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L. Mark Walker

Dale E. Cottingham

AN ABRIDGED PRIMER ON THE LAW OF PUBLIC NUISANCE

L. Mark Walker†
Dale E. Cottingham††

I. INTRODUCTION

> There is perhaps no more impenetrable jungle in the entire law than that which surrounds the "nuisance." It has meant all things to all men . . . .[1]

The term "nuisance" has been called "a sort of legal garbage can."[2] Included within this garbage can is that which is known as a "public nuisance." Although often viewed as an arcane subject, the law of public nuisance has experienced a resurgence recently, particularly in the area of environmental law. Today most claims for money damages for pollution brought under state common laws include a claim for public nuisance. The attempt is being made to apply the law of public nuisance in the environmental area because of perceived benefits that apply to claims for public nuisance such as statute of limitations and measure of damages. To understand how the rules and principles of public nuisance should be properly applied to new areas such as environmental law, one must first understand the history and purpose of the law of public nuisance. What follows is a review of this

† Director and Shareholder, Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma. B.B.A., 1980, J.D., 1983, University of Oklahoma. Mr. Walker's practice has emphasis in the areas of oil and gas and environmental litigation. In addition, he is the author of numerous published articles covering oil and gas and environmental law subjects and has been a frequent speaker at CLE seminars on these subjects. He is also a member of the Mineral Lawyers Society of Oklahoma City.

†† Member, Moricoli, Harris, Cottingham & Hurst, Oklahoma City, Oklahoma, a firm which specializes in oil and gas and energy law. B.A., 1979, Oklahoma Baptist University; J.D., 1982, Southern Methodist University. Mr Cottingham's practice has a major emphasis in environmental risk management, litigation and regulatory matters. He is also a member of the Mineral Lawyers Society of Oklahoma City.

1. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 86, at 571 (4th ed. 1971).

2. J.B. LEE & BARRY A. LINDAHL, MODERN TORT LAW § 35.01, at 191 (Rev. ed. 1990) (quoting William L. Prosser, *Nuisances Without Fault*, 20 TEX. L. REV. 399, 410 (1942)).

thing called public nuisance, particularly as it is known in Oklahoma, and an attempt to penetrate a segment of this jungle.

II. HISTORY OF PUBLIC NUISANCE

What is now known as the law of "public nuisance" began its development in England as early as the thirteenth century.[3] The earliest cases of public nuisance involved purprestures, which were encroachments upon the royal domain or public highways.[4] Such an encroachment was an infringement upon the rights of the crown or the general public and, as such, constituted a crime.[5] As a crime, a public nuisance was redressed by suits by the crown.[6] Over time, the term public nuisance came to include such things as lotteries, unlicensed plays, common scolds and "a host of other rag ends of the law."[7] The term continued to expand until it finally came to include any "act not warranted by law, or omission to discharge a legal duty, which inconveniences the public in the exercise of rights common to all Her Majesty's subjects."[8]

It was not until the sixteenth century that the crime of public nuisance, for the first time, also became the tort of public nuisance.[9] In an anonymous case in 1536, it was first held that a public nuisance can also give rise to a private tort claim if the plaintiff can show that, as a result of the public nuisance, he sustained injuries different in kind from those suffered by the public in general.[10] It is in this restricted manner that the private claim for public nuisance has endured to this date. At the time of its creation, the "tort" of public nuisance was a significant departure from the general rule that the courts would not

3. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 86, at 572 (4th ed. 1971).

4. *Id.*

5. *Id.*

6. *Id.* "There was enough of a superficial resemblance between the blocking of a private right of way [a private nuisance] and the blocking of a public highway to keep men contented with calling the latter a nuisance as well; and thus was born the public nuisance." *Id.* (quoting F.H. Newark, *The Boundaries of Nuisance*, 65 LAW Q. REV. 480, 482 (1949)).

7. *Id.*

8. *Id.* (quoting STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 105 (1890)).

9. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 646 & n.37 (5th ed. 1984) (citing the anonymous case of Y. B. 27 Hen. 8, Mich., pl. 10 (1536)).

10. *Id.*

> This qualification has persisted, and it is uniformly held that a private individual has no action for the invasion of the purely public right, unless his damage is in some way to be distinguished from that sustained by other members of the general public. It is not enough that he suffers the same inconvenience or is exposed to the same threatened injury as everyone else.

Id.

impose tort liability upon a person for the violation of a criminal law that was intended to protect the public at large.[11] The tort of public nuisance is only one of two early common law instances in which a criminal violation became a tort per se.[12]

III. WHAT IS A "PUBLIC" NUISANCE?

Any discussion of a public nuisance must include a description of the object which the word "public" modifies: the word "nuisance." In Oklahoma, a nuisance is defined by statute.[13] In describing a nuisance, it has been said:

> [T]he term "nuisance" signifies in law such a use of property or such a course of conduct, irrespective of actual trespass against others, or of malicious or actual criminal intent, which transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom. It is a class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person of his own property, working an obstruction or injury to the right of another, or to the public, and producing such material annoyance, inconvenience, and discomfort that the law will presume a resulting damage.[14]

Thus, under Oklahoma law, the nuisance is the "act" or "failure to act" which causes damage.[15] For example, land damage may result from the act or failure to act, but the land damage is not the nuisance. The Oklahoma Supreme Court has stated that "[t]he Defendant might abate its nuisance, but could not, by so doing, restore Plaintiff's premises."[16]

In most jurisdictions in the United States, a public nuisance is a nuisance or wrong affecting an interest "common to the general public, rather than to one peculiar individual or several."[17] In these states, infringement upon a public right, even if the infringement literally affects only one or a few people, constitutes a public nuisance.

