

A Study on the Interest Approach Towards Sustainable Development Through the Law of Tort Focusing on Private Nuisance

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Abstract: The interest approach within the law of tort by focusing on private nuisance plays an important role in environmental sustainability towards sustainable development. The used of interest approach within the law of tort by focusing on private to the area of environmental sustainability is largely in reply to the necessity of every each individual to protect their rights and interests in land from being polluted towards sustainable development. Therefore, this study will examine the used of the interest approach within the law of tort by focusing on private in relation to environmental sustainability in Malaysia, identify cases and actions which deal with environmental sustainability in Malaysia and lastly, discussing the interest approach within the law of tort by focusing on private nuisance as an instrument of environmental sustainability in Malaysia towards sustainable development.

Key words: Interest approach, sustainable development, law of tort, private nuisance, sustainability

INTRODUCTION

Environment is very precious to every single creature in this world. The environment itself is the based for all activities on the earth (Jamaluddin, 2001; Razman *et al.*, 2010a). Therefore, it is very essential to take extra care to the environment. A good environmental sustainability will ensure the environment is maintained properly. Environmental sustainability can be divided into two parts. The first part is the environmental sustainability through non legal approaches and the second part is the environmental sustainability through legal means (Jahi, 2001; Jamaluddin, 2001).

The environmental sustainability through non legal approaches can be done through education, research, monitoring, public policies, guidelines and development plans (Jamaluddin, 2001). On the other hands, the environmental sustainability through legal approaches can be classified into 2 classifications. There are environmental sustainability through public law and environmental sustainability through public law (Ball and Bell, 1995; Aiyub and Arifin, 2001; Razman, 2001, 2002).

Based on the above-mentioned matter, the environmental sustainability through legal approaches can be classified into 2 classifications. There are private law and public law. Private law governs the relationship between an individual and other individual. On the other hand, as for public law governs the relationship between a state and an individual (Beatrix and Wu, 1991; Razman *et al.*, 2010b). These private and public law play very essential role in the environmental sustainability. The development of the law on environmental sustainability is not solely based on public law alone; anyway, private law has also contributed to serve similar function in environmental sustainability. Private law, essentially law of tort, serves as a tool of environmental sustainability (Ball and Bell, 1995; Aiyub and Arifin, 2001; Razman and Syahirah, 2001; Razman, 2002).

Law of tort consist 4 types of areas. There are trespass, negligence, strict liability and private nuisance. As for this study is concerned, this study deals with the private nuisance as an instrument of environmental sustainability in Malaysia towards sustainable development focusing on interest approach.

THE INTEREST APPROACH

Based on Barrett (2003) and Hasenclever *et al.* (1997), there are 2 types of classification on the idea of interest approach namely; the first group that emphasises on the international institutions and the second group which is less using the international institutions.

The first group emphasises on the international institutions effort to bring together states around the globe to realise the common interests that balance with benefits and costs involvement in creating environmental co-operations (Hasenclever *et al.*, 1997). The international institutions always ensure that all states will be benefited with the co-operation that being created in order to achieve joint gains and to reduce potential costs expenditure. Nevertheless, the international institutions are capable of making all states that are involved to notice the common interest in that particular environmental co-operations even when the elements that brought them in the first place being no longer effective (Hasenclever *et al.*, 1997). As for Hasenclever *et al.* (1997), this situation as co-operation under the umbrella of anarchy or utilitarian approach. In addition, Hasenclever also regarded this approach as a game theory. Meanwhile, Keohane (1984) and Oye (1986) argued that the international institutions will not be able to fulfill the optimal outcomes of every member state, for instance, in the position of the prisoner's dilemma game. However, the international institutions may facilitate and smooth the progress of gaining common benefits by heartening reciprocity in the negotiation which treated others as you would like to be treated with upgrading level of communication and information. Therefore, the international institutions will able to persuade state response in order to maneuver results in the international environmental co-operations.

