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Remedies--Private Nuisance--Comparative Injury Doctrine in West Virginia

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REMEDIES—PRIVATE NUISANCE—COMPARATIVE INJURY DOCTRINE IN WEST VIRGINIA

I. INTRODUCTION

"There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'." One certainty, however, is that every successful nuisance action involves two central issues. First, there must be a judicial determination that there is in fact a nuisance, and secondly, the court must decide whether the appropriate remedy is damages or injunctive relief. The first issue is largely a factual determination. This note is directed toward remedies. In particular, it is directed toward the factors that are given primary consideration in deciding whether a permanent injunction against a business enterprise by a private individual will be granted.

Increasingly, modern nuisance litigation has involved a balancing of conflicting interests between business establishments and private residences. Representative of this conflict is a Massachusetts case that determined that the operation of a piggery would be enjoined where it could hardly be contended that damages alone were adequate compensation for the affront to the senses of homeowners and their families from the nauseating odors. Noting that it would be a costly and inconvenient process to move the business, the court determined an injunction to be the only way to avoid the unpleasantness and insure the day to day comfort of the neighboring residents. None would seriously challenge the homeowner's legal right to use and enjoy his property. Furthermore, each homeowner has an interest in protecting his investment

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2 W. Prosser, supra note 1, at § 80; Mahoney v. Walter, 205 S.E.2d 692, 699 (W. Va. 1974).
3 205 S.E.2d at 699.
4 Id.
5 The question of whether an alleged nuisance is in fact a nuisance is not within the scope of this note. Also not discussed is the body of law governing public nuisance actions. For a discussion of public nuisance see, Rothstein, Private Actions for Public Nuisance: The Standing Problem, 76 W. Va. L. Rev. 453 (1974).
6 This issue was squarely before the court in Mahoney v. Walter, 205 S.E.2d 692 (W. Va. 1974).
8 Id. at 312, 187 N.E.2d at 145.
and in preventing its market value from declining. The West Virginia Supreme Court of Appeals has recently recognized that ordinarily habitation rights are superior to the rights of business. Additionally, the individual has certain intangible rights such as the right to be free from excessive noise, light, unsightliness, or harmful forms of pollution.

When these interests are asserted against established businesses, the impact can be significant. In one case where a cement company was throwing clouds of dust upon adjacent property and the investment was $800,000 with five hundred men on the payroll, the court issued an injunction to curtail production after private landowners alleged damage to their citrus trees and surrounding property. In another case, defendant’s one million dollar plant employing four to five hundred people was closed down by the court because it did one hundred dollars annual damage to the homeowners’ property. The impact of an injunction upon the community can also be significant. Injunctions of this type may cause disadvantages by discouraging desirable businesses from locating in such an area, thereby effectively destroying any possible growth potential. Given such possible adverse consequences, the

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9 205 S.E.2d at 697.
10 Id. at 698.
16 Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913). The principle applied in this case was overruled by the court in Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). In Boomer, the issue before the court was whether to enjoin the operation of a cement plant that employed over three hundred people and represented a $45,000,000 investment because it polluted farms and caused $185,000 in permanent damage. If the court had followed the Whalen decision, the injunction would have been granted, however, the court chose to allow the plant to continue operating. The court granted the injunction conditioned on the payment of permanent damages to the plaintiffs that would compensate them for the total economic loss to their property caused by the plant’s operations. In essence, Boomer applied the doctrine of “disparity of economic consequences” which states that permanent damages are allowed where the loss recoverable would obviously be small as compared with the cost of removal of the nuisance. Kentucky-Ohio Gas Co. v. Bowling, 264 Ky. 470, 477, 95 S.W.2d 1, 5 (1936).
approach and legal justification for any course of action taken by
a court is of critical importance.

II. FORMER PRACTICE

At one time the clear majority rule was that the courts would
not balance the conflicting interests involved. The rule was more
specifically stated: "[I]f the nuisance is clearly established, and
it appears that it is causing substantial, material, and irreparable
injury to the complainant, for which there is no adequate remedy
at law . . . the complainant is entitled to relief by injunction ir-
respective of the resulting damage to defendants." This rule ac-
counted for some of the harsh decisions reached by courts in many
cases; however the policy supporting this doctrine continues to be
sound today. As was indicated in one case, "[E]very substantial,
material right of person or property is entitled to protection against
all the world. . . . If the smaller interest must yield to the larger,
all small property rights . . . and pursuits would sooner or later
be absorbed by the larger, more powerful few . . . ."

