

THE RELEVANCE OF THE TORT OF PUBLIC NUISANCE TO THE CORONA VIRUS PANDEMIC*

Abstract

The tort of public nuisance was designed to protect public safety. As the global trend on the outbreak of COVID-19 continues, the pandemic had its first wave between December 2019 and January 2020 in Asia, and then swept through to Europe and America, recording its second wave from February till date. The Pandemic continues to take lives and leave a lot of negative impact in countries around the world. This ranges from the interference and obstruction with the exercise and enjoyment of certain rights and freedoms, to the rise in unemployment rate and the fall in economic growth and development. The effect of the coronavirus disease pandemic has also posed a challenge to the tort of public nuisance. The aim of this paper is to examine the relationship between the ravaging COVID-19 Pandemic and the tort of public nuisance.

Keywords: Public Nuisance, Tort, Coronavirus, Pandemic

1. Introduction

The word ‘nuisance’ ordinarily means anything or person that causes annoyance, irritation, trouble or inconvenience.¹ Under the Law of tort, ‘nuisance’ refers to any unreasonable interference with the use and enjoyment of land. In *Adeniran v. Interland Transport Ltd*², the word ‘nuisance’ was defined by the Supreme Court of Nigeria as any conduct that is obstructing the public or a section of it in the exercise and enjoyment of a common right. There are basically two types of nuisance under the Common law Tort which are public nuisance and private nuisance. The focus of this paper shall be on the Common Law Tort of public nuisance. A public nuisance is any conduct that interferes with the reasonable comfort and convenience of the public, or obstructs the public in the exercise of a common right³. The word ‘nuisance’ is traditionally used in three ways. The first is to describe an activity or condition that is harmful or annoying to others (e.g., indecent conduct, a rubbish heap or a smoking chimney). The second is to describe the harm caused by the before-mentioned activity or condition (e.g., loud noises or objectionable odours). The third is to describe a legal liability that arises from the combination of the two. However, the ‘interference’ was not the result of a neighbour stealing land or trespassing on the land. Instead, it arose from activities taking place on another person's land that affected the enjoyment of that land. The tort of nuisance was created to stop such bothersome activities or conduct when they unreasonably interfered either with the rights of other private landowners (i.e., private nuisance) or with the rights of the general public (i.e., public nuisance).

2. The Tort of Public Nuisance

The tort of public nuisance is committed where some harmful activity affects the general public or some section of it. The Tort of Public Nuisance is designed to protect the public and the rights of the people. Public Nuisance⁴, very broadly speaking, encompasses matters which concern public health and other issues which can have a significant effect on the local population. Public Nuisance is an unreasonable, unwarranted, or unlawful interference with a right common to the general public. It covers a wide variety of acts or omissions that threaten the health, morals, safety, comfort, convenience, or welfare of a community. Simply speaking, a public nuisance is an act or omission affecting the public at large or some considerable portion of it; and it interferes with rights which members of the community might otherwise enjoy. Such an act or omission must cause any form of injury, danger or annoyance to the public. Public nuisance is committed where a person carries on some harmful activities capable of affecting members of the public or a class of persons or inflicting damage, injury, inconvenience to the

*By **Chi Johnny OKONGWU, PhD**, Senior Lecturer, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam Campus, Anambra State. Email lawleviokongwu@gmail.com. Tel: 08034850007; and

***Ejokema Simon IMOISI, LLB (Hons), BL, LLM, ACI Arb (UK), PhD**, Ag Head, Department of Public and International Law, Edo University Iyamho. Email imoisi.simon @edouniversity.edu.ng Tel.08056460834.

¹ Ese Malemi, *The Law of Tort*, 2nd Edition, Princeton Publishing Co. Ltd, Ikeja, Lagos, 2013; 448

² (1990) NWLR PT 214 P. 155

³ Malemi, *The Law of Tort*, 452

⁴ ‘Wiglaw’ [Accessed June 2, 2020]. <https://wiglaw.co.uk/public-nuisance/>

generality of the population. Unlike private nuisance, public nuisance does not specifically involve interference with anyone's private property. In a public nuisance case, it is important to show that the degree of interference is more than just slight or trivial⁵. Interference doesn't necessarily mean actual damage- material annoyance or irritation could be sufficient.