According to Barrett (2003), the second group is less using international institutions and the game theory as vehicles to gain from the interest approach in the environmental co-operations. As for Barrett (2003), interest in environmental co-operations must be derived from individual state needs and capacity. Each individual state will calculate it own benefits and perceived costs that will be incurred. Interest of a state begins when a particular issue that is being raised has shown a lot of benefits to the said state (Barrett, 2003; Harris, 1991; Snidal, 1991). Finally, it is very important to bring in the interest approach in the negotiations of creating of the environmental co-operations, regardless if the interest approach is using the first group theory or the second group ideas. The main purpose to build up the co-operations is to tackle consumer problems and

subsequently able to achieve sustainability based on the concept of sustainable development (Barrett, 2003; Harris, 1991; Snidal, 1991).

THE CONCEPT OF SUSTAINABLE DEVELOPMENT

The concept of sustainable development has been defined by the world commission on environment and development as development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs. The above-said concept covers two essential scopes, i.e., environment and social aspects. This concept of sustainable development has been highlighted in the 1992 United Nations Conference on Sustainable Development in Rio de Janeiro, as the results, Agenda 21 and Rio Declaration has been established. According to Sands (1995, 2003), Agenda 21 emphasises the following matters which include sustainable human settlement, population, consumption pattern, poverty and human health. On the other hand, Mensah (1996) stated that the Rio Declaration addresses on mankind entitlements and rights which include health and productive life.

Basically this concept of sustainable development has been an element in the international legal framework since early as 1893. According to the case of United States of America v Great Britain [1983] 1 Moore's Int. Arb. Awards 755, well known as Pacific Fur Seals Arbitration where in this case the United States of America has stated that a right to make sure the appropriate and lawful use of seals and to protect them, for the benefit of human beings, from meaningless destruction (Razman *et al.*, 2009b, 2010c; Emrizal and Razman, 2010).

Sands (1995, 2003) indicated that this concept of sustainable development is perhaps the greatest contemporary expression of environmental policy, commanding support and presented as a fundamental at the Rio Summit, Rio Declaration on Environment and Development in year 1992.

According to Article 33 of the Lome Convention, 1989 states that in the framework of this convention, the protection and the enhancement of the environment and natural resources, the halting of deterioration of land and forests, the restoration of ecological balances, the preservation of natural resources and their rational exploitation are basic objectives that the African-Caribbean-Pacific (ACP) states concerned shall strive to achieve with community support with a view to bring an immediate improvement in the living conditions of their populations and to safeguarding those of future generations (Razman *et al.*, 2009c; Emrizal *et al.*, 2011).

THE INTEREST APPROACH TOWARDS SUSTAINABLE DEVELOPMENT THROUGH THE LAW OF TORT FOCUSING ON PRIVATE NUISANCE IN MALAYSIA

There is no specific statute in Malaysia governs the law of private nuisance. In this situation, when there is no specific statute governs the particular private law, therefore Civil Law Act, 1956 (Revised 1972) will take place.

According to the section 3 of the Civil Law Act, 1956 (Revised 1972) stated that: 3 (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:

- In West Malaysia or any part thereof, apply the common law of England and rules of equity as administered in England on the 7th day of April, 1956
- In Sabah, apply the common law of England and rules of equity, together statutes of general application as administered or enforced in England on the 1st day of December, 1951
- In Sarawak, apply the common law of England and rules of equity, together statutes of general application as administered or enforced in England on the 12th day of December, 1949

Provided that said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of states of Malaysia and their respective inhabitant's permits and subject to such qualifications as local circumstances render necessary.

Based on the section 3 of the Civil Law Act, 1956 (Revised 1972), it is clearly that in the event where there is no specific statute governs a particular private law, the common law, rules of equity and statutes of general application, as administered or enforced in England shall be applied so far only as the circumstances of states of Malaysia and their respective inhabitants permits and subject to such qualifications as local circumstances render necessary (Wu, 1987; Razman, 2001; Razman *et al.*, 2009a). Therefore, the law of private nuisance in Malaysia is based on the English law of private nuisance.

