

Boomer v. Atlantic Cement Company

Court of Appeals of New York
26 N.Y.2d 219 (1970)

[A cement plant emits pollutants affecting the surrounding neighbors. Is the negative externality caused by the factory or by the presence of the residents? The pollution is a nuisance. However, the cost to the neighboring properties is small compared to the financial impact from eliminating the emissions. Should the court award an injunction or monetary damages? Are there economic reasons for preferring monetary damages more than an injunction? Previous case law indicates that an injunction would be warranted.]

JUDGES: Chief Judge Fuld and Judges Burke and Scileppi concur with Judge Bergan; Judge Jasen dissents in part and votes to reverse in a separate opinion; Judges Breitell and Gibson taking no part.

OPINIONBY: BERGAN

Defendant operates a large cement plant near Albany. These are actions for injunction and damages by neighboring land owners alleging injury to property from dirt, smoke and vibration emanating from the plant. A nuisance has been found after trial, temporary damages have been allowed; but an injunction has been denied.

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...[T]here is now before the court private litigation in which individual property owners have sought specific relief from a single plant operation. The threshold ... is whether the court should resolve the litigation between the parties now before it as equitably as seems possible; or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives.

A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

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It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public

expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

A court should not try to do this on its own as a by-product of private litigation and it seems manifest 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.

The cement making operations of defendant have been found by the court at Special Term to have damaged the nearby properties of plaintiffs in these two actions. That court, as it has been noted, accordingly found defendant maintained a nuisance and this has been affirmed at the Appellate Division. The total damage to plaintiffs' properties is, however, relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek.

The ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction. This theory cannot, however, be sustained without overruling a doctrine which has been consistently reaffirmed in several leading cases in this court and which has never been disavowed here, namely that where a nuisance has been found and where there has been any substantial damage shown by the party complaining an injunction will be granted.

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The problem of disparity in economic consequence was sharply in focus in *Whalen v. Union Bag & Paper Co.* (208 N. Y. 1). A pulp mill entailing an investment of more than a million dollars polluted a stream in which plaintiff, who owned a farm, was "a lower riparian owner [owned the river bank]". The economic loss to plaintiff from this pollution was small. This court, reversing the Appellate Division, reinstated the injunction granted by the Special Term against the argument of the mill owner that in view of "the slight advantage to plaintiff and the great loss that will be inflicted on defendant" an injunction should not be granted ...

Thus the unconditional injunction granted at Special Term was reinstated. The rule laid down in that case, then, is that whenever the damage resulting from a nuisance is found not "unsubstantial", viz., \$ 100 a year, injunction would follow. This states a rule that had been followed in this court with marked consistency ...

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Although the court at Special Term and the Appellate Division held that injunction should be denied, it was found that plaintiffs had been damaged in various specific

amounts up to the time of the trial and damages to the respective plaintiffs were awarded for those amounts. The effect of this was, injunction having been denied, plaintiffs could maintain successive actions at law for damages thereafter as further damage was incurred.

The court at Special Term also found the amount of permanent damage attributable to each plaintiff, for the guidance of the parties in the event both sides stipulated to the payment and acceptance of such permanent damage as a settlement of all the controversies among the parties. The total of permanent damages to all plaintiffs thus found was \$ 185,000. ...

This result at Special Term and at the Appellate Division is a departure from a rule that has become settled; but to follow the rule literally in these cases would be to close down the plant at once. This court is fully agreed to avoid that immediately drastic remedy; the difference in view is how best to avoid it. *

* Respondent's investment in the plant is in excess of \$ 45,000,000. There are over 300 people employed there.

One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance; another is to grant the injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property present and future caused by defendant's operations. For reasons which will be developed the court chooses the latter alternative.

If the injunction were to be granted unless within a short period -- e.g., 18 months -- the nuisance be abated by improved methods, there would be no assurance that any significant technical improvement would occur.

The parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant. If there were no improved techniques found, there would inevitably be applications to the court at Special Term for extensions of time to perform on showing of good faith efforts to find such techniques.

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For obvious reasons the rate of the research is beyond control of defendant. If at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles.

On the other hand, to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the

contending parties. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed.

The nuisance complained of by these plaintiffs may have other public or private consequences, but these particular parties are the only ones who have sought remedies and the judgment proposed will fully redress them. The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court.

It seems reasonable to think that the risk of being required to pay permanent damages to injured property owners by cement plant owners would itself be a reasonable effective spur to research for improved techniques to minimize nuisance.

Thus it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation. ...

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DISSENTBY: JASEN

DISSENT: Jasen, J. (dissenting). I agree with the majority that a reversal is required here, but I do not subscribe to the newly enunciated doctrine of assessment of permanent damages, in lieu of an injunction, where substantial property rights have been impaired by the creation of a nuisance.

It has long been the rule in this State, as the majority acknowledges, that a nuisance which results in substantial continuing damage to neighbors must be enjoined. ... To now change the rule to permit the cement company to continue polluting the air indefinitely upon the payment of permanent damages is, in my opinion, compounding the magnitude of a very serious problem in our State and Nation today.

I would enjoin the defendant cement company from continuing the discharge of dust particles upon its neighbors' properties unless, within 18 months, the cement company abated this nuisance.

It is not my intention to cause the removal of the cement plant from the Albany area, but to recognize the urgency of the problem stemming from this stationary source of air pollution, and to allow the company a specified period of time to develop a means to alleviate this nuisance.

I am aware that the trial court found that the most modern dust control devices available have been installed in defendant's plant, but, I submit, this does not mean that *better* and

more effective dust control devices could not be developed within the time allowed to abate the pollution.

Moreover, I believe it is incumbent upon the defendant to develop such devices, since the cement company, at the time the plant commenced production (1962), was well aware of the plaintiffs' presence in the area, as well as the probable consequences of its contemplated operation. Yet, it still chose to build and operate the plant at this site.

In a day when there is a growing concern for clean air, highly developed industry should not expect acquiescence by the courts, but should, instead, plan its operations to eliminate contamination of our air and damage to its neighbors.

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Questions

1. The majority assert that public policy should not be determined through private decision and not court decisions? Do you agree or disagree? Explain.
2. Using the concept of opportunity cost, restate the courts determination that the damage from the nuisance is much less than the cost of the injunction. Why would the cost of the injunction exceed damages?
3. In this case is it more likely that damages or an injunction would provide a more efficient outcome? Explain
4. The court discusses two alternatives to an immediate injunction, a delayed injunction and an injunction conditioned on the payment of damages. What are the relative merits of these alternatives? Is there an economic rationale for awarding damages rather than an injunction?
5. The court recognizes that if permitted the injunction it would put pressure on the parties to privately settle the matter? Why does it not choose this alternative?
6. Can we place a minimum or maximum value on the subjective harm the plaintiff's have suffered? Where is the court setting the award?
7. If you unintentionally damage my car should I be reimbursed for my subjective loss or the market value of the loss? Why might these two values differ? Suppose the plaintiff was intentionally harmed, should the plaintiff be entitled to subjective damages or market damages?
8. Why would damages spur the development of new pollution control techniques?
9. Should it matter who was in the neighborhood first? It appears that the residents may have been there before the cement factory.
10. Using the Coase Theorem explain why the private market has not internalized this externality? Why is the court's intrusion into private negotiations necessary for an efficient solution? Why does it matter who gets the right to pollute?
11. Suppose the right to pollute was auctioned off to the highest bidder? How would this affect an efficient outcome?
12. If the utility of a nuisance is greater than the harm, should an injunction ever be granted?