All forms of public nuisance are crimes. They are offences or wrongs because they obstruct, damage or inconvenience the rights of the community. In his book, *The Digest of Criminal Law*⁶, Sir James Stephen defines public/ common nuisance as 'an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all *Her Majesty's Subject*'. Thus, a person will be guilty of the criminal offence of public nuisance if that person (a) Does an act not warranted by law, or (b) Omits to discharge a legal duty, if the effect of the omission is 'to endanger the life, health, property, morals or comfort of the public. A public nuisance has been defined as⁷ 'an offence against the public, either by doing a thing which tends to the annoyance of all members of the public, or by neglecting to do a thing which the common good requires'. Public nuisances are such inconvenient or troublesome offences that annoy the whole community in general and not just some particular individual. The Elements of public nuisance are:

- (1) That the nuisance is material. That is, the nuisance must be real and affect the comfort and convenience of the people.
- (2) That the nuisance is interfering with ordinary comfort or causing inconvenience. Interference with convenience must be established.

In a case of Public Nuisance, the Attorney General is responsible for suing or bringing up proceeding for an injunction. However, a private individual can bring up an action in tort for damages for public nuisance. That individual (plaintiff) will claim that he has suffered specific harm because the defendant created a nuisance. In order to establish this claim, he must prove all of the following⁸:

1. That the defendant, by acting or failing to act, created a condition that was harmful to health, or was indecent or offensive to the senses, or was an obstruction/ interference to the free use and comfortable enjoyment of life and property.
2. That the condition affected a substantial number of people at the same time.
3. That an ordinary person would be reasonably annoyed or disturbed by the condition.
4. That the seriousness of the harm outweighs the social utility of the defendant's conduct.
5. That he (the plaintiff) did not consent to the defendant's conduct.
6. That he (the plaintiff) suffered harm (special damage) that was different from (over and above) the type of harm/ damage suffered by the general public.
7. That the defendant's conduct was a substantial factor in causing the harm/ damage suffered by the plaintiff.

In the case of *Adediran v Interland Transport*⁹, the Plaintiffs who were residents of Ire-Akari Housing Estate, Isolo, Lagos State and had formed an association known as the Ire-Akari Housing Estate Association, brought up an action on behalf of all its members against the Defendants, which were limited liability companies, and owners of some plots in the estate. The defendants were in the transport business, and thus, owned several trailers and used their premises in the estate as their workshop and for parking the trailers. This resulted in considerable traffic of the long heavy trailers throughout the day and some part of the night, obstruction of the roads leading to residential houses, rendering of the roads unsafe for children, destruction of the roads and electric polls, and even disturbing noises. These constituted Public Nuisance and after several protests, the Plaintiffs brought up an action against them. The Supreme Court, however, held that the Plaintiffs seek redress separately as they may deem fit. This

⁵'LexisNexis', RELX Group, [Accessed June 4, 2020]. <https://www.lexisnexis.co.uk/lega/guidance/public-nuisance-general-principles>.

⁶ Sir James F. Stephens, *Digest of the Criminal Law*, Page 120. <https://en.m.wikipedia.org/wiki/Nuisance>. [Accessed June 4, 2020]

⁷ 'WIGLAW', Gordon Wignall, [Accessed June 4, 2020]. <https://wiglaw.co.uk/public-nuisance/>.

⁸ 'JUSTIA', Tim Stanley, [Accessed June 4, 2020]. <https://www.justia.com/trials-litigation/docs/caci/2000/2020/>.

⁹ ADEDIRAN & ANOR V INTERLAND TRANSPORT (1991) NWLR (PT. 214) 155.

implies that for an individual to take up an action for public nuisance, he must do so in Tort, and must also prove that he suffered some sort of damage special than the one suffered by the general public/particularized harm. It can either be done by an individual or done by the Attorney General, for the public.