PRIVATE NUISANCE

According to the definition given by Lord Scott in the case of *Read v Lyons and Co. Ltd.* [1945] K.B. 216, 236 defined private nuisance in following words:

Private nuisance as unlawful interference with a person's use or enjoyment of land or some right over or in connection with it

In addition, Ball and Bell (1995) further explained the above-mentioned definition illustrates the essential difference between private nuisance and other law of torts, such as law of negligence and law of trespass in which the protection afforded is directed towards controlling proprietary interests rather than the control of an individual's activity and conduct. This law of private nuisance which gives the protection of proprietary interests, may provide a general helpful to the members of the public as a means to protect environment.

REASONABLENESS

In the situation where the injured party (the plaintiff) intends to take legal action against the polluter (the defendant) based on the law of private nuisance, the plaintiff is required first of all, to establish to the court that the defendant failed to use his land reasonably.

The above-mentioned principle is based on the case of *Saunders Clark v Grosvenor Mansions Company Limited and D'Alles-Sandry* [1900] 2 Ch.D. 373. According to Buckley J. in the case of *Saunders Clark v Grosvenor Mansions Company Limited and D'Alles-Sandry* [1900] mentioned that:

The court must consider whether the defendant is using his property reasonably or not. If he is using it reasonably, there is nothing which at law can be considered a nuisance but if he is not using reasonably then the plaintiff is entitled to relief

Thus, the plaintiff's legal action against defendant based on the law of private nuisance, the court will determine the matter by using the balance between the reasonableness of defendant's conduct and its impact upon the plaintiff's ownership rights. In assessing the balance, the court will ensure the following factors which include:

- Locality
- Duration
- Sensitivity on the part of the plaintiff
- Intention of the defendant
- The utility of the defendant's activity (Wolf and White, 1995)

Locality: Locality is the first factor to determine the reasonableness of the defendant's activity and conduct. Thus, the case of *St. Helens Smelting Co. v Tipping* [1865] 11 HLC 642 explains the matter. According to the case of *St. Helens Smelting Co. v Tipping* [1865] 11 HLC 642.

Parties involved: St. Helens Smelting Co. as the Appellants/Defendants and Mr. Tipping as the Respondent/Plaintiff.

Fact of the case: Mr. Tipping the Respondent/Plaintiff obtained a piece of land situated at the St. Helens. Later, Mr. Tipping the Respondent/Plaintiff used the before mentioned land for agricultural purposes. St. Helens was an industrial area. Moreover, nearby Mr. Tipping's land, the Appellants/Defendants conducted works dealing with copper smelting. The works on copper smelting had caused damages Mr. Tipping's agricultural works. Therefore, Mr. Tipping took legal action against St. Helens Smelting Co. based on the law of private nuisance. On earlier part, the Court gave decision to Mr. Tipping the Respondent/Plaintiff. Later St. Helens Smelting Co. the Appellants/Defendants appealed to the House of Lords.

Court's decision: The House of Lords drew the distinction between a private nuisance which causes actual damage to the property and a private nuisance which causes personal discomfort. In order to determine whether a personal discomfort can be considered under legal action based on the law of private nuisance, it is very essential to take into consideration the factor of locality. However on the other hand, the factor of locality is not taken into account in the event of a private nuisance which causes actual damage to the property. Therefore in this case, Mr. Tipping the Respondent/Plaintiff, able to prove to the House of Lords that this case based on a private nuisance which causes actual damage to the property where the factor of locality is not taken into account. Thus, Mr. Tipping the Respondent/Plaintiff, therefore managed to recover the above-mentioned damages.