In the majority of jurisdictions, conduct does not become a public nuisance merely because it interferes with the use and enjoyment of

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11. RESTATEMENT (SECOND) OF TORTS § 821C (1977).
12. *Id.* The other is libel.
13. OKLA. STAT. tit. 50, § 1 (1991).
14. Hummel v. State, 99 P.2d 913, 917 (Okla. Crim. App. 1940).
15. Oklahoma City v. Page, 6 P.2d 1033, 1034 (Okla. 1931); City of Holdenville v. Kiser, 156 P.2d 363, 365 (Okla. 1945).
16. Atchison, T.& S.F. Ry. Co. v. Kelly, 266 P. 775 (Okla. 1928).
17. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 88, at 585 (4th ed. 1971); *see also* RESTATEMENT (SECOND) OF TORTS § 821B (1977).

land owned by a large number of persons.[18] There must be some interference with a public right. In these jurisdictions, therefore, the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not, for that reason alone, become a public nuisance.[19]

Professor Prosser identifies Oklahoma as one of three states which has departed from this general rule.[20] In Oklahoma, a public nuisance is statutorily defined as a nuisance "[w]hich affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal."[21] This suggests that the Oklahoma statute defines a public nuisance to include interference with any considerable number of persons and that no public right need be involved. Therefore, in Oklahoma, if enough downstream riparian owners which form a community, neighborhood or considerable number of persons are adversely affected by a polluted stream, a claim for public nuisance exists, even though no public right as such is involved.[22]

The Oklahoma Supreme Court seems to affirm Professor Prosser's notion in *Reaves v. Territory*.[23] In declaring a disorderly and disreputable theater in the city of Guthrie to be a public nuisance, the court stated that "[t]he difference between a public nuisance and a private nuisance is that one affects the people at large, and the other simply the individual."[24] It is certain in Oklahoma that the nuisance or wrong does not have to affect the government or the entire community of the state to be a public nuisance.[25]

There are Oklahoma cases which suggest that an activity which affects a public interest is a public nuisance.[26] However, even these

18. RESTATEMENT (SECOND) OF TORTS § 821C (1977).

19. *Id.* § 821B.

20. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §88, at 585 (4th ed. 1971).

21. OKLA. STAT. tit. 50, § 2 (1991).

22. RESTATEMENT (SECOND) OF TORTS § 821B (1977). While the Restatement does not specifically refer to Oklahoma, it does provide that, in jurisdictions with statutes like Oklahoma, such downstream riparian owners have a suit for a public nuisance despite the lack of injury to the public interest.

23. 74 P. 951, 953 (Okla. 1903).

24. *Id.* (quoting *In re* Debs, 158 U.S. 564, 592 (1895)).

25. Finkelstein v. City of Sapulpa, 234 P. 187 (Okla. 1925).

26. Mackey v. Oklahoma *ex rel.* Harris, 495 P.2d 105, 108 (Okla. 1972); City of McAlester v. Grand Union Tea Co., 98 P.2d 924 (Okla. 1940).

cases find that the nuisance must affect a community of people in order to be a public nuisance. In *State ex rel. Field v. Hess*,[27] the state sought to enjoin the operation of an adult bookstore as a public nuisance.[28] While finding that a public interest was involved, the court necessarily determined that the activity adversely affected a community of people.[29] Thus, in Oklahoma, even if a nuisance affects a public right, a claim for public nuisance exists only if the activity affects a considerable number of people.

The Oklahoma statute defining public nuisance requires that in order to be a common or public nuisance, the activity must affect the community of people "at the same time."[30] An interesting case which considered this aspect of the definition is *City of McAlester v. Grant Union Tea Co.*[31] The city of McAlester enacted an ordinance which declared door-to-door salesmen entering upon private residences without the invitation of the private owner to be a public nuisance.[32] In determining that the ordinance was beyond the power of the city to enact, the court found that the activity was not a public nuisance because the solicitor "can only be at one place at one time and such a call cannot reasonably be said to disturb at the same time an entire community or neighborhood or any considerable number of persons."[33] Accordingly, the act, or failure to act, which constitutes the nuisance must itself affect a community of people. It cannot be a series of like acts.

IV. Legislative Authority to Declare Certain Activities to be Public Nuisances

The legislature, in the exercise of its police power, has the authority to declare certain uses of property or certain conduct to be public

27. 540 P.2d 1165 (Okla. 1975).

28. *Id.* at 1170.

29. *Id.*

> Continued life beyond sale, tendency to reach the impressionable young and reasonable capability of encouraging or causing anti-social behavior especially in its impact on young people, sets forth a public interest and affect. The nuisance already determined in this opinion is one affecting at the same time an entire community or neighborhood, or a considerable number of persons, though the extent upon individuals may be unequal. We find here a public nuisance under 50 O.S. 1971 § 2.

Id.

30. Okla. Stat. tit. 50, § 2 (1991).

31. 98 P.2d 924 (Okla. 1940).

32. *Id.* at 926.

33. *Id.*

nuisances and to provide for their suppression.[34] In doing so, the legislature has broad discretion.[35] In general, the legislature may declare anything to be a nuisance which is detrimental to the health, morals, peace or general welfare of its citizens.[36] The suppression of public nuisances to protect the public health and morality has been described as one of the most important duties of government.[37]

Again, in Oklahoma, the legislature has generally defined a public nuisance as any nuisance which affects an entire community, neighborhood or considerable number of persons.[38] In addition, the Oklahoma legislature has identified a number of specific activities as public nuisances per se.[39] These legislatively identified public nuisances represent an interesting assortment of diverse and dissimilar activities.

The power of the legislature to regulate public nuisances can be delegated to state agencies or municipalities.[40] The Oklahoma legislature has so delegated its authority in several instances. For example,

34. *See* FRANCIS H. BOHLEN & FOWLER V. HARPER, TORTS § 189, at 388 (1933); 58 AM. JUR. 2D *Nuisances* § 50 & n.54 (1989) (citing Lawton v. Steele, 152 U.S. 133 (1894)).

35. 58 AM. JUR. 2D *Nuisances* § 51 (1989).

36. FRANCIS H. BOHLEN & FOWLER V. HARPER, TORTS § 189, at 388 (1933); 58 AM. JUR. 2D *Nuisances* § 51 & n.54 (1989) (citing Lawton v. Steele, 152 U.S. 133 (1894)).

37. 58 AM. JUR. 2D *Nuisances* § 50 (1989) (citing Phalen v. Virginia, 49 U.S. 163 (1842)).