The Tort of Public Nuisance has been described as a ‘rag-bag of odds and ends’¹⁰. It has been convincingly argued that public nuisance is a historical anomaly, riding on the coat-tails of private nuisance. Centuries ago, early commentators began to compile court records of judgments concerning different types of nuisance which affected individuals in the enjoyment of their properties (precursors of private nuisances, where a right to exclusive occupation must be proved). Over time, these commentators felt it necessary to add accounts of similar types of nuisance which affected the local community (rather than private individuals and the enjoyment of their land). Originally, adjudication of these latter claims would only take place in the local criminal courts (the leet courts). Inevitably, they concerned activities which were prevalent in the community, such as smelly pigs or rubbish placed on the highway. However, as a more sophisticated court system developed, the judges also started to provide civil law remedies in respect of these common, local, problems. This historical development is manifest in public nuisance as it exists today. All public nuisances are criminal offences. They must have affected a significant proportion of the ‘Queen’s subjects’. They tend to affect public health, or are concerned with the use of the highway. In particular, they tend to continue to cover the same subject-matter as they did centuries ago, and these are often topics which are also the subject-matter of private nuisance proceedings. As has already been said, they are actionable in the civil courts where the claimant can show some special wrong over and above the damage done to the rest of the affected community. The history of public nuisance shows that it is also related and even overlaps with the tort of private nuisance although they are two separate torts. However, they are all under the tort of nuisance and have similar concepts.

3. The Corona Virus Pandemic

The Coronavirus Disease otherwise called (COVID-19) is a highly transmittable and pathogenic viral infectious disease that emerged in a seafood market in Wuhan City, China in December 2019, and has become a global public health concern as it rapidly spreads to different countries around the world. The virus that causes COVID-19 is mainly transmitted through droplets generated when an infected person coughs, sneezes, or exhales. These droplets are too heavy to hang in the air, and quickly fall on floors or surfaces. A person can be infected by breathing in the virus if he is within close proximity of someone who has COVID-19, or by touching a contaminated surface and then either his eyes, nose or mouth. According to current data¹¹, time from exposure to onset of symptoms is usually between two and fourteen days, with an average of five days. According to the WHO¹², the most common symptoms of Covid-19 are fever, tiredness and a dry cough. Some patients may also have a runny nose, sore throat, nasal congestion and aches and pains or diarrhoea. Some people report losing their sense of taste and/or smell. About 80% of people who get Covid-19 experience a mild case – about as serious as a regular cold – and recover without needing any special treatment. About one in six people, the WHO says, become seriously ill. The elderly and people with underlying medical problems such as high blood pressure, heart problems or diabetes, or chronic respiratory conditions, are at a greater risk of serious illness from Covid-19. In the UK, the National Health Service (NHS) has identified the specific symptoms to look for as experiencing either: A high temperature – you feel hot to touch on your chest or back, or a new continuous cough – this means you have started coughing repeatedly. As this is viral pneumonia, antibiotics are of no use. The antiviral drugs we have against flu will not work, and there

¹⁰ ‘WIGLAW’, Gordon Wignall, [Accessed June 4, 2020]. <https://wiglaw.co.uk/public-nuisance/>.

¹¹ ‘Lab Manager’, [Accessed June 9, 2020]. <https://www.google.com.hk/amp/s/www.labmanager.com/lab-health-and-safety/covid-19-a-history-of-coronavirus-22021/amp>.

