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# AN APPRAISAL OF THE RIGHT TO SUE FOR THE TORT OF PRIVATE NUISANCE IN NIGERIA

By

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## 1.1 Introduction

Liability in the tort of nuisance can be categorised into public and private. Public nuisance is generally a crime unless where the right of an individual has been affected in which case the tortuous aspect of public nuisance will come into play. Nuisance is generally a tort against property and therefore, no cause of action could be based on nuisance unless the nuisance affects property or the enjoyment of it. Where the nuisance affects the personality of the victim liability could lie in other torts (such as negligence) but not in nuisance. This is simply based on the fact that nuisance is generally a tort against property. Private nuisance which is the focus of this paper, could take the form of physical injury to the plaintiff's property and it could be in the nature of interference with enjoyment of land such as where the plaintiff is subjected to unreasonable noise or smell emanating from the defendant's neighbouring land. The tort may also be committed where there is interference with the use and enjoyment of the property or some right over or in connection with such right.[1]The word nuisance emanated from the Latin word, *nocumentum*, which could be any form of annoyance that may cause actual damage.[2] Historical accounts have conferred upon this word the special and technical meaning and dual character it possesses now.[3] The idea of nuisance defies a precise definition until in the Williams' case at the end of 16th Century when it was accepted that if by invasion of a public right, a private individual's rights had been infringed hence he could maintain an action.[4]

Generally however, for one to claim in nuisance he is required to show some damage before the cause of action becomes complete.[5] The damage in the action on the case for nuisance which was primarily damage to land also included

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[1]*Registered Trustees of the Living Bread Christain Centre vsLt. Col. Oluborokun(Rtd)* (2017) 1 NWLR (pt. 1545) 1 at p. 40

[2]Gandhi, B. M (2011) *Law of Torts*, Easterrn Book Company, Lucknow, India at p. 320

[3] ibid

[4] ibid

[5]Oliphant, K and Lunney, M (2008) *Tort Law: Text and Materials*, Oxford University Press Ltd, p. 528

damage in the things affixed to the land, such as trees and crops as well as damage to the use and enjoyment of the land through smell, sound or vibrations.[6]

The law on nuisance is one based on the idea of "live and let live" or "give and take" hence every person has the right to use his land in such a manner so as not to interfere with another person's use of his land, even where his act is lawful.[7]Although the tort of private nuisance could take two forms, the first being physical material damage to property, and the second being interference with use and enjoyment of the property, which must be substantial, courts are more disposed to granting injunctions and award of damages with respect to the first.[8]One major problem attributable to private nuisance which takes the form of unlawful interference with use and enjoyment of land is that courts are sometimes reluctant to give judgement to owners or occupiers of land on the basis that such interferences are not substantial. [9] When is interference said to be substantial is not precise and not amenable to any universally acceptable definition but each case is treated on the basis of its own merit. This approach adopted by the court makes it difficult for victims of private nuisance relating to interference with use and enjoyment of land to succeed. This is perhaps because the courts in most cases, always interpret the discretion given to them by the law negatively against claimants even where the activities which constitute the nuisance take place over a long period of time. This type of interpretation may also spell injustice for victims even though their suffering may not be physical.

In view of the importance land and quiet enjoyment of it is to man, this paper therefore, analyses the basis for a cause of action in private nuisance and the manner in which the courts in Nigeria interpret the phrase "substantial interference" against victims of private nuisance with respect to unlawful interference with use and enjoyment of land. This has been done by showing how the courts in Nigeria, have placed less emphasis on the type of interference that could be regarded as substantial. This has in turn reduced the phrase, which is fundamental to the proof of private nuisance, to a mere abstraction not capable of being proved before the court,

## 1.2 Private Nuisance

One important thing which should be noted with regards to nuisance is that it protects use and enjoyment of land, and on this note it shares some characteristics with the tort of trespass to land. The tort has enjoyed a double life; and its origin lies in the medieval protections over land, and it was used in the

[6]ibid

[7]*Registered Trustees of the Living Bread Christain Centre vsOluborokun*, op cit at p. 40

[8]*St. Helen's Smelting Co. vs Tipping* (1865)11 ER 1483

[9]*Helios Ltd vsIsiaka Bello &Anor* (2017) 3 NWLR (pt. 1551) 93

nineteenth century by wealthy landowners to preserve their estates while the condition of many historical towns approached the infernal.[10]The tort may be described as an unlawful interference with a person's use and enjoyment of land or some right over, or in connection with it. This may take any of the following forms:

(a) Encroachment into neighbour's land which may take the form of spreading of roots of tree or its branches.