38. OKLA. STAT. tit. 50, § 2 (1991).

39. OKLA. STAT. tit. 4, § 499.10 (1991) (failure to comply with the Dog & Cat Sterilization Act regarding pets adopted from agencies); OKLA. STAT. tit. 4, § 507 (1991) (failure of an animal shelter to comply with Oklahoma's euthanasia laws); OKLA. STAT. tit. 11, § 22-111 (1991) (maintenance of certain weeds and trash); OKLA. STAT. tit. 11, § 22-112 (1991) (dilapidated buildings); OKLA. STAT. tit. 21, § 946 (1991) (maintenance of a gambling house); OKLA. STAT. tit. 21, § 972 (1991) (slot machine or punch-board gambling); OKLA. STAT. tit. 21, § 1052 (1991) (lotteries); OKLA. STAT. tit. 21, § 1204 (1991) (maintenance of dump yards near highways); OKLA. STAT. tit. 21, § 1225 (1991) (maintenance of a slaughterhouse in unauthorized areas); OKLA. STAT. tit. 21, § 1247 (1991) (smoking in certain public areas); OKLA. STAT. tit. 31, § 102 (1991) (maintenance of hazardous conditions at airports); OKLA. STAT. tit. 41, § 995.15 (1991) (operation of bingo halls contrary to statutory requirements); OKLA. STAT. tit. 47, § 11-206 (1991) (maintenance of unauthorized traffic signs); OKLA. STAT. tit. 50, § 43 (1991) (maintenance of cemetery in unauthorized areas); OKLA. STAT. tit. 63, § 4 (1991) (maintenance of dogs which attack or disturb livestock); OKLA. STAT. tit. 62, § 1-1011 (1991) (maintenance of filth or other conditions conducive to the breeding of insects or rodents that might contribute to the spreading of diseases or other conditions adverse to the public health); OKLA. STAT. tit. 63, § 1-818.7 (1991) (maintenance of a group home for handicapped or disabled persons not in compliance with statutory requirements); OKLA. STAT. tit. 63, §§ 1-1020 to 1-1021 (1991) (maintenance of a public bath not in compliance with statutory requirements); OKLA. STAT. tit. 63, § 1-1105 (1991) (maintenance of unsafe or unsound foodstuffs); OKLA. STAT. tit. 63, § 1-1940 (1991) (maintenance of a nursing home not in compliance with statutory requirements); OKLA. STAT. tit. 63, § 2012 (1991) (maintenance of a junkyard not in compliance with statutory requirements); OKLA. STAT. tit. 69, §§ 1252, 1258 (1991) (improper maintenance of an industrial waste facility); OKLA. STAT. tit. 69, § 1280 (1991) (billboard advertising not in compliance with statutory requirements); OKLA. STAT. tit. 74, § 152.8 (1991) (transportation of oil or gas contrary to statutory requirements); and OKLA. STAT. tit. 82, § 926.4 (1991) (pollution of waters of the State).

40. *See* 58 AM. JUR. 2D *Nuisances* §§ 50, 354 (1989).

the Oklahoma legislature has expressly granted cities and towns the power to determine what activities constitute public nuisances within their corporate limits and to abate such nuisances.[41] Similarly, the legislature has expressly empowered the Scenic River Commission to identify and abate certain public nuisances affecting state rivers.[42] The legislature has also expressly empowered the State Commissioner of Health to identify and abate public nuisances inimical to public health.[43]

Of course, the power of the legislature or its delegees to declare certain activities to be public nuisances is not without limits. It is subject to constitutional limitations.[44] For example, the power to regulate public nuisances is subject to the constitutional limitation against unreasonable, arbitrary or capricious governmental action.[45] Similarly, the legislature cannot extend or enlarge its constitutional power over property under the guise of regulating nuisances.[46] Moreover, with regard to the termination of pre-existing activities thereafter declared by the legislature to be public nuisances, due process requirements of notice and opportunity for hearing must be satisfied.[47]

The legislature or its delegees cannot lawfully declare something to be a nuisance if it in fact is not.[48] The court illustrates this point in *McAlester*, wherein the city of McAlester tried to declare uninvited door-to-door solicitation a public nuisance.[49] The court held that, at most, specific incidents of door-to-door solicitation could constitute separate and unrelated instances of private trespass or private nuisance, but in no event did the activity constitute a public nuisance.[50] Therefore, the court invalidated the city ordinance stating "the municipality cannot successfully declare that to be a nuisance which plainly is not."[51]

41. OKLA. STAT. tit. 11, § 22-121 (1991); OKLA. STAT. tit. 50, § 16 (1991). *See also* Whitson v. City of Ada, 44 P.2d 829 (Okla. 1935).

42. OKLA. STAT. tit. 82, § 1461 (1991).

43. OKLA. STAT. tit. 63, §§ 1-106, 1-204 (1991).

44. 58 AM. JUR. 2D *Nuisances* §§ 55, 56 & n.94 (1989) (citing Vance v. Universal Amusement Co., 445 U.S. 308 (1980), *reh'g. denied*, 446 U.S. 947 (1980)).

45. *Id.* § 55 & n.94 (citing CEEED v. California Coastal Zone Conservation Co., 118 Cal. Rptr. 315 (1974)).

46. *Id.* §§ 55 & n.95, 56 & n.11 (citing Ghaster Properties Inc. v. Preston, 184 N.E.2d 552 (Ohio 1962), transferred to 194 N.E.2d 158, *rev'd on other grounds*, 200 N.E.2d 328 (Ohio 1964)); State *ex rel.* Wausau S.R. Co. v. Bancroft, 134 N.W. 330 (Wis. 1912).

47. *CEEED*, 118 Cal. Rptr. at 328.

48. *Id.* (citing Lawton v. Steele, 152 U.S. 133 (1894)).

49. City of McAlester v. Grand Union Tea Co., 98 P.2d 924, 925 (Okla. 1940).

50. *Id.* at 926.

51. *Id.*

V. MIXED NUISANCES IN OKLAHOMA

Public and private nuisance laws are often overlapping and interrelated. In many jurisdictions they are not mutually exclusive approaches to a nuisance factual situation.[52] In these jurisdictions, a nuisance may be both public and private in character.[53] Such nuisances are referred to as mixed nuisances.[54] In these jurisdictions, a nuisance which affects a considerable number of people or a public interest and which also produces special injury to private rights may be the subject of both a public nuisance and private nuisance claim.[55]

Oklahoma follows the general rule. The Oklahoma nuisance statute declares that every nuisance not included in the definition of a public nuisance is a private nuisance.[56] The statute suggests that a public nuisance can be a private nuisance if it is specially injurious to private interests, but that a purely private nuisance cannot become a public nuisance. The Oklahoma courts have found mixed nuisances on occasion.[57] Thus, in Oklahoma, if an individual suffers special injury from a public nuisance, he may proceed on claims for both a public and private nuisance.