To avoid the harsh effects of such an absolute rule, many
exceptions were developed. If the injury complained of was slight
or trivial, the injunction would not be granted. The "trivial"
exception was not really an exception, however, because the gen-
eral rule recognized that the harm complained of had to be "sub-
stantial" and "material." Nonetheless, slight or trivial injury
meant that the injury itself was slight, not that it was slight as
compared with the injury to the defendant. Additionally, a mi-
nority of cases recognized the exception that if a business was
located in a business area and the nuisance complained of was one
that naturally flowed from that type of business, the right to an
injunction was not absolute but rested in the sound discretion of

521, 525 (Ch. 1917).
18 E.g., Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913);
Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 928 (1911); Sullivan
19 Hulbert v. California Portland Cement Co., 161 Cal. 239, 251, 118 P. 928,
933 (1911), quoting Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753,
807 (C.C.D. Cal. 1884).
267 (1914); Gray v. Manhattan Ry., 128 N.Y. 499, 28 N.E. 498 (1891).
21 See text accompanying note 17 supra.
22 Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 5, 101 N.E. 805, 806 (1913);
See also Annot., 61 A.L.R. 924 (1929)
the court. The majority, however, failed to recognize this exception, holding that habitation rights were superior to business rights whenever they conflict. Also, the majority would not recognize the exception that when public convenience was involved, an injunction would not issue as a matter of right.

The "absolute rule," that once a substantial harm was proven by the plaintiff stemming from a private nuisance, an injunction would issue as a matter of right, was never part of the West Virginia law. As early as 1891 the court, in Powell v. Bentley & Gerwig Furniture Co., stated that to enjoin a nuisance was not a matter of strict right, but of reasonable discretion. This rule has been consistently followed, and as late as 1969 the West Virginia court reiterated the discretionary rule.

26 34 W. Va. 804, 811, 12 S.E. 1085, 1087 (1891): For although a court of equity in such cases follows precedent, and goes by rule, as far as it can, yet it follows its own rules—and among them is the one that to abate or restrain in case of nuisance is not a matter of strict right, but of orderly and reasonable discretion, according to the right of the particular case—and hence will refuse relief, and send the party to a court of law, when damages would be a fairer approximation to common justice, because to silence a useful and costly factory is often a matter of serious moment to the state and town, as well as to the owner.
27 Severt v. Beckley Coals, Inc., 153 W. Va. 600, 170 S.E.2d 577 (1969). In West Virginia, as in most other jurisdictions, the law of private nuisance remedies has not been clearly stated and has frequently varied with changing social pressures. Injunctive relief in nuisance actions was guided initially by the general law of injunction, with the basic principles of injunction still normally applicable to modern nuisance actions. Pointing out the general law of injunction in West Virginia, the court in State ex rel. Donley v. Baker, 112 W. Va. 263, 164 S.E. 154 (1932), stated that "[t]he granting or refusal of injunction . . . calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved . . . ." Id. at 263, 164 S.E. at 154 (emphasis added). Obviously, the nature of the controversy can refer to nuisance actions, with the case dictating the exercise of discretion to be partially focused upon this aspect. Similarly, the object can be the permanent elimination of particular noise, pollution, excess light, odors, and other possible nuisances and discretion is to be utilized in this respect. Furthermore, Donley impliedly directs the court in nuisance actions, whose object is the permanent elimination of some item, to base its decision upon the comparative hardships and convenience of the parties.
III. CURRENT PRACTICE

Although the "absolute rule" was undoubtedly the majority position forty years ago,\textsuperscript{25} courts have recently adopted what is frequently referred to as the doctrine of comparative injury.\textsuperscript{26} Although stated differently by many courts, the doctrine states that the relative hardship likely to result to the defendant if the injunction is granted and to the plaintiff if it is denied is one of the factors to be considered in determining the appropriateness of an injunction.\textsuperscript{27} The United States Supreme Court has stated that whether a court of equity will restrain the acts complained of must depend upon a variety of circumstances, including the comparative injury from granting or refusing the injunction.\textsuperscript{28} The policy justification for the doctrine was stated by one court: "[I]n a case of conflicting rights . . . the law must make the best arrangement it can between the contending parties with a view to preserving to each one the largest measure of liberty possible under the circumstances."\textsuperscript{29}