In dealing with the factor of locality, it is best to refer the quotation made by Lord Thesiger in the case of *Sturges v Bridgman* [1889] 11 Ch.D. 852, 865. Based on the case of *Sturges v Bridgman* [1889] 11 Ch.D. 852, 865, Lord Thesiger mentioned, what would be nuisance in Belgrave Square would not necessarily be so in Bermondsey. Therefore, an interference that may be permissible and it is may not be considered as nuisance in one place but the interference may not be permissible and it is may be considered as nuisance in another place (Rogers, 1989).

However, the before mentioned authority does not give an absolute freedom to anyone who is in the location of industrial estate to emit and cause pollution in which causing other individual's personal discomfort or an individual has been given planning permission by the

authority to conduct an activity that may causing other individual's personal discomfort. Thus if an injured party able to show to the court that the polluter in the area of industrial estate or the individual that obtained the planning permission failed to comply statutory requirements and act unreasonably, therefore the court will allow the legal action under the law of private nuisance based on the personal discomfort.

There are two cases that highlighted the before mentioned principles. There are:

- *Rushmer v Polsue and Alfieri* [1906] Ch.D. 234
- *Gillingham BC v CV Medway (Chatham) Dock* [1992] 3 WLR 449

Duration: The second factor that will be taken into consideration under the law of private nuisance is the duration of the interference made by the defendant. The plaintiff is required to prove to the court that the duration of the interference caused by the defendant that is not considered as temporary basis in nature.

According to the case *Harrison v Southwark and Vauxhall Water Company* [1891] 2 Ch.D. 409:

Fact of the case: The Southwark and Vauxhall Water Company as the defendants conduct an activity in a piece of land. The said land was next to Mr. Harrison's land that was the plaintiff. The activity was concerned about pumping water from a shaft. The activity had caused noise to Mr. Harrison. As the result of the said noise, Mr. Harrison took legal action against The Southwark and Vauxhall Water Company under the law of private nuisance.

Court gave decision to the defendants on the ground that the plaintiff failed to establish the second factor under the law of private nuisance is the duration. The duration of the interference caused by the defendants in this case was not permanent in nature but only temporary in nature. Therefore, the court refused to accept the action made by the plaintiff. In addition in this case, Vaughan Williams J. mentioned that for instance, a man who pulls down his house for the purpose of building a new one no doubt causes considerable inconvenience to his next door neighbours during the process of demolition but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by works of demolition. Nor is he liable to an action, even though the noise and dust and consequent annoyance be such as would constitute a nuisance if the same had been created in sheer wantonness or in the execution of works for a purpose involving a permanent continuance of noise and dust.

The sensitivity of the plaintiff: The third factor in the law of private nuisance that the court will take into account is the sensitivity of the plaintiff. If the plaintiff failed to prove to the court that his sensitivity is a normal one, therefore the court will reject the plaintiff's legal action under law of private nuisance.

The before mentioned matter has been discussed in the following cases:

- Robinson v Kilvert [1881] 41 Ch.D. 88
- Health v Brighton Corporation [1908] 98 L.T. 718

According to the case of Robinson v Kilvert [1881] 41 Ch.D. 88:

Fact of the case: The plaintiff was a tenant. The plaintiff had occupied the upper part of defendant's building. The plaintiff had used the upper part of the building as paper storage. At the same time, the defendant had conducted an activity that required the lower part of the building in the environment of dry and hot. Unfortunately, the defendant's activity had caused damage to papers belong to plaintiff which had been kept at the upper part of the said building. Later, the plaintiff took legal action against the defendant under the law of private nuisance.

The court gave decision favour to the defendant and refused to the legal action made by plaintiff under the law of private nuisance. The court gave decision as such because papers that belong to the plaintiff were having extra sensitivity if compared to normal and ordinary type of paper. From the evidences that being tender to the court, the court satisfied that the defendant's activity would not caused damage to normal and ordinary paper. In addition, the plaintiff failed to inform to the defendant on the existence of the extra ordinary sensitive paper in the upper part of the said building.

