THE DEFINITION OF PARTICULAR DAMAGE IN NUISANCE.

Although the principle that private individuals may bring civil proceedings in respect of public nuisances if they have suffered or incurred some "special", "particular" or "private" damage or loss is of respectable antiquity[1] its application has often caused great difficulty, and attempts to evaluate and define the sort of damage capable of supporting an action have not led to the discovery of any generally acceptable formula.[2] Judicial expression has been given to the difficulty involved in the task of reconciling all the cases;[3] though some judges have sought to overcome this difficulty by laying down a broad test.[4] However their views have not been concordant or universally adopted. A conflict still exists between those judges who think that the plaintiff's injury must have been different in kind, nature, and character from the hardship suffered by the public at large,[5] and those who

1 Y.B. 27 Hen. VIII, 627; Co. Litt. 569; *Williams's Case*, (1592) 5 Co. Rep. 72b, at 73a, and 77 E.R. 163, at 164.

2 In Scotland this problem has not arisen, since any member of the public can maintain an action for the purpose of obtaining general relief on behalf of the public: *Ogston v. Aberdeen District Tramways Co.*, [1897] A.C. 111. *Aliter* in common law countries; there *must* be a bona fide individual wrong and not a colourable claim for the enforcement of a statutory or common law duty, which should be brought by the Attorney-General: *Glossop v. Heston and Isleworth Local Board*, (1879) 12 Ch.D. 102; *Jones v. Llanrwst Urban District Council*, [1911] 1 Ch. 393; *Mintz v. Hamilton Radial Electric Railway*, [1923] 1 Dominion L.R. 268, at 278; *Pride of Derby and Derbyshire Angling Association Ltd. v. British Celanese Ltd.*, [1953] 2 W.L.R. 58, at 76 per Evershed M.R.

3 See per Greer L.J. in *Blundy, Clark & Co. Ltd. v. London & North Eastern Railway Co.*, [1931] 2 K.B. 334, at 360; and cf. Tilghman C.J. in *Hughes v. Heiser*, (1808) 2 Am. Dec. 459, at 461 (Pa.).

4 See for example Lyon J. in *Clark v. Chicago & North-Western Rly. Co.*, 5 Am. St. Rep. 187, at 188 (Wis.). Contrast Kelly C.B. in *Winterbottom v. Lord Derby*, (1867) L.R. 2 Ex. 316, at 322, with Willes J. in *Beckett v. Midland Rly. Co.*, (1867) L.R. 3 C.P. 82, at 94.

5 For example, Kenny J. dissenting in *Smith v. Wilson*, [1903] 2 I.R. 45; Putnam J. in *Stetson v. Faxon*, (1837) 31 Am. Dec. 123, at 131 (Mass.); Morton J. in *Brayton v. City of Fall River*, (1873) 18 Am. Rep. 470, at 473 (Mass.); Orde J.A. in *Turtle v. City of Toronto*, (1924) 56 Ont. L.R. 252, at 277; Bigelow C.J. in *Wesson v. Washburn Iron Co.*, (1866) 90 Am. Dec. 181, at 184, 185; and see *East St. Louis v. O'Flynn*, (1887) 59 Am. Rep. 795 (Ill.), *Clark v. Chicago and North-Western Rly. Co. (supra)*, *Thayer v. Boston*, (1837) 31 Am. Dec. 157 (Mass.), *Bigelow v. Hartford Bridge Co.*, (1842) 35 Am. Dec. 562, *Green v. Lake*, (1877) 28 Am. Rep. 378 (Mass.), *Shaw v. Boston & Albany Railway Co.*, 159 Mass. 597, and *Zettel v. West Bend*, 24 Am. St. Rep. 715 (Wis.).

are of the opinion that all the plaintiff need prove is that his hardship or inconvenience was greater, more direct, or more proximate than that of the ordinary member of the public, without differing in nature therefrom.[6] Text-book writers, in the main,[7] have been content to enunciate the general rule and cite a few examples illustrative of its application and practical effect without going into further analysis, essaying any finer definition or attempting to resolve the conflict contained in the decisions.[8] It is a topic eschewed in the legal journals. Yet this seemingly small point in the law of torts has practical consequences of some importance, as to which the number of ancient and modern cases where it has been raised will testify. It has recently again come to light in Australia;[9] and indeed it may arise anywhere and at any time. Consequently it seems deserving of fuller treatment and deeper consideration.

