

**COMMENTS**  
**COMMENTAIRES**

**An Expedition to the Frontiers of Nuisance**

**I. Introduction**

There are two doctrines sufficiently indicated by the maxims "Cujus est solum ejus est usque ad inferos," and "Sic utere tuo ut alienum non laedes," which have to be considered. These doctrines, driven to their logical extreme, are irreconcilable. Some practical limitation of one by the other has to be arrived at.<sup>1</sup>

The conflict between the concepts enshrined in these two maxims has arisen most often in the context of a nuisance action. While the *cujus est* doctrine suggests that one can do whatever one likes with his property, the maxim *sic utere tuo* implies that this right is circumscribed by a duty to respect the interests of others. In its most basic terms, the conflict pits property law against tort law. The absolutist view of property rights suggested by the *cujus est* maxim has, of course, always been limited by the nuisance action. The courts have long imposed liability on one who, in the exploitation of his land, rendered life unhealthy or unpleasant for his neighbours. However, it is often unclear on what basis such liability has been founded. Are damages awarded because a proprietary right of the plaintiff has been infringed, because a duty of care owed to the plaintiff has been breached,<sup>2</sup> or simply because the very fact of

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<sup>1</sup> *Jordeson v. Sutton, Southcoates & Drypool Gas Co.* [1899] 2 Ch. 217, 243 (C.A.) per Rigby L.J.

<sup>2</sup> Historically, of course, one cannot speak in terms of "duty of care". I refer here to liability based on the regime which eventually emerged as tort law as opposed to liability in a real action. In early times, nuisance was considered a form of partial disseisin in that one deprived another of privileges which were normally incident to his land. Thus the remedy was by way of the assize of nuisance, which complemented the assize of novel disseisin. Eventually the procedural advantages of the action on the case for nuisance caused the assize of nuisance to fall into desuetude, and with the evolution of the action on the case into generalized law of tort, the idea of nuisance as a form of ouster was forgotten. See Fleming, *The Law of Torts* 5th ed. (1977), 394. However, as this paper will endeavour to show, the roots of nuisance in a real action have remained to prevent the flowering of nuisance as a full-fledged tort, rather than the *sui generis* real-personal hybrid it now is.

harm generates liability, irrespective of the degree of care exercised by the defendant? Normally, the distinction would not matter, but in one class of cases it is crucial: those in which the plaintiff has incontestably suffered harm, but no right recognized by the law of property has been infringed. Such is the whole range of rights which can exist if acquired by negative easement (the right to light, air, support) or restrictive covenant (the right to a view, to have maintained an open space) but are not considered to form part of the bundle of rights which attach to any interest in land existing at common law or in equity. Also included in this category are rights in waters percolating below the surface of one's land in an undefined channel. One has a right to use them *à volonté* once they seep into one's land, but no right to demand that an uphill neighbour allow them to arrive there.<sup>3</sup> If the law imposes liability on the defendant because he has breached a duty of care owed to his neighbour, or because the harm itself generates liability, then it is irrelevant whether the plaintiff has a proprietary interest which has been infringed by the defendant. If, however, the purpose of the nuisance action is purely to protect known property rights, then the absence of such a right will be fatal to the plaintiff's claim. The harm will be *damnum absque injuria*, and consequently neither its gravity nor the negligence of the defendant will be relevant.<sup>4</sup>

Until quite recently, it was exactly this view which prevailed in the English and Canadian jurisprudence. Within the last few years, however, two Court of Appeal decisions, *Penno v. Government of Manitoba*<sup>5</sup> from Manitoba and *Pugliese v. National Capital Commission*<sup>6</sup> from Ontario, have refused to follow what will herein be called "the property view" and have awarded damages based on the other two tests of liability suggested above ("the tort view"). In so doing they have, in the writer's opinion, rationalized the nuisance action by placing it on an entirely new footing. This comment will attempt to explain this new view of nuisance and to examine its ramifications in the areas of property law and tort law. The approach taken by the civil law of Quebec to this problem will also be discussed and will be followed by a conclusion in the form of a comparative look at the law in the two systems.

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<sup>3</sup> See text, *infra*, Pt II for a full discussion of the law in this area. One might also add to this list of "non-existent" property rights the interest which is infringed when a plaintiff is a victim of a public nuisance. See *infra*, note 89.

<sup>4</sup> *Infra*, note 10.

<sup>5</sup> (1975) 64 D.L.R. (3d) 256 (Man. C.A.).

<sup>6</sup> (1977) 79 D.L.R. (3d) 592 (Ont. C.A.); *aff'd* (on slightly different grounds) [1979] 2 S.C.R. 104; see *infra*, note 48.

## II. The common law position on percolating waters

As *Penno*<sup>7</sup> and *Pugliese*<sup>8</sup> deal with percolating waters, it will be convenient to set out briefly the law on this subject as it existed prior to the decisions rendered in these two cases.<sup>9</sup>

There are two problems which frequently arise as a result of the abstraction of percolating waters: first, an adjoining owner might no longer receive adequate water for personal or agricultural uses; and second, an adjoining owner's land, which had been supported by the underground waters, might subside. In the first case, the old rule in *Acton v. Blundell*<sup>10</sup> applied: as there was no *proprietary* right to percolating waters,<sup>11</sup> a landowner had no right of action if a selfish neighbour extracted the lion's share of the waters before they reached the former's lands. This principle was also applied to the second type of case, albeit with one important qualification: if the plaintiff could prove that his land was supported not by water alone<sup>12</sup> but by a bed composed of water and some other substance, he could assert his natural right to support against

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<sup>7</sup> *Supra*, note 5.

<sup>8</sup> *Supra*, note 6.

<sup>9</sup> See the judgment of Howland J.A. of the Ontario Court of Appeal in *Pugliese*, *supra*, note 6, 598-615, wherein the English, American, and Australian rules which govern these situations are set out after which the position in Ontario and the rest of common law Canada is discussed.

<sup>10</sup> (1843) 12 M. & W. 324, 152 E.R. 1223. In this case, a mine-owner who sank pits on his land which drained away the subterranean waters formerly used by the plaintiff in his cotton mill was held not liable as the damage was *damnum absque injuria*.

<sup>11</sup> Presumably this is an exception to the *usque ad inferos* maxim. One can only suppose that these waters are *res nullius* as the author has found no claim that they are vested in the Crown at common law (although they may be deemed to be so by statute: see, e.g., *The Water Rights Act*, R.S.M. 1970, c. W80, ss. 2(g), 6 and 7(1)). Curiously enough, even though one has no proprietary rights to these waters, one can maintain an action in nuisance against a neighbour who pollutes them: see, e.g., *Jackson v. Drury Construction Co.* (1974) 4 O.R. (2d) 735 (C.A.), applying *Ballard v. Tomlinson* (1885) 29 Ch. 115 (C.A.).

<sup>12</sup> Rigby L.J. opined *obiter* in *Jordeson*, *supra*, note 1, 244, that one could acquire such a right of support by prescription, though the House of Lords thought otherwise in *Chasemore v. Richards* (1859) 7 H.L.C. 349, 115 R.R. 187, where the plaintiff's land had been supported by the waters for sixty years. Rigby L.J. based his opinion on *Popplewell v. Hodkinson* (1869) L.R. 4 Ex. 248 where the Court of Exchequer Chamber held that such a right could be conveyed by express or implied grant (see *infra*, text accompanying note 83).

his neighbour and recover damages for nuisance.<sup>13</sup> This exception to the rule in *Acton v. Blundell* was enshrined in the *Jordeson* case,<sup>14</sup> where the withdrawal of a large quantity of running silt (sand and water) from beneath the plaintiff's lands causing subsidence which resulted in structural damage to his cottages was held to be "an actionable nuisance at common law".<sup>15</sup>

### III. Recent attenuations to the common law position

#### A. *Penno v. Government of Manitoba*

The plaintiff in *Penno*<sup>16</sup> owned a farm upon which he grew hay and alfalfa in his cattle raising operation. As part of a flood control system, the defendant dug a drainage ditch through Penno's property to a depth lower than the existing water table. Consequently the aquifer under Penno's land sank considerably, and so did the productivity of his farm. The water was undoubtedly of the ordinary underground variety, and not in a defined channel. One would have thought this to be a clear *Acton v. Blundell* situation, but the Manitoba Court of Appeal affirmed the award of \$30,000 in damages to Penno. Monnin J.A., with whom Guy J.A. concurred, simply said that proprietary rights to water were not in issue and observed that there was "grave doubt" whether decisions such as *Bradford v. Pickles*,<sup>17</sup> based on the common law, were of any use in Manitoba after the passing of *The Water Rights Act*<sup>18</sup> which greatly restricts a landowner's right to abstract percolating waters from his property.<sup>19</sup> Thus he felt the case should be decided on the grounds of either negligence or nuisance.<sup>20</sup>

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<sup>13</sup> *A fortiori*, the principle applied where support was afforded by a substance containing no water at all, such as semi-fluid pitch: see *Trinidad Asphalt Co. v. Ambard* [1899] A.C. 594 (P.C.).

<sup>14</sup> *Supra*, note 1.

<sup>15</sup> *Ibid.*, 239 *per* Lindley M.R. For a recent application, see *Lotus Ltd v. British Soda Co.* [1971] 1 All E.R. 265 (Ch. D.) where the abstraction of salt and water solution causing subsidence was held actionable in nuisance.

<sup>16</sup> *Supra*, note 5.

<sup>17</sup> [1895] A.C. 587 (H.L.). In this case, it was held that if a landowner diverted or appropriated percolating waters legally (*i.e.*, within his own land), he could not be held liable for resulting damage to the property of a neighbouring landowner even if he were acting maliciously.

<sup>18</sup> R.S.M. 1970, c. W80, s. 6.

<sup>19</sup> See *infra*, note 21.

<sup>20</sup> *Supra*, note 5, 259. Consequently he felt he could distinguish *Schneider v. Town of Olds* (1969) 8 D.L.R. (3d) 680 (Alta S.C.T.D.), where the digging of the defendant's well, which diminished the supply of water to the plaintiff's well, was not done negligently. In *Schneider*, the Court was clearly applying

Matas J.A. gave a more thorough, better-reasoned judgment in which Freedman C.J.M. concurred. After dispensing with the defendant's argument based on *The Water Rights Act*,<sup>21</sup> and noting the reservations regarding *Acton v. Blundell* voiced in *Lotus Ltd v. British Soda Co.*<sup>22</sup> and the *Jordeson* case,<sup>23</sup> Matas J.A. concluded that *Acton v. Blundell* and *Bradford v. Pickles* were no longer applicable after the regime instituted by *The Water Rights Act*.<sup>24</sup>

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the *Acton v. Blundell* rule; Monnin J.A.'s distinction is not valid because he confuses negligence in the construction of the well itself with negligence in the whole plan of drilling a well to a depth which would foreseeably diminish the plaintiff's water supply in the first place. Matas J.A. makes the same specious distinction of *Schneider* (at p. 271-72) even though he later shows (at p. 274) that the two types of negligence are in fact different: "It is not alleged by plaintiff [i.e., Penno] that there was any negligence in carrying out the work in accordance with plans and specifications . . . . *The negligence is more fundamental than that.* There was a lack of concern, in the concept and design of the drainage scheme, for the overall effects of the new system" [emphasis added]. *Schneider* may yet have been rightly decided if the town's action did not diminish unduly the plaintiff's water supply, but there is no evidence in the report as to the degree of harm suffered. Obviously if the town drills a well where none existed before, there is bound to be less water available to surrounding proprietors, but that does not mean that the town should not drill a well at all — as every proprietor has the right to do that on his soil — but merely that the town should be obliged to drill only to a depth which will cause the least degree of harm to the landowners in the area. See *infra*, text between notes 58 and 61.