VI. PRIVATE RIGHT TO SUE FOR PUBLIC NUISANCE

In order for a private person to bring a claim for public nuisance in Oklahoma, that person must have standing to sue.[58] A person has standing to sue if the public nuisance is "specially injurious" to him, but not otherwise.[59] The purpose for requiring special injury is to avoid the burden on both the courts and defendants wrought by a

52. Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 712 P.2d 914, 917 (Ariz. 1985).

53. *Id.*

54. Riggins v. District Ct. of Salt Lake County, 51 P.2d 645, 662 (Utah 1935).

55. State *ex rel.* Ashcroft v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99 (Mo. Ct. App. 1979).

56. OKLA. STAT. tit. 50, § 3 (1991).

57. Jordan v. Luippold, 114 P.2d 917, 919 (Okla. 1941). Suit was brought by adjoining landowner against the owner of a dilapidated property that was breeding ground for rats, among other things. *Id.* at 918. The Court determined that the condition was "a hazard to the health of the community" and also allowed a claim for private nuisance. *Id.*

58. Ruminer v. Quanilty, 179 P.2d 164 (Okla. 1947).

59. OKLA. STAT. tit. 50, § 10 (1991).

multiplicity of suits for a nuisance which affects a community of individuals.[60] Special injury has been defined as an injury which is different in kind, not merely degree, from that suffered by the general public.[61] The standing rule has been easier to state than to apply.

What kind of injury is special or different in kind, and not merely degree? A fruitful line of cases which considers this question and provides some answers involves obstruction of public roads.[62] In *McKay v. City of Enid*,[63] the plaintiff owned land near the City of Enid.[64] There were three public roads which afforded access to his land from the city.[65] The city authorized a railroad company to construct a railway which obstructed two of the roads.[66] The plaintiff brought suit on a public nuisance theory.[67] The court determined that the plaintiff did not suffer special injury and, therefore, had no standing to sue.[68] He may have been inconvenienced, but his injury was unlike the other people who exercised the right of passage.[69] The court compared the plaintiff's injury, not to the public in general, but to the people who actually exercised the right which was interfered with, that is, the right to use the obstructed road.[70]

Injury is suffered which is different in kind from those who actually exercise the right of passage on a public road if the individual's land abuts an obstructed public road and access to the land is entirely cut off[71] or materially interrupted.[72] In these cases, the abutting landowner has standing to sue to abate a public nuisance. Thus, in order to bring an action for public nuisance, the individual plaintiff must establish some injury materially different from the injury suffered by the public in general.

60. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 88, at 587 (4th ed. 1971).

61. Schlirf v. Loosen, 232 P.2d 928, 930 (Okla. 1951).

62. McKay v. City of Enid, 109 P. 520 (Okla. 1910); Revard v. Hunt, 119 P. 589 (Okla. 1911); Liggett v. Peck, 168 P.2d 622 (Okla. 1946).

63. 109 P. 520 (Okla. 1910).

64. *Id.* at 521.

65. *Id.* at 520.

66. *Id.*

67. *Id.* at 521.

68. *Id.* at 523.

69. *Id.*

70. *Id.*

71. Revard v. Hunt, 119 P. 589 (Okla. 1911).

72. Ligget v. Peck, 168 P.2d 622 (Okla. 1946); Thomas v. Farrier, 65 P.2d 526 (Okla. 1937); Mackey v. Aycock, 201 P. 365 (Okla. 1921).

Once the threshold standing issue has been satisfied, the private citizen may sue on a public nuisance theory. In such a case, the Plaintiff invokes the public right and sues to protect the public right.[73] The individual stands in the shoes of the public prosecutor with all the rights, benefits and limitations of the public prosecutor.[74] Presumably, the private plaintiff bringing a public nuisance claim thereby inherits all the rights and limitations imposed upon the public prosecutor.

VII. PUBLIC NUISANCE REMEDIES

Public nuisances have historically been treated as crimes against the state, therefore, the remedies against public nuisances generally reside with governmental authorities and officials.[75] This is the case in Oklahoma.[76] According to Oklahoma law, "[a] public nuisance may be abated by any public body or officer authorized thereto by law."[77] Other statutes authorize specific governmental officials, such as the Attorney General and the district attorneys to suppress the maintenance of public nuisances.[78]

In Oklahoma, the available remedies for public nuisance include: 1) An indictment or information; 2) A civil action; or 3) An abatement.[79] Thus, where a public nuisance exists, the appropriate governmental official can cause the nuisance to be abated by the state, the official can bring a civil action for abatement and/or damages against the person maintaining the public nuisance, the official can bring a criminal proceeding against the person maintaining the public nuisance, or the official can seek all three remedies.[80] It has been observed that the penal aspect of creating or maintaining a public

73. Ruminer v. Quanilty, 179 P.2d 164 (Okla. 1947).

74. *Revard*, 119 P. at 593.

75. *See* 3 J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW § 35.02 (Rev. ed. 1990) ("[A] public nuisance . . . is an invasion of a right common to members of the public generally. . . . It is an offense against the state. . . . It is a crime."); 58 AM. JUR. 2D *Nuisances* § 259 (1989) ("[A] public nuisance is generally redressed by an action or proceeding in the name of the state, or at the suit of some proper officer or body as its authorized representative.").

76. OKLA. STAT. tit. 21, § 1191 (1991) provides: "Any person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor."

77. OKLA. STAT. tit. 50, § 11 (1991).

78. OKLA. STAT. tit. 4, § 507 (1991); OKLA. STAT. tit. 12, § 1397 (1991); OKLA. STAT. tit. 63, §§ 1-106, 1-204 (1991); OKLA. STAT. tit. 82, §§ 926.10, 1461 (1991).