For the sake of clarity, and in order that through the undergrowth of cases to be discussed and investigated a path pointing and leading to some definite fixed conclusion may be visible, the submissions to be made by the present writer, based on an examination of the authorities, will be stated at the outset. They are: That the test to be applied in every case is whether the plaintiff suffered some new kind of injury, however slight, not shared by everybody else; that mere inconvenience can never be such new kind of injury, since all persons in the vicinity are inconvenienced by a public nuisance—otherwise it would be neither public nor a nuisance;[10] and that the only proper basis for determining whether such new kind of injury was suffered is whether the plaintiff has incurred pecuniary loss.[11]

6 For example, Madden J. in *Smith v. Wilson*, [1903] 2 I.R. 45; Sholl J. in *Walsh v. Ervin*, [1952] Argus L.R. 650; Lord Penzance in *Metropolitan Board of Works v. McCarthy*, (1874) L.R. 7 H.L. 243, at 263.

7 But see Underhill, *Law of Torts*, (16th edition) 121, and Davis, *Law of Torts in New Zealand*, (1951) 85-87, where the damage required is referred to as being "different in kind" or else as amounting to an interference with private rights or property.

8 See Pollock, *Torts*, (15th edition) 303; Salmond, *Law of Torts*, (10th edition) 269 *et seq.*; Clerk & Lindsell on *Torts*, (10th edition) 572 *et seq.*; Winfield, *Text-Book of the Law of Tort*, (4th edition) 439; Bigelow on *Torts*, (3rd edition, 1905) 386, despite the numerous American authorities on the subject, could not say what special damage would amount to a detriment entitling the sufferer to sue.

9 *Walsh v. Ervin*, [1952] Argus L.R. 650, discussed below.

10 The Canadian phrase "common nuisance" perhaps makes the point clearer.

11 Though the financial aspects in some cases have been obscured and neither clearly nor directly brought out in the judge's reasonings.

Dealing first with cases where the plaintiff was successful, the following groups or sub-divisions can be found:—

Where the plaintiff has suffered some personal injury.

This is the classic example of particular damage. Coke[12] and Bacon[13] both cite the illustration of injury to person or to property caused by a man's horse falling into a ditch dug in the highway by the defendant and forming an obstruction to free passage. In *Fowler v. Sanders*[14] the plaintiff was personally hurt when his horse stumbled over logs obstructing the highway; this was special damage. In *Schoeni v. King*[15] a child who fell into a motor-box slaked with lime was held able to sue. Any injury to health, such as that caused by noxious fumes from gasoline oil tanks and a pump[16] is special damage; for in its nature it is special and peculiar to the plaintiff, not common and public.[17] Physical harm (just like damage to property) has its economic or pecuniary aspects. Injury is capitalised; for the law assesses wrong-doing in terms of money compensation. Consequently there has never been any doubt that some personal injury arising from public nuisance gives a distinct right of action apart from criminal proceedings.[18]

Where the plaintiff's business was affected.

The decision to allow a plaintiff to sue if by reason of the defendant's conduct customers generally were prevented from coming to his business or diverted away from it, thereby causing financial loss, was made in *Iveson v. Moore*,[19] which firmly established this doctrine. The defendant stopped up the highway near the plaintiff's colliery and, according to the plaintiff, customers could not come there and his coal could not be sold. Gould and Turton JJ. were in favour of giving the plaintiff judgment: for he had lost the

12 Co. Litt. 56a.

13 Abridgment 116.

14 (1618) Cro. Jac. 446, 79 E.R. 382; and cf. *Southerne v. Hone*, (1619) 2 Rolle 26, 81 E.R. 635: " . . . . come si nusance soit fait sur le hault chymin, si le chivall de ascun home in particular soit hurt, la il avera action". This occurred in *Dygert v. Schenk*, (1840) 35 Am. Dec. 375 (N.Y.), where the plaintiff's mare was injured; he succeeded.

15 [1944] Ont. L.R. 38.

16 *Code v. Jones & Town of Perth*, [1923] Ont. L.R. 425.

17 Bigelow C.J. in *Wesson v. Washburn Iron Co.*, (1866) 90 Am. Dec. 181, at 186.

18 *Cf.* Pollock C.B. in *Hardcastle v. South Yorkshire Rly. & River Dun Co.*, (1859) 4 H. & N. 67, at 74; 157 E.R. 761, at 763-4.

19 (1699) 1 Ld. Raym. 486, 91 E.R. 1224; 1 Salk. 15, 91 E.R. 16; Holt 10, 90 E.R. 904; Carth. 451, 90 E.R. 861; 12 Mod. 262, 88 E.R. 1309 (sub nom. *Jeveson v. Moor*).

benefit and profit of his colliery and, because of the lack of buyers consequent on the obstruction, his coals had deteriorated and gone down in value. There was, therefore, a special pecuniary loss. The dissent of Rokeby J. and Holt C.J. did not amount to a denial that loss of this kind could be particular damage entitling the plaintiff to sue, but was based on the view that no actual loss could be shown since the plaintiff had not proved that specific customers had been kept away;[20] their judgments were founded upon a more restricted interpretation of the word "special", for in their opinion the loss alleged was only "general" damage.[21] This unduly pedantic and constrainingly pedestrian outlook was not acceptable to all the judges, before whom the case was re-argued, with the result of a verdict for the plaintiff. However the general tenor of all the various judgments was that financial loss was the mainspring of the action; without proof of such damage, peculiar to the plaintiff and not general to the public, the action could not have succeeded.