¹² Sarah Boseley, Hannah Devlin and Martin Belam, ‘The Guardian’, What is Coronavirus, what are its symptoms, and when should I call a doctor?, [Friday 17 Apr 2020 08.53 BST]. <https://www.theguardian.com/world/2020/apr/17/what-is-coronavirus-what-are-its-symptoms-and-when-should-i-call-a-doctor>.

is currently no vaccine. Recovery depends on the strength of the immune system. The WHO has also outlined some steps to take in order to prevent one-self and also to reduce the spread¹³. They are:

- Regularly and thoroughly clean your hands with an alcohol-based hand rub or wash them with soap and water.
- Maintain at least 1 metre (3 feet) distance between yourself and others.
- Avoid going to crowded places.
- Avoid touching eyes, nose and mouth.
- Make sure you, and the people around you, follow good respiratory hygiene. This means covering your mouth and nose with your bent elbow or tissue when you cough or sneeze. Then dispose of the used tissue immediately and wash your hands.
- Stay home and self-isolate even with minor symptoms such as cough, headache, mild fever, until you recover. Have someone bring you supplies. If you need to leave your house, wear a mask to avoid infecting others.
- If you have a fever, cough and difficulty breathing, seek medical attention, but call by telephone in advance if possible and follow the directions of your local health authority.
- Keep up to date on the latest information from trusted sources, such as the WHO or your local and national health authorities. Local and national authorities are best placed to advise on what people in your area should be doing to protect themselves.

The WHO officially declared the Coronavirus a pandemic on March 11, 2020, reflecting alarm that countries aren't working quickly and aggressively enough to fight the disease it causes, Covid-19¹⁴. 'We are deeply concerned both by the alarming levels of spread and severity and by the alarming levels of inaction,' said WHO Director General, Tedros Adhanom Ghebreyesus. For weeks, the WHO hesitated to make the pandemic declaration, for fear of inciting panic or prompting some countries to flag in their efforts, even though many epidemiologists believed the coronavirus had already spread to pandemic levels. The Director General of the WHO cautioned that "'pandemic' is not a word to use lightly or carelessly. It is a word that, if misused, can cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering and death.' Disease experts use the term 'pandemic' to describe when an epidemic (a widespread occurrence of an infectious disease in a community at a particular time) has become rampant in multiple countries and continents simultaneously. (The term comes from the Greek word 'pan,' meaning 'all,' and 'demos,' meaning 'people.'). While the word may evoke fear, it describes how widespread an outbreak may be, not its deadliness. 'I think one of the things people misunderstand when it comes to pandemics is it's not about how severe it is or how many cases there are or even how worried we need to be. It's about literal geography,' said Caitlin Rivers, epidemiologist at the Johns Hopkins Centre for Health Security. The WHO — the global body with authority to officially declare a pandemic — defines pandemic loosely as 'the worldwide spread of a new disease.' The U.S. Centres for Disease Control and Prevention defines it this way: 'Pandemic refers to an epidemic that has spread over several countries or continents, usually affecting a large number of people'. Simply put, a pandemic is a disease outbreak that spreads rapidly among countries or continents at the same time. The pandemic declaration was fueled by frustration with slow and inadequate responses by some countries as the virus kept on spreading. Michael Ryan, WHO director for health emergencies, said the declaration is aimed at 'galvanizing the world to fight' and not as a reason for government 'to give up or to grow fear'. The WHO's announcement does not trigger any new funding, protocols or regulations. But it is an acknowledgement of the disease spreading across several continents. The main characteristic of a pandemic is its 'worldwide spread'. The coronavirus pandemic can be said to have indeed spread worldwide. 213

¹³'World Health Organisation', [Accessed June 9, 2020]. <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>.

¹⁴William Wan, The Washington Post, 'WHO declares a pandemic of coronavirus disease COVID-19', [March 11, 2020 at 8:45 p.m. GMT+1]. <https://www.washingtonpost.com/health/2020/03/11/who-declares-pandemic-coronavirus-disease-covid-19/>.

Countries and Territories around the world have reported a total of 7,258,766 confirmed cases of the coronavirus disease, and a death toll of 411,193 deaths¹⁵.