Meanwhile, based on the case of Health v Brighton Corporation [1908] 98 L.T. 718:

The plaintiff was the priest of a church. The plaintiff took legal action against the defendant under the law of private nuisance. The reason the plaintiff took the action because the defendant's activity had caused a loud noise to the church which under the administration of the plaintiff.

The court gave decision favour to the defendant and refused to accept the plaintiff's action. The court held that the plaintiff failed to prove to the court the following matters. The plaintiff failed to prove that the loud noise caused by the defendant had interrupted the church activities and the attendance of the public to the said church.

Intention of the defendant: The fourth factor that court will take into the consideration in legal action made under the law of private nuisance is the intention of the defendant. The plaintiff is required to show to the court that the defendant's action has an element of malice. This element of malice will be considered as the defendant's action is unreasonable.

The above-said principle is based on the following cases. There are:

- Christie v Davey [1893] 1 Ch.D. 316
- Hollywood Silver Fox Farm Ltd. v Emmett [1936] 2 K.B. 468

Based on the case of Christie v Davey [1893] 1 Ch.D. 316:

Fact of the case: The plaintiff was a music teacher. The plaintiff had conducted music lessons in the plaintiff's house. The defendant was plaintiff's neighbour who stayed next door to the plaintiff. Defendant's house was being separated by a piece of wall. The plaintiff took legal action against the defendant under the law of private nuisance. The action was being taken by the plaintiff on the ground that the defendant had caused interference when the plaintiff conducted music lessons by creating unreasonable noise.

The court gave decision favour to the plaintiff. This is because the defendant had caused the unreasonable noise with the intention of malice. In other words, the defendant purposely created unreasonable noise in order to disturb the plaintiff. In addition, North J. mentioned that if what has taken place had occurred between two sets of persons both perfectly innocent, I should have taken an entirely different view of the case.

Next case, the Hollywood Silver Fox Farm Ltd. v Emmett [1936] 2 K.B. 468.

Fact of the case: The plaintiffs used the land for breeding silver foxes. On the other hand, the defendant who was a person owned a land nearby to the plaintiffs' land. The plaintiff took legal action against the defendant under the law of private nuisance. The legal action was being taken by the plaintiff on the ground that the defendant had purposely caused guns shoot on the defendant's own land. The guns shoot that caused by the defendant had disturbed the plaintiffs' silver foxes during breeding period.

The court gave decision favour to the plaintiff. This is because the defendant had caused the guns shoot with the intention of malice. In other words, the defendant purposely caused guns shoot in order to disturb the

plaintiffs' silver foxes during breeding period. In this case, Macnaghten J. mentioned that the female silver foxes are highly nervous during breeding period and a lot of damage was created as the result of the defendant's activity in which with the intention of malice.

The utility of the defendant's activity: The final factor that court will take into the account in legal action made under the law of private nuisance is the utility of the defendant's activity. The plaintiff is required to prove to the court that the defendant's activity that caused interference to the plaintiff is not utility advantage and benefit to other public members.

In addition based on Hughes (1992), in the event where the defendant is carrying out activities that give a general benefit to the members of public, the private nuisance will be considered reasonable.

ACTIONS UNDER THE THE INTEREST APPROACH TOWARDS SUSTAINABLE DEVELOPMENT THROUGH THE LAW OF TORT FOCUSING ON PRIVATE NUISANCE IN MALAYSIA

There are a number of cases that has been brought forward to the Court of Law on environmental management for the environmental protection under the law of private nuisance. Among the leading cases in Malaysia, there are Pacific Engineering Limited v Haji Ahmad Rice Mill Limited [1966] 2 MLJ 142 and Chan Jen Chiat v Allied Granite Industries Sdn Bhd [1994] 3 MLJ 495.