Such loss was a feature of the plaintiff's case in *Baker v. Moore*[22] where because of a wall erected by the defendant, making access to their properties difficult, the plaintiff's tenants left the premises and the plaintiff thereby lost his profits by the rents. The same thing occurred in *Stetson v. Faxon.*[23] In *Campbell v. Paddington Corporation*[24] the council's stand obstructed the view of a procession out of which the plaintiff had hoped to make a profit. As a result of the erection of the stand she had to return the price paid for hiring the window. This was clearly particular damage. Hindrance of customers, by obstructing a thoroughfare, making it impossible for them to come to the plaintiff's shop and even diverting them elsewhere, was actionable in *Wilkes v. Hungerford Market Co.*;[25]

20 See 1 Ld. Raym. at 492, 495; 91 E.R. at 1228, 1230. No loss was shown in *Martin v. London County Council,* (1899) 80 Law Times Rep. 866; therefore the plaintiff failed.

21 *Cf.* the explanation of this case by Kindersley V.C. in *Soltau v. De Held,* (1851) 2 Sim. (N.S.) 133, at 147-148; 61 E.R. 291, at 297.

22 (1696) Hil. 8 Will. 3 (cited by Gould J. in 1 Ld. Raym. 486, at 491; 91 E.R. 1224, at 1227).

23 (1837) 31 Am. Dec. 123 (Mass.).

24 [1911] 1 K.B. 869.

25 (1835) 2 Bing. N.C. 281, 132 E.R. 110; doubted in *Ricket v. Metropolitan Rly.,* (1867) L.R. 2 H.L. 175, at 188 (Lord Chelmsford L.C.) and 199 (Lord Cranworth), but supported in *Blundy, Clark & Co. v. London & North Eastern Rly. Co.,* [1931] 2 K.B. 334, and *Harper v. Haden and Sons Ltd.,* [1933] Ch. 298.

Callanan v. Gillman,[26] and *Fritz v. Hobson*;[27] here again the "damnum" to the plaintiff was regarded as consisting of substantial pecuniary loss. The same is true of what might be called the "queue cases",[28] where, in each instance, excessive attraction of crowds at shops and theatres led to the congregation of numbers of people in front of the plaintiff's premises, obstructing access thereto. In *Benjamin v. Storr*[29] the plaintiff's injury was the monetary loss resulting to him by customers being turned away owing to the defendant's nuisance. The defendant placed his horse-driven vans in front of the plaintiff's coffee stall, thus obscuring it from the view of passers-by, prospective customers; and the smell coming from the animals also affected the likelihood of their wanting to partake of refreshments at such close quarters.

Where the plaintiff has been delayed causing him to lose time and incur trouble and expense.

Here the rationale of granting a remedy is undoubtedly that "time is money" in the particular instance before the court;[30] or in some cases, that the plaintiff has been put to greater trouble and expense (the two elements are inseparable) than the ordinary member of the public (generally a user of the highway or other thoroughfare). The considerations involved in both are clearly economic and are not merely considerations of personal comfort, even though an interference with personal comfort may aggravate the injury. Thus in *Hart v. Bassett*[31] the defendant dug a ditch and erected a gate in the highway so that the plaintiff was prevented from getting directly to his barn into which to put his corn. The court held he had suffered particular damage, for "the labour and pains he was forced to take with the cattle and servants, by reason of the obstruction, may well be of more value than the loss of a horse, or such damage as is allowed to maintain an action in such a case".[32]

26 (1887) 1 Am. St. Rep. 831 (N.Y.).

27 (1880) 14 Ch. D. 542.

28 *Barber v. Penley*, [1893] 2 Ch. 447; *Lyons, Sons & Co. v. Gulliver*, [1914] 1 Ch. 631; contrast *Dwyer v. Mansfield*, [1946] K.B. 437.

29 (1874) L.R. 9 C.P. 400.

30 As distinct from the theory that every man's time is of pecuniary value "which would involve the proposition that *everybody* could sue for delay": see Kenny J. (dissenting) in *Smith v. Wilson*, [1903] 2 I.R. 45, at 54.

31 (1682) Jones, T. 156, 84 E.R. 1194.

32 Jones, T. at 157, 84 E.R. at 1195. Cf. *Brown v. Watson*, (1859) 74 Am. Dec. 482 (Mass.), and *Pierce v. Dart*, (1827) 7 Cowen (N.Y.) 609, in which delay, labour, and expense counted as special damage.