(b) Physical injury to the land which is direct;

(c) Interference with use and enjoyment of the land.[11]

The position of the law is that in private nuisance, where it affects use and enjoyment of land, it has to be substantial. This means a single act of nuisance may not be sufficient to ground an action. In this regard, the tort of private nuisance was defined in the case of *Cunnard vs AntifyreLtd*[12] to mean: Interference for a substantial length of time by an owner or occupier of property with the use or enjoyment of neighbouring property[13]. Also, Section 235 of the Anambra State Torts Law, 1986 defines Private Nuisance as: "a nuisance is private if it does not cause damage or inconvenience to the public at large, but does interfere with a person's use or enjoyment of land or of some right connected with land in his possession." The above definition does not in any way provide anything new from the ones provided by the courts both in England and Nigeria.

### 1.2.1 Elements of Liability in private Nuisance

For liability to arise in private nuisance certain factors have to be put into consideration which the claimant must prove. Where the claimant could not prove any of these elements or a multiple of them his claim is bound to fail. These elements are:

#### *1.2.1.1 Interference*:

The kinds of interferences or annoyances that may constitute actionable nuisances are limitless.[14]But substantial interference with use and enjoyment of land may be

[10]Wightman, J. Nuisance-The Environments Tort? Hunter vs Canary Wharf in the House of LordsIn:*The Modern Law Review* Vol. 61, No. 6 (Nov. 1998) 879-885 at p. 870

[11]W.V.H Rogers (2014) *Winfield and Jalowicz on Tort*, Sweet and Maxwell, London p. 646

[12] (1933) 1KB 551 of 557

[13]Ibid at p. 555

[14]James, P.S and Latham-Brown, D. J (2014) General Principles of the Law of Torts, Sweet and Maxwell, London, p. 178

one of such instances where liability may arise. As one of the forms which the tort of nuisance can take, this is not easily ascertainable because it is not physical that can be seen with the naked eyes. Also, courts do normally give priority to injury to land rather than enjoyment of it which may be an abstract. For this reason, a test has been fashioned out on how to determine whether a particular interference or discomfort amounts to nuisance or not. According to *Luxmore J. in Vanderpar vs Mayafair Hotels Co. Ltd*[15]

> Whether the act complained of is an inconvenience materially interfering with the ordinary physical discomfort of human existence, not merely according to elegant lifestyle or mode and habits of living but according to plain and sober and simple notions obtained among English people. It is also necessary to take into account the circumstances and character in which the complainant is living.... Also, the question on the existence of nuisance is one of degree and depends on the circumstances of the case.

One fundamental issue is that since it is not easily ascertainable to determine nuisance with respect to use and enjoyment of land, though it dwells on substantial interference, defining substantial interference is also a difficult issue and this therefore requires the use of other factors for the purpose of precision.[16]

Although the issue of use and enjoyment of land is fundamental to the tort of private nuisance courts in some cases disagree with claimants who bring an action under it because to them the claimants could not adduce enough evidence to prove that the nuisance is substantial to such an extent that it has interfered with the use and quiet enjoyment of the claimants land. This has been the approach of some English courts decided decades ago and adopted even in the twenty first century in Nigeria. Recently, the Court of Appeal in Nigeria adopted the same approach in two cases brought before it. In those cases, after proper articulation of the centrality of use and enjoyment of land in the tort of private nuisance, the courts decided against the claimants on the ground that they could not adduce enough evidence to prove that the nuisances were substantial.