<sup>21</sup> *Supra*, note 5, 264-66. The defendant took the extreme position that, as all proprietary rights to water were vested in the Crown by virtue of the Act, "only the Government owns and has the right to use and control that water". Matas J.A. pointed out that if this interpretation were correct, every farmer would be required to obtain a licence before planting a crop which drew upon water. In any case, he found that the plaintiff's action was not based on a proprietary right in the water at all, rendering the defendant's argument irrelevant, even if valid. It appears that Monnin and Matas J.A. were of the opinion that *The Water Rights Act* made *Bradford v. Pickles* somehow inapplicable or obsolete in Manitoba; however, in the author's view, *Bradford* was not followed for other reasons. In both cases the defendant is saying that the plaintiff cannot succeed because he has no proprietary right in the water. The only difference is that no one owned the water in *Bradford* while the Government of Manitoba claimed to own it in *Penno*. Hence, in the author's view, *Bradford* does not apply because it was based on "the property view" which the Court rejects, and not because it is incompatible with the Act.

<sup>22</sup> *Supra*, note 15.

<sup>23</sup> *Supra*, note 1.

<sup>24</sup> See *supra*, note 21. He then considered the application of *Acton v. Blundell* in *Langbrook Properties, Ltd v. Surrey County Council* [1969] 3 All E.R. 1424 (Ch. D.), and expressly disagreed with Plowman J.'s conclusion in that case that there was no room for the operation of principles of

The rout of "the property view" was complete; enter tort law. Armed with numerous quotes from *Nova Mink Ltd v. Trans-Canada Airlines*<sup>25</sup> about the circumstances generating a legal duty of care, Matas J.A. had no trouble impaling the defendant on the horns of negligence, holding that the direct adverse effects of the drain on the plaintiff's land were foreseeable and constituted an actionable breach of a legal duty of care.<sup>26</sup> He then went on to look at nuisance as an alternative basis of liability and decided that the House of Lords had limited the applicability of *Bradford v. Pickles* in its later decision in *Sedleigh-Denfield v. O'Callaghan*.<sup>27</sup> Thus he felt justified in disregarding *Bradford* and following the broad *dicta* of Lord Wright in *Sedleigh-Denfield*<sup>28</sup> on the subject of reasonable user.

In a dissenting judgment, Hall J.A. took the strict "property view" and held that no action in nuisance was possible under such circumstances. If the common law were to be departed from in principle, "that [was] a matter for legislative intervention".<sup>29</sup>

#### B. *Pugliese v. National Capital Commission*

In the *Pugliese* case,<sup>30</sup> the National Capital Commission (N.C.C.) authorized the construction of the Lynwood Collector Sewer on lands adjacent to properties owned by the one hundred seventy-one plaintiffs in the action. In order to facilitate its tunnelling operations forty feet below the surface, the defendant<sup>31</sup> undertook a gargantuan

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negligence or nuisance. Obviously frustrated by the problems encountered in the application of technical English rules in a Canadian context, he verged on saying that these rules were never received into Manitoba: "[T]he case is to be decided on principles of negligence and should not be confined to an examination of the common law decisions dealing with refinements and distinctions of landowners' rights over surface or percolating water, or water in defined or undefined channels": *ibid.*, 273. In *Pugliese, supra*, note 6, 610, Howland J.A. specifically mentions that *Acton v. Blundell* was decided in 1843, after the 1792 cutoff date for reception of English law into Ontario.

<sup>25</sup> [1951] 2 D.L.R. 241 (N.S.S.C., App. Div.).

<sup>26</sup> *Supra*, note 5, 271-74.

<sup>27</sup> [1940] A.C. 880 (H.L.). Matas J.A. felt obliged to aim one more blow at *Bradford* since counsel for the defendant had insisted that any action brought specifically in nuisance was precluded by that case.

<sup>28</sup> *Ibid.*, 903. Quoted *infra*, text accompanying note 61.

<sup>29</sup> *Supra*, note 5, 263. As for *The Water Rights Act*, Hall J.A. rightly said that it did not put the plaintiff in any better position than that which he enjoyed at common law.

<sup>30</sup> *Supra*, note 6.

<sup>31</sup> The term "defendant" includes the two construction companies which carried out the work for the N.C.C. No distinction as to their respective bases of liability is made in the judgment.

dewatering operation which drastically altered the soil stratigraphy of the area. As layers of clay consolidated and strata of sand and silt compressed, houses settled, laneways cracked, walls went askew and faults snaked across basement floors. Again it was a question of whether damages resulting from the abstraction of percolating water were recoverable, and again the defence was *Acton v. Blundell*. Galligan J.,<sup>32</sup> favouring *Penno* but uneasy about the conflicting decision in *Langbrook Properties, Ltd v. Survey County Council*,<sup>33</sup> referred the question of law to the Court of Appeal pursuant to section 35 of *The Judicature Act*.<sup>34</sup> After an exhaustive review of the English, Australian, American, and Canadian jurisprudence, Howland J.A. (as he then was) for the Court answered the question as follows:

1. An owner of land does not have an absolute right to the support of water beneath his land not flowing in a defined channel, but he does have a right not to be subjected to interference with the support of such water, amounting to negligence or nuisance.
2. Such an owner does have a right of action
  - (a) in negligence for damages resulting from the abstraction of such water, or
  - (b) in nuisance for damages for unreasonable user of the lands in the abstraction of such water.
3. Such an owner does not have a right of action under the *Ontario Water Resources Act* for damages for subsidence arising from the pumping of water in excess of the amounts set out in permits issued under that Act.<sup>35</sup>

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<sup>32</sup> Of the High Court, (1977) 15 O.R. (2d) 335.

<sup>33</sup> *Supra*, note 24.

<sup>34</sup> R.S.O. 1970, c. 228. S. 35(1) reads: "If a judge considers a decision previously given to be wrong and of sufficient importance to be considered in a higher court, he may refer the case before him to the Court of Appeal". The Court of Appeal did not approve of Galligan J.'s reference as neither decision was binding on him; thus he was free to choose between them on the basis of principle and precedent. However, the Court of Appeal agreed to determine the following question of law before resubmitting the matter to the High Court for full trial as to the issue of damages:

Does an owner of land have a right to the support of water beneath his land, not flowing in a defined channel, and does such an owner have a right of action in negligence or nuisance or under *The Ontario Water Resources Act* [R.S.O. 1970, c. 332 as am.] (from the pumping of water in excess of the amounts as set out in permits granted under that Act), for any damage resulting from the abstraction of such water?

See *supra*, note 6, 596. The Court held that no right arises from the breach of a statutory duty: *ibid.*, 619-21. This aspect of the case is not considered herein. However, see *infra*, note 48 for a discussion of the Supreme Court of Canada decision, *supra*, note 6, which centres on this point.

<sup>35</sup> *Supra*, note 6, 621. As to the third point, see *supra*, note 34 and *infra*, note 48.

His reasons may be conveniently encapsulated in the following quote:

While recognizing the well-settled English rule as to the abstraction of percolating water, I consider that recognition should be given at the same time to the equally well-settled doctrines in the law of torts which impose liability for property damage caused by negligence and nuisance. To conclude that those who abstract percolating water have an unbridled licence to wreak havoc on their neighbours would be harsh and entirely out of keeping with the law of torts as it exists today.<sup>36</sup>

I will now examine in detail the two major propositions set out in *Penno* and *Pugliese*.

#### IV. The negligence argument

Not surprisingly, the nineteenth century courts tended to look at the above problems as conflicts involving the balancing of two sets of proprietary rights.<sup>37</sup> As the tort of negligence was only in its infancy during that period, it simply was not considered by the courts. Moreover, if recovery were denied in an action for nuisance,<sup>38</sup> even in cases where the interference had been malicious,<sup>39</sup> *a fortiori* a claim in negligence would fail.<sup>40</sup>

However, at least since *Donoghue v. Stevenson*,<sup>41</sup> the rationale for denying liability in a *Penno* or *Pugliese* type case has been based on an entirely false premise. Suppose that B, in exercising a property right of his own, interferes with some amenity enjoyed by A on his land. According to the old rule in *Acton v. Blundell*,<sup>42</sup> if A's enjoyment of this amenity does not fall within a recognized right of property, B is not liable for the interference. B owes A no duty of care in *tort* because A lacks a *property* right which the law will protect. This rule harks back to the pre-*Donoghue* days when B could escape liability in tort because there was no contract between himself and A.<sup>43</sup> The contradiction in the pre-*Donoghue* position is obvious: if A had a property right or a contractual right he

<sup>36</sup> *Ibid.*, 615.

<sup>37</sup> See, e.g., *Acton v. Blundell*, *supra*, note 10; *Chasemore v. Richards*, *supra*, note 12; *Popplewell v. Hodkinson*, *supra*, note 12.

<sup>38</sup> An exception, of course, is the *Jordeson* type situation, *supra*, note 15, where the defendant was held liable for damages resulting from the withdrawal of running silt.

<sup>39</sup> See, e.g., *Bradford v. Pickles*, *supra*, note 17.

<sup>40</sup> It was this argument which appealed to Plowman J., in *Langbrook Properties, Ltd v. Surrey County Council*, *supra*, note 24, the case which so exercised Galligan J. in *Pugliese*, *supra*, note 32.

<sup>41</sup> [1932] A.C. 562 (H.L.).

<sup>42</sup> *Supra*, note 10.

<sup>43</sup> This is the so-called *Winterbottom v. Wright* fallacy, (1842) 10 M. & W. 109, 152 E.R. 402 (Ex.).

would base his action on it and tortious liability would be totally superfluous.<sup>44</sup> The whole function of tort law is to create a regime of civil responsibility separate from that of contract and conceptually distinct from the law of property. Once this tort-property dispute is resolved (which for some reason has taken fifty years longer than the settlement of the tort-contract imbroglio), it is obvious that the plaintiff's lack of property right is no longer a defence to a tort action.<sup>45</sup>

In matters which may possibly involve two areas of substantive law, much depends on how a judge characterizes the issue. If he finds previous cases on the subject listed in *Halsbury's*<sup>46</sup> under "Water and Watercourses" or "Easements" rather than "Torts" or "Negligence", he will instinctively look for a solution in property law. Thus Plowman J. in *Langbrook*<sup>47</sup> was content to ask himself how the rule in *Acton v. Blundell* applied in a particular fact situation.<sup>48</sup> Howland J.A. went further and decided that there was a tort aspect of the problem which demanded consideration.<sup>49</sup> He observed that "[i]n order for the plaintiffs to succeed in their action they must, in my opinion, have a right which the law deems worthy of protection".<sup>50</sup> This replacement of the "protectable interest" for the contract or the property right is the keystone of the whole argument. In determining which interests should receive such protection, Howland J.A. simply applied Lord Atkin's good neighbour test:

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<sup>44</sup> An exception, of course, is the historical accident which requires vindication of a proprietary right via the tort action of nuisance.

