

Law of Tort on Private Nuisance in Urban Sustainability: Legal Perspectives

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Abstract: The law of tort on private nuisance plays an important role in urban sustainability. The used of the law of tort on private nuisance to the area of urban sustainability, largely in response to the necessity of every individual state to protect their rights and interests in order to safeguard the environment in urban area. Therefore, this study will examine the used of the law of tort on private nuisance in relation to the urban sustainability from the legal perspectives; identify actions which deal with the protection for the mother nature and as a tool for the achievement in sustainable development in urban area.

Key words: Law of tort on private nuisance, urban sustainability, legal perspectives, urban areas, nuisance, Malaysia

INTRODUCTION

Urban sustainability as described many researchers is a mixture of various features of life including culture, social, economic and environment (Hadi *et al.*, 2007). Hadi further defined urban sustainability as a capacity to sustain the quality of life, we value or to which we aspire. In operational words, it is usually analyses as ornamental the environment, social, cultural and economic well-being of current and future inhabitants (Hadi *et al.*, 2007). Urban sustainability is very essential to human habitat in order to ensure the good quality of life to mankind (Jahi, 2001; Razman and Azlan, 2009; Razman *et al.*, 2009a).

Therefore, it is very vital to take extra care to the environment in order to achieve urban sustainability. A good environmental management will ensure to (Razman *et al.*, 2010a; Sulaiman and Razman, 2010) achieve urban sustainability. Environmental management can be divided into two parts. The 1st part is the environmental management through non-legal approaches and the 2nd part is the environmental management through legal means (Jahi, 2001). The environmental management through non-legal approaches can be done through education, research, monitoring, public policies,

guidelines and development plans (Jahi, 2001). On the other hands, the environmental management through legal approaches can done through the implementation of the legislations (Razman *et al.*, 2010b) that being enacted by legislative bodies in the country (Jahi, 2001). Both environmental management the non-legal approaches and the legal approaches derives from the concept of sustainability.

THE CONCEPT OF SUSTAINABILITY

The concept of sustainability has been defined by the World Commission on environment and development as development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs. This concept covers two essential scopes, i.e., environment and social aspects. This concept of sustainability has been highlighted in the 1992, United Nations Conference on sustainable development in Rio de Janeiro as the results, Agenda 21 and Rio declaration has been established.

According to Sands (1995, 2003), Agenda 21 emphasises the following matters which include sustainable human settlement, population, consumption

pattern, poverty and human health. On the other hand, Mensah (1996) stated that the Rio declaration addresses on mankind entitlements and rights which include health and productive life.

Basically, this concept of sustainability has been an element in the international legal framework since, early as 1893. According to the case of United States of America vs. Great Britain (1893) 1 Moore's Int. Arb. Awards 755, well known as Pacific Fur Seals Arbitration where in this case, the United States of America has stated that a right to make sure the appropriate and lawful use of seals and to protect them for the benefit of human beings from meaningless destruction (Razman *et al.*, 2009b, 2010c; Emrizal and Razman, 2010).

Sands (1995) indicated that this concept of sustainable development is perhaps the greatest contemporary expression of environmental policy, commanding support and presented as a fundamental at the Rio Summit, Rio declaration on environment and development in year, 1992.

According to Article 33 of the Lome Convention, 1989 states that in the framework of this convention, the protection and the enhancement of the environment and natural resources, the halting of deterioration of land and forests, the restoration of ecological balances, the preservation of natural resources and their rational exploitation are basic objectives that the African-Caribbean-Pacific (ACP) states concerned shall strive to achieve with community support with a view to bring an immediate improvement in the living conditions of their populations and to safeguarding those of future generations (Razman *et al.*, 2009c; Emrizal and Razman, 2010).