Due to the rapid rate at which the disease spreads, the Chinese authority was the first to resort to the lockdown strategy. The lockdown strategy is a mitigation strategy and it can be said to be as a result of the need to ensure that people do not come in close contact with each other, thereby, limiting the transmission of the coronavirus disease. The lockdown strategy ensures social distancing which also minimizes the contact between infected and healthy individuals. This lockdown strategy involves lockdown of all activities in the country, for example, lockdown of restaurants, schools, bars, clubs, gyms and other places (excluding hospitals and healthcare facilities and some commercial establishments in the food, energy, petroleum, and security sectors) with citizens forced to stay at home irrespective of their status to avoid coming in contact with the virus. As of April 14, 2020¹⁶, The United States, Spain, Italy, France, Germany and The United Kingdom, which were the countries that were the most hit by the virus also enforced the lockdown strategy. The lockdown strategy was also adopted by the Nigerian government. On March 29, 2020, President Buhari announced a cessation of movement in the Federal Capital Territory and in Lagos and Ogun States to reduce the spread of COVID-19. The lockdown went into effect at 11:00 pm on March 30 and remained in place for an initial period of fourteen days, but was however extended for another fourteen days due to increasing cases. Just before the end of the federal government extended lockdown, Nigeria Governors' Forum (NGF), decided to ban inter-state movement for two weeks as part of efforts to control the spread of COVID-19 which was necessitated by the increasing evidence of community transmission of the virus. Some states have even enforced acts and regulations in response to the COVID 19. For example, Rivers State and some other states have enforced the Infectious Disease Act. Lagos State has also enforced a regulation. The Lagos State Infectious Diseases (Emergency Prevention) Regulations 2020¹⁷ ('the Regulation') was issued to prevent and contain the spread of the severe respiratory syndrome, coronavirus 2 ('COVID-19'), within Lagos State. It declares COVID-19 a dangerous infectious disease which constitutes a serious and imminent threat to the public health of the people in Lagos State. The Regulation was issued further to the powers of the Governor under the Quarantine Act 2004 and the Lagos State Public Health Law 2015, and took effect on the 27th of March 2020. Although the Government is authorised to impose restrictions, issue directives or take all necessary action to prevent, control or contain the incidence of COVID-19 within States, this does not change the fact that certain rights are being interfered with in all effort to do this and that is the point where the intertwining with public nuisance comes in.

4. Relevance between the Tort of Public Nuisance and the Corona Virus Pandemic

In order to determine the connection between the tort of public nuisance and the coronavirus pandemic, the definition of public nuisance will have to be examined. Public Nuisance has been defined as the interference with the convenience and comfort of the public or obstruction of the public/ a section of it in the exercise and enjoyment of a common right. The Coronavirus pandemic is a major threat to public health. The lives of people are at risk and because of this, people live in fear. The health of people in various countries is at stake as their lives hang on the line due to the spread of this deadly disease. People are more cautious than ever. Innocent people have even loss their lives due to the disease. Public health is at risk. Interference with public health is an example of public nuisance¹⁸. Because of how quickly it spreads, people get infected on a daily basis and people even die on a daily basis. For example, according to the Sky News¹⁹, Coronavirus will delete Yemen from maps all over the world. Yemen is

¹⁵'worldometer', [Updated June 9, 2020, 18:30 GMT]. <https://www.worldometers.info/coronavirus/countries-where-coronavirus-has-spread/>.

¹⁶Ekienabor Ehijiele, 'Coronavirus (Covid-19): The Lockdown Strategy in Nigeria', 'ResearchGate'. https://www.researchgate.net/publication/341294462_Coronavirus_Covid-19_The_Lockdown_Strategy_in_Nigeria.

¹⁷Bukola Iji , Yimika Ketiku and Olayanju Phillips, 'Nigeria: Infectious Diseases (Emergency Prevention) Regulations 2020' [Updated 27 April, 2020]. <https://www.mondaq.com/nigeria/reporting-and-compliance/923788/infectious-diseases-emergency-prevention-regulations-2020>

¹⁸ Ese Malemi, *LAW OF TORT* (Revised Edition 2013), page 453.

