Abuse of Rights

There are now quite a number of articles in English language reviews which examine the theory of abuse of rights from an historical point of view,[1] or which consider the way the theory operates in the modern French, Quebec, Swiss, Louisiana and German legal systems.[2] This note will not attempt to traverse this ground. Instead, it will introduce the reader to some Dutch experience with the problem of abuse of rights; it will present their attempts to deal with this issue through three differing approaches, namely the classical, the "objective" and the "socialist" theories. Finally, the note will ask whether abuse of rights deserves any recognition in the common law systems.

The Dutch experience

While the doctrine of abuse of rights does appear in some form in the Swiss, Peruvian, Polish and Lebanese codes,[3] the Dutch Code, like the civil codes of France and Quebec,[3a] is silent on this issue. In these latter jurisdictions the doctrine has been a creation of the judiciary.

In the 1930's the Dutch courts were given the opportunity to contribute to the formulation of such a doctrine when a dispute arose between a lawyer and an engineer who owned adjoining properties in a scenic river valley in the Netherlands.[4] The lawyer forbade the engineer to use his footpath, and the engineer retaliated by erecting on his own property, a fifteen meter pole with a number of unsightly rags tied to it, thus spoiling the lawyer's view of the valley. The lawyer brought a successful action in the *Rechtbank* at Arnhem for removal of the pole.

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[1] See, *e.g.*, Scholtens, *Abuse of Rights* (1958) 75 S.A.L.J. 39.

[2] See, *e.g.*, Crabb, *The French Concept of Abuse of Rights* (1964) 6 Inter-American L.Rev.1; Gutteridge, *Abuse of Rights* (1935) 5 Cam.L.J. 22; Mayrand, *Abuse of Rights in France and Quebec* (1973-74) 34 La.L.Rev. 993.

[3] Mayrand, *ibid.*, 1013; Crabb *supra*, note 2, 6.

[3a] The *Report on Legal Personality* (1976), C.C.R.O., Montreal, XLIII, recommends the adoption of the following provision: "No person may exercise a right with the intent of injuring another, or in any way that causes damage out of proportion to the benefit he is seeking." (Art.11.)

[4] This litigation is reported in Meijers, *Verzamelde Privaatrechtelijke Opstellen* (1954), 63-64.

The engineer responded by replacing the pole with a fifteen meter "American Tower" topped by a water reservoir without, however, connecting it to his water supply. Once again the lawyer sued and won, but the *Rechtbank* was only prepared to condemn the presence of the tower *in its present state.* Taking his cue from the italicized words, the engineer rendered his tower functional by connecting it to his water supply and by using it to irrigate part of his land.

The lower court (*Rechtbank*) which had twice assisted the lawyer refused to order removal in the new circumstances. The lawyer appealed successfully to a higher court (the *Hof*) at Arnhem. This court held that the engineer was still motivated by malice, and that the terrain of his property was such that he could as easily have erected the tower in a place which did not interfere with the lawyer's view. The engineer appealed this decision to the highest court in the Netherlands (the *Hooge Raad*) which remitted the case back to the *Hof* with the directive that no person was to be compelled to abandon one of a number of alternative ways of doing something simply to avoid detriment to another.

When the matter came back to the *Hof*, however, it still ordered removal on the grounds that the tower conferred no real benefit on its builder, and that it was erected for the sole purpose of harming the lawyer. This five-year legal battle finally came to an end with an unsuccessful appeal to the *Hooge Raad* by the engineer.

The final ruling of the *Hof* provides an example of the classical approach to the problem of abuse of rights. The foundations of this doctrine can be traced back to Roman law and in Justinian's *Corpus Juris*, the jurist Ulpian writes:

> In conclusion, Marcellus says that when anyone, while excavating upon his own land, diverts a vein of water belonging to his neighbor, no action can be brought against him, not even one on the ground of malice. And it is evident that he should not have such a right of action, where his neighbor did not intend to injure him, but did the work for the purpose of improving his own property.[5]

Professor Scholtens' historical study of the doctrine has shown that the classical requirement for abuse of rights was the performance of some ostensibly legal action which (i) conferred little or no benefit on the actor, and (ii) was performed with the intention of injuring another.[6]

The problem with this formulation is that instances of disinterested malice are rare. We saw how the engineer in the legal

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[5] *Digest* 39.3.1.12, trans. by Scott, *The Civil Law* (1932), vol.ix, 4.