79. OKLA. STAT. tit. 50, § 8 (1991).

80. The fact that abatement is accomplished does not preclude an action to recover damages for the past existence of the nuisance. OKLA. STAT. tit. 50, § 6 (1991). Similarly, the fact

nuisance is only incidental to the state's main objective of preventing continuing threats to the public health and safety.[81]

Where the remedy of indictment or information is sought, the proceeding is treated as any other criminal proceeding.[82] Abatement, on the other hand, can occur as the result of self help by the state or as the result of a judicial proceeding seeking injunctive relief.[83] However, abatement always refers to the abatement of the nuisance, not the damages caused by the nuisance and care should be taken not to confuse the two. "A nuisance should be called a 'nuisance' instead of 'damage'. 'Injury' is often used in a lay sense as meaning 'damage' but in a legal sense it means 'wrong'. Injury is a wrong, and damage is the result."[84] The damages sustained as a result of a public nuisance must be recovered through a civil action. Often a party will refer to the injury suffered as though the injury itself is the nuisance. However, as explained above, the nuisance is the thing which causes the injury, not the injury that results therefrom.

Because public nuisances have traditionally been considered offenses against the state, i.e., crimes, claims regarding public nuisances were originally governed by concepts of criminal law, not tort law.[85] However, many jurisdictions recognize that a public nuisance may also constitute a tort where the nuisance causes harm to an individual of a kind different in character from that suffered by the public in general.[86] Oklahoma has recognized the tort of public nuisance.[87] Thus, where a public nuisance causes special injuries to an individual, in addition to the injuries suffered by the public in general, the public nuisance is both a crime against the state and a tort against the individual.

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that criminal prosecution is sought does not preclude abatement by injunctive relief. *See* McNulty v. State, 217 P. 467 (Okla. 1923).

81. Osborne M. Reynolds, Jr., *Public Nuisance: A Crime in Tort Law*, 318 OKLA. L. REV. 318, 322 (1978) (citing Town of Carter Lake v. Anderson Excavation and Wrecking Co., 241 N.W.2d 896 (Iowa 1976)).

82. OKLA. STAT. tit. 50, § 9 (1991).

83. *Id.* §§ 8, 11; Simons v. Fahnestock, 78 P.2d 388 (Okla. 1938).

84. Oklahoma City v. Page, 6 P.2d 1033, 1036 (Okla. 1931) (noting that misuse of the terms "nuisance" and "damage" has caused confusion difficult to unscramble).

85. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1977).

86. 1 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 1.23, at 77 (2nd ed. 1986) (citing RESTATEMENT (SECOND) OF TORTS § 821C (1977)); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 645 & n.33 (5th ed. 1984) ("[n]o case has been found of tort liability for a public nuisance which was not a crime.").

87. OKLA. STAT. tit. 50, § 10 (1991) provides: "A private person may maintain an action for public nuisance if it is specially injurious to him but not otherwise."

Where an individual sustains special injuries as a result of a public nuisance, his remedies are a civil action, abatement, or both.[88] However his remedies are strictly limited to the extent of his special injuries.[89] The individual cannot also recover for the injuries to the general public in his private tort action.[90] Thus, in abating a public nuisance, an individual may only abate the nuisance to the extent it is specially injurious to him.[91] For example, if an obstruction on a public highway impairs an individual's access to his own land, he can only remove as much of the obstruction as is necessary to permit him to have access to his land.[92] He cannot go further under the auspices of enforcing the public's right to completely remove the obstruction and, if he does, he runs the risk of personal liability.[93]

There has long been recognized the tort of private nuisance. It has been said that an individual's rights under a private nuisance claim are the same as under a public nuisance claim.[94] Indeed, other than

88. *Id.* § 10 (providing for a civil action); *id.* § 12 (providing for abatement, the statute states: "[a]ny person may abate a public nuisance which is specially injurious to him, by removing or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace or doing unnecessary injury.").

89. *See* RESTATEMENT (SECOND) OF TORTS § 821C (1977).

90. *Id.* Professors Keeton and Prosser provide: "Redress of the wrong to the community must be left to its appointed representatives. The best reason that has been given for the rule is that it relieves the defendant of the multiplicity of actions which might follow if everyone were free to sue for the common harm." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §90, at 646 (5th ed. 1984). Prosser and Keeton note that there has been "some agitation for abolition of the rule" in connection with environmental matters. *Id.* at 646-47. However, they state that on the absence of express statutory authority to the contrary, "[n]o case has been found in which a private individual has been held to have standing to sue for a public nuisance" to enforce the public's rights. *Id.*

In Garland Grain Co. v. D-C Home Owners Improvement Ass'n, 393 S.W.2d 635, 639-40 (Tex. Civ. App. 1965) the court stated:

> The state is not a party to this suit. Even though the pollution of a public stream is made unlawful . . . the duty of prohibiting pollution of public waters is vested exclusively in the state. Though a nuisance may be public, it furnishes an individual no right of action, unless he has in some way been actually injured or will suffer such an injury by its maintenance. No one can constitute himself a guardian of the public and maintain an action for public nuisance which does not sensibly injure him or his property, although he be a member of the community where such nuisance exists. The rights of the general public are not involved unless the state—the custodian of those rights—is made a party to the suit.

In Oklahoma, the state has jurisdiction over pollution of public waters. OKLA. STAT. tit. 27A, § 2-6-103 (1993).

91. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 605 (4th ed. 1971); *see also* FOWLER V. HARPER ET AL., THE LAW OF TORTS § 1.18, at 59 & n.17 (2d ed. 1986).

92. FOWLER V. HARPER ET AL., THE LAW OF TORTS § 1.18, at 59 & n.17 (2d ed. 1986).

93. *Id.*

94. FRANCIS H. BOHLEN & FOWLER V. HARPER, TORTS § 179, at 371-72 (1933) ("a public nuisance is not actionable by an individual unless and until it becomes, as to him, a private

the remedy of criminal prosecution, the remedies for private nuisances in Oklahoma are the same as for public nuisances.[95] Why then, is there a need for both the torts of public and private nuisance? The reason is that, historically, a private nuisance was "an invasion, usually non-trespassory, of the private use and enjoyment of land."[96] Thus, even though personal injuries could be recovered, in addition to the damages to the land once the private nuisance was shown to exist, the underlying action was grounded strictly upon the interference with the use and enjoyment of land.