<sup>45</sup> This does not mean that the lack of a property right is totally irrelevant. Howland J.A. was careful to point out that both tort and property principles has to be considered: *supra*, note 6, 615. Presumably he means that absence of liability based on "the property view" can never be conclusive *in se* in a tort action.

<sup>46</sup> *Halsbury's Laws of England*, 4th ed. (1973).

<sup>47</sup> *Supra*, note 24.

<sup>48</sup> Donnelly J. was equally content to do so in *Rade v. K. & E. Sand & Gravel (Sarnia) Ltd* [1970] 2 O.R. 188 (H.C.). This case is probably no longer good law in Ontario after the Court of Appeal decision in *Pugliese* but its status is more uncertain since the Supreme Court decision. Pigeon J., delivering the judgment of a seven-man Court, decided that s. 37 of *The Ontario Water Resources Act*, R.S.O. 1970, c. 332 could not serve as a defence in an action for negligence or nuisance if the defendant had pumped water in quantities exceeding that authorized by a permit issued under the Act: *supra*, note 6, 115. One wonders whether the statute could constitute a complete defence if one pumped water within the requisite limits and damage still occurred. This may well have been the situation in *Rade* (the facts are not clear from the judgment) but the question remains unanswered by Pigeon J.'s judgment.

<sup>49</sup> *Supra*, text accompanying note 36.

<sup>50</sup> *Supra*, note 6, 615.

It would be difficult to conclude that the defendants should not reasonably have had the plaintiffs within their contemplation in the performance of their pumping operations. The physical proximity of the plaintiffs' land to the defendants' operations was such as to give rise to a foreseeable risk of harm . . . .

In the absence of any statutory provision or other evidence to negative or reduce the duty of care with respect to any of the defendants, there was a duty to take reasonable care to avoid acts or omissions which one could reasonably foresee would cause injury to those to whom the duty was owed.<sup>51</sup>

Howland J.A.'s well-reasoned judgment, following that of the Manitoba Court of Appeal in *Penno*, represents a creative application of principles of tortious liability to a problem traditionally seen only in terms of real property law. Insofar as these two decisions represent a change in an area of the law long recognized as anomalous, and constitute the logical culmination of a process begun by Lord Atkin forty-five years earlier, they are to be welcomed.<sup>52</sup>

## V. The nuisance argument

Authors and judges have long lamented the impossibility of defining the term "nuisance".<sup>53</sup> This is largely a result of the fact that nuisance provides a remedy in such a wide variety of situations. However, some basic principles emerge: nuisance protects a proprietor's beneficial user and enjoyment of his land as well as the physical integrity of that land. If the plaintiff sues on the basis of actual physical harm to his lands ("case 1"), then once he proves damage and causality he must recover from the defendant.<sup>54</sup> Liability is, in this case, strict. We may call the defendant's action "unreasonable", but this epithet does not advance us very far and indeed may mislead us. Confusion arises because "unreasonable" has a technical meaning when we consider case 2, in which the plaintiff alleges interference with the enjoyment of his property short of actual physical damage. Here it is not sufficient to prove

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<sup>51</sup> *Ibid.*, 616.

<sup>52</sup> The Manitoba Court of Appeal in *Wilton v. Hansen* (1969) 4 D.L.R. (3d) 167, 170-71, voiced the opinion that a duty of care existed between neighbours such as to make B liable for excavations causing A's well to collapse even though A's structures had acquired no easement of support. The remark was *obiter* as A had in fact acquired an easement of support in the instant case. See *infra*, text accompanying notes 110-111.

<sup>53</sup> See, e.g., Fleming, *supra*, note 2, 393; *Bamford v. Turnley* (1862) 3 B. & S. 62, 66, 122 E.R. 27 (Ex.).

<sup>54</sup> *St Helen's Smelting Co. v. Tipping* (1865) 11 H.L.C. 642, 11 E.R. 1483 (damage to plaintiff's trees caused by vapours from defendant's copper smelting plant).

damage and causality; the plaintiff must also prove that the defendant's user was "unreasonable" (in the technical sense) within the context of that particular locality.<sup>55</sup> If, for example, the defendant operates a noisy asphalt plant overnight near a residential neighbourhood, that is an unreasonable user.<sup>56</sup>

In determining whether the user is unreasonable the court may look at various factors, the most common of which are the gravity of harm and the social utility of the defendant's conduct.<sup>57</sup> The concept of unreasonable user remains, however, a "property" concept rather than a "tort" concept, in spite of the tort terminology. It examines the activities of the defendant as he exploits his property rather than any interest of the plaintiff which might be infringed.<sup>58</sup>

*Penno* and *Pugliese* are examples of case 1. In the traditional view, then, the reasonableness of the defendant's conduct is irrelevant. However, both cases discuss "reasonableness" at some length in another context: the accent shifts from the unreasonable user of the *defendant* to the question of whether the impugned act was unreasonable from the *plaintiff's* point of view. In determining whether a nuisance exists, it is not sufficient to ask whether an occupier has made a reasonable use of his own property. One must ask whether his conduct is reasonable *considering the fact*

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<sup>55</sup> *Ibid.* This distinction has been applied regularly in the Canadian cases: see, e.g., *Muirhead v. Timbers Bros. Sand & Gravel Ltd* (1977) 3 C.C.L.T. 1 (Ont. H.C.); *Walker v. Pioneer Construction Co.* (1976) 8 O.R. (2d) 35 (H.C.).

<sup>56</sup> *Muirhead, supra*, note 55, 6. Rutherford J. states that even if the user were reasonable when seen in the context of the neighbourhood (and in the instant case he found there was nothing inherently unreasonable in the defendant operating a gravel quarry and asphalt plant in that part of the Township of Uxbridge), the plaintiff could still recover in nuisance "to the extent (if any) that the defendants' activities resulted in material damage to the plaintiffs' property and, further, to the extent that such activities caused discomfort and inconvenience that exceeded the requisite standard of comfort given the mixed use nature of the locality". This gloss, which well illustrates the inherent conceptual difficulties in the unreasonable user test, is unnecessary if one adopts the broad nuisance principle suggested *infra*, text between notes 64 and 65. In fact, once Rutherford J. leaps from the sinking ship of unreasonable user, his only *tabula in naufragio* is "inconvenience that exceeded the requisite standard of comfort ... of the locality". This is virtually a paraphrase of the words of Howland J.A. in *Pugliese, supra*, note 6, 618.

<sup>57</sup> Howland J.A. quotes Fleming to this effect in *Pugliese, supra*, note 6, 618.

<sup>58</sup> An excellent example of this is the Australian case of *Owen v. O'Connor* (1963) 63 S.R. (N.S.W.) 1051 (Eq.) discussed *infra*, note 116.

that he has a neighbour.<sup>59</sup> In this discussion the courts attribute yet another meaning to the word "reasonable". Howland J.A. puts it best when he asks "Did it [the abstraction of the water] subject the plaintiffs' lands to damage beyond that which they could reasonably be expected to tolerate?"<sup>60</sup> Here he goes beyond the limited, technical meaning of "unreasonable" used in the determination of liability in "case 2" actions to pose a wider test: in short he progresses from "unreasonable" as understood by holders of "the property view" to the meaning of the word as applied in tort law.<sup>61</sup>

What, then, is actionable nuisance after *Penno* and *Pugliese*? First, it must be noted that case 1 and case 2 seem to be merging.<sup>62</sup> Had *St Helen's Smelting Co.*<sup>63</sup> been followed, the courts, after rejecting the English rule regarding percolating waters, could have said simply: "We find that the defendant's actions caused physical harm to the plaintiff's land; consequently we find the former liable in damages". But they did not. They went on to examine in some detail the rationale for imposing liability in tort. In so doing, they opted for the broad test propounded by Lord Wright without the limitations imposed upon it by the property view.<sup>64</sup>

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<sup>59</sup> *Supra*, note 6, 617.

<sup>60</sup> *Ibid.*, 619.

<sup>61</sup> It is significant that both Howland J.A. (*supra*, note 6, 617) and Matas J.A. (*supra*, note 5, 276) quote from the same passage in Lord Wright's judgment in *Sedleigh-Denfield v. O'Callaghan*, *supra*, note 27, 903: "A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society". While neither *Penno* nor *Pugliese* takes up the point, Lord Wright's statement was expressly limited to the case where the plaintiff could point to a proprietary right which had been infringed; his reference to and tacit approval of *Bradford v. Pickles* make this clear.

<sup>62</sup> This implies that liability would not be strict in a case 1 situation. However, it would be difficult, once "the property view" was rejected, to imagine a case where physical damage to A's property would be within the reasonable limits of neighbourhood.

<sup>63</sup> *Supra*, note 54.

<sup>64</sup> Lord Wright, in spite of his broad statements about the necessity of reasonable behaviour, was at pains to point out the *proprietary* basis of the nuisance action in the assize of nuisance. See *supra*, note 27, 903: "The ground of responsibility is the possession and control of the land from which the nuisance proceeds". It is remarkable that the *Sedleigh-Denfield* case, or at least a *dictum* from it, should have been so widely quoted in the nuisance cases. The case itself turned on a rather narrow point, *viz.*, whether the defendant could be liable in nuisance when the damage arose as a result

The arguable result of this reasoning process is a new definition of nuisance which runs as follows:

Any act by a landowner which subjects his neighbour's lands to interference beyond that which he could reasonably be expected to tolerate is an actionable nuisance.

When put in this way, it is obvious that the basis of liability is not solely interference with a proprietary right but also with Howland J.A.'s "protectable interest", expressed as it was in terms of the reasonable expectations of neighbourhood.

This is an extremely broad principle, especially when one recalls that liability in nuisance is strict. Thus, if the N.C.C. had conducted extensive hydrological tests beforehand, the results of which would have led a reasonable man to believe that the eventual damage suffered was extremely unlikely, the N.C.C. could have been held liable in nuisance, though not in negligence.<sup>65</sup> The question which arises now is whether this new concept of nuisance will be limited to the seldom-explored realm of percolating waters. In the author's opinion, there is no reason, in principle, to restrict the potentially vast realm of application of *Penno* and *Pugliese*, and the following decision of the Ontario High Court supports this view.

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of a pipe laid on his land by a trespasser without his knowledge. The pipe had become blocked, flooding the plaintiff's land. Lord Wright's *dictum* was purest *obiter*, as the defendant was not relying on his proprietary rights at all, but merely pleading that he should not be held responsible for an act of which he was totally unaware.