In the case of *Holios Tower Ltd vs Isiaka Bello & Anor*[17] the claimant/respondent is the owner of a three bedroom bungalow at No. 3 Adebayo Street, Ado-Ekiti. He sued the appellant/defendant in 2012 before the Ekiti State High Court of Justice claiming for trespass, nuisance and wrongful interference

[15](1930)1 ch. 138

[16]*Abiolavsljeoma*(1970) 1 All NLR 268and*TebitevsNigeria Maritime & Trading Co. Ltd* (1971) 1 UILR 432

[17](2017) 3 NWLR (pt. 1551) 93

with the claimant's use and enjoyment of his land. He also claimed damages for same as well as imminent negative biological effects caused by the appellant/defendant, who operated a mobile phone transmission mast installed near the respondent's/claimant's residential building. He also claimed that the said mast made it difficult for him and members of his family to sleep as a result of the emission of noise and micro-wave from the transmission mast. The claimant told the court that he had to relocate to another residence due to the noise. The trial judge entered judgement in favour of the respondent/claimant and awarded two million Naira damages.

Dissatisfied, the appellant appealed to the Court of Appeal and it was held that no nuisance was proved by the respondent. It was further held that the whole aim of nuisance is to protect one's right to peaceful enjoyment of property and damage to that right.[18] The law of private nuisance is designed to protect individual owner or occupier of land from substantial interference with his enjoyment thereof. That where an action is founded on interference with his enjoyment of land such as where a plaintiff complains of inconvenience, annoyance or discomfort caused by the defendant's conduct the interference must be shown to be substantial.[19] The court went further to hold that in view of the findings of the lower court it cannot be said that a case of nuisance has been made out by the respondent and that the respondent must show actual damage not speculation.[20]

In another case of *Registered Trustees of the Living Bread Christian Centre vs. Lt. Col. S.T Oluborokun*[21] the respondent sued the appellant at the High Court claiming for an injunction restraining the appellant and all the members of the church from further noise generated by their activities in conducting worship services at their premises which is adjacent to the respondent's residence and Five Million Naira damages for the nuisance generated due to the said activities of the appellant. The respondent complained that the rowdy manner in which the appellants carry out their activities, himself and members of his household are subjected to extreme panic and absolute sense of insecurity. It was further contended by the respondent that his household has been subjected to a lot of stress and trauma which have rendered them restless and that their house had become inhabitable as most of the activities of the appellants were conducted indiscriminately, ranging from sessions very early in the morning, afternoon and evening which rendered his children not being able to rest after school; and that sometimes those activities were carried out very late into the night leading to the

[18]Ibid at p. 115
[19]ibid
[20]Ibid at p. 116
[21]supra

next morning in the name of night vigils. The trial court gave its verdict in favour of the respondent and the appellant appealed to the Court of Appeal where the court *inter alia*, held as follows:

1. That nuisance is a branch of the law of torts which is closely connected to the environment. It covers areas such as pollution by oil spillage or noxious fumes and other offensive smells from premises or noise generated from industrial concerns and other human activities, obstruction of public highways etc,[22]
2. That private nuisance...may be described as an unlawful interference with a person's use and enjoyment of land or some right over or in connection with such right; private nuisance could therefore be in the form of physical injury to the plaintiff's property. It could also be in the nature of interference with use and enjoyment of land such as where the plaintiff is subjected to unreasonable noise or smelling emanating from the defendant's neighbouring land.[23] The court dismissed the appeals in both cases on the ground that the inconveniences suffered by the appellants were not enough to prove substantial interference with use and enjoyment of their lands.

From the above two decisions of the Court of Appeal two questions come into mind, the first being whether use and enjoyment of land which is one of the pillars upon which the tort of nuisance stands has been relegated to the background? Secondly, what amounts to substantial interference?

In answering these twin questions one must bear in mind that use and enjoyment of land is the essence of private nuisance despite the fact that where an alleged nuisance affects that use and enjoyment of land by individuals, it has to be substantial.[24] Also, in spite of the fact that the law on private nuisance is predicated on the principle of "give and take" or "live and let live", the court must in all circumstances, strike a balance between the interests of two contending parties to make sure that no one party gives the other a nuisance beyond the limit allowed by law. With regards to the second question even the courts did not define when a nuisance could be said to be substantial though the court acknowledged the fact that an inconvenience or annoyance in the form of noise or smell where it becomes substantial is enough to ground an action in private nuisance.[25] Despite that the court in both cases cited above, refused to grant an injunction or the damages sought even where someone and members of his

[22]Ibid at p. 40
[23]ibid
[24]Substantial interference jn the Law of Torts parlance presupposes that the nuisance must have taken place over a long period of time unabated.
[25]Ibid at p. 40

household were caused discomfort of such a magnitude that denied them peaceful sleep which ordinarily is a corollary of quiet enjoyment of one's property.[26] This is in spite of the fact that the court has acknowledged in the Trustees of the Living Bread's case that:

> The crucial issue in the law of private nuisance has always been how to strike a balance between the right of the defendant to use his land as he wishes and the right of the plaintiff to be protected from interference with his enjoyment of his own land. To strike a balance between the contending and conflicting rights of the parties the courts have held the view that if the injury or interference complained of is with respect to damage to land or use of such land, the injury or interference must be sensible, while if it is a case of interference with the plaintiff's enjoyment of his land the interference must be substantial. This is so because the law on private nuisance is designed to protect the individual owner or occupier of land from substantial interference with his enjoyment thereof.[27]

Despite the court's acknowledgement of substantial interference as the foundation of the tort of private nuisance in the form of interference with enjoyment of land, it still went ahead to allow the appeal in the two cases mentioned above on the ground that substantial interference was not proved. Although enjoyment of land is an abstraction that is not physical in nature, certain parameters are necessary to know when interference is unlawful and therefore actionable. In this regards, one may say with all sense of modesty and humility that the court did not put into consideration the enormity of the noise that emanated from the defendants to such an extent that the claimants were denied reasonable comfort in their residences and prevented from sleeping. The fact that the discomfort caused by the nuisance made one of the claimants to relocate to another area should have been enough evidence that there was actionable nuisance and at least award damages to him even if it would not grant the injunction he sought. The court should ordinarily have adopted the approach of the High Court of Lagos in the case of *S.O. Odugbesanvs I. O. Ogunsanya & Ors*,[28] where *Adefarasin* J held that:

> owners or occupiers of premises are entitled to use such premises for any purpose for which it may, in the ordinary and natural

[26]See for example the case of *Registered Trustees of the Living Bread Christian Centre vsOluborokun, supra*
[27]Ibid at p. 42
[28]Suit No LD 354/67/2/1970 (unreported)

> course of the enjoyment of land, be used but they are not entitled to apply such property or premises to extra-ordinary and unreasonable uses or purposes which would impose upon their neighbours burdens which in the ordinary course of things, they are not called upon to bear.[29]

The above case was decided in a circumstance similar to that in the case of *Registered Trustees of the Living bread* but the court agreed in the latter that the noise emanating from the defendant's church was enough nuisances that could inconvenience the claimant and granted an injunction to stop it. In arriving at its decision, Justice Adefarasin held further that:

> It must be made clear that the defendants are entitled to conduct their worship in any manner they believe. They are entitled to their own beliefs however much these beliefs may be disagreeable to persons of other religious persuasion. However, much as the plaintiff may disbelieve or dislike the manner in which the defendants prayed or spoke in tongues or prophesised or were possessed of the spirit, he has no right to complain against the things...I find that the noise which the defendants make especially in the dead of the night and when they claimed to be possessed of the spirit was such as not only disturbed the comfort of the plaintiff but were so excessive as they would disturb any reasonable person in the neighbourhood, having regard to the standard of the locality...Although it is expected that everyone in an organised society must put up with a certain amount of discomfort from the legitimate activities of his neighbours, it is too much to expect any reasonable person to put up with an excessive noise in this case which goes on every day of the week to the extent that the plaintiff could hardly hear people talking in his house and it goes on from midnight to the morning on more than two nights in any one week.[30]

The above principle enunciated by *Adefarasin* J for determining when a nuisance could be substantial or not should have been the guiding principle for courts to adopt, especially considering the character of neighbourhood, which is the factor used by court in the present case. The two recent decisions of the Court

[29]ibid
[30]ibid

of Appeal held otherwise because the court did not consider locality as a factor in determining liability for private nuisance in the form of the abstraction "use and enjoyment", which is not physical in nature.[31] It is therefore, when the locality or character of neighnourhood is put into consideration that the court would be able to strike a balance between the interests of different land users with respect to the use and enjoyment of their respective lands.