Unlike the tort of private nuisance, the tort of public nuisance need not be grounded (although it may) upon interference with one's use and enjoyment of private land.[97] For example, an obstruction to a public highway, i.e., a public nuisance, may cause an individual to have a collision resulting in personal injuries. In such instance, the individual has sustained injuries different in kind from those sustained by the public and could therefore maintain an action for public nuisance. However, because the injuries do not relate to the individual's use or enjoyment of his land, at common law an action for private nuisance would not lie.[98]

VIII. JOINT AND SEVERAL LIABILITY FOR PUBLIC NUISANCES

The majority rule is that, in the absence of joint or concurrent conduct or community of action, there is no joint liability for separate and independent actions which contribute to the creation or maintenance of a public nuisance.[99] Thus, if separate and independent industries discharge pollutants into a stream or river, under the majority

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nuisance, i.e., until he suffers some special and definite harm therefrom.") (quoting Davis v. Spragg, 79 S.E. 652 (W. Va. 1913)).

95. OKLA. STAT. tit. 50, § 13 (1991).

96. FOWLER V. HARPER ET AL., THE LAW OF TORTS § 1.23, at 76 (2d ed. 1986) (citing RESTATEMENT (SECOND) OF TORTS § 821D (1977)); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 572 (4th ed. 1971); Mandell v. Pivnick, 125 A.2d 175, 176 (Conn. 1956). It is noted, however, that Oklahoma's definition of private nuisance may have deviated from the historical concept of private nuisance. OKLA. STAT. tit. 50, §§ 1-3 (1991).

97. RESTATEMENT (SECOND) OF TORTS § 821B (1977).

98. FOWLER V. HARPER ET AL., THE LAW OF TORTS § 1.23, at 78 (2d ed. 1986) (citing RESTATEMENT (SECOND) OF TORTS § 821C cmt. d (1977)); Beckwith v. Stratford, 29 A.2d 775 (Conn. 1942); Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).

99. 66 C.J.S. *Nuisance* § 89 & n.43 (1950) (citing Johnson v. City of Fairmont, 247 N.W. 572 (Minn. 1933); Midland Empire Packing Co. v. Yale Oil Corp., 169 P.2d 732, 733-34 (Mont. 1946)).

rule each would be severally liable only for its proportionate share of the damages.[100]

Some states, including Oklahoma, do not adhere to the majority rule.[101] The minority rule, as applied in Oklahoma, holds that "[w]hen, although, concert is lacking, the separate and independent acts of several combine to produce directly a nuisance and resulting injury, each is responsible for the entire result, even though the separate acts of the parties might not have caused the result."[102] The Oklahoma cases make it clear, however, that the independent acts must combine to produce a single injury.[103] Thus, if an industrial user discharges pollutants into a public river, and a different industrial user discharges pollutants into the air, there is no single injury which gives rise to joint liability even though a common piece of land may be affected thereby.

When dealing with joint and several liability, the question arises as to whether successive owners of property are jointly and severally liable in Oklahoma for a public nuisance. The statute addressing this issue states: "[e]very successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property created by a former owner, is liable therefore in the same manner as the one who first created it."[104] In considering the effect of this provision on the liability of a successor owner for a pre-existing nuisance on the land, the Oklahoma courts have held that a purchaser of land cannot be held liable for damages occasioned by the nuisance until his attention has been called to it and he has been asked to abate it.[105] The rule is different where the purchaser uses or repairs the nuisance. In such an instance, the requirement of notice is waived and the purchaser may be held liable for the nuisance, just as the creator of it may be held liable.[106]

The Idaho Supreme Court, in considering that state's identical statutory provision, considered the contention "that under this statute a man who purchases property containing a nuisance is liable for the

100. *Id.* § 89 & n.45 (citing Ralston v. United Verde Copper Co., 37 F.2d 180 (D. Ariz. 1929), *aff'd*, 46 F.2d 1 (9th Cir. 1931)).

101. *Id.* § 89 & nn.49-52 (citing West Muncie Strawboard Co. v. Slack, 72 N.E. 879 (Ind. 1904); Cook v. City of DuQuoin, 256 Ill. App. 452 (1930)).

102. Oklahoma City v. Tyetenicz, 52 P.2d 849, 850 (Okla. 1935), *overruled on other grounds*, 61 P.2d 649 (Okla. 1936); *see also* Phillips Petroleum Co. v. Vandergriff, 122 P.2d 1020, 1023 (Okla., 1942); Northup v. Eakes, 178 P. 266, 268 (Okla. 1918).

103. *Northup*, 178 P. at 268.

104. OKLA. STAT. tit. 50, § 5 (1991).

105. Daniels v. St. Louis & S. F. R. Co., 128 P. 1089, 1090 (Okla. 1912).

106. Chicago, R. I. & P. Ry. Co. v. Morton, 157 P. 917, 920 (Okla. 1916).

damage previously inflicted by that nuisance."[107] The court held that the statute did not impose liability.[108] Thus, the purpose of the statute is to insure that liability for the nuisance cannot be defeated merely by conveying the land to a new owner.[109]

If the nuisance results from the manner in which an operation is conducted and is not a nuisance per se, the nuisance cannot continue after sale of the property without action by the purchaser.[110] In such an instance, the acts of the former owner and the purchaser have not combined to result in a single harm, but rather their acts are successive.[111] Therefore, a former owner of property and its current owner are not jointly and severally liable for damages resulting from the nuisance.[112]

In order to require a party to abate a nuisance, he must have a legal right and be under a legal duty to terminate the cause of injury.[113] The obligation to abate a nuisance can only be imposed upon a person who has exclusive control over the property where the nuisance is located.[114] Once the conveyance of the land is complete and the former owner has conveyed his right of exclusive occupancy of the land, he has no such right or duty.[115] Thus, there is no cause of action to abate a nuisance against a former owner who conveyed to another exclusive control over the land which contains the nuisance.[116]

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107. Brose v. Twin Falls Land & Water Co., 133 P. 673, 676 (Idaho 1913).

108. *Id.* The Court went on to describe the purpose of the statutory provision in the following terms:

> It was enacted for the purpose of rendering the purchaser of a property that contains a nuisance liable to an action to abate the nuisance in the same manner as if he had created the nuisance. . . . In other words, it was intended to preclude the purchaser of property containing a nuisance defending against an action for damages or to abate the same, on the ground that he did not create the nuisance, and that he was not responsible for its creation.

Id.