While all jurisdictions have not adopted this rule, a large majority of courts balance the interests of each party in a nuisance action.\textsuperscript{30} Although not mentioned by name, the West Virginia court in Powell applied the doctrine and refused injunctive relief to the plaintiff, stating that "damages would be a fairer approximation to common justice, because to silence a useful and costly factory is often a matter of serious moment to the state and town, as well as to the owner."\textsuperscript{31} The first West Virginia case to refer to the

\textsuperscript{25} Rowland v. New York Stable Manure Co., 88 N.J. Eq. 168, 101 A. 521 (Ch. 1917). See the cases collected in Annot., 61 A.L.R. 924 (1929).
\textsuperscript{26} The Restatement of Torts § 941 (1936) refers to this doctrine as the "balancing of hardships." Other terms applying to the same rule are the "balance of injury," "comparative hardship," "balance of convenience," "balance of interests," or doctrine of "social utility." Restatement (Second) of Torts does not discuss this matter. See Gunther v. E.I. DuPont De Nemours & Co., 157 F. Supp. 25 (N.D.W. Va. 1957); Annot., 40 A.L.R.3d 601 (1971). The term "doctrine of comparative injury" will describe the concept in this note.
\textsuperscript{27} Restatement of Torts § 941 (1936).
\textsuperscript{28} Arizona Copper Co. v. Gillespie, 230 U.S. 46, 56 (1913).
\textsuperscript{29} Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 367, 83 S.W. 658, 667 (1904).
\textsuperscript{31} Powell v. Bentley & Gervig Furniture Co., 34 W. Va. 804, 811, 12 S.E. 1085, 1087 (1891). The approach used by the court in Powell is remarkably similar to that
comparative injury doctrine by name and to require its application was *State ex rel. Donley v. Baker*\(^35\) in 1932. Notwithstanding the applications and announcements of the doctrine, the law in West Virginia went through a period of uncertainty on the issue. The doctrine was first confused in *Ritz v. Womans Club*.\(^36\) The defendant, because of a large investment in a club that was declared a private nuisance because it held late night dances in a residential area, asked the court to apply the "comparative injury doctrine" and refuse the injunction. In reply, the court stated that the weight of authority was against a balancing of injury and that even where it is recognized, it is applied with "great caution" and there can be no "balancing of conveniences when such balancing involves the preservation of an established right."\(^37\) The exact meaning of this series of statements is not clear, but surely the court did not intend a wholesale abandonment of the doctrine. In a syllabus point written by the court, it was stated, "In cases of nuisance the 'comparative injury' doctrine should be applied with great caution. The doctrine must yield ordinarily to established property rights."\(^38\) More probably, the doctrine was not rejected but was clearly restricted by the "great caution" limitation, so as to not allow defendants to easily escape the remedy of injunction. Another case, *Board of Commissioners v. Elm Grove Mining Co.*, reiterated the "great caution" limitation to the application of the "comparative injury" doctrine.\(^39\) In addition to approving the "great caution" limitation, the court narrowed the application of the doctrine by holding that there was an extremely narrow basis for undertaking to balance conveniences when people's health was involved.\(^40\) The

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\(^35\) 112 W. Va. 263, 164 S.E. 154 (1932).
\(^36\) 114 W. Va. 675, 173 S.E. 584 (1934).
\(^37\) *Id.* at 678, 173 S.E. at 565.
\(^38\) *Id.* at 675, 173 S.E. at 564 (emphasis added).
\(^39\) 122 W. Va. 442, 452, 9 S.E.2d 813, 817 (1940).
\(^40\) *Id.* at 452, 9 S.E.2d at 817. The health hazard in *Elm Grove* was a burning pile of gob or refuse material produced as a by-product of the defendant's mining operation. The substance of the testimony at the trial was that within a radius of more than a mile of the gob pile, the atmosphere was pungent with the odor of burning sulphur and that the gases given off caused a burning sensation to the nose,
impact of this decision is hard to gauge since Elm Grove was a public nuisance action, not a private nuisance action.\textsuperscript{41} This constant chipping away at the comparative injury doctrine could lead some to believe that it was being disapproved. Additional confusion was created by the decision in Hark v. Mt. Fork Lumber Co. where the court stated, "[N]or is the expense and great inconvenience to defendant grounds for application of that theory."\textsuperscript{42} Furthermore, the court left unclear the exact status of the doctrine by quoting other broad statements of rejection and citing cases that had refused to accept the comparative injury doctrine.\textsuperscript{43} However, Hark did not involve a nuisance, but rather a trespass, and can be distinguished on that basis.\textsuperscript{44} Notwithstanding the uncertainty the three cases have caused, the court recently recognized the comparative injury doctrine and ignored the confusion.\textsuperscript{45} The recent statement of the doctrine should settle the issue, making it clear that West Virginia will apply the comparative injury doctrine.\textsuperscript{46}