According to the case of Pacific Engineering Limited v Haji Ahmad Rice Mill Limited [1966] 2 MLJ 142:

- Parties involved as follows:
 - Plaintiffs-Pacific Engineering Limited
 - Defendants-Haji Ahmad Rice Mill Limited
- The fact of the case:
 - The defendants had conducted an activity dealing with burning rice husks on defendants' land. The defendants' activity had caused interference to plaintiffs' personal comfort. The plaintiffs' personal discomfort which was caused by rice husks, dust, smoke and ash, came from the defendants' activity. Therefore, the plaintiffs took legal action under the law of private nuisance
- The plaintiffs' argument:
 - The plaintiffs mentioned that the defendants' activity which burning rice husks on their land, bringing and permitting rice husks to be remained on the defendants' land, the rice husks to such amount and in such way as to caused a danger from fire to plaintiffs' property and the rice husks, itselfs may caused discomfort to plaintiffs' workers, contractors and visitors

- The defendants' argument:
 - The defendants stated that their activity on their land was noxious in the sense of being injurious to health. In addition, the defendants' added that the plaintiffs claims were based on abnormal sensitivity which the plaintiffs are not entitle forthe actions under the law of private nuisance
- The court gave decision to the plaintiffs because the plaintiffs able to show to the court that the evidences of the injury to the plaintiffs and interference to the plaintiffs' comfort. In addition, it is sufficient enough for the plaintiffs to show the court on the interference with plaintiffs comfort only and it is not necessary for the plaintiffs to show the court that the interference should be noxious in nature that caused injury to health

Next, based on the case of Chan Jen Chiat v Allied Granite Industries Sdn Bhd [1994] 3 MLJ 495:

- Parties involved as follows:
 - Plaintiff-Chan Jen Chiat
 - Defendants-Allied Granite Industries Sdn. Bhd
- The fact of the case:
 - The defendants had conducted an activity in dealing with the construction of a factory on thedefendants' land. The defendants' activity had caused pollution to the water that flow through the defendants' land. The said water had been used by the plaintiff as source of water for fishery and horticulture purposes. In addition, the defendants' activity also had caused interferenceto plaintiff's flow of water. Therefore, the plaintiffs took legal action under the law of private nuisance
- The plaintiff's argument:
 - The plaintiff mentioned that the defendants' activity which dealing with construction of a factory on their land, had caused interference to the flow of the water as well as polluting the said water. Therefore, the said activity had caused private nuisance to the plaintiff who operates fishery and horticulture business nearby the neighbourhoods
- The defendants' argument:
 - The defendants stated that their activity on their land was only temporary basis. In other words the said activity was not permanent in nature. Therefore, the defendants' were carrying out the said activity in reasonable and proper manner
- The court gave decision to the plaintiff because the plaintiff able to show to the court that the evidences of the injury to the plaintiff and interference to the

plaintiff's business permanent in nature. The defendants' activity had caused pollution to the water that flow through the defendants' land which the said water had been used by the plaintiff for fishery and horticulture purposes and in addition, the defendants' activity also had caused interference to plaintiff's flow of water

CONCLUSION

Based on the earlier discussion, in the event when an individual suffers injury or damage caused by pollution, the said individual may take legal action against the polluter under the interest approach within the law of tort focusing on private nuisance towards sustainable development. Under the law of tort focusing on private nuisance, the court will determine the matter by using the balance between the reasonableness of defendant's conduct and its impact upon the plaintiff's ownership rights. In assessing the balance, the court will ensure the following factors which include: Locality, duration, sensitivity on the part of the plaintiff, intention of the defendant and the utility of the defendant's activity (Wolf and White, 1995).

In addition, Ball and Bell (1995) mentioned that the foundation for the law of tort focusing on private nuisance is the balance between competing rights of neighbours to utilize their asset as they wish. It must be emphasized that each of interferences cannot be considered as a private nuisance. Therefore in order legal action can be taken under the the law of tort focusing on private nuisance based on interest approach, the plaintiff must establish that the interference is an unreasonable interference with an occupier's interest in the beneficial use of his land in order to enhance environmental sustainability towards sustainable development.

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