109. Pierce v. German Sav. & Loan Soc'y, 13 P. 478 (Cal. 1887); Ahern v. Steele, 22 N.E. 193 (N.Y. 1889); Midland Empire Packing Co. v. Yale Oil Corp., 169 P.2d 732 (Mont. 1946).

110. *Midland Empire*, 169 P.2d at 735.

111. *Id.*

112. Citizens & Southern Trust Co. v. Phillips Petroleum Co., 385 S.E.2d 426 (Ga. 1989); New York Telephone Co. v. Mobil Oil Corp., 473 N.Y.S.2d 172 (1984); State of New York v. Shore Realty Corp., 759 F.2d 1032, 1051 (2nd Cir. 1985); RESTATEMENT (SECOND) OF TORTS §§ 351-54 (1977).

113. Vana v. Grain Belt Supply Co., 18 N.W.2d 669 (Neb. 1945); Keener v. Addis, 5 S.E.2d 695 (Ga. 1940).

114. *Shore Realty*, 759 F.2d at 1051.

115. *Midland Empire*, 169 P.2d at 736.

116. *Shore Realty*, 759 F.2d at 1051.

IX. STATUTE OF LIMITATIONS

In Oklahoma, the Statute of Limitations for torts is two years.[117] This includes the tort of nuisance.[118] However, the statutes provide that "[n]o lapse of time can legalize a public nuisance amounting to an actual obstruction of a public right."[119] At common law, the right to maintain a nuisance could be acquired by prescription, laches, or another time-based legal theory.[120] The Tenth Circuit, addressing Oklahoma law, recognized that the right to pollute a stream and sustain a nuisance could be acquired by way of prescription.[121]

Oklahoma codifies the common law rule that the right to maintain a public nuisance cannot be acquired by prescription or other time-based legal theory.[122] In *Revard v. Hunt*,[123] wherein the court construed this statute, the court determined that "[f]rom this statute, as well as the common law, it is clear no lapse of time can either legalize a public nuisance, nor can any right or title be acquired by prescription to permit or continue the same."[124] Thus, the statute addresses the right of the public authority or a private individual, who through special injury, gains standing to maintain an action to protect public rights to abate the nuisance no matter how long the nuisance has been in existence. The right to continue a public nuisance cannot be acquired by prescription or other time-based legal theory.[125]

Federal Courts in Oklahoma appear to be split on the issue of whether the two year statute applies to a private individual claiming money damages resulting from a public nuisance. One has held that there is no statute of limitations for a private claim for money damages resulting from a public nuisance[126] and another has held that the two year statute of limitations applies.[127] However, the Oklahoma Supreme Court has never rendered such a holding, therefore, this seems to be an open question. Any Oklahoma Court reviewing this question should consider that Oklahoma's statute[128] is derived from

117. OKLA. STAT. tit. 12, § 95 (1991).
118. Haenchen v. Sand Products Co., 626 P.2d 332, 334 (Okla. Ct. App. 1981).
119. OKLA. STAT. tit. 50, § 7 (1991).
120. 5 R. POWELL & P. ROHAR, THE LAW OF REAL PROPERTY ¶ 704[3][d][ii] (1990).
121. United States v. Fixico, 115 F.2d 389, 392 (10th Cir. 1940).
122. OKLA. STAT. tit. 50, § 7 (1991).
123. 119 P. 589 (Okla. 1911).
124. *Id.* at 592.
125. Lindauer v. Hill, 262 P.2d 697, 700-01 (Okla. 1953).
126. Damron v. Apache, No. 92-C-6431 (W.D. Okla. Sept. 1993).
127. Branch v. Mobil, No. 91-C-7621 (W.D. Okla. Dec. 10, 1991).
128. OKLA. STAT. tit. 50, § 7 (1991).

the laws of North Dakota.[129] North Dakota, in turn, borrowed from California.[130] In fact, Idaho,[131] North Dakota,[132] South Dakota,[133] and California[134] all have codified provisions identical to Oklahoma. The Courts in these states, like Oklahoma, have affirmed that the section is intended to insure that the right to maintain a public nuisance cannot be acquired by prescription.[135] Nearly 100 years after codification of the provision, the Supreme Courts of these states have yet to hold that there is no statute of limitations for a private claim for money damages resulting from a public nuisance. The Oklahoma Courts should also consider the historical framework under which the tort of public nuisance developed. A private individual brings an action on a public nuisance in order to protect the public rights.[136] In this regard the private individual bringing a public nuisance claim retains all the restrictions of the public prosecutor. The public prosecutor cannot bring a claim for money damages to private property for a public nuisance.[137] Likewise, when a private individual brings a claim for money damages resulting from a public nuisance, the rules for determining money damages in a private nuisance action are employed. In this framework, it would seem that the private claimant requesting money damages in the context of the public nuisance claim cannot avoid the statute of limitations which is otherwise applicable to the private nuisance claim.

X. LEGISLATIVE PERMISSION TO CONDUCT WHAT MIGHT OTHERWISE CONSTITUTE A PUBLIC NUISANCE

"Just as the legislature, within its constitutional limitations . . . may declare particular conduct to be a nuisance, it may authorize that which would otherwise be a nuisance."[138] Some states have laws which provide that nothing which is done or maintained under express

129. N.D. CENT. CODE § 42-01-13 (1983).

130. CAL. CIV. CODE § 3483 (West 1993).

131. IDAHO CODE §52-109 (1994).

132. N.D. CENT. CODE § 42-01-13 (1983).

133. S.D. CODIFIED LAWS ANN. § 21-10-8 (1987).

134. CAL. CIV. CODE § 3483 (West 1993).

135. City of Lewiston v. Booth, 34 P. 809, 811 (Idaho 1893); Livingston v. Kodiac Packing Co., 37 P. 149 (Cal. 1894).

136. Phillips v. Altman, 412 P.2d 199, 201 (Okla. 1966).

137. RESTATEMENT (SECOND) OF TORTS § 821C (1977).

138. WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 91, at 606 (4th ed. 1971).

authority of a statute can be deemed a nuisance.[139] Oklahoma has such a statute.[140] In addressing these statutes it has been said:

> [a]s a rule, the courts will not hold conduct to constitute a nuisance where authority for such conduct exists by virtue of legislative enactment. When the legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid on the ground that the legislature is ordinarily the proper judge of what the public good requires . . . .[141]

Thus, where the legislature expressly authorizes an activity, conducting such activity cannot constitute a public nuisance. State and federal regulations often authorize the conducting of certain industrial activities if conducted in a specified manner.[142] Often a permit must be obtained from a regulatory agency before the activity can be commenced. For example, Oklahoma and many other states strictly regulate air emissions from hydrogen sulfide gas processing ("sweetening") plants and require that a permit for all such facilities be obtained from the State.[143] Where such a gas sweetening plant is operated in accordance with the state-issued permit, in no event can the permitted air emissions constitute a public nuisance.[144]

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139. *See* Rebelo v. Cardoso, 161 A.2d 806 (R.I. 1960); Borough of Collegeville v. Philadelphia Suburban Water Co., 105 A.2d 722 (Pa. 1954); Messer v. City of Dickinson, 3 N.W.2d 241 (N.D. 1942).