¹⁹Mark Stone, 'Coronavirus will delete Yemen from maps all over the world', Sky News [Uploaded Monday 18 May, 2020]. <https://www.google.com.hk/amp/s/news.sky.com/story/amp/coronavirus-will-delete-yemen-from-maps-all-over-the-world-11989917>

an Asian country that has been wrecked by civil war for almost six years and because of this, the country's health facilities are dysfunctional and nearly a quarter a quarter of the country's districts have no doctors. This fact, coupled with the effect of the coronavirus pandemic has led to a big loss for Yemen. Because the immunity among the population is very low, every 10minutes in Yemen, a child dies. Another example is the United States of America. Some experts in the U.S²⁰ have claimed that the virus has killed more than 1800 Americans almost every day since April 7, and the official toll may be an undercount. At the rate, they have said that the Coronavirus will clear out about ¼ of the U.S.A by the end of 2020. This shows that the coronavirus pandemic is indeed a threat to public health and public lives.

The other part of the definition of public nuisance is that, It is an interference on the rights which members of the public/ community might otherwise enjoy. In all efforts to curb the Coronavirus disease pandemic, the rights and freedoms/ enjoyment of the public has been gravely interfered with. In Nigeria, for example, on March 20, 2020²¹, the Nigerian government announced the closure of tertiary educational institutions, secondary and primary. In the attempt to control the spread of the disease, the Right to Education (as guaranteed under Article 26 of the United Declaration of Human Rights) is being interfered with. All educational institutions had to be closed down and all students, including those preparing for their Senior Secondary Certificate Examination (SSCE), and those in the midst of on-going Examinations in various Universities had to take a halt and go back to their respective homes. On March 24, The National Examination Council even had to announce an indefinite postponement of the 2020 common entrance examination into 104 Unity schools in Nigeria, which was scheduled to hold on 28 March. Also, on March 20 and 21, 2020, Nigeria extended travel ban to more countries, announced the closure of international airports, railway services, and on March 29, closed all land borders, and also restricted inter-state movement. These are hindrances to the Right to Freedom of Movement as guaranteed under Section 41 of the 1999 Constitution of the Federal Republic of Nigeria. No one has the freedom to travel or move freely due to these restrictions put in place by the government. On March 24, FCT directed the immediate suspension of gathering in churches and mosques and before the end of the month of March, all other states also suspended all forms of religious gatherings. Mosques and Churches are places of worship and a temporary close down interferes with the rights of individuals to gather together in their places of worship and serve their God. It interferes with the Right to freedom of thought, conscience and religion as provided by Section 38 of the 1999 Constitution of the Federal Republic of Nigeria. In addition to religious gatherings, other social and political gatherings were also restricted. On March 24, The Federal Capital Territory Administration ordered the immediate closure of shops in the markets and neighbourhood centres, except those selling food items, medicines and other essential commodities and in about one week, states also ordered the closure of shops and even markets for a while. These deprived shop owners from going about their daily businesses which ensured them their daily bread. The halt in business activities in the country has rendered many penniless and unable to provide for themselves the basic amenities needed for the duration of the lockdown brought about as a result of COVID-19. Further, this has also put a halt to economic growth and has rendered economic development stagnant. These basic rights and freedoms that were once enjoyed by all citizens of Nigeria without and interference has now been disturbed due to the stringent preventive measures/ strategies implemented to control the spread of the coronavirus disease. Nigerians can no longer go about in the exercise and enjoyment of some of their basic rights due to these obstructions imposed by the coronavirus pandemic, thereby rendering it a public nuisance. Nigeria as a country has been seriously affected and has also suffered damage from this pandemic. The Nigerian Minister for finance on 28

²⁰ Donald G. McNeil Jr., 'The Coronavirus in America: The Year Ahead', The New York Times [Updated April 18, 2020]. <https://www.google.com.hk/amp/s/www.nytimes.com/2020/04/18/health/coronavirus-america-future.amp.html>

²¹ 'VANGUARD', Nigeria: Presidency Lists 50 Measures Government Has Taken to Combat Coronavirus, [April 1, 2020], <https://allafrica.com/stories/202004020070.html>.