The Tort of Public Nuisance in England and Canada

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According to the orthodox English understanding, liability in the tort of public nuisance requires the claimant to prove two things: first, that the crime of public (or common) nuisance has been committed; and secondly, that the claimant has suffered particular damage in consequence (see *R v Rimmington* [2006] 1 AC 468 (HL)). Although there are many conceptual problems with this understanding, it logically follows from it that the repeal or abolition of the crime in England, as has been advocated by the Law Commission, would also mean the end of the tort of public nuisance (see *Simplification Of Criminal Law: Public Nuisance And Outraging Public Decency*, Consultation Paper No 193). As John Murphy has pointed out: ‘Perhaps ironically, one of the strongest arguments that can be made in favour of retaining the common law crime of public nuisance is the fact that, without it, there would be no prospect of an individual obtaining a civil law remedy in respect of such interferences’ (*The Law of Nuisance* (OUP, 2010) at 154).

Although Canadian courts and commentators have paid, and continue to pay, lip service to the orthodox conception (see *Stein v Gonzales* (1984) 14 DLR (4th) 263), they have rarely taken it seriously. Thus when deciding public nuisance cases, modern Canadian courts have merely asked whether an activity unreasonably interferes with a public right or with the health, safety, morality, comfort or convenience of the public (see *Ryan v Victoria* [1999] 1 SCR 201 at ¶ 52-53). However, if the orthodox conception is correct Canadian courts should have been asking additional questions since the codified Canadian criminal offence is more onerous than its English equivalent. For example, in order to secure a conviction, the Crown has since 1892 had the additional burden of proving that the act which constitutes the nuisance was independently ‘unlawful’ (see Criminal Code of Canada, 1892, c.29, s. 191). Moreover, since the reform of the criminal law in 1954, the Crown must also prove that any interference with public rights endangered the ‘lives, safety or health of the public’ or caused ‘physical injury to any person’ (see Criminal Code, RSC 1985, c C-46, s. 180). As Canadian commentators have pointed out, however, no ‘action for public nuisance has failed because the defendant’s conduct has not been proven criminal’ (see J Cassels, ‘Prostitution and Public Nuisance: Desperate Measures and the Limits of Civil Adjudication’ (1985) 63 Can Bar Rev 764 at 782; L Klar, *Tort Law*, 5th ed (Carswell, 2012) at 751). While this might at first appear to be a major failing of judicial method, the conference paper will suggest that the Canadian courts have been right not to follow the orthodox conception since it is not a particularly compelling understanding of the tort. Rather than being parasitic on criminal liability, it will be suggested that the true conceptual core of public nuisance is the protection of rights, akin to easements and profits à prendre, that citizens enjoy over public property. Thus, even if the crime of public (or common) nuisance were abolished tomorrow in either jurisdiction, this would not automatically abolish the tort of public nuisance; just as the abolishment of any other crime (such as theft, assault or defamatory libel) would not automatically abolish its corresponding tort.