140. OKLA. STAT. tit. 50, § 4 (1991) ("[N]othing which is done or maintained under the express authority of a statute can be deemed a nuisance"). *See also* McKay v. City of Enid, 109 P. 520 (Okla. 1910) (authorization by the State to conduct a particular business or industry relieves the company "from liability to suit, civil or criminal, at the instance of the government").

141. 58 Am. Jur. 2d *Nuisances* § 463 (1989).

> The legislature generally may legalize, insofar as the public is concerned, what would otherwise be a public nuisance . . . and within constitutional limitations it may make lawful things that were nuisances, even though by doing so, the use or value of the property is affected. Where the doing of a thing that would otherwise be a public nuisance is authorized by legislative authority, the doing of that thing by the person so authorized in the manner authorized cannot constitute a public nuisance. The legislative authority is a complete protection against accountability for a public nuisance from the mere doing of the act, and exempts the person doing it from civil or criminal liability therefor at the suit of the State.

Id. § 464 (citing State *ex rel.* Brown v. Rockside Reclamation, Inc., 351 N.E.2d 448 (Ohio 1976)); Middelkamp v. Ressemer Irrigating Ditch Co., 103 P. 280 (Colo. 1909); Urie v. Franconia Paper Corp., 218 A.2d 360 (N.H. 1966). Other authorities are in accord. 1 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 1.29, at 117 (2d ed. 1986) ("[t]he legislature may and often does authorize an activity. Such legislative authorization will (if exercised within constitutional bounds) prevent the activity from being a public nuisance provided it is carried on within the limits of the authorization") (quoting Richards v. Washington Terminal Co., 233 U.S. 546 (1914)); Robinson Brick Co. v. Luthi, 169 P.2d 171 (Colo. 1946).

142. *See, e.g.*, OKLA. STAT. tit. 63, §§ 1-1601, 1-2300 (1991); OKLA. STAT. tit. 17, § 301 (1991).

143. *See, e.g.*, Oklahoma Clean Air Act, OKLA. STAT. tit. 63, § 1-1801 (1991).

144. OKLA. STAT. tit. 50, § 4 (1991); 66 C.J.S. *Nuisance* § 17 (1950).

In order for legislative authority to be a valid defense to a public nuisance claim, the activity must be conducted in accordance with the legislative authority.[145] The defense is lost if the authority is not complied with or is exceeded.[146] Also, if the legislative authority pertains only to certain aspects of the activity, and not to others, compliance with the statutes will not be a defense to a public nuisance claim as to the non-regulated or unauthorized aspects of the activity.[147] For example, if the State regulations do not authorize the specific location, the authorized activity may still constitute a public nuisance if located at a place injurious to others.[148] Similarly, if the legislative authority does not specify the exact method of operation, operation of the activity in an unreasonable or offensive manner may still constitute a public nuisance.[149] Stated differently, the regulated aspect of the activity must cover the same aspect which is alleged to constitute the public nuisance. Thus, the fact that a building is constructed in accordance with all existing statutes and codes does not thereafter preclude the building from constituting a public nuisance if it is later used as a gambling house.[150]

XI. CONCLUSION

Increasing efforts are being made today to apply the law of public nuisance to new types of private claims for money damages which were not traditionally associated with claims for public nuisance. In assessing the appropriateness of applying the law of public nuisance to such new claims, one must understand the history of the law of public nuisance as it has evolved through the common law. Originally, public nuisance was to address wrongs against the crown, i.e. the governmental body.[151] Although the doctrine of public nuisance was later extended to private claims by individuals, it was so extended only in

145. 66 C.J.S. *Nuisance* § 17 (1950).

146. 58 AM. JUR. 2D *Nuisances* § 463 (1989) (citing Messer v. City of Dickinson, 3 N.W.2d 241 (N.D. 1942)).

147. 66 C.J.S. *Nuisance* § 17 (1950).

148. 58 AM. JUR. 2D *Nuisance* § 463 (2d ed. 1989) (citing People v. Borden's Condensed Milk Co., 151 N.Y.S. 547 (1915), *aff'd*, 110 N.E. 1046 (N.Y. 1915); Rosenheimer v. Standard Gaslight Co., 55 N.Y.S. 192 (1898)).

149. 1 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 1.29, at 119 (2d ed. 1986) (citing Christopher v. Jones, 41 Cal. Rptr. 828 (1964); Nair v. Thaw, 242 A.2d 757 (Conn. 1968); O'Neill v. Carolina Freight Carriers Corp., 244 A.2d 372 (Conn. 1968)).

150. *See, e.g.*, Bakersfield v. Miller, 410 P.2d 393 (Cal. 1966), *cert. denied*, 384 U.S. 988 (1966); Knapp v. Newport Beach, 9 Cal. Rptr. 90 (1960).

151. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 86, at 572 (4th ed. 1971).

those limited cases where the individual experienced injuries as a result of an interference or obstruction of a public right and the individual had no other cause of action available to redress such injuries.[152] It was never intended to give the individual yet another cause of action where another more traditional cause of action such as negligence, trespass or private nuisance was already available. Nor was it intended to give the individual special damages or protection over and above what was available under these more traditional causes of action. Because of this, efforts to make wholesale application of the law of public nuisance to new types of private claims for money damages should be seriously considered within the developmental framework out of which the tort of public nuisance arose.

152. RESTATEMENT (SECOND) OF TORTS § 821B (1977).