In *Rose v. Miles*[33] the plaintiff's actual use of a public navigable creek[34] was obstructed, and he was put to considerable trouble and expense to convey overland his barges laden with goods which ordinarily would have been taken by water. The necessity for going to greater expense to carry goods was the ratio decidendi in *Little Rock, Mississippi River and Texas Railroad Co. v. Brooks*,[35] *Brayton v. City of Fall River*,[36] and *Knowles v. Pennsylvania Railroad Co.*[37] Similarly in *Blundy, Clark & Co. v. London & North Eastern Rly. Co.*,[38] the failure of the defendants to keep in good repair a canal lock for which they were responsible, resulted in its collapse; and the plaintiffs, who normally sent their sand and gravel by the canal, had to send it all by rail, involving additional expense and loss of time. In another case[39] the plaintiff suffered special damage when he was compelled to go himself and to send his servants, employed in the management of his land and the tending of his cattle, by a longer route, because the defendant had obstructed a public footpath communicating between two of his (the plaintiff's) fields; for his servants' work and labour had been consumed to a greater extent and he had been prevented from employing them usefully and gainfully during the periods wasted through the necessity of a longer journey. In the Irish case of *Smith v. Wilson*,[40] it might be argued that the majority decision in favour of the plaintiff rested in part, if not entirely, upon the fact that, because the defendant had removed a bridge over a public road and had erected a fence on it, the plaintiff, on several occasions, was forced to hire a car to take him by a longer and more circuitous route to a market town which, in the course of his everyday affairs, he was accustomed to visit.[41] Lord O'Brien L.C.J. considered that the plaintiff had been "distin-

33 (1815) 4 M. & S. 101, 105 E.R. 773. This case was approved and followed in *Greasley v. Codling*, (1824) 2 Bing. 263, 130 E.R. 307, where the plaintiff's asses were compelled to carry his coal by a circuitous route; inconvenience, delay, and loss of money were all equated (per Burrough J. at 266 and 308 in the respective reports).

34 Thus distinguishing this case from the *contemplated* user of a river in *Hubert v. Groves (infra)*; cf. *Harvard College v. Stearns*, 15 Gray 1, and *Clark v. Chicago & N.W. Rly. Co. (supra)*.

35 (1882) 43 Am. Rep. 288 (Ark.).

36 (1873) 18 Am. Rep. 470 (Mass.).

37 (1896) 52 Am. St. Rep. 860 (Pa.).

38 [1931] 2 K.B. 334.

39 *Blagrave v. Bristol Waterworks Co.*, (1856) 1 H. & N. 369, 156 E.R. 1245.

40 [1903] 2 I.R. 45; the dissenting judgment of Kenny J. affords an acute analysis of the problems raised.

41 See, for example, Lord O'Brien L.C.J., at 80.

guished in injury".[42] Unfortunately it is not made clear whether this meant a difference in *kind* or in *degree;* and whereas Madden J. thought that the proper test was the substantiality of damage (i.e., *degree*) and not the nature of the injury (i.e., *kind*), the dissenting judgment of Kenny J.[43] was based upon his acceptance of the latter as the proper criterion to adopt.

Mere delay, on the other hand, not involving long detours with consequent expense and increased trouble, and unaccompanied by proof of actual monetary loss, was held sufficient in *Wiggins v. Boddington*[44] and *Boyd v. Great Northern Rly. Co.*,[45] for the loss of time in itself was considered to have its financial effects. In the former case the plaintiff's carts were held up because a swing bridge was kept open for an unreasonable length of time.[46] The plaintiff in the latter case was a doctor whose time "was of pecuniary value"; he was detained at a level crossing for twenty minutes because the defendant's servant unreasonably delayed opening the gate.

Where the plaintiff suffered some injury to property affecting its use and enjoyment.

Nuisance, generally speaking, is a wrong committed against the plaintiff as property-owner;[47] from Bracton[48] onwards it has been stressed that the plaintiff's right of action springs from his right as freeholder to enjoy his property without deleterious and unreasonable interference from others. Hence it is not surprising that if a public nuisance involves an interference with such inherent rights appertaining to a freeholder it should be regarded as actionable at the suit of that person. Whether such a nuisance is regarded as detracting from the market or economic value of the land, or as injuriously affecting its enjoyment (and so making the ownership or possession of it a barmecide advantage), there is clearly special damage occurring to the plaintiff in cases where the defendant's

[42] *Ibid.*, at 79.

[43] Submitted here to be nearer in reasoning to the true rule of law than those of the majority, though on the facts the majority were right since actual pecuniary loss had been proved, viz., paying for a car.

[44] (1828) 3 C. & P. 544, 172 E.R. 539.

[45] [1895] 2 I.R. 555.

[46] The inarticulate minor premiss being that this meant waste of the wages, etc., paid to the plaintiff's employees who could have been better occupied elsewhere.