LAW OF TORT ON PRIVATE NUISANCE

A private nuisance is referred to any unlawful interference with a person's use or enjoyment of land or of some right over or in connection with it (Rogers, 1989). Hughes (1996) further explained on the private nuisance as follows:

- Interference with use and enjoyment of land. For example in the case of Bone vs. Seale (1975) 1 All ER 787 (1975) 1 WLR 797, interference occurred as a result of an unpleasant smell arising from a neighboring pig farm
- Actual physical interference with land itself. For example in the case of Meux's Brewery Co. vs. city of London Electric Lighting Co. (1895) 1 Ch. 287 where powerful vibrating from engines on neighboring land cause damage to the structure of plaintiff's house

Likewise, Lord Scott in the case of Read vs. Lyons and Co. Ltd. (1945) K.B. 216, 236; defined private nuisance as private nuisance as unlawful interference with a person's use or enjoyment of land or some right over or in connection with it.

The definition pointed that law of private nuisance is concerned with the unlawful interference with a person's use or enjoyment of land, some right over or in connect with it. The essential difference between private nuisance and other law of torts such as law of negligence and law of trespass which the protection afforded is directed towards controlling proprietary interests rather than the control of individual's activities and conduct. Thus, the law of private nuisance which gives the protection of proprietary interests may provide a general helps to members of public as a means to protect environment.

Talib (2003) explained that in an action of private nuisance, the plaintiff must prove interference with the enjoyment of his land. Therefore, a plaintiff must have an interest in land to be able to sue in private nuisance, unlike a claim based on public nuisance which does not require the plaintiff to have any interest over land. Person who have an interest over land are a land owner, a tenant and a licensee who has been granted a license to use the land for a particular purpose.

IMPORTANT FACTORS UNDER THE LAW OF TORT ON PRIVATE NUISANCE

One important concept in the application of the law of private nuisance is the reasonableness. For nuisance, reasonableness is measured by balancing the rights and interests of both parties; the plaintiff and the defendant. Interference becomes unlawful and constitutes a nuisance when it unreasonably interferes with the plaintiff's enjoyment of his land. In the case of Saunders Clark vs. Grosvenor Mansions Company Ltd. and D'Alles-Sandry (1900) 2 Ch.D. 373, Lord Buckley stated that the court will consider whether the defendant is using his property reasonably or not. If he is using it reasonably, there is nothing which at law can be considered a nuisance but if he is not using reasonably, the plaintiff is entitled to relief. In assessing the balance between the reasonableness of defendant's conduct and its impact on the plaintiff's ownership rights, the court will take into consideration five factors; locality, intention of the defendant, the sensitivity of the plaintiff, duration of interference and the utility of the defendant's activity (Bell, 1997; Ahmad and Hingun, 1998; Talib, 2003).

Locality: The location of the plaintiff's and defendant's premises is relevant considerations in assessing whether

the defendant's activity is unreasonable and amount to substantial interference. The case of *St. Helen's Smelting Co. vs. Tipping* (1985) 11 HLC 642 illustrates factor on locality. The plaintiff acquired an estate which was situated in a manufacturing area. The smoke from the defendant's copper-smelting factory had caused considerable damage to the trees on the plaintiff's estate. Lord Westbury LC distinguished between a physical damage (actual damage to the property) and non-physical damage (personal discomfort). The factor of locality is not taken in the event of a private nuisance which causes actual damage to the property. However, the factor of locality is essential to determine whether a personal discomfort can be considered under legal action. In this case, the respondent/plaintiff able to prove to court that this case based on a private nuisance which causes actual damage to the property where the factor of locality is not taken into account.

In *Syarikat Perniagaan Selangor Sdn. Bhd. vs. Fahro Rozi Mohdi and Ors* (1981) 2 MLJ 16 (FC), the appellant who had a lease over a piece of land had agreed and promised to use the land as a skating rink, restaurant and cinema. The appellant subsequently build an open stage and staged some shows. He also opened a discotheque. The court held that people who lived in the town area must be prepared to accept a lot of noise from their neighbors and he himself may make noise. However, no one has the right to create excessive noise. Similarly, a person is not required to tolerate an excessive level of noise which is unreasonable and is a nuisance.