***1.2.1.2 Unlawfulness of the Defendant's Act:*** *The act of the defendant can only be a nuisance* where it becomes unlawful. Where the interference is not unlawful then it does not become a nuisance, hence no action would lie. It must therefore, not be thought that every kind of interference with one's neighbour's enjoyment of his land must necessarily become a nuisance, even if it takes the form of one of the kinds of annoyances which have been mentioned above as examples of activities which may be nuisance.[32]This is on the basis of the fact that the tort is founded on the principle of 'give and take' and 'live and let live'[33] The whole of the law of nuisance is an attempt to preserve a balance between two conflicting interests, where one occupier exercises his right to use his land as he thinks fit and that of his neighbour in the quiet enjoyment of his land.[34]

Essentially, the tort of private nuisance as stated above, generally results from lawful activities, where an owner or occupier of land or premises has the right to use and enjoyment of his land. But his own use and enjoyment must be balanced with that of his neighbour and this has to be within certain limits which shall be discussed in the next sub-head. Barring such limitations, the owner of land has every right to use and enjoy his land without constituting a nuisance.

**1.2.1.3 Unreasonableness of the defendant's Action**: For the act of the defendant to be unlawful thereby constituting a nuisance, it must be unreasonable. Rogers, in a long paragraph itemised certain considerations which must be assessed before determining whether the act of the defendant is reasonable or not, where he said:

> Reasonableness signifies what is legally right between the parties taking into account all circumstances of the case. No precise universal formula is possible to determine reasonableness in the above sense. Whether or not, an act

[31]*Tebitevs Nigerian Marine & Trading Company Ltd* (1971) 1 UILR 432 and
[32]Latham-Brown, D.J and Philips, S.J op cit at p. 179
[33]Per Bramwell B in *BanfordvsTurnley* (1862) 3 B & S 66 at 84
[34]W.H.V Rogers, (2014) *Winfield and jalowicz on Tort*, op cit at p. 647

> constitutes a nuisance cannot be determined merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, the time and place of its commission, the seriousness of the harm, the manner of committing it, whether it is done maliciously or in the reasonable exercise of right and the effect of its commission, that is, whether it is transitory or permanent, occasional or continuous; so that it's a question of facts whether or not, a nuisance has been committed.[35]

In summation, determining whether a particular act of the defendant is reasonable or not, is a question of fact, which requires the consideration of other factors as discussed hereunder:

a) Duration of the Nuisance

b) Abnormal sensitivity

c) Defendant's Malice

d) Character of the Neighborhood

e) Utility of the Defendants' Conduct

f) Fault

**(a) Duration:**

The shorter the duration of the nuisance the less likely it is that the use will be found to be unreasonable.[36]Although the court may not grant injunction to stop temporary nuisance, it may award damages to compensate for the nuisance which has taken place already. That notwithstanding, judicial authorities are however, not consistent as to whether an isolated or single act may constitute nuisance. In *Stone vs. Bolt*[37] Oliver J. held that: "a nuisance must be a state of affairs, however, temporarily and not usually an isolated happening". In *Midwood vs Manchester Corporation*[38] a simple gas explosion was held to be a nuisance. Even though for an act to be nuisance it is necessary that the act must not be temporary, circumstance will determine whether or not such act is a nuisance.

[35]Ibid at p. 649-650

[36]*Harrison vsSouthwark and Vauxhall Water Co* (1891) and ch 409

[37](1949)1 All E.R. 237

[38](1905) 2 KB 597.See also *British Celanese vs Hunt* (1969)1 WLR 959

**(a) Abnormal Sensitivity:**

The rule is that where the plaintiff or his property is injured simply because he or the property is abnormally delicate, the defendant will not be liable in nuisance if the plaintiff would not have been injured if he were not abnormally sensitive. Also, a man cannot make another liable in nuisance if he decides to put his property to a special use which makes it abnormally sensitive.[39] In *Heath vs. Mayor of Brighton*[40]a noise emanating from the defendants' electrical power station was held not to be a nuisance – that the Minister was only inconvenienced because he was abnormally sensitive

**(c) Character of Neighborhood:**

By the authority of the case of *St. Helens' Smelting co. vs tipping*[41]the character of the neighborhood is not relevant in determining liability in cases of physical damage to property. Where however the nuisance complained of relates to the use and enjoyment of property, this is a relevant factor. According to *Thesiger L.J. in Sturgesvs Bridgman*:[42] "what would be a nuisance in Belgrade square would not be necessarily so in Bermunsdey. This is as good as saying that what could be regarded as a nuisance in Ikeja GRA or Victoria Island in Lagos may not be a nuisance in Ajegunle or Oshodi, in Lagos.[43]