[47] *Malone v. Laskey*, [1907] 2 K.B. 141; *Cunard v. Antifyre Ltd.*, [1933] 1 K.B. 551; see Lord Simonds in *Read v. J. Lyons & Co. Ltd.*, [1947] A.C. 156, at 183.

[48] Fol. 234.

wrongful act has amounted to direct intervention. So in *Maynell v. Saltmarsh,*[49] the defendant erected posts in the highway whereby the plaintiff could not get in to his close to his corn which was thus corrupted and spoiled; this was held to be immediate and sufficient special damage. Putting a fish trap in a river preventing the plaintiff from enjoying some fishing was also actionable;[50] while in *Venard v. Cross,*[51] the defendant by raising the water of a dam flooded a public highway, making it impassable for all, but especially for the plaintiff who was deprived of his only means of access to a useful part of his land, the value of which was thus rendered nugatory.[52]

Claims for compensation under the provisions of the Railways or Lands Clauses Acts[53] and claims under other statutes granting persons the right to commit what would otherwise be a nuisance, are also illustrative of this head of liability since the test the courts must apply in determining whether the particular statute entitles a plaintiff to any monetary compensation is whether an action would lie for nuisance at common law apart from the effect of statutory authority. Decisions on this point, therefore, are directly relevant since they involve a discussion of the same principles as are here being considered.[54] In *Lyon v. Fishmongers Co.*[55] the defendants proposed to erect an embankment upon which warehouses would be built, thereby restricting the plaintiff's frontage on the Thames. The House of Lords held that the plaintiff should be granted the injunction he sought since access to land was a form of enjoyment of land and any work taking it away was an "injurious

49 (1664) 1 Keble 847, 83 E.R. 1278.

50 *Norris v. Graham,* 58 Am. St. Rep. 33 (Wash.).

51 (1871) 8 Kansas 248. Cf. *Kaje v. Chicago & North Western Rly.,* (1894) 47 Am. St. Rep. 627 (Minn.).

52 Bigelow's comment on this case is: "sed qu. unless it appears that this actually causes pecuniary loss?" This question assumes the purpose of the inquiry to be what in this article it is submitted to be. That the plaintiff incurred pecuniary loss seems an obvious and reasonable assumption for the Court to have made. See also *Boyce v. Paddington Borough Council,* [1903] 1 Ch. 109.

53 8 & 9 Vict. c. 18; 8 & 9 Vict. c. 20.

54 See *Metropolitan Board of Works v. McCarthy,* (1874) L.R. 7 H.L. 243, at 252 per Lord Cairns; *Caledonian Rly. Co. v. Walker's Trustees,* (1882) 7 App. Cas. 259, at 293 per Lord Blackburn; and *Blundy, Clark & Co. v. London and North Eastern Rly. Co.,* [1931] 2 K.B. 334, at 352 per Scrutton L.J.

55 (1876) 1 App. Cas. 662; see also *Chamberlain v. West End of London Crystal Palace Rly. Co.,* (1862) 2 B. & S. 605, 617, 121 E.R. 1197, 1202; *Duke of Buccleuch v. Metropolitan Board of Works,* (1872) L.R. 5 H.L. 418; *Metropolitan Board of Works v. McCarthy,* (1874) L.R. 7 H.L. 243.

affecting" within the meaning of the Statute.[56] In *Caledonian Rly. Co. v. Walker's Trustees*[57] the House of Lords had to consider five of its own previous decisions on similar or analogous facts;[58] but the facts in the instant case showed that the defendant's act had resulted in the diminution of the value of the plaintiff's land. The plaintiffs owned a spinning mill, access to which was interfered with and severely restricted by road works performed by the railway company under the authority and provisions of a special Act of Parliament. It was held that the plaintiffs could claim compensation under the Lands and Railways Clauses Consolidation (Scotland) Acts 1845.[59] The principle to be deduced from these cases is that for an action to lie it must be shown that, without statutory authority, it would have lain in respect of an injury to land or an interest in land.[60] Or, as Lord Penzance said in *Metropolitan Board of Works v. McCarthy*[61] "The right to compensation will accrue whenever it can be established . . . . that a special value attached to the premises in question, by reason of their proximity to, or relative position with, the highways obstructed, and that this special value has been permanently abridged or destroyed by the obstruction".

56 Lord Cairns L.C., in (1876) 1 App. Cas. 662, at 672; the statute was The Thames Conservancy Act 1857 (20 & 21 Vict. c. 147). Cf. *Macey v. Metropolitan Board of Works*, (1864) 33 L.J. Ch. 377 (Thames Embankment Act 1862, 25 & 26 Vict. c. 93), and contrast *Kearns v. Cordwainers' Company*, (1859) 6 C.B. (N.S.) 388, 141 E.R. 508, where the powers given by the Thames Conservancy Act to grant a licence for the projection of a jetty into the river in front of the plaintiff's premises could not be restricted, even though the jetty would interfere with the navigation of the adjoining owners, since the interference, i.e., the nuisance, affected a common right of enjoyment. This case and *Attorney-General v. Conservators of the Thames*, (1862) 1 Hemm. & Mill. 1, 71 E.R. 1, provide a neat converse of the other cases.