<sup>65</sup> See *Royal Anne Hotel Co. v. Village of Ashcroft* (1979) 95 D.L.R. (3d) 756 (B.C.C.A.) where McIntyre J.A. (as he then was), delivering the judgment of the Court, held a municipality liable in nuisance for damage resulting to landowners from a random blockage in the sewer system maintained by it. The trial judge, Macdonald J., had expressly absolved the municipality of negligence with respect to the construction, maintenance and operation of the sewer [see (1976) 1 C.C.L.T. 299, 307] and this finding was upheld on appeal. McIntyre J.A. clearly outlined the difference between negligence and nuisance in the area of strict liability: *ibid.*, 759-60. Other important distinctions between negligence and nuisance exist. While recovery for pure economic loss in a negligence action is a moot point, no action in nuisance has ever disallowed economic loss as a head of damage: see Fleming, *supra*, note 2, 427; though *cf. infra*, note 89. See also *Trappa Holdings Ltd v. District of Surrey* (1978) 95 D.L.R. (3d) 107 (B.C.S.C.), where Ruttan J. awarded \$8,000.00, representing lost sales, to the owner of a plant nursery where a municipality had negligently restricted access to the business while reconstructing a street in the area. The trial judge found both negligence and nuisance on the part of the municipality and the contractor. The strict requirement of physical injury in negligence is unknown in nuisance, and damages for interference with "sensibilities" are common: see Fleming, *ibid.* Thus one should not take at face value statements in *Penno* and *Pugliese* to the effect that it is immaterial whether the plaintiff bases his action in nuisance or negligence.

## VI. Application of the new principles: *T. H. Critelli Ltd v. Lincoln Trust & Savings Co.*

Surprisingly enough, no case prior to *Critelli*<sup>66</sup> seems to have considered the problem which arose in this eminently Canadian fact situation: where B builds a nine-storey building immediately adjacent to A's two-storey building, creating a lee in which an inordinate amount of snow accumulates and seriously damages A's roof, does A have a cause of action?<sup>67</sup> The construction was effected without negligence; the damage was inevitable once a neighbouring structure rose more than eight feet above A's roof.<sup>68</sup> B, naturally enough, denied liability on the grounds that he had made a lawful and non-negligent user of his property. Nevertheless, said Grange J., "the question falls to be decided on general principles of negligence and nuisance and the user of land".<sup>69</sup> Thus he had no difficulty in awarding A \$14,000 damages (the cost of strengthening the roof to bear the increased load of snow). Although Grange J. appears to have based his award on the claim in nuisance, he clearly thought that the defendant had been negligent in the *Penno* sense (that is, with regard to the overall design of the building), rather than in the physical erection thereof.<sup>70</sup> His use of the language of foreseeability makes this clear:

The defendant Lincoln Trust ... knew before construction of the existence of the plaintiffs' building and that the planned construction would inevitably cause damage. Surely it was incumbent upon Lincoln Trust to take steps to prevent that damage.<sup>71</sup>

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<sup>66</sup> (1978) 2 R.P.R. 290 (Ont. H.C.).

<sup>67</sup> The City Building Code required that the roof be able to withstand 30.4 lbs./sq. ft. of snow; the plaintiffs' roof was built to withstand 50 lbs./sq. ft. pressure, but the snow load after the defendants' construction increased to 114 lbs./sq. ft.

<sup>68</sup> *Quaere* whether the finding of liability in this case creates a chink in the armour of the "abnormal sensitivity" rule. It is usually said that one cannot, by adapting one's land to a special use, require one's neighbour to stop an activity which would otherwise be unobjectionable. The plaintiffs' user in *Critelli* was not "special" in the sense that it was not unusual for a two-storey building to exist in downtown St Catharines (pop. 125,000). But was the use not "special" in that it could have rendered liable in damages neighbours on three sides who erected buildings surpassing the plaintiffs' by more than eight feet in height?

<sup>69</sup> *Supra*, note 66, 293. In support of this view he cited the passage from *Pugliese* in which Lord Wright's ubiquitous *obiter* was quoted (see *supra*, note 61) and the passage where Howland J.A. affirmed the strict liability principle in nuisance: *ibid.*, 293-94.

<sup>70</sup> See *supra*, note 20.

<sup>71</sup> *Supra*, note 66, 294.

An unpretentious little decision, one might say. It is very unlikely, however, that it would have been decided in the same way before *Penno* and *Pugliese*, given that the defendant was exercising a valid proprietary right and that the right to be protected from the weather cannot exist as an easement.<sup>72</sup> Grange J. does not even mention "the property view", but wholeheartedly applies the new principle of nuisance suggested above. Thus, there is already clear judicial support for the *Pugliese* view.

## VII. The import of the nuisance principle

Given the breadth of the nuisance principle in *Penno* and *Pugliese* and its application in *Critelli*, what further developments can we expect? There are many occasions when A might wish compensation for the injury caused to him by the activities of his neighbour B on B's own land, such as erecting a billboard which would spoil A's magnificent view, or constructing a wall which will block all the light penetrating A's windows. If A has no right to these amenities *ex jure naturae*,<sup>73</sup> he has the choice of acquiring the right to them by easement or contract, or of bringing an action in nuisance against B to prevent unreasonable interference with his enjoyment of such amenities. However, some of these rights cannot exist as easements as they are not capable of forming the subject-matter of a grant.<sup>74</sup> Those based on contract are necessarily tenuous as B may sell his land.<sup>75</sup> Finally, a nuisance action in this area has traditionally been met with the *Acton v. Blundell* defence.<sup>76</sup> Thus A's only recourse often has been a slow boil; if the *Critelli* approach is any indication, however, A may soon take heart.

It will be convenient to divide the types of rights which A wants protected into two categories: those which can exist as easements

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<sup>72</sup> *Phipps v. Pears* [1965] 1 Q.B. 76 (C.A.).

<sup>73</sup> The rights *ex jure naturae* comprise the right to lateral support of one's soil (but not one's buildings), the right to subjacent support by minerals (but not by water), and the right to the accustomed flow of water running in a defined channel through one's land. See *Halsbury's Laws of England*, *supra*, note 46, vol. 14, §§ 168, 170, 190. There is no natural right to light passing over a neighbour's property. Only the light which falls perpendicularly on one's land is an incident of property: see *ibid.*, § 210; Maurice, *Gale on Easements* 14th ed. (1972), 238. There is no natural right to the passage of air: *Halsbury's Laws of England*, *ibid.*, § 237. As to support, see *infra*, notes 101-103. As to water, see *Re Snow & City of Toronto* (1924) 56 O.L.R. 100 (C.A.).

<sup>74</sup> See *Gale on Easements*, *supra*, note 73, 22-34.

<sup>75</sup> Unless, of course, the contract takes the form of a restrictive covenant which binds the land: see *infra*, note 117.

<sup>76</sup> See *supra*, text accompanying note 10.

and those which cannot. Effectively, the acquisition of either type of right produces the desired result: the imposition of obligations of a negative nature on B, which prevent him from doing what he would normally be able to do as a property owner.

## A. Easements

### 1. Easements of light and air

As just noted, A has no natural right to light or air,<sup>77</sup> and can no longer acquire an easement therein by prescription in Ontario.<sup>78</sup> Presumably he could obtain these rights by express or implied grant from B,<sup>79</sup> but this course of action might be costly, and in any case B could refuse. Could A take an action in nuisance against B and obtain an injunction prohibiting B from building a wall blocking all of A's light?<sup>80</sup> Or could A recover damages if B proceeded regardless of A's protests? Based on the broad scope of nuisance as set out in *Pugliese* and as applied in *Critelli*, it is difficult to see why not. The fact that A has no right at common law to the light passing over B's land is no longer a complete defence by B. Assessment of damages would not be easy, but this has never stopped the courts.<sup>81</sup>

A special problem arises with regard to air. While A can no longer acquire a right to air by prescription, B can acquire a right

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<sup>77</sup> *Supra*, note 73.

<sup>78</sup> *The Limitations Act*, R.S.O. 1970, c. 246, s. 33. See also R.S.A. 1970, c. 209, s. 50; R.S.N.B. 1973, c. E-1, s. 8; R.S.N.S. 1967, c. 168, ss. 31-32; R.S.S. 1978, c. L-5, s. 72. As to the Territories, see R.S.C. 1970, c. L-4, ss. 73, 80.

<sup>79</sup> There is some doubt in the English jurisprudence whether a right to light or air can be the subject of an *express* grant (though undoubtedly, but illogically, these rights can be obtained via *presumed* grant (prescription) in England: see *Gale on Easements*, *supra*, note 73, 23-24).

<sup>80</sup> Grange J. considered this possibility in *Critelli*, *supra*, note 66, 295 and concluded that "relief [might] have been refused upon the ground of the adequacy of the damage remedy". Obviously, A would have to present a very strong case before an injunction would be granted. The courts are unlikely to call a halt to construction simply because A's kitchen will receive 37% less light than previously; however, if A owns a greenhouse which represents his livelihood, they may be more sympathetic to such an action. In *Walker v. McKinnon Industries Ltd* [1949] O.R. 549, [1949] 4 D.L.R. 739 (H.C.), *aff'd* [1950], 3 D.L.R. 159 (Ont. C.A.), *aff'd (sub nom. McKinnon Industries Ltd v. Walker)* [1951] 3 D.L.R. 577 (P.C.), an injunction issued to prevent the defendant steel manufacturer from spewing forth "smoke, noxious fumes, vapours and gases" which had damaged orchids in the plaintiff's greenhouse. If one can classify nuisance actions generally into those which actually damage A's premises and those which merely interfere with his enjoyment of those premises, as stated *supra*, text accompanying notes 54 and 55, it is evident that an injunction is more likely to issue in the former situation.

<sup>81</sup> See, e.g., *Chaplin v. Hicks* [1911] 2 K.B. 786 (C.A.).

to pollute A's air by twenty years' user.<sup>82</sup> Could A push the *Pugliese* principle to its logical extreme and argue that B's user is unreasonable when looked at from A's point of view and that therefore a defence involving a proprietary claim (the prescriptive easement) is of no avail to B because the matter is to be decided according to principles of tort law? Courts would no doubt be hesitant to accept this reasoning, as such a decision would involve giving priority to a judge-made rule (*Pugliese*) over a statutory rule (*The Limitations Act*), yet the above result is arguably a natural consequence of the broad nuisance principle set out in *Pugliese*.<sup>83</sup>

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<sup>82</sup> See, e.g., *Radenhurst v. Coate* (1857) 6 Grant 139, 143 (C.A.); *Russell Transport Ltd v. Ontario Malleable Iron Co.* [1952] O.R. 621, [1952] 4 D.L.R. 719 (H.C.). It should be noted that A is not totally without recourse once the prescription period has run: for a discussion of arguments which might be used to defeat B's claim, see McLaren, "The Law of Torts and Pollution", in *Special Lectures of the Law Society of Upper Canada* (1973) 309, 328-29.