**(d) Defendant's Malice**

The fact that someone uses his property maliciously to annoy or inconvenience his neighbour is a relevant factor in establishing the reasonableness or otherwise of the defendant's conduct. Malice here means spite or ill will or evil motive. For a plaintiff to sue on this, he must show to the court that the defendant maliciously interfered with the right of the plaintiff to enjoy his property. In *Christie v Davey*[44]it was held that the act of the defendant of beating drums maliciously while the plaintiff was giving music lesson to his students was nuisance.[45]

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[39]*Robinson vsKilvert* (1889) 41 Ch.d 68
[40] (1908) 98 L.T 718
[41] (1865) 11 ER 1483
[42](1879) 11 ch. 852. cf*RoshmervsPolsue& Alfieri Ltd* (1906) 1 ch 234
[43]*Tebitevs Nigeria Marine Trading Co. Ltd* supra at p. 434
[44] (1893) ch. 36
[45]*Hollywood Silver Fox Farms Ltd vsEmmet*(1936) 2 K.B 468

### (d) Utility of the Defendant's Conduct

The more reasonable and useful the defendant's act, the more likely it is that the defendant's action is not a nuisance. See *Bellew vs Cement Co. Ltd*[46]cf with the case of *Bantel Ridgefield Co*[47].

### 1.3 Who Can Sue in Private Nuisance

By *Banford vs Turnley*[48] only persons having proprietary or other interest in land affected by the nuisance are entitled to bring an action. This is against the position earlier taken in the case of *Malone vs Laskey*[49] where only persons with strict proprietary interest, such as owners of property or tenants, could bring an action. In that case, the Plaintiff who was the wife of a tenant was injured when a cistern unseated by vibration from the defendant's electric generator next-door fell upon her. When she sued it was held that she could not lay a claim for nuisance; that it was a matter entirely for her husband and that a person who is merely present in a house cannot complain of a nuisance which has no element of public nuisance. This position therefore excludes even the wives and children of an owner or the tenant, who do not own the land from bringing an action in nuisance. The same principle applies to lodgers in a hotel and licensees. The position in Malone was subsequently abolished and modified in the case of *Khoradsanjian vs Bush*[50].

The decision in *Khoradsanjian* was influenced by the decision of the Supreme Court of Alberta, which changed the position of the law as enunciated in the case of *Malone* [51]*v Laskey*. The above decision though of persuasive authority, was accepted as the law in England, as evidenced in the case of *Khoradsanjian v Bush*. It was further accepted in the case of *Hunter vs.*

*Canary (wharf) Ltd*[52] by the English Court of Appeal though subsequently reversed by the House of Lords when the case went on appeal. On who could bring an action for private nuisance, Lord Goff (Baron Goff of Cheverly) held *inter alia*:

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[46] (1948) CR. 61,
[47](1924) 229 p. 306, 37 ALR
[48] (1861 – 73) ALL ER 489
[49] (1907)2 KB 141
[50] (1993) 3 WLR 476 The case of*MotherwellvsMotherwell*[50] which first set the ball rolling in reversing the position earlier taken by the English courts in Malone's case is a decision of the Supreme Court of Alberta (Canada) that was subsequently adopted by the House of Lords in the *Khoradsandjian's* case.
[51]ibid
[52](1997) AC 655. (1997) 2 WLR 684

The question therefore arises whether your lordships should be persuaded to depart from established principles and recognize such a right in others who are no more than mere licensees on the land. At the heart of this question lies a more fundamental question which relates to the scope of the law of private nuisance...In any event it is right for present purpose to regard the typical case of private nuisance as being those concerned with interference with the use and enjoyment of land, and as such generally only actionable by a person who has a right in the land. Characteristics of example of cases of this kind are those concerned with noise, vibrations, noxious smells and the like. The two appeals with which your lordships are here concerned arise from actions of this character.

Private nuisance of this kind the primary remedy is in most cases injunction, which is sought to bring the nuisance to an end and in most cases, should swiftly achieve that objective. The right to bring such proceedings is, as the law stands, ordinarily vested in the person who has exclusive possession of the land. He or she is the present person who will sue, if it is necessary to do so...Moreover, any such departure from the established law on this subject, such as that adopted by the Court of Appeal in the present case, faces problem of defining the category of persons who would have the right to sue.