57 (1882) 7 App. Cas. 259.

58 *Caledonian Rly. Co. v. Ogilvy*, (1856) 2 Macq. H.L. 229; *Hammersmith Rly. Co. v. Brand*, (1869) L.R. 4 H.L. 171; *Ricket v. Metropolitan Rly. Co.*, (1867) L.R. 2 H.L. 175; *Duke of Buccleuch v. Metropolitan Board of Works (supra); Metropolitan Board of Works v. McCarthy (supra);* see (1882) 7 App. Cas. at 294-299, per Lord Blackburn.

59 8 & 9 Vict. cc. 19 and 33. Another incidental point raised related to the effect of an agreement between the parties as to compensation made prior to the passing of the Private Act, under which agreement the plaintiffs had withdrawn opposition to the Bill as it then was. No claim was maintainable under that agreement.

60 (1882) 7 App. Cas. 259, at 293 per Lord Blackburn. Cf. *Mitchell & Dresch v. Sandwich, Windsor & Amherstburg Rly. Co.*, (1914) 32 Ont. L.R. 594, especially at 611.

61 (1874) L.R. 7 H.L. 243, at 264, cited by Lord O'Hagan in (1882) 7 App. Cas. 259, at 288.

What is meant by "value" in such a context, it is submitted, is monetary or economic value. The language of the judges excludes compensation for mere interference with comfort or the causing of personal inconvenience and annoyance, since the purpose of the compensation provisions in such statutes is to protect property rights and reimburse property-owners for pecuniary damage resulting from harmful interference. These cases, therefore, throw considerable light upon the meaning to be attached to the phrase under consideration.

Where the plaintiff suffered inconvenience but could not point to actual financial loss.

Care should be taken against confusing cases where the damage, though different in kind, is only slight, with those where the plaintiff's claim is based on some inconvenience shared equally by the public. In the former the slightness of the injury is immaterial and not fatal to the success of the plaintiff; for the crucial point is the *distinctness* of his injury, not its gravity. Of the latter there are scarcely any examples; for in most, as shown above, a loss of pecuniary advantage was either proved directly or was obviously to be implied from the position and affairs of the plaintiff. *Greasley v. Codling*,[62] already referred to, might be classified under this heading, though, having regard to the language of the court,[63] it would be better to regard it not as a case of simple inconvenience, but as an instance of delay involving loss and expense.

The language of the Court in *Harvey v. Shire of St. Arnaud*[64] is also indicative of lack of clarity or analysis in the judicial approach to this matter. There the plaintiff was compelled to stop in order to open a gate which the defendant had left obstructing the highway. While he did this his horses ran away. The question for the court to determine was whether the damage caused by the flight of the horses was too remote from the defendant's act; it was held to be sufficiently proximate to entitle the plaintiff to recover,[65] but the

62 (1824) 2 Bing. 263, 130 E.R. 307; see note 33 *supra*.

63 Especially Burrough J. at 266 and 308 respectively. See also *Mayor of Lynn v. Turner*, (1774) 1 Cowp. 86, 98 E.R. 980, where Lord Mansfield, without giving reasons, seems to have accepted that the plaintiff suffered special damage when he had to carry his corn by a circuitous route as the creek he generally used was unnavigable because of the corporation's neglect; contrast *Dobson v. Blackmore*, (1847) 9 Q.B. 991, 115 E.R. 1554, where obstruction of access was not actionable since the plaintiff could not show that he had been put to any expense in taking his goods by another route.

64 (1879) 5 Victorian L.R. (Cases at Law) 312.

65 Cf. *Aldham v. United Dairies (London) Ltd.*, [1940] 1 K.B. 507.

court, in passing judgment, did speak of the plaintiff's "adopt(ing) the wiser course of turning back, and then claiming damages for the *loss or inconvenience*[66] he would so have sustained." It seems clear that in this case the defendant's nuisance did cause particular financial loss; but the wording of the judgment suggests, obiter, that the hindrance alone would have entitled the plaintiff to recover damages. Perhaps the dogma of "time is money" was implicit in the judgment of the Court.