<sup>83</sup> The whole concept of gaining the right to commit a nuisance via prescriptive easement seems hard to justify at the present time. Presumably, the hallowed formula, "Easements lie in grant: express, implied or presumed" led Rigby L.J. to reason in *Jordeson* that if A can grant to B, expressly or impliedly, the right to pollute A's air (i.e., if the right satisfies the four requisites of an easement: see *Gale on Easements, supra*, note 73, 7 *et seq.*), B must be able to acquire that right by prescription: *supra*, note 1, 244. While the maxim has symmetry and history on its side, it does not distinguish among the wide range of rights which the law recognizes as easements. Other than the fact that the law calls them both easements, there is no inherent reason why an ordinary right of way and a right to sully the air with noxious fumes should be subject to the same rules. Indeed, the legislature of Ontario saw fit to abolish prescription as a means of obtaining easements to light and air as early as 1880, no doubt as a result of the arcane technicalities which had come to characterize those areas of the law: see *An Act to amend certain particulars in the law of Real Property*, S.O. 1880, c. 14, s. 1. A majority of the English Law Reform Committee advocated the total abolition of prescription: Law Reform Committee, *Fourteenth Report*, Cmnd 1100 (1966). Certainly there is an even stronger policy justification for abolishing the prescriptive acquisition of rights to commit a nuisance. Undoubtedly the principle of prescription is useful and necessary in many areas (e.g., personal injuries actions, validation of small encroachments by adjacent owners). It appears, however, to have been extended by analogy to nuisances without any clear idea of the consequences. Prescription is supposedly based on consent. If A does not object to B's pouring sulphur into his air, A is thought to acquiesce in this activity and, given a long enough period of indifference, will lose his right to complain. This is said to create certainty in the law, in that B will know (after waiting twenty years) that A can no longer take an action against him. One might ask what happened to this concern for certainty *during* the twenty-year period, when B knew A could sue him at any time. The twenty-year rule seems totally arbitrary in this context and its abolition would be preferable to a reduction or extension. Then the law would be certain. The

## 2. Easements in or over water

As an owner of land adjacent to water running in a defined natural channel, A has a right *ex jure naturae* to the customary flow of water, as regards both quality and quantity.<sup>84</sup> This riparian right is an incident of the land itself and is not dependent on any easement. B, located on the same stream, may nevertheless acquire by way of easement a right to use the water in a manner exceeding his normal rights as a riparian owner: for instance, a right to pollute the water,<sup>85</sup> or to pen back a stream and flood neighbouring lands.<sup>86</sup> There was always, however, a curious *lacuna* in the law regarding pollution owing to the fact that a riparian owner has no *proprietary* rights in water flowing by his property. If B's pollution constituted an unreasonable interference with A's use and enjoyment of his property, A could take an action in nuisance against B, or an action for infringement of riparian rights.<sup>87</sup> However, should B's pollution cause the death of fish which A had been accustomed to take from the stream, A could not protest because he had no *proprietary* right in the fish, a right which only accompanies ownership of the *solum*.<sup>88</sup> Thus he was relegated to the position of a victim of a public nuisance, and could only recover upon showing peculiar damage.<sup>89</sup> If one is entitled to set aside the question of

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right to commit a nuisance would be obtained only through a truly consensual contract rather than the fictional consent of prescription.

Ironically enough, by recognizing as nuisances activities which previously had not been considered so, *Pugliese* and *Critelli* have widened the range of interferences in another's land which may subsequently be legitimated by prescription. We may have jumped out of the frying pan into the fire, but this merely illustrates the futility of not following *Pugliese* to its logical extreme, as suggested *supra*, text preceding note 81.

<sup>84</sup> See *supra*, note 73.

<sup>85</sup> *Hunter v. Richards* (1912) 26 O.L.R. 458 (Div. Ct); *aff'd* (1913) 28 O.L.R. 267 (C.A.).

<sup>86</sup> *Cardwell v. Breckenbridge* (1913) 24 O.W.R. 569, 4 O.W.N. 1295, 11 D.L.R. 461 (H.C.).

<sup>87</sup> *McKie v. K.V.P. Co.* [1948] O.R. 398 (H.C.).

<sup>88</sup> Ownership of the bed of a river is vested in the Crown in right of the province, barring an express grant: *The Beds of Navigable Waters Act*, R.S.O. 1970, c. 41, s. 1.

<sup>89</sup> *McKie v. K.V.P.*, *supra*, note 87. This case brings out the distinction between riparian and proprietary rights very well, as one plaintiff owned a water lot (and thus the *solum*) while the others were mere riparian owners. All plaintiffs were entitled to an injunction on the basis of nuisance; however only the owner of the *solum* was awarded damages for the loss of fishing rights. Because a riparian owner will generally be able to get an injunction solely on the basis of his right to receive the flow of water unaltered in quality, he has a remedy, albeit indirect, for the loss of fishing rights in a

property rights, as Howland J.A. does in *Pugliese*, one is certainly faced with an unreasonable user of land by B which causes harm to A, and, in the absence of a defence of prescription<sup>90</sup> or statutory authority, it is difficult to see why B would not be liable in damages.<sup>91</sup>

It is important to remember that, in determining what constitutes an "unreasonable" user of land, courts generally balance several competing factors — most notably, the social utility of the defendant's conduct and the gravity of harm to others resulting from such conduct. However, in *McKie v. The K.V.P. Co.*<sup>92</sup> McRuer C.J.H.C. said:

Some evidence was given on behalf of the defendant to show the importance of its business in the community, and that it carried it on in a proper manner. Neither of these elements is to be taken into consideration in a case of this character, nor are the economic necessities of the defendant relevant to be considered . . . . In my view, if I were to consider and give effect to an argument based on the defendant's economic position in the community, or its financial interest, I would in effect be giving to it a veritable power of expropriation of the common law rights of the riparian owners, without compensation.<sup>93</sup>

If, by this pronouncement, the Chief Justice meant that a judge could *never* examine the social utility of the defendant's conduct, he was overstating the case. In *Pugliese*, Howland J.A. quoted Fleming as stating that the utility of the defendant's conduct and

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river. However, if we are dealing with fishing rights in the ocean, the problem arises in a more acute form, because there is no right to unpolluted sea water. In *Hickey v. Electric Reduction Co.* (1970) 21 D.L.R. (3d) 368 (Nfld S.C.), several fishermen sued the owners of a phosphorous plant which was dumping poisonous waste into the ocean and ruining their fishing business. Furlong C.J. held that this amounted to a public nuisance; thus, the Attorney-General's consent had to be obtained. In addition, even if this hurdle had been overcome, he thought damages for economic loss would not be recoverable, quoting Lord Denning M.R. in *SCM (UK) Ltd v. W. J. Whittal & Son Ltd* [1970] 3 All E.R. 245 (C.A.). Cf. *supra*, note 65.

<sup>90</sup> For the arguments against the existence of pollution sanctioned by prescription, see *supra*, note 83.

<sup>91</sup> See, e.g., *supra*, note 6, 617-18; see also Fleming, *supra*, note 2, 402; McLaren, *supra*, note 82, 317-18. One argument against this approach is that it assimilates public and private nuisance. As public nuisance is beyond the scope of this paper, the argument will not be explored any further.

<sup>92</sup> *Supra*, note 87, 410-11.

<sup>93</sup> *Ibid.* The Chief Justice's compunctions evidently did not trouble the Ontario Legislature, as it soon passed *The KVP Company Limited Act, 1950*, S.O. 1950, c. 33, dissolving the injunction granted. *The Lakes and Rivers Improvement Act*, now R.S.O. 1970, c. 233 was subsequently amended to direct judges to balance the "importance . . . benefit and advantage . . . [to] that locality" of such mills against the private injury: see s. 37(1)(a). No cases have since been reported under this section.

gravity of harm were factors in the evaluation process.<sup>94</sup> Matas J.A. referred to the "desirable objective" of the Government of Manitoba in *Penno*.<sup>95</sup> And of course the ubiquitous *Sedleigh-Denfield* formula<sup>96</sup> would hardly permit a plaintiff to insist on his strict rights even though it led to the economic ruin of a community. Nuisance is always a two-edged sword, a balancing act. As one discards the old defences to nuisance based on property law and as nuisance moves more and more into the realm of tort, extending the rights of our mythical plaintiff A, one runs the risk of allowing A to sterilize B's land.<sup>97</sup> A, whom we are trying so hard to protect, could turn into another Mr Pickles precisely because we are protecting him. Thus the need for the courts to examine all the factors, including social utility, gravity of harm, sensitivity of the plaintiff, character of the locale, duration of the interference, even the malice of the parties,<sup>98</sup> is greater than ever.<sup>99</sup> However, having looked at them, in the final analysis it must be said that Chief Justice McRuer's statement remains hard to controvert. If we accept that the court's function is basically adjudicative, it is difficult to see why A's remedy should be sacrificed to the *deus ex machina* of public interest. If the result is unsatisfactory from a global point of view, recourse should be sought in other arenas.<sup>100</sup>

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<sup>94</sup> *Supra*, note 6, 617-18.

<sup>95</sup> *Supra*, note 5, 269.

<sup>96</sup> *Supra*, note 27.

<sup>97</sup> It was exactly this consideration which motivated the court in *Popplewell v. Hodkinson*, *supra*, note 12, a decision which is open to criticism in that it followed the old *Acton v. Blundell* school of thought. However, *Popplewell* was arguably a good decision on the facts. The defendant wanted to drain his land in order to develop it, as it was too soggy to support buildings. In draining it, he inevitably drained some of his neighbour's land as well, causing the subsidence damage which led to the action. Had the court permitted the action, it would have in effect obliged the defendant to keep his land as a swamp forever. "Once a morass, always a morass", as Rigby L.J. observed in *Jordeson* (*supra*, note 1, 243), would have been the rule. But even though an injunction would not be granted, it would not seem altogether unjust to allow damages.

<sup>98</sup> See the famous case of *Hollywood Silver Fox Farm v. Emmett* [1936] 1 All E.R. 825 (K.B.).

<sup>99</sup> The list is not exhaustive. These are simply the factors most commonly mentioned in the texts and the cases: see Fleming, *supra*, note 2, 401-8; Armitage & Dias (eds.), *Clerk & Lindsell on Torts* 14th ed. (1975), § 1395; *Halsbury's Laws of England* 3d ed. (1959), vol. 28, §§ 161-163.

<sup>100</sup> For a thought-provoking look at this conflict, see Hawkins, "In and of Itself": *Some Thoughts on the Assignment of Property Rights in Nuisance Cases* (1978) 36 U.T. Fac. L. Rev. 209.

### 3. Easements of support

A has a right to lateral support for his soil from the soil of his neighbour B,<sup>101</sup> a right to subjacent support by minerals or soil should the surface belong to A and the substratum to B<sup>102</sup> and, after *Penno* and *Pugliese*, a qualified right to the support of percolating waters.<sup>103</sup> The first two are natural rights which are incident to the land.<sup>104</sup> The third is not a right of property *stricto sensu* but a hybrid of real and personal rights defined in terms of nuisance, which is itself a hybrid action.

Until *Penno* and *Pugliese*, it was clear that A had no natural right to support for his buildings from adjacent soil or structures.<sup>105</sup> Such a right could only exist as an easement based on an express, implied or presumed grant.<sup>106</sup> This would appear still to be the

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<sup>101</sup> *Cleland v. Berberick* (1915) 34 O.L.R. 636, 25 D.L.R. 583 (H.C.) (applying the classic authority *Dalton v. Angus & Co.* (1881) 6 App. Cas. 740 (H.L.)); *aff'd* (1916) 36 O.L.R. 357, 29 D.L.R. 72 (C.A.).