### 1.3.1 Who can be sued in Private Nuisance?

Generally, the person to be sued in the tort of Nuisance is the person who created it. This however, suggests that occupiers of land from where the nuisance emanates, would be liable once they are in control of it. Liability is therefore not limited to occupiers, for they will not necessarily be the ones who are responsible for starting the nuisance.[53] Therefore, since the matter is not entirely free from doubt, the law will hold responsible, anyone who created it or authorizes the creation of the nuisance, and it will also hold responsible anyone who, having

authorizes the creation of the nuisance, and it will also hold responsible anyone who, having knowledge or the means of knowledge of it, permits the existence, upon premises over which he has control, of a state of affairs which gives rise to a nuisance.[54]

[53] James, P.S and Latham Brown, D.J (1978) *General Principles of the Law of Torts*, op cit at p.187
[54] ibid

The case of *Goldman vs. Hardgrave*[55] has settled the matter with respect to the liability of an occupier of land for nuisance caused by the act of nature. According to Lord Wilberforce, "occupiers of land were not simply under a duty to refrain from causing damage to the plaintiff, but could be under positive duty to take steps to prevent such harm from arising. It should however, be noted that an occupier who does not instigate the occurrence of certain affairs which results in nuisance, would not be liable. He is however duty bound to take care of the state of affairs before it leads to the nuisance.

## 1.4 Public Nuisance in Relation to Tort

A public nuisance is some unlawful act or omission to discharge some legal duty, which act or omission endangers the lives, safety, health or comfort of the public (or some section of it), or by which the public (or some section of it) are obstructed in the exercise of some common right.[56] Nuisance is public where it materially affects the reasonable comfort and convenience of a class of Her Majesty's subjects who come within the sphere or neighbourhood of its operation, though it is a question of fact, determining whether the number of persons affected is sufficiently large to attract the description of public to the nuisance.[57] The essential thing about public nuisance is that it is a crime punishable by the state, though it may also be restrained by injunction at the suit of the Attorney General acting on behalf of the public[58]. This is the Position at least at Common Law even though the position of the law has been varied in Nigeria. Judicially, Denning L.J also defined public nuisance in *AG vs. PYA Quarries Ltd*[59] as, "A Nuisance which is widespread in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should take on the responsibility of the community at large".

As stated above, public nuisance is generally a crime and it can only be a tort where a single individual claims that he has suffered damage over and above what has been suffered by the public at large, in which case he can institute a separate action. In *Adeniran vs. Interland Transport Ltd*[60]*Karibi- Whyte* JSC, defines public nuisance to mean: "One which inflicts damage or injury or

[55](1967) 1 AC 645 See *Leakey vs National Trust* (1980) QB 485

[56] James, P.S and Lathham Brown, D. J (1978) *General Principles of the Law of Torts*, Butterworths op cit at p. 203

[57]

Dugdale, A. M et al (2000) *Clerk &Lidsell on Torts*, Sweet and Maxwell, London, p. 974

[58]James, P.S and Latham Brown, D. J op cit at p. 203

[59] (1957)2 Q.B 169

[60] (1986) NWLR (pt.20) 40

inconvenience to the generality of the population or upon all of a class who come within its ambit"

Defining particular damage sometimes becomes problematic; while some authorities suggest it is an issue of peculiarity, some suggest it is an issue of degree. Cases such as *Savage vs. Akinrinade & Anor*[61], *Ejowhomu vs Edok-eter Ltd*[62] suggest peculiarity, others such as *Winterbottom vs Derby*[63] and *Rose vs. Miles*[64], Suggest degree but the latter opinion is preferred. This is because the second interpretation suggests that the private individual who wants to sue in public nuisance is doing so due to the fact that in addition to the injury which he has suffered in unison with the public, he has also suffered a higher damage not suffered by others to such an extent that he will not be sufficiently compensated by the public suit.