Until 1952 the only instance of a plaintiff succeeding where all he *seems*[67] to have suffered was delay and inconvenience was *Chichester v. Lethbridge*.[68] In that case the plaintiff several times attempted to travel along the highway with his coach, and the defendant not only put locked gates, bars and posts across the route, and dug trenches in the ground, but in person withstood and opposed the plaintiff and prevented him from removing the obstructions. Willes C.J. delivered judgment to the effect (inter alia) that there was a particular damage to the plaintiff in that he had been delayed, and moreover, had been prevented by the defendant in person from dealing satisfactorily with the cause of the delay.[69] For the first reason *Hart v. Bassett*[70] was cited with approval as an authority. But, it will be remembered that the damage suffered there was not just delay but was the incurring of trouble and expense through having to convey corn to a barn by an idirect route. The time of servants is valuable since it is useful, and money is paid for it, in consequence of which, delay involving wastage of time that could be employed more profitably causes financial loss. Nothing in *Chichester v. Lethbridge*[71] seems to indicate that the time of the plaintiff or his servants was taken up with overcoming the nuisance when it could have been employed *profitably* (in the financial sense). The second reason (which in the words of Willes C.J. made "the present case . . . . stronger than the case in Jones")[72] savours of the element of personal injury, which, as seen above, in no way embarrasses the view herein expressed. But the judgment in this case was cited by Sholl J. in *Walsh v. Ervin*,[73] the latest decision on this point, in

66 Italics supplied.
67 But see below.
68 (1738) Willes 71, 125 E.R. 1061.
69 Cf. Trimble J. in *Barr v. Stevens*, 1 Bibb's Kentucky Reports 293, where diversion *plus* corporal damage grounded the plaintiff's action.
70 (1682) Jones, T. 156, 84 E.R. 1194.
71 (1738) Willes 71, 125 E.R. 1061.
72 (1738) Willes 71, at 74; 125 E.R. 1061, at 1063.
73 (1952) Argus L.R. 650.

support of his venturesome adoption of a wide interpretation of "particular damage."

The plaintiff was the owner of a farm, and the defendant, his neighbour, placed fences and other obstructions across the highway running between their respective properties, and ploughed up the road outside the plaintiff's gate. The result was that the plaintiff's access by motor-car to both the highway and his property was interfered with and he was greatly inconvenienced, though he did not prove any actual pecuniary loss, ascertained or capable of being precisely ascertained in money. Following his review of the authorities, Sholl J. came to the conclusion[74] that "particular damage" was not limited to "special damage", in the sense of actual pecuniary loss, but might consist of "general damage", meaning delay and inconvenience of a substantial character, direct and not merely consequential, so long as it was not merely similar *in nature and extent* to that in fact suffered by the rest of the public. However, in another part of his judgment[75] the learned judge speaks of "proved general damage . . . . that is appreciably greater *in degree*[76] than any suffered by the general public." These, it is respectfully submitted, are confusing and inconsistent statements; moreover the effect of the judgment in favour of the plaintiff is to run counter to all the authorities dealt with above, for they clearly show that pecuniary loss and a different kind of injury are essential to success.

This argument is reinforced by the reasoning in those cases in which the plaintiff did not succeed. Thus in *Hubert v. Groves*[77] the defendant's obstruction of the highway with soil and rubbish resulted in the plaintiff's having to carry his coal and timber by a circuitous and inconvenient way; he claimed that he could not enjoy his premises and could not carry on his trade in so advantageous a manner as he was wont. But no loss could be shown; no customers were diverted; no time and money were wasted through going round the obstruction. Consequently the plaintiff failed.[78] Inconvenience was all the plaintiff could point to as his damage in *Winterbottom v. Lord Derby.*[79] He had been delayed in passing along a public way

74 *Ibid.*, at 657.
75 *Ibid.*, at 659.
76 Italics supplied.
77 (1794) 1 Esp. 148, 170 E.R. 308.
78 Cf. *Houck v. Wachter,* (1870) 6 Am. Rep. 332 (Md.), and contrast *Pierce v. Dart,* (1827) 7 Cowen (N.Y.) 609, where there was something more than delay.
79 (1867) L.R. 2 Ex. 316; cf. *Zettel v. West Bend,* 24 Am. St. Rep. 715, where the plaintiff had to go round about to get to and from his garden; no special damage.

through the defendant's obstruction, and had been obliged, *in common with everyone else who attempted to use the way,* to go by a less direct route, or else to go to the trouble (but not expense — and without incurring any personal injury) of removing the obstruction. Here, too, the plaintiff could not succeed; for, although the comfortable conduct of his life had been interfered with, no special financial loss could be shown. As Ducker C.J. said in *Blanding v. Las Vegas*[80] obstruction of a highway by itself is not special damage. So the fact that an obstruction caused the plaintiff's meat to be transported more slowly from a slaughterhouse was not of itself special damage, even though some of it went bad.[81]

Furthermore there are a number of cases in which the judgment of the Court clearly points to the necessity for showing some *new kind* of damage from that suffered by all members of the public in common.[82] Failing to deliver a sermon,[83] stopping up a way,[84] letting a ferry fall into decay even though a bridge was built instead,[85] erecting a pigeon house,[86] impeding navigation by maintaining oyster-beds,[87] obstructing the navigation of a highway or stream[88] were

80 (1929) 68 Am. L.R. 1273, at 1282.