<sup>102</sup> *Davies v. James Bay* [1914] A.C. 1043 (P.C.), varying (1913) 28 O.L.R. 544 (C.A.). One also has an absolute right to the support of any substance flowing, oozing, or stagnant beneath one's soil provided it is not wholly water: *supra*, note 1.

<sup>103</sup> *Supra*, text accompanying note 35.

<sup>104</sup> *Supra*, note 73.

<sup>105</sup> As Lord Penzance said in *Dalton v. Angus & Co.*, *supra*, note 101, 804: "[I]t is the law ... that at any time within twenty years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground". See also *Gale on Easements*, *supra*, note 73, 290.

<sup>106</sup> See *Gale on Easements*, *supra*, note 73, 292-300. In fact, cases where the grim scenario painted by Lord Penzance, *supra*, note 105, has actually arisen appear to be extremely rare, as the courts are very willing to find a prescriptive easement of support or an implied agreement between the neighbours that the excavating party will not do anything to prejudice an adjacent house. See *Canada Trust Co. v. Town of Strathroy* [1955] O.W.N. 840 (H.C.); *aff'd* [1956] O.W.N. 474 (C.A.) and *Metropolitan Life Insurance Co. v. McQueen* [1924] 2 W.W.R. 981, [1924] 2 D.L.R. 942 (Alta S.C.). In general, judicial common sense appears to have prevented the intolerable results of the Penzance principle. One decision of the Supreme Court of Canada, however, came very close to adopting it. The facts of *Iredale v. Loudon* (1908) 40 S.C.R. 313, *rev'g* (1907) 15 O.L.R. 286 (C.A.) and restoring with a variation (1906) 14 O.L.R. 17 (Ch. D.) could have been taken from a law student's pre-exam nightmare. In brief, the plaintiff had acquired a possessory title to the upper storey of the defendants' two-storey building by twelve years' user and had used an entrance and staircase during the whole of his seventeen years' occupation. Thus he fell just short of acquiring a prescriptive easement over the stairway. At this point the defendants decided to demolish the building. A nice question arose: did the plaintiff's title include a natural right to support which oozed through the lower storey and into the ground? Or was his support to be determined solely on the principles applicable to two

law in England,<sup>107</sup> but there has been marked resistance to the rule in Canada and New Zealand<sup>108</sup> when it leads to a manifestly unjust result. In *Wilton v. Hansen*,<sup>109</sup> where D's excavations caused P's wall to collapse, the Manitoba Court of Appeal allowed an action for damages in tort based on P's acquisition of a prescriptive easement.<sup>110</sup> However, Freedman J.A. (as he then was) clearly stated<sup>111</sup> that, irrespective of the existence of the easement, the plaintiff could have recovered in negligence. *Dalton v. Angus*,<sup>112</sup> the classic authority denying liability in such circumstances, was not even mentioned, but *Donoghue v. Stevenson* was.<sup>113</sup> The Court

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buildings leaning one against the other? In a sibylline pronouncement, Duff J., with whom Sir Charles Fitzpatrick C.J. concurred, opined: "The plaintiff is therefore not entitled to the injunction in the broad terms of the order granted by Mabee J. [see (1906) 14 O.L.R. 17], but he is I think entitled to an order restraining the defendants from interfering with so much of the structure as rests upon that part of the soil itself to which he had acquired a possessory title" (*ibid.*, 337-38). Davies J. thought that the possessory title to the upper storey carried with it what was absolutely necessary to its existence, *viz.*, a right to support from the lower storey and the right to use the staircase. Thus he would have restored in full the judgment of Mabee J. Idington and Macleennan JJ. dissented. It would be interesting to know how and if Duff J.'s order was ever executed.

<sup>107</sup> *Ray v. Fairway Motors (Barnstaple) Ltd* (1968) 112 Sol. Jo. 925 (C.A.). P was able to recover for damages caused to his well by D's excavations because an easement in P's favour was admitted to exist, but Willmer and Russell L.J.J. expressed the view *obiter* that if no easement had existed, *Dalton v. Angus* would have applied and that the reconciliation of *Dalton* with *Donoghue v. Stevenson*, *supra*, note 41, should be left to the House of Lords.

<sup>108</sup> See *Bognuda v. Upton & Shearer Ltd* [1972] N.Z.L.R. 741, where the Court of Appeal refused to follow *Dalton v. Angus* and applied *Donoghue v. Stevenson* instead. The prescription argument which is so intimately bound up with the *Dalton* view was held inapplicable in New Zealand where prescriptive easements of all kinds have been abolished: *Land Transfer Act 1952*, S.N.Z. 1952, No. 52, s. 64. There exists land titles legislation in some Canadian provinces to the same effect: *The Land Registry Act*, R.S.B.C. 1960, c. 208, s. 38 as am. by S.B.C. 1971, c. 30, s. 8; *The Land Titles Act*, R.S.O. 1970, c. 234, s. 58; *Land Titles Act*, R.S.S. 1978, c. L-5, s. 72. *The Land Titles Act*, R.S.C. 1970, c. L-4 contains no express disposition but *quaere* whether s. 72(1) effectively negatives the possibility of prescriptive easements in the Territories. As to Manitoba, see *infra*, note 110.

<sup>109</sup> *Supra*, note 52.

<sup>110</sup> In agreeing that prescriptive easements were possible in Manitoba, the Court followed *Stall v. Yarosz* (1964) 43 D.L.R. (2d) 255, 47 W.W.R. 113 (Man. C.A.) which said the prohibition of adverse possession did not apply to easements, which are acquired by user. See *The Real Property Act*, R.S.M. 1970, c. R30, ss. 57(1)(c) and 61(2).

<sup>111</sup> *Supra*, note 52, 169-70.

<sup>112</sup> *Supra*, note 101.

<sup>113</sup> *Supra*, note 41.

of Appeal made no reference to *Wilton* in its later decision in *Penno*, but both cases clearly involve exactly the same issue in admitting the possibility of a claim in tort by a plaintiff who would have no *locus standi* from the point of view of property law.<sup>114</sup> Thus the decisions in *Penno* and *Pugliese* confirm Freedman J.A.'s *obiter* in *Wilton*. To paraphrase Howland J.A.,<sup>115</sup> the law would now seem to be that an owner of land does not have an absolute right of support for his buildings from neighbouring soil, but he does have a right not to be subjected to interference with the support of such soil, amounting to negligence or nuisance.

### B. *Rights less than easements*

The extent to which the *Pugliese* decision will apply to cases not dealing with percolating waters becomes even more important when one considers the rights not presently capable of existing as easements which A may want over B's land: A may have a magnificent view which will be totally obliterated if B erects a billboard advertising his new fast-food restaurant. B may buy the lot next door to A and construct his house in such a way that B's living room window looks directly into A's secluded patio. Since the law does not recognize easements of prospect or privacy,<sup>116</sup> A can only protect

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<sup>114</sup> Although Freedman J.A. spoke only of negligence, it is clear that he would have been receptive to a claim in nuisance had the defendant not been negligent.

<sup>115</sup> *Supra*, note 6, 621.

<sup>116</sup> As to prospect, the law was stated in *Bland v. Moseley*, a case dating from 1587 cited by the Court in *Alfred's Case* (1610) 9 Co. Rep. 57b, 77 E.R. 816. In the former case, the plaintiff possessed a fine house with seven windows in one wall overlooking "land containing half a rood". His neighbour built a structure which barred the light from these windows and obstructed the view as well as the flow of air. Recovery was allowed as the rights to light and air were "ancient" (*i.e.*, enjoyed since prior to 1189) but Wray C.J. said: "[F]or prospect, which is a matter only of delight and not of necessity, no action lies for stopping thereof". *Bland v. Moseley* was cited with approval in *Phipps v. Pears*, *supra*, note 72, 83. In *McBean v. Wyllie* (1902) 14 Man. L.R. 135 (K.B.), the erection of a building which cut off the plaintiff's view was held not actionable in itself.

In *Browne v. Flower* [1911] 1 Ch. 219, Parker J. said the law did not recognize an easement of privacy when considering the rights of a ground floor tenant whose privacy had been invaded by the construction of an outdoor wrought-iron stair which afforded a full view of his bedroom. See also *Dalton v. Angus*, *supra*, note 101, 824 *per* Lord Blackburn.

As neither a right to a view nor to privacy can be the subject of an easement, neither can be acquired by prescription. Presumably such rights can be acquired only by contract (and thence, by restrictive covenant), at

himself by having B consent to a restrictive covenant, and here the law prescribes certain conditions which must be fulfilled before the benefit and burden of the covenant will run with the land.<sup>117</sup> If any one of these is not met, A may again find himself without a remedy. Or will he? Can A not say, "It is immaterial that I have no right, as that word is understood in the law of property or contract, to the view, or to my privacy. You, B, are acting unreasonably in interfering with my enjoyment of my property. For that I can recover damages". B's actions fall directly within the ambit of Grange J.'s words in *Critelli*: "[T]he defendant... made a lawful and *non-negligent* user of its property... [yet] the question falls to be decided on general principles of negligence and nuisance and the user of land".<sup>118</sup>

Admittedly the courts would be extremely chary of interfering with B's actions in most cases. No one would suggest that development should come to a complete halt because all property owners are entitled to "acquire" views which they enjoy over their neighbours' lands at a given point in time. But between these extremes there is surely a *via media* which can be plotted with reference to two concepts referred to in *Pugliese*. First, the plaintiff must have a right which the law deems worthy of protection.<sup>119</sup> In order

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least before *Penno* and *Pugliese*. However, a relaxation of this rule occurred in *Owen v. O'Connor*, *supra*, note 58, where the defendant's offending structure encroached 18 feet onto a public roadway. This constituted a public, as opposed to a private, nuisance and imposed the added burden on the plaintiff of proving that she had suffered peculiar damage above that suffered by the public in general. In spite of these hurdles, she succeeded in her damages action for obstruction of her sunlight and view. The key element in the case was the characterization of the defendant's action as "unlawful" because the building encroached on a public way. Would Sugerman J. have reached the same conclusion if the building had been two feet over the line? Six inches? These questions merely point up the inadequacy of his concept of "unlawful". It has been argued that one has a right *ex jure naturae* to aesthetic surroundings: see Silverstone, *Visual Pollution: Unaesthetic Use of Land as Nuisance* (1974) 12 *Alta L. Rev.* 542.

<sup>117</sup> Megarry & Wade, *The Law of Real Property* 4th ed. (1975), 753 *et seq.*

<sup>118</sup> *Supra*, note 66, 293 [emphasis added].

