 118 P. 928 (1911).

18. *Id.* at 250, 118 P. at 932, quoting with approval the dissenting opinion in Mountain Copper Co. v. United States, 142 F. 625 (9th Cir. 1906).

> them the benefit of the injunctive relief accorded them by the chancellor below. To permit the cement company to continue its operations, even to the extent of destroying the property of the two plaintiffs and requiring payment of the full value thereof, would be, in effect, allowing the seizure of private property for a use other than a public one—something unheard of and totally unauthorized in the law.[19]

In accord with the above reasoning and after distinguishing the majority's supportive case law as based on broad public benefit rationales, the dissent in *Boomer* stated that the effect of the majority's holding was to allow a type of "inverse condemnation," which is permissible only when the public is served in the taking or impairment of property.[20] The opinion continued: "Nor is it constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use."[21]

Several cases support the dissent's position. In *Crushed Stone Co. v. Moore*,[22] after finding that over $13,000 had been expended in improvements, the Supreme Court of Oklahoma held that the operation of a quarry constituted a nuisance and granted an injunction despite the disparity in economic consequences to the parties. And in an Ohio decision[23] involving a found nuisance resulting from quarry operations, the court granted an unconditional injunction stating:

> This rule of law is obviously based upon the theory that an invasion of the rights of an owner of real estate by interfering with his enjoyment thereof, through an explosion, either by throwing missiles upon it or by concussion, is as much a trespass as wrongfully going upon it, and, as a continuing trespass may always be enjoined, hence continued wrongs of the character claimed by plaintiffs would be such an invasion of their rights by the defendant as would warrant equitable relief by way of injunction.[24]

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19. *Id.* at 245, 118 P. at 930.
20. *See generally* Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964). The *Martin* opinion states: "Inverse condemnation is the popular description of an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power." *Id.* at 310 & n. 1, 391 P.2d at 542 & n. 1.
21. 26 N.Y.2d at —, 257 N.E.2d at 876 (1970) (dissenting opinion).
22. 369 P.2d 811 (Okla. 1962). *Accord,* Weaver v. Yoder, 89 Ohio L. Abs. 402, 184 N.E.2d 622 (C.P. of Tuscarawas County 1961).
23. Heilman v. France Stone Co., 20 Ohio App. 261, 51 N.E. 798 (1925).
24. *Id.* at 263, 51 N.E. at 799.

In *McIvor v. Mercer-Frasher Co.*,[25] although the court granted damages to adjacent property owner plaintiffs against the defendant quarry operator, it refuted a defense based on the comparative injury doctrine with the following:

> If appellant's theory were sound, one who coveted his neighbor's property could force a sale of the same by the simple expedient of injuring such property or impairing the enjoyment thereof and cause the owner to sell or forego all right to damages by tendering to the owner the cost of said property to him or the market value thereof. This of course cannot be the law.[26]

The doctrine of comparative injury is accepted in some jurisdictions and denied in others. It is a difficult doctrine to apply rationally, because insofar as the plaintiff is denied a decree enjoining an actual nuisance, the defendant in effect is given an easement over plaintiff's land. This amounts to a taking of property for private use in violation of established constitutional principles.[27] Where the defendant is required to pay plaintiff the reasonable value of his property, or the interest therein which is injured, the effect is condemnation for the benefit of a private industrial plant, which does not possess the power of eminent domain.[28] Arguably, the taking could be justified, consistent with established constitutional tenets, by characterizing the industrial plant as quasi-public for purposes of awarding equitable relief insofar as its vital societal contribution pervades individual enterprise. However, such a characterization of private business as quasi-public for purposes of condemnation would create myriad problems, and it would allow *any* industrial polluter to continue its harmful operations by paying the plaintiff the value of his property.

The use of the comparative injury doctrine is justified in cases of severe environmental effect only when the general health hazard is factored into the balancing formula along with the economic consequences of an injunction on the operations of private enterprise. As the majority in *Boomer* suggests, resolution of the *total* problem of

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25. 76 Cal. App. 2d 247, 172 P.2d 758 (1946).

26. *Id.* at 251-52, 172 P.2d at 761.

27. The due process clause of the fourteenth amendment states that a state cannot deprive a person of life, liberty or property without due process of law. Due process, within the context of this comment, would require that any interference with the use or enjoyment of a person's property against his will to the extent that it constitutes a taking be authorized and reasonable. *See* Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 928 (1911).

28. Kennedy & Porter, *Air Pollution: Its Control and Abatement*, 8 VAND. L. REV. 854 (1955).

environmental purity is beyond the competence of private litigation, but courts, as forums of objective fact-finding and resolution of disputes, can provide necessary leadership toward promoting the individual responsibility of business and industry with regard to the pollutive effects of their operation. Failure to respond to this responsibility and further compounding the problem should not be the response of the courts.

Finally, the instant case is unfortunate in that it fails to conform to recognized jurisdictional precedent and, more importantly, because it disregards the irreversible effects of air pollution, especially the type which produces the greatest hazard to human health[29]—that which results from cement plant and blasting operations.

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29. Boomer v. Atlantic Cement Co., 26 N.Y.2d at ——, 257 N.E.2d at 875 (1970).