[6] Scholtens, *supra*, note 1, 43 *et seq.*

siege described above tried to exploit the weakness of the classical theory by giving his "nuisance tower" a functional aspect. In practice, the defendant's desire to injure the plaintiff is often inextricably bound up with a motive which is not only tolerated but actually applauded in contemporary society — the desire for material gain. Indeed, the supposedly classical English case on the effect of a malicous exercise of a right is an example of such an amalgam of motives. In *Bradford* v. *Pickles*[7] the defendant intercepted the town's water to "shew that he was the master of the situation, and to force the corporation to buy him out at a price satisfactory to himself".[8] "Where," one might ask with Lord Macnaghten, "is the malice?"[9]

An eminent Dutch scholar, Prof. E.M. Meijers, has attempted to solve this problem by proposing a purely objective criterion for the determination of abuse of rights.[10] According to this theory, a court ought to find an abuse of rights whenever the defendant derives no benefit from his action, or whenever his benefit is a very small one relative to the detrimental effect of his actions upon the plaintiff, whether or not the conduct complained of was motivated by malice.

The Dutch case of *Brusse* v. *Holders*[11] may serve as an illustration of the application of these objective criteria. In this case a building which the defendant was erecting on his own property encroached upon the plaintiff's property. The value of the land which the defendant had accidentally appropriated amounted to about one dollar. The plaintiff refused all reasonable offers of compensation and sued the defendant for removal of his building. The court refused to accede to this demand, holding that the plaintiff was abusing his right of action; the exercise of his right to demand removal would have conferred a negligible benefit on him, compared to the enormous loss it would have caused the defendant.

Apart from the classical theory and the new "objective" theory there is a third formulation of abuse of rights, an example of which is to be found in article 5 of the Soviet Civil Code: "Civil rights

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[7] [1895] A.C. 587 (H.L.).
[8] *Ibid.*, 600.
[9] *Ibid.*, 601.
[10] Meijers, *supra*, note 4, 74. It is important to note that the proposed Quebec provision (*supra*, note 3a) adopts this objective criterion as an independant ground for liability and alternative to malice.
[11] *Nederlandse Jurisprudentie* (1956) no.475.

shall be protected by law, except as they are exercised in contradiction to their purpose in socialist society . . .".[11a] However, as Meijers points out, this third criterion does not give an accurate expression of the prevailing social philosophy in Western Europe.[11b] For example, when the absentee owners of houses refused to lease them during the acute housing shortage in the Netherlands after the Second World War, it was the task of the legislator to forbid an owner to leave his house unoccupied without reasonable cause. It is hardly conceivable that a judge would have declared such a refusal to lease as an abuse of rights in the absence of a statutory provision.[12]

This paper, then, has suggested that there are three approaches to the doctrine of abuse of rights: the classical theory which relies on malice, the "objective" theory which requires a great inequality between the benefit derived from the exercise of the right and the detriment which accrues to another, and the "socialist" theory which condemns any exercise of a right contrary to its social and economic purpose. But any such doctrine is clearly civilian in nature.

How then does the common law deal with what the civil law would term an abuse of rights? It is certain that the doctrine does not form part of the common law. We have this on good authority: the House of Lords in *Bradford* v. *Pickles*[13] (although, as previously mentioned,[13a] that case was not concerned with disinterested malice). However, it is not in the nature of the common law to formulate a general rule at the high level of abstraction typical of the civil law.[14] Therefore, it can be argued that,

> [a]buse of rights does have some blood relations living among us, but they do not bear the family name, and hence the kinship may not be generally realized.[15]

In the remainder of this paper I hope to show that there *are* rules of common law reflecting all three formulations of the doctrine of abuse of rights, but that there is also,

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[11a] *Fundamentals of Civil Legislation of the U.S.S.R. and the Union Republics* (1968).