Intention of the defendant: In nuisance to determine the issue of reasonableness, the court may take into account the purpose or malice of the defendant's activity. The existence of malice may cause the defendant's act to be unreasonable. For example in the case of *Christie vs. Davey* (1893) 1 Ch. 316, the plaintiff was a music teacher who conducted music class at her house. Her neighbor, the defendant did not like the sounds from the musical instruments and in turn shouted, banged at the adjoining walls and clashed pots and pans whilst the plaintiff was conducting her classes. The plaintiff took legal action against the defendant on the basis that the defendant had caused interference by creating unreasonable noise to disturb the plaintiff. The court found that the defendant was malicious in his actions and an injunction was granted to the plaintiff.

The sensitivity of the plaintiff: The law of nuisance is not sympathetic to a plaintiff who is extra sensitive whether the sensitivity is related to the plaintiff himself or to his property. Sensitivity cannot be used as a basis for

claiming that the defendant's conduct constitutes an unreasonable and substantial interference but once unreasonable and substantial interference is established, sensitivity will not deprive the plaintiff from obtaining the remedy.

Based on the case of *Robinson vs. Kilvert* (1881) 41 Ch.D. 88, the defendant was in the business of making paper boxes. The process involved using hot air. The plaintiff who lived in the floor above the same premises was in the business of selling special paper which was sold according to weight. Naturally, the hot air from the defendant's place caused the moisture in the plaintiff's papers to dry up. The raised temperature in the plaintiff's premises did not inconvenience the plaintiff's workers and it would not have affected normal paper. The court denied the plaintiff's claim for compensation on the ground that ordinary paper would not have been affected by hot air and therefore the plaintiff's property was extra ordinary sensitive.

Duration of interference: Duration of the interference made by the defendant must be something that is continuous or occurs very often. The plaintiff is required to prove to the court that the duration of the interference caused by the defendant that is not considered as temporary basis in nature.

In *Harrison vs. Southwark and Vauxhall Water Co.* (1891) 2 Ch. 409, the defendant was a water company which had dug a shaft to pump water from land adjacent to the plaintiff. As shaft was being sunk, the pumps that were being used created a continuous noise. Plaintiff brought an action in nuisance to stop the noise. The court held that the duration of the interference caused by the defendant in this case was not permanent in nature.

The utility of the defendant's activity: Plaintiff is required to prove to the court that the defendant's activity that caused interference to the plaintiff is not utility advantage and benefit to other public members. If the defendant's conduct benefits the members of public generally, it is more likely that the conduct will not be deemed unreasonable. So, a claim for building of schools, factories, government hospitals and power stations, although giving rise to interference in the form of noise and dust to nearby residents would probably be denied on the basis of the utility derived from the construction of the facilities. According to the case of *Adams vs. Ursell* (1913) 1 Ch. 269, the defendant was in the trade of selling fried fish. The shop was located in the residential part of the street. Faced with the claim for an injunction, he argued that his business benefited the public, especially the poor and therefore, the smell produced by

his trade was justified. The court rejected the defense as the plaintiff's comfort and convenience also had to be considered.

CONCLUSION

Malaysia had depended very much on the existing institutional and legal arrangements for the implementation of its environmental policy objectives and strategies. Thus, legislative is important as a tool to manage and protect the environment. According to Bell (1997), the development of the law relating to the protection of environment is not solely governed by the realm of public and administrative law. Private law provides a general help to the members of the public as a means of to protect environment. For that reason, members of the public can appoint any law firms to represent and bring cases to the court.

RECOMMENDATIONS

It is recommended to apply the law of private nuisance as an alternative to the existing law and regulations. Nuisance is that branch of the law of tort most closely concerned with protecting the environment. The whole of the law of private nuisance represents an attempt to preserve a balance between two conflicting interests that of one occupier in using his land as he thinks fit and that of his neighbor in the quiet enjoyment of his land (Rogers, 1989).

Thus, efforts should be taken to create awareness among members of the public as well as to the lawyers to apply the law of private nuisance as an alternative in controlling damage to the environment.

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