At common law, where for any reason, criminal prosecution becomes an inadequate sanction, the Attorney General may on the information of a member of the public bring a civil action through a Relator Action (i.e. the Attorney General. being a relation of the plaintiff); this must be done with the sanction and in the name of the Attorney General[65] But recent developments in Nigeria have modified the law from what it was known under the common Law. This led to the emergence of a new position where an individual can sue even where nuisance is considered to be public without the leave of the Attorney General. This is by virtue of the decision of the Supreme Court of Nigeria in the case of *Adediran vs. Interland Transport Ltd*[66] where Karibi-Whyte JSC, held the view that it is unconstitutional for anybody to stop an individual from suing simply because it is a public Nuisance.

Delivering the leading judgement of the Supreme Court, Karibi-whyte JSC ruled that the interposition of the Attorney General was not to rob the person injured by the nuisance of his right of action or the recourse to justice but to protect the generality of the population where their interest is involved.[67] The learned Justice held further that:

> ...the basic law of the country is the constitution which came into force on 1st October, 1979 and Section 1 makes it supreme, its provisions having binding force on all persons and authorities...therefore, the distinction between public and private

[61] (1964) U.R 238
[62] (Supra)
[63] (1961) 2 ALL ER 12
[64] (1930) ch. D 38
[65] *A.G. v. Logan* (1891)2 QBD 100
[66] Supra at p. 43
[67] Supra at p. 41

> nuisance at common law on the right of action in public nuisance is inconsistent with the provision of Section 6(6) (b) of the 1979 Constitution (now 1999 as amended). This means that the rules of common law on the right of action, which is an existing law and which has to be in existence only in accordance with the constitution, is now inconsistent with it and therefore, cannot stand.

For clarity of understanding it will be of importance to reproduce the aforesaid provision of the Constitution, starting with the provision of Section 6(6)(1) which provides that: "The judicial powers of the federation shall be vested in the courts to which this section relates, being courts established for the federation." Section 6(6) (b) further provides:

> The judicial powers vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between government and authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

Relying on the above provision, the learned Justice of the Supreme Court further held that since the constitution has vested the courts with the power of determination of the civil rights and obligations between persons or between government or authority and any person in Nigeria, where such is in issue, any law which imposes conditions is inconsistent with the free and unrestrained exercise of that right and is void to the extent of such inconsistency.[68]

The learned Justice concluded by declaring that "the distinction between public and private nuisances has been abolished by the 1979 constitution; that the exercise of the right of action for nuisance is no longer based on or determined by the distinction"

## 1.5 Conclusion

The tort of nuisance has over the years undergone several transformations after being subjected to judicial process. Private nuisance is completely a tort because it is dealing with the right of use and enjoyment of the land of an individual while public nuisance is generally a crime because it is the kind of nuisance which affects the generality of the public or a section of it. Determining the number of people who will make the public or a section of it is a question of fact to be

[68]ibid

determined by each circumstance. Public nuisance therefore, has limited application in tort and an individual can only sue in tort where he has suffered peculiar or special damage as a result of public nuisance to the extent that the remedy which would be granted by the court will not be sufficient to compensate for his loss because of the peculiarity of the damage he has suffered. Liability in nuisance is generally strict in private nuisance even though it is not always easy to succeed as it affects the use and enjoyment of land or loss of amenity right that may not be seen with the naked eyes. This is unlike the nuisance which results in damage to property such as erosion on the land or cracks in buildings.

This paper has found that the approach which the courts adopt in determining liability for nuisance that has to do with use and enjoyment of land is not likely to do justice to victims of such nuisance because the courts more or less, treat the main ingredient for determining liability, which is "substantial interference", as a mere abstraction. Instead, the courts in most cases, place priority on the principle of "live and let live" or "give and take" rather than the period for which the nuisance has been taking place. This approach adopted by the courts in Nigeria, always provide an avenue for the defendants to avoid liability and at the same time, leave claimants with no compensation even when their rights to enjoy their own property has been infringed upon. It is therefore recommended that in determining whether a particular activity amounts to a nuisance or not, the courts need to first and foremost appreciate the period of time for which the activity has taken place. Secondly, even though the law governing private nuisance is one based on the principle of "give and take", where the act of the defendant has the character of creating a permanent inconvenience to such an extent that the claimant will not be able to use and enjoy his land (such as not being able to sleep continuously for a long period), the right of the defendant ceases. At this point the defendant's activity has become unlawful and therefore a nuisance, which must be abated by the court through damages or even injunction, depending on the circumstance and the nature of the nuisance