Using Nuisance Law as a Tool to Battle Environmental Pollution

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New York Law Journal

10-21-2011

In American Electric Power Company Inc. v. Connecticut, the U.S. Supreme Court reversed the determination of the U.S. Court of Appeals for the Second Circuit, which held that the plaintiffs could maintain a public nuisance lawsuit to enjoin allegedly major air polluters from discharging carbon monoxide and other greenhouse gases into the atmosphere. The purpose of this article is to discuss the effects, if any, that the determination in American Electric will have on New York's common law involving actions to abate public and private nuisances caused by environmental pollution. In order to answer the question, the background of American Electric should be considered.

The plaintiffs in one of the two American Electric lawsuits were eight states and New York City. In the other lawsuit, the plaintiffs were three land trusts. The defendants were six electric power corporations that own and operate fossil fuel fired power plants in 20 states. In spite of the statement in Erie Railroad Co. v. Tompkins that "[t]here is no federal general common law," the lawsuits in American Electric were based upon federal common law, as well as upon state common law nuisance.

The history of American Electric involved different environmental philosophies. Regulation of greenhouse gas emissions requires a balancing of environmental concerns against economic realities. Under the prior administration, the Environmental Protection Agency on Sept. 8, 2003, determined that the Clean Air Act did not give it the power to regulate greenhouse gas emissions from new automobiles. Given the unwillingness or inability of the EPA to regulate greenhouse gases, plaintiffs had no alternative but to commence the American Electric lawsuit in 2004. After the lawsuit was commenced, the Supreme Court, in Massachusetts v. EPA held that the Clean Air Act did authorize federal regulation of carbon dioxide and other greenhouse gases. Notably, a number of the plaintiffs in the American Electric case were also plaintiffs in Massachusetts.

It was largely the determination in Massachusetts that caused the reversal in American Electric. While Erie Railroad Co. v. Tompkins had held there was no federal common law, the case resulted in the emergence of federal case law on matters of national concern, one of which involved global warming. In view of the holding in Massachusetts, the Court held that the Clean Air Act displaced the federal common nuisance law even though the EPA had not yet promulgated regulations...
New York courts have dealt for years with nuisance cases that were of an environmental nature. New York courts have addressed balancing of equities questions in such cases. For example, in *Boomer v. Atlantic Cement Co., Inc.*, the defendant operated a large cement plant near Albany. Actions were brought for injunction and damages by neighboring land owners alleging injury to property from dirt, smoke and vibration emanating from the plant. The court first noted that "the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley."

Nevertheless, the court also noted that "there is now before the court private litigation in which individual property owners have sought specific relief from a single plant operation." In considering the relief that should be granted, the court noted that the rule in New York is that equitable relief will be granted in spite of the fact that there may be considerable disparity in the economic consequences between the effect of the injunction and the effect of the nuisance.

The court considered two alternative types of relief. The first was to grant the injunction but postpone its effective date to allow time for scientific advances that could eliminate the nuisance. The second was to condition the continuance of an injunction on the payment of permanent damages. Because the first alternative was uncertain as to when, if ever, it would be technologically possible to eliminate the nuisance, the court opted for a remedy of permanent damages.

*State of New York v. Schenectady Chemicals Inc.* answered the question of whether New York State, either by statute or common law, could maintain an action to compel a chemical company to pay the costs of cleaning up a dump site so as to prevent pollution of surface and ground water when the dumping took place between 15 and 30 years ago at a site owned by an independent contractor hired by the defendant chemical company to dispose of the waste material. The lawsuit was brought by the state in its role as the guardian of the environment. The court noted that "[t]he common law is not static. Society has repeatedly been confronted with new inventions and products that, through foreseen and unforeseen events, have imposed dangers upon society (explosives are an example). The courts have reacted by expanding the common law to meet the challenge, in some instances imposing absolute liability upon the party who, either through manufacture or use, has sought to profit from marketing a new invention or product."

Although we know now that many products are polluting the air and water and pose a threat to all life forms, there still remains the question of who must pay to solve the problem of pollution. That is a political question and can only be decided by the Legislature. Nevertheless, courts are bound to decide cases brought by litigants who claim to have been injured by the pollution. Accordingly, the court allowed plaintiff's nuisance claims to proceed.

In a case dating back to 1876, *Campbell v. Seaman* the plaintiffs owned about 40 acres of land, in the village of Castleton, on the east bank of the Hudson River. As the decision tells it, plaintiff built upon it an expensive dwelling-house, and improved the land by grading and terracing, building roads and walks through the same, and planting trees and shrubs, both ornamental and useful. The defendant owned adjoining lands, which he had used as a brick-yard.

Gas coming from defendant's kilns had killed the foliage on plaintiff's white and yellow pines and Norway spruce, and had, after repeated attacks, killed and destroyed from 100 to 150 valuable pine and spruce trees, and had injured plaintiff's grape vines and plum trees. That the plaintiff suffered actual injury because of the gases was essential to the claim. "To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or..."
such as to render its enjoyment specially uncomfortable or inconvenient."^{12}

In addition to the necessity of there being an injury, the magnitude of the injury is also important. "Where the damage to one complaining of a nuisance is small or trifling, and the damage to the one causing the nuisance will be large in case he be restrained, the courts will sometimes deny an injunction."^{13} See also *Cogswell v. The New York, New Haven and Hartford Railroad Co.*^{14}

Similarities and Differences

In all of these cases, either the plaintiffs suffered meaningful damages that were caused by the defendant's pollution, or the state brought an action on behalf of land owners who had suffered such damage. As noted, New York courts have held that such damages are an essential element of a nuisance claim and that the magnitude of the damages is something to be considered. While some of the New York cases have emphasized that it is not the role of the courts to solve all of the problems caused by pollution, they have also held that the courts have the responsibility to provide relief to a person who has been seriously injured or to a state that has sued on behalf of its citizens who have suffered such injury.

The primary difference between the New York cases and the relief being sought in *American Electric* is the scope of the relief being sought. In the New York cases, the nature of the damages was clearly articulated. They had occurred in New York State to New York residents. While the balancing of the equities was a concern in some of the cases, the courts recognized their obligation to make an effort to do so because the plaintiffs had suffered serious injuries. To take the New York common law, or the common law of any state, and apply that law nationally beyond the boundaries of the particular state, seems to be a bit of a reach. While the activities of the defendants in *American Electric* may have seriously affected the residents of New York, a remedy that will affect only New York residents may not be possible.

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Endnotes:

2. 582 F.3d 309 (2d Cir. 2009).
3. 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).
7. Id. at 26 N.Y.2d 223.
8. Id. at 26 N.Y.2d 222.
10. Id. at 117 Misc.2d 966.
11. 63 N.Y. 568 (1876).
12. Id. at 63 N.Y. 577.
13. Id. at 63 N.Y. 586.
14. 103 N.Y. 10, 8 N.E. 537 (1886).