[11b] Meijers, *supra*, note 4.

[12] *Ibid.*, 73-4.

[13] *Supra*, note 7.

[13a] See text, *supra*, p.138.

[14] David and Brierley, *Major Legal Systems in the World Today* (1968), 74 and 292.

[15] Crabb, *supra*, note 2, 1.

> a kind of hinterland to our law ... where the King's writ does not run — a veritable legal Alsatia — in which greed, envy and spitefulness are permitted to remain supreme.[16]

I propose first to examine those blood relations of abuse of rights which have their home in the common law and then to discuss at least one case where the absence of the doctrine in the common law has left an Alsatia — "a sanctuary for debtors and lawbreakers", perhaps even "an asylum for criminals".[17]

Counterparts of the classical doctrine in the common law

In the law of nuisance there is a well defined exception to the rule in *Bradford* v. *Pickles*.[18] There is jurisprudence which stands as authority for the proposition that a certain level of noise, not ordinarily actionable, becomes so if produced for a malicious purpose.[19] In *Hollywood Silver Fox Farm* v. *Emmet*[19a] the defendant had discharged a gun upon his premises. The plaintiff was a breeder of silver foxes. As a result of the gunfire one vixen would not mate and another devoured her cubs. The defendant unsuccessfully tried to persuade the court that the purpose of the shooting was to keep down rabbits, and the court assumed that, if this had been true, then the shooting would not have been actionable no matter how injurious it was to the plaintiff. Macnaghten J. decided that "the fact that the shooting took place intentionally for the purpose of injuring the plaintiffs made it actionable".[20]

Similarly in the tort of conspiracy,

> ... liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection of promotion of any lawful interest of the combiners ... it is not a tortious conspiracy, even though it causes damages to another person.[21]

Without attempting to give an exhaustive catalogue of common law rules which are dependant upon malice, one might mention, in conclusion, the rule in *Thomas* v. *Bradbury*[22]: comment that is

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[16] Gutteridge, *supra*, note 2, 31.

[17] These phrases are taken from the definition of Alsatia in *The Shorter Oxford English Dictionary* 3d ed. (1971), vol.1, 53.

[18] *Supra*, note 7.

[19] See *Christie* v. *Davey* [1893] 1 Ch. 316; *Hollywood Silver Fox Farm* v. *Emmet* [1936] 1 All E.R. 825 (K.B.).

[19a] *Ibid.*

[20] *Ibid.*, 829.

[21] *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* [1942] A.C. 435, 445 (H.L.).

[22] [1906] 2 K.B. 627 (C.A.).

prima facie fair may lose its protection and become actionable by proof of malice.

The objective theory of abuse of rights in the common law

There is no need to invoke an abuse of rights theory in common law to solve the problem of small encroachments. There is a specific rule allowing the court to award damages instead of ordering their removal where the latter would involve undue hardship.[22a] There is, in other words, a special provision in the common law to meet the *Brusse* v. *Holders*[23] problem discussed previously in connection with the objective theory of abuse of rights.

One situation where a common law court *might* not permit the exercise of a right, if that exercise would confer little or no benefit on the holder of the right and cause a disproportionately large loss to someone else, could arise where an aggrieved contractual party decides to go ahead with his own performance in the face of an anticipatory breach by the other party. Is this an absolute right which he can assert at all costs? In *White and Carter* v. *McGregor*[24] Lord Keith, in his dissenting judgment, did not think so:

> I find the argument advanced for the appellants a somewhat startling one. If it is right it would seem that a man who has contracted to go to Hong Kong at his own expense and make a report, in return for a remuneration of £10,000, and who, before the date fixed for the start of the journey and perhaps before he has incurred any expense, is informed by the other contracting party that he has cancelled or repudiates the contract, is entitled to set off for Hong Kong and produce his report in order to claim in debt the stipulated sum. Such a result is not, in my opinion, in accordance, with principle or authority and cuts across the rule that where one party is in breach of contract the other must take steps to minimise the loss sustained by the breach.[25]

A common law counterpart of the socialist theory of abuse of rights

It will be recalled that Meijers argued that no court in Western Europe would compel an absentee landlord to lease his empty house to give effect to any supposed social and economic purpose.[25a] This is perfectly true, but, here again, there is an exceptional rule which

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[22a] See *Halsbury's Laws of England* 2d ed. (1934), vol.13, by Viscount Hailsham, para.54.

[23] *Supra*, note 11.

[24] [1961] 3 All E.R. 1178 (H.L.).

[25] *Ibid.*, 1190.

[25a] See text, *supra*, p.139.

forbids the owner of a right to adopt a dog-in-the-manger attitude toward his property. In effect, a socialist attitude is evident in the granting of patent rights in Canada. The Federal government or any other interested party can apply for compulsory licencing where the owner of a patent has not made use of it within a reasonable time:

> For the purpose of determining whether there has been any abuse of the exclusive rights under a patent, it shall be taken, in relation to every paragraph of subsection (2), that patents for new inventions are granted not only to encourage invention but to secure that new inventions shall so far as possible be worked on a commercial scale in Canada without undue delay.[26]

Alsatia

This short enumeration of common law rules has shown that the common law is far from being defenseless against what civilians would call an abuse of rights. Specific rules cannot, however, by definition, provide the protection which a general theory of abuse of rights affords. There is at least one case which suggests that the absence of such a theory does leave "a sanctuary for law-breakers". In *Chapman* v. *Honig*,[27] the defendant, a landlord, had previously been condemned by the Court of Queen's Bench to pay damages for wrongfully evicting the Harrand family in circumstances which amounted to "a high-handed defiance of the plaintiff's legal rights".[28] Chapman, another tenant, had been asked by Mr Harrand to give evidence against Honig. Fearful of the consequences, Chapman had to be subpoenaed to come to court. On the day after Chapman had given his evidence, June 23, 1962, Honig served a notice on him to quit the apartment by July 28, 1962. Chapman ignored this notice. On August 15, 1962, while Chapman was at work, Honig's father put padlocks on the doors of two of the rooms and a staple on the third. Chapman was called home and the police were also called. When they asked Honig's father why he wanted the tenants out, he replied: "He gave evidence against me in court and you don't do that to landlords."[29] The padlocks were then removed from the doors, and the tenant obtained an injunction restraining the landlord from trespassing on the flat. However, Mrs Chapman was so distressed by these events that the family moved anyway on August 27, 1962.

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[26] *Patent Act*, R.S.C. 1970, c.P-4, s.67(3). See also ss.41(12), 67, 68, 70 and 71.
[27] [1963] All E.R. 513 (C.A.).
[28] *Ibid.*, 515.
[29] *Ibid.*

Chapman thereupon sued Honig, alleging that the notice to quit was invalid because it was in contempt of court and claiming damages for trespass and breach of covenant of quiet enjoyment. The judge awarded the plaintiff £50 damages.

Honig's appeal to the Court of Appeal was successful. Both Lord Denning M.R. and Davies L.J. considered that Honig's action constituted contempt of court, but only Lord Denning regarded it as an actionable civil wrong. Pearson L.J. regarded the fact that Honig's eviction was in accordance with the contract of lease as conclusive:

> A person who has a right under a contract or other instrument is entitled to exercise it and can effectively exercise it for a good reason or a bad reason or no reason at all.[30]

Only Lord Denning was prepared to hold that the purported exercise of the contractual right was no exercise at all since it was done for a spiteful and illegal reason. His dissent stands as a persuasive piece of reasoning for all common law courts not bound by the decisions of the Court of Appeal.

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[30] *Ibid.*, 522.

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