<sup>119</sup> See *Restatement (2d) of the Law of Torts* (1965) § 1, quoted by Howland J.A., *supra*, note 6, 615. Although a view is ordinarily not credited with much weight in the judicial process, there may be cases where it would be otherwise. Consider a tourist lodge in a scenic area, the major attraction of which is the unparalleled view afforded by the lodge's elevated situation. B, a property owner half way down the slope, decides to erect an immense sign with flashing neon lights which can be seen by motorists on a highway several miles away, and refuses to enter into a restrictive covenant with his neighbour. The lodge's business will undoubtedly suffer a sharp decline. The

to determine which interests are worthy of protection, one must look to the second concept mentioned in *Pugliese*: the *Sedleigh-Denfield v. O'Callaghan* formula.<sup>120</sup> It is clear that this formula works on a sliding scale — as “the ordinary usages of mankind living in society” change, so must the law of nuisance. While the House of Lords saw nothing wrong with Mr Pickles’ interference with the Town of Bradford’s water supply in 1895, it is doubtful whether the same result would be reached today. By parity of reasoning, Wray C.J.’s restrictions enunciated in 1587 should not bind us today if our standards of “reasonableness” have changed. It is clear that what is reasonable can only be measured by balancing all the relevant factors.<sup>121</sup> As the law becomes more sophisticated, it is capable of protecting a range of interests beyond those of health, physical comfort, and property damage which have been historically sanctioned by the action in nuisance. An excellent example of this expanded view of nuisance is *Nor-Video Services Ltd v. Ontario Hydro*,<sup>122</sup> where Robins J. found that television reception, even if it were a purely recreational facility, was an interest worthy of protection.<sup>123</sup> Consequently, he imposed liability on Ontario Hydro for constructing a transformer which interfered with the reception of TV signals by the plaintiff cable TV company, signals which it in turn would have rebroadcast to its subscribers.<sup>124</sup>

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plaintiff's interest is thus a commercial one and arguably is worthy of protection.

<sup>120</sup> See *supra*, note 61.

<sup>121</sup> See *supra*, text accompanying notes 91-100.

<sup>122</sup> (1978) 19 O.R. (2d) 107 (H.C.). The case is all the more interesting in that it comes to a different conclusion from that reached by Buckley J. in *Bridlington Relay, Ltd v. Yorkshire Electricity Board* [1965] Ch. 436 on a similar set of facts. Cf. *Morrisset v. St-Germain* [1977] C.P. 235.

<sup>123</sup> In so doing he considered the social utility of television (particularly to a remote community such as Atikokan where the case arose), the ease with which Ontario Hydro could have located its transformer elsewhere, and the social utility of the latter's actions. While on the issue of liability the balance favoured Nor-Video, on the damages question Hydro won the day. Nor-Video would have had to spend at least \$200,000 to remedy the interference caused by Hydro, but the programming on the Thunder Bay channel which Nor-Video had lost was substantially the same as that of a Winnipeg station which could still be received. Thus the subscribers, whom Nor-Video in effect represented, had suffered virtually no harm and damages were limited accordingly.

<sup>124</sup> Robins J. equated the position of Nor-Video with that of an individual subscriber whose viewing pleasure had been interrupted: *supra*, note 122, 118. The question here becomes one of degree. What range of sensibilities are we going to protect via the nuisance action? Traditionally, the famous *dictum* of Knight-Bruce V.-C. in *Walter v. Selte* (1851) 4 De G. & Sm. 315, 322, 64 E.R.

### C. *The meaning of nuisance after Pugliese*

In sum, then, one might say that A, the victim of a nuisance which takes the form of an interference with his light or support, may have a remedy against B, the instigator, based on the *Pugliese* principle, if that interference exceeds the limits which A can reasonably be expected to tolerate. The novel element after *Pugliese* is that A need not necessarily have acquired an easement which protects his interest in the light or support. As regards air pollution, it appears that the relevant statute of limitations would still be an ironclad defence. A's rights over water are sufficiently protected by the existing law, save for the problem noted above regarding the destruction of marine life in public waters. Here *Pugliese* might be of assistance, subject, of course, to the peculiarities found in the law regarding public nuisance, notably the requirement that the consent of the Attorney-General be obtained prior to the commencement of an action.

Turning to those activities which cannot at present be protected by means of a negative easement, it is here that *Pugliese* may find its fullest flowering. The *Critelli* decision is an excellent illustration of the "tort view" of nuisance exemplified in *Pugliese*; *Nor-Video* clearly shares the same philosophy, though it did not have to examine the property/tort conflict. In effect, *Pugliese* allows A to jump two hurdles at once: the absence of a proprietary right with which B is interfering (a property argument), and the absence of a covenant, restrictive or otherwise, which protects his pursuit of the desired activity (a contract argument). Again it must be emphasized that A has not suddenly acquired a whole flock of "rights" which are opposable to B; he has simply gained judicial protection from undue interference by his neighbour. *Pugliese* represents not so much an alteration of the law as a change in attitude. Traditionally the courts were content to ask whether B was "validly" (the adverb of course begs the question) exercising his own proprie-

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849, 852 has been the last word on the subject: "[O]ught this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?". As the frontiers of nuisance expand, inconveniences which might previously have been considered trivial may well be actionable. The "trivial inconvenience" argument is probably no longer an absolute defence, but only one factor in the balancing process. Robins J. looked at the ease with which Ontario Hydro could have avoided the harm complained of when considering this question: *supra*, note 122, 119.

tary rights when the neighbourly conflict with A arose. Provided that A could not point to a recognizable proprietary right of his own which had been infringed, a virtually irrebuttable presumption existed that B was blameless. What we witness in *Pugliese* is a substantial dilution of that presumption; indeed one may argue that the presumption is now the other way.

As a postscript, one is compelled to ask whether the exposé here presented remains valid after the Supreme Court of Canada decision in *Pugliese*.<sup>125</sup> Regrettably, the decision adds nothing to the debate. In view of the painstaking efforts of the Ontario Court of Appeal, coming so soon after the Manitoba Court of Appeal's similar judgment in *Penno*, one can only issue the usual lament that our highest court did not see fit to bestow its *imprimatur* on the work of these appellate courts.<sup>126</sup> However, until the issue again reaches the Supreme Court (which is not likely to be in the near future), one can only conclude that the principles enunciated by Howland J.A. are the last word on the subject.

### VIII. Nuisance in the civil law of Quebec

Every legal system must deal with the problem of regulating the rights and obligations of neighbouring landowners. It will be instructive to examine the approach taken by the civil law of Quebec and to compare it to that adopted by the common law provinces.<sup>127</sup>

Upon looking at the dispositions of the Civil Code on the subject, one is immediately struck by the dichotomy between property and obligations. Some articles (for example, articles 399, 406, 508 and 585) are found in Book II of the Code, entitled "Of Property, Of Ownership and its Different Modifications", while others (notably articles 1053 and 1057) are found in Book III, Title Third, "Of Obligations". A few preliminary observations about these texts are in order.

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<sup>125</sup> *Supra*, notes 6 and 48.

<sup>126</sup> Pigeon J. (at p. 115) was of the opinion that the common law rule on the abstraction of percolating waters had been abrogated by the *Ontario Water Resources Commission Act*, R.S.O. 1970, c.332, s. 37. Since the defendant had abstracted a quantity of percolating water in excess of statutory limits, his behaviour was unreasonable, and hence, a nuisance.

<sup>127</sup> I do not purport to undertake a comprehensive survey of the law of Quebec on the subject of nuisance (or, to use the more colourful phrase favoured by Quebec jurists, *troubles de voisinage*). The purpose here is simply to set out the broad trends in the jurisprudence of Quebec in order to make comparisons with the *Pugliese* approach to the subject. For a succinct treatment of the law of Quebec in this area see Cohen, *Nuisance: A Proprietary Delict* (1968) 14 McGill L.J. 124.

Article 406 C.C. undoubtedly sets forth the basic principle:

Ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law, or by regulation.

Our main concern is not the rule but the exception. What is a use "prohibited by law or by regulation"? Two restrictions on the plenary right of ownership are indicated in article 508 and article 1057, paragraph 3. Article 508 says that proprietors are subject to mutual obligations independently of any stipulation while article 1057, paragraph 3 speaks of such obligations as being imposed on owners of adjoining properties (*terrains adjacents*). Is article 508 wider than article 1057? The question has never been addressed in the jurisprudence. This discrepancy may be overlooked for the time being, as we are not so much concerned with the debtor of the obligation as we are with its content. It may seem odd that article 508 speaks of obligations of proprietors but is included in the section of the Code dealing with servitudes established by law. In fact, it has been suggested that these so-called *servitudes légales*<sup>128</sup> are not servitudes at all but circumscriptions of the right of ownership (as envisaged by article 406), which take the form of an "obligation passive universelle de respecter le droit de propriété des héritages voisins pour le bon ordre social".<sup>129</sup> In other words, this section of the Code is not really about property rights *stricto sensu*, but is really a partial codification of the law on *troubles de voisinage*.<sup>130</sup>

Thus article 508 C.C. regulates a number of potential "neighbourhood conflicts" in a concrete way. How does it deal with innominate nuisances, such as the cases of careless excavations and percolating waters discussed earlier? Doctrinal writers and judges have attempt-

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<sup>128</sup> These comprise the "servitudes" of division walls and ditches (arts. 510-532 C.C.); of view (arts. 533-538 C.C.); of eaves (art. 539 C.C.); and of the right of way in favour of a proprietor whose land is enclosed on all sides by that of others (arts. 540-544 C.C.). It is worthy of note that in the civil law one has a qualified right to light, privacy, and view; theoretically, in the common law one does not.

<sup>129</sup> Caron, *Les "servitudes légales" sont-elles des servitudes réelles?* (1962) 12 *Thémis* 123, 126. See also Cardinal, *La Propriété* (1964-65) 67 *R. du N.* 271, 323, 443; *Duchesneau v. Poisson* [1950] B.R. 453, 457 *et seq.*, *per* Pratte J.; *Collin v. Lemieux* [1957] C.S. 385, 388, *per* Brossard J.; Marler, *The Law of Real Property* (1932), 77.

<sup>130</sup> If the late Professor Caron's theory is correct, and we are dealing not with property rights but with circumscriptions of rights, then an important corollary is that the legal servitudes are imprescriptible: Caron, *supra*, note 129, 126. This avoids many of the problems which arise in the common law: see, *e.g.*, *supra*, Pt VII-A.

ed to elaborate the general statements of articles 406, 1053 and 1057, paragraph 3 C.C.; however, their pronouncements have not always been in accord with one another. The greatest controversy has raged around the question of fault as a precondition to liability in these matters. It is a fundamental principle of the civil law of Quebec that in order to succeed in an action for breach of a legal obligation, one must prove fault,<sup>131</sup> damage, and causality. Thus those cases which seem to adopt the English view of nuisance as a strict liability offence involving no "fault" component<sup>132</sup> are generally discredited by the doctrine.<sup>133</sup>

This tendency is unfortunate and, it is submitted, wrong in that it assumes that article 1053 is the touchstone of liability in this type of case. In fact, a consensus has recently emerged that the *obligation de voisinage* does not flow from article 1053 but rather from article 406, or a combination of article 406 and 1057. The trend became evident in the case of *Katz v. Reitz*,<sup>134</sup> in which A excavated on his property to a depth below that of the water table, causing water to escape from beneath his neighbour B's property and triggering subsidence which virtually destroyed B's house. While Lajoie J.A. mentioned article 1053 *en passant*, the core of his judgment was contained in the following statement:

L'exercice du droit de propriété, si absolu soit-il, comporte l'obligation de ne pas nuire à son voisin et de l'indemniser des dommages que l'exercice de ce droit peut lui causer. Cette obligation existe, *même en l'absence de faute*, et résulte alors du droit du voisin à l'intégrité de son bien et à la réparation du préjudice qu'il subit, contre son gré, de travaux faits par autrui pour son avantage et profit.<sup>135</sup>

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<sup>131</sup>"Fault" is defined in art. 1053 as a "positive act, imprudence, neglect or want of skill".