81 Is not this decision wrong, having regard to the "weight of authority"— to quote Ducker C.J.?

82 *Cf.* Kelly C.B. in *Winterbottom v. Lord Derby (supra)* at 322: "some damage peculiar to himself, his trade or calling".

83 *Williams's Case,* (1592) 5 Co. Rep. 72b, 77 E.R. 163.

84 *Action sur le case,* (1584) Moo. K.B. 180, 72 E.R. 517; *Stone v. Wakeman,* (1607) Noy 120, 74 E.R. 1805; *Fineux v. Hovenden,* (1599) Cro. Eliz. 664, 78 E.R. 902, where Coke's argument that the facts resembled *Williams's Case* was accepted by Popham C.J. and Gawdy and Fenner JJ. Clench J., however, thought that the stopping itself was a special prejudice to the plaintiff in that he could not go that way. No final opinion seems to have been expressed since the case was adjourned. But if Clench J. were right everybody would be able to sue; *cf.* Kenny J. in *Smith v. Wilson,* [1903] 2 I.R. 45, at 54.

85 *Payne v. Partridge,* (1695) 1 Salk. 12, 91 E.R. 12; 3 Mod. 289, 87 E.R. 191, sub nom. *Pain v. Patrick;* Carth. 191, 90 E.R. 715, sub nom. *Paine v. Partrich.* If the plaintiff had been forced to pay a toll to go across the bridge that would have been special damage.

86 *Dewell v. Sanders,* (1619) Cro. Jac. 490, 79 E.R. 419.

87 *Mayor of Colchester v. Brooke,* (1845) 7 Q.B. 339, 115 E.R. 518, in which the nuisance alleged was relied upon as a *defence* to a claim for damaging an oyster-bed by faulty navigation. The defendant said that since there was special damage to him through the obstruction of his ship's passage by the oyster-beds, he was entitled to abate the nuisance by removing it and therefore had committed no actionable wrong. This defence did not succeed: cf. *Brown v. DeGroff,* (1888) 7 Am. St. Rep. 794 (N.J.), where on similar facts the defence did succeed.

88 *Brightman v. Fairhaven,* 7 Gray 271; *Willard v. Cambridge,* 3 Alben 574; *Blackwell v. Old Colony Railroad Co.,* (1877) 122 Mass. 1; *Fall River Iron Works Co. v. Old Colony & Fall River Railroad Co.,* 5 Alben 221.

all public nuisances, but in each case the plaintiff could only prove that he had been wronged in the same way as everyone else.[89] Whatever the inconvenience it was shared by all; and a common annoyance, while a public nuisance, does not of itself involve any particular damage or private injury.

It is therefore again submitted, in conclusion, that all the cases show: First, that the courts have interpreted the rule about particular damage to mean financial loss or (what amounts to the same thing) proprietary disadvantage. No case of mere inconvenience supports the view of Sholl J.; they were all decided against the plaintiff with the exception of *Greasley v. Codling*[90] and *Chichester v. Lethbridge*[91] which, it is hoped, have been explained above; secondly, that the plaintiff's injury must be substantially distinct from that suffered by the community in general.[92] The test of "difference in degree" adopted by the majority in *Smith v. Wilson*[93] and by Sholl J. in *Walsh v. Ervin*[94] is neither justified by authority nor preferable as a matter of principle and common sense to the test of "difference in kind".

G. H. L. FRIDMAN*

But contrast *Blood v. Nashua & Lowell Railroad Co.*, 2 Gray 137, where the obstruction of a stream sent water back on the plaintiff's sawmill: this was special damage.

89 Compare also *Turtle v. City of Toronto*, (1924) 56 Ont. L.R. 252; and *O'Shea v. Cork Rural District Council*, [1914] 1 I.R. 16, where the plaintiff, an agricultural labourer to whom the defendants had failed to let a cottage acquired under the Labourers (Ireland) Act, had not suffered special damage since a common right for the premises to be let to such labourers had been infringed; and see *Aram v. Schallenberger*, 41 Idaho 249, and *Pittsburgh & Lake Erie Railroad Co. v. Jones*, (1886) 56 Am. Rep. 260 (Pa.), where a distinction was drawn between obstructing a ferry landing and obstructing access to the plaintiff's leasehold.

90 (1824) 2 Bing. 263, 130 E.R. 307.

91 (1738) Willes 71, 125 E.R. 1061.

92 Though of course there may be *several* people who each suffer the same sort of particular damage.

93 [1903] 2 I.R. 45.

94 [1952] Argus L.R. 650.

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