<sup>132</sup>The seminal case is that of *Drysdale v. Dugas* (1896) 26 S.C.R. 20, 22, where the owner of a livery stable which was "constructed on the most approved methods as regards ventilation and drainage" was held liable in damages when offensive odours and noises emanating therefrom disturbed his neighbour.

<sup>133</sup>See Baudouin, *La responsabilité civile délictuelle* (1973), 65-66. Nadeau & Nadeau, *Traité pratique de la responsabilité civile délictuelle* (1971), 233, argue that fault did indeed exist in the *Drysdale* situation in that there was a "dépassement des droits ordinaires du voisinage". But surely this type of "fault", which is really indistinguishable from the damage itself, was never contemplated by art. 1053.

<sup>134</sup>[1973] C.A. 230.

<sup>135</sup>*Ibid.*, 237 [emphasis added]. Taschereau and Salvat JJ.A. concurred with their brother Lajoie. Lajoie J.A. seems to flirt with the theory of risk in the latter part of the quote. See Haanappel, *Faute et risque dans le système québécois de la responsabilité civile extra-contractuelle* (1978) 24 McGill L.J. 635.

While Lajoie J.A. seemed to think that this obligation flowed from article 406, his earlier mention of article 1053 makes matters less clear than they might be.

A later decision of the Court of Appeal appears to come down exclusively on the side of article 406. In *Carey Canadian Mines Ltd v. Plante*,<sup>136</sup> the defendant asbestos mining company had polluted a river which crossed the plaintiff's lands, rendering the water unfit for bathing or drinking. Bélanger, Bernier and Montgomery J.J.A. all agreed, in separate judgments, that the defendant was liable in damages, but only Bernier J.A. addressed himself to the source or the obligation. He began by saying "Il s'agit d'une action fondée sur l'obligation de voisinage (art. 406 C.C.)",<sup>137</sup> and then proceeded to quote the statement by Lajoie J.A.<sup>138</sup> before saying that "[c]ette obligation s'étend à tout le voisinage; il n'est pas nécessaire que les propriétés soient contiguës".<sup>139</sup> Article 1053 is mentioned nowhere in any of the judgments. In view of the confusion surrounding the inter-relationship of the two articles in the jurisprudence, a positive statement clarifying the present position would be welcome.<sup>140</sup>

The members of the Civil Code Revision Office agreed that the *obligation de voisinage* was "a specific legal obligation, distinct from both the obligation set forth in article 1053 C.C. and the concept of fault implied by that article".<sup>141</sup> It consists of the obligation "to refrain from causing any *gênes intolérables* . . . regardless of whatever

<sup>136</sup> [1975] C.A. 893.

<sup>137</sup> *Ibid.*, 899.

<sup>138</sup> Reproduced *supra*, text accompanying note 135.

<sup>139</sup> *Supra*, note 136, 899. The judgments do not indicate whether in fact the properties were contiguous.

<sup>140</sup> The case is very interesting from the point of view of remedies. At first instance, the plaintiff asked for a permanent injunction which Masson J. refused to grant, "vu l'importance de l'industrie de l'appelante pour les citoyens de ce district qui en retirent leur principal moyen de substance": see *ibid.*, 894. It is unfortunate that the plaintiff did not appeal from this part of the judgment, as it is a remarkable example of the law effectively expropriating individual rights for the benefit of a larger community. As there is no article in the Code which could conceivably justify Masson J.'s action, it would be interesting to know on what grounds he felt authorized to refuse the injunction (his judgment is unreported). Cf. the attitude of McRuer C.J.H.C. in *McKie v. K.V.P. Co.*, *supra*, note 87.

<sup>141</sup> Civil Code Revision Office, *Report on the Québec Civil Code* (1977), vol. II, t. 2, 620. The drafters do not mention art. 406 as the source of this obligation, but do note the obligation of diligence imposed by art. 1057 as the ancestor of their proposed art. 96. From a practical point of view, it would probably be best to consider the "exception clause" to art. 406 as the source of the *obligation de voisinage* until the Draft Code takes effect.

measures have been taken to eliminate such inconveniences".<sup>142</sup> Thus it would appear to be an obligation of warranty; once the damage is proved to have been caused by the defendant, he will be unable to exonerate himself. This is reflected in the proposed article 96:

No person may cause to another damage which exceeds the normal inconveniences resulting from proximity [*les inconvénients normaux du voisinage*].<sup>143</sup>

The terms of the article are imperative; no defence is permitted. Thus, on the crucial question of fault, the jurisprudence of Quebec has resiled from the view that a 1053-type fault is necessary, in favour of a "strict liability" approach very similar to that of the English common law. Since *Katz v. Reitz*,<sup>144</sup> the courts would appear to have stolen a march on the Civil Code Revision Office, such that the present law in Quebec is not very different from that enunciated in the proposed article 96.<sup>145</sup>

We have seen that two of the biggest problems in the common law of nuisance have been those regarding water rights and the right of buildings to support. It will be instructive to see how the civil law of Quebec deals with these matters.

As regards water, the present article 502 seems to contain an unpleasant echo of *Acton v. Blundell*:

He who has a spring on his land may use it and dispose of it as he pleases. "Spring", *stricto sensu*, refers only to a stream which at some point gushes forth from the earth, and thus would not appear to cover percolating waters which are wholly subterranean. However, in view of the fact that the Code nowhere states what rights a proprietor has in the waters seeping through his land,<sup>146</sup> one may well assimilate their legal status to that of a spring. Indeed, one rather Gothic case dating from the late nineteenth century has done so. In *Robert v. Les Curé et Marguilliers de l'Oeuvre et Fabrique de Montréal*,<sup>147</sup> water percolated through the graves of diseased bodies which the defendant parish had buried in its cemetery, infiltrating the plaintiff's water supply and causing sickness in his family. Doherty J. of the Superior Court quoted *Acton v. Blundell*,<sup>148</sup> article 502 C.C., Roman law, and

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<sup>142</sup> *Ibid.*, 619.

<sup>143</sup> *Ibid.*, vol. I, Book V, art. 96.

<sup>144</sup> *Supra*, note 134.

<sup>145</sup> See also *Dumas Transport Inc. v. Cliche* [1971] C.A. 160; Larouche, *Chronique de droit des obligations* (1975) 6 R.G.D. 193, 221-23.

<sup>146</sup> Art. 501 merely states that the lower proprietor cannot prevent the flow of these waters, and is silent as to whether the upper proprietor can deprive him of them.

<sup>147</sup> (1896) 4 R. de J. 279 (C.S.).

<sup>148</sup> *Supra*, note 10.

old French law in coming to the conclusion that the parish could do whatever it pleased with the subsurface waters, even to the extent of polluting them. Even before the enactment of the *Environment Quality Act*<sup>149</sup> in 1972, it is doubtful whether a similar decision would have been reached in recent times. The case remains, however, one of the very few on the subject in the jurisprudence of Quebec. Should a *Penno* or *Pugliese* type case arise today in Quebec, one would expect it to be settled in the context of the *obligation de voisinage*, along the lines set out in *Katz v. Reitz*,<sup>150</sup> and not according to the more absolutist view suggested by article 502.<sup>151</sup>

The right of a building to lateral support from neighbouring soil was well established even before *Katz v. Reitz*.<sup>152</sup> Article 414 C.C. seems to suggest the contrary, insofar as it states that the proprietor "may make . . . any . . . excavations he thinks proper", but it must be read as subject to the *obligation de voisinage* which flows from article 406. It remains to be seen whether this right of support is a full-fledged proprietary right *ex jure naturae*, preventing a neighbouring proprietor from interfering in any way with the support of any type of structure on adjacent land, or whether it is simply an example of a neighbourly obligation, importing the idea of reasonable inconvenience. The line is a fine one, but may have to be drawn in a particular fact situation. With the current trend away from strict property rights, it is submitted that the latter approach would probably prevail. In any case, it is important to remember that one need not acquire a servitude or easement of support for buildings in Quebec. This constitutes an important divergence between civil law and the common law.

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<sup>149</sup> S.Q. 1972, c. 49 [now L.R.Q. 1977, c. Q-2]. S. 111 states "No recourse before the civil courts shall be suspended by the fact that it involves an act or omission constituting an offence within the meaning of this act".

<sup>150</sup> *Supra*, note 134. Indeed the fact situation in *Katz* was very similar to the one in *Pugliese*. It is interesting to note that the law regarding subsurface waters was not even considered in *Katz v. Reitz*.

<sup>151</sup> See the *Report on the Québec Civil Code*, *supra*, note 141, vol. II, t. 2, 390 for the codifiers' comments on the present art. 502 C.C. and its proposed replacement, art. 40.

<sup>152</sup> See Marler, *supra*, note 129, 77, quoting the old French law on the subject. In the courts of Quebec, see the *obiter* of Wurtele J. in *Dugas v. Drysdale* (1895) 6 K.B. 278, 283 and *Hotte v. Berlind* (1916) 22 R.L. n.s. 300 (Cour de Rev.); cf. *Falardeau v. Windsor Hotel Co.* (1920) 57 S.C. 385 (Cour de Rev.), now of doubtful validity.

## IX. Conclusion

After looking at the new approach taken by *Penno* and *Pugliese* to the law of nuisance in common law Canada, and after examining recent developments in the civil law of Quebec in the field, one is struck by a sense of common cause, of parallel paths proceeding towards the same goal. The key concept in *Pugliese* is that of interference beyond that which a landowner could reasonably be expected to tolerate.<sup>153</sup> The Civil Code Revision Office speaks of disturbances beyond *les inconvénients normaux du voisinage*.<sup>154</sup> At the heart of both of these statements is a quest for a general principle to regulate neighbourhood conflicts, accompanied by a certain impatience with technical rules of property law which create more problems than they solve. The method by which the desired result is being achieved is the same in both systems: the basis of liability for nuisance is being shifted from the law of property to the law of obligations. The latter is suited to the formulation of broad principles governing the behaviour of man in society, and is a much better vehicle for the resolution of neighbourhood differences than property law, which has been elaborated in terms of rights or absence of rights, winners and losers, black and white. The law has come to realize that perhaps shades of grey were what was required after all.

The theme is not a new one. The nuisance action was, after all, only an early form of judicial zoning. We have long inhabited a world of zoning by-laws, regional planning authorities and demolition permits. All aim at creating a harmonious environment in which the potential conflicts between various incompatible land uses will be minimized. All impose obligations or restrictions on landowners which reduce the scope of activities in which one can engage on that land. At the heart of all this legislation is the idea that one must refrain from certain land uses in the interests of a larger community — a tort, not a property, concept.

The range of things one can do with one's property grows more and more circumscribed. Property lawyers lament that the rules of their art are no more than interesting baubles cast upon the shore, to be picked up, admired for an instant, then thrown back into the sea of reasonableness. To this, one can only reply that the tide is inexorable.

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<sup>153</sup> *Supra*, text *circa* note 64.

<sup>154</sup> *Supra*, text accompanying note 143.

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