\textsuperscript{41} Since the West Virginia court in Powell has recognized that the public interest is a principle deserving appropriate attention in the balancing process in a private nuisance action, 34 W. Va. 804, 12 S.E. 1085 (1891), there seems to be no logical reason why Elm Grove should not apply with equal force to private nuisance actions, notwithstanding the fact the case itself involved a public nuisance.


\textsuperscript{43} For example, the court stated, "Once it is ascertained that a person has established property rights which he seeks to protect by injunction, he will not ordinarily be deprived of that remedy on the ground that the injunction operates to the inconvenience of the person against whom the remedy is invoked . . . ." Id. The court cited for support of this statement Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 A. 1065 (1904), a case that followed the "absolute rule" and would not balance the hardships. The court also cited Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913), in which the New York court rejected the balancing of comparative injury and closed a one million dollar factory.

\textsuperscript{44} Clearly trespass and nuisance involve different types of actions, but the difference in application of equitable principles is not that significant. In fact, just as courts will balance the hardships in nuisance cases, they will also balance them in trespass cases, D. Dobbs, \textit{HANDBOOK OF THE LAW OF REMEDIES} § 5.6 (1973).


\textsuperscript{46} Essentially the court in Severt v. Beckley Coals, Inc., 153 W. Va. 600, 170 S.E.2d 577 (1969), indicated there was no absolute right to injunctive relief in the absence of a statute. To support this statement of law the court cited point four of the syllabus in State \textit{ex rel.} Donley v. Baker, 112 W. Va. 263, 164 S.E. 154 (1932). \textit{See also} note 27 supra. By its use of the Donley statement the court in Severt
IV. Important Factors

Assuming that courts will balance conflicting interests, it is necessary to determine those factors that are important in the balancing process. Although some factors are of varying effectiveness in different contexts, others are important in virtually every case.

The principle that is determinative of more cases than any other is the adequacy of a remedy at law. The adequacy of a remedy at law, which in most nuisance cases means damages, is of crucial importance in at least two areas of nuisance remedy. The first area involves the traditional view that equitable relief will not lie unless plaintiff’s remedy at law is inadequate.\(^4^7\) There is no general rule for determining when a legal remedy is inadequate, but certain guidelines and standards have emerged.\(^4^8\) In the case of nuisance the injunctive remedy in equity is almost always superior to damages, because the plaintiff has suffered diminished use and enjoyment of his land which cannot be fully compensated by damages.\(^4^9\) Thus, when there is little hardship on the defendant in granting the injunction, and the only issue is adequacy of a remedy at law, the nuisance will be enjoined.\(^5^0\) If damages alone are adequate relief from the nuisance, injunctive relief will not be considered and damages will be awarded.\(^5^1\)

\(^4^7\) D. Dobbs, supra note 44, § 2.5, at 57.

\(^4^8\) Id. § 2.5, at 57-58. The legal remedy is usually inadequate and the equitable remedy is usually granted when damages will not suffice because the plaintiff needs the thing itself, e.g., peace and quiet, or because damages at law would be adequate but cannot be measured with any reasonable degree of accuracy, e.g., damage from excessive light or noise.

\(^4^9\) Id. § 2.5, at 59.

\(^5^0\) Muehlman v. Keilman, 257 Ind. 100, 272 N.E.2d 591 (1971). The court stated that if plaintiff can show great damage and no adequate remedy at law, he is entitled to injunctive relief. The defendant’s interference with plaintiff’s comfortable enjoyment of his property constituted great damage. Such matters as good health and enjoyment of one’s property transcend material wealth and defy attempts to affix a price tag to them.

\(^5^1\) Jost v. Dairyland Power Cooperative, 45 Wis. 2d 164, 172 N.W.2d 647 (1970). See also Haack v. Lindsay Light & Chem. Co., 393 Ill. 367, 66 N.E.2d 391 (1946), wherein the court indicated that if the damages are of a nature that cannot adequately be compensated in a suit at law, equity will afford relief by injunction. And conversely, an injunction may not be granted to abate the nuisance if redress may be obtained in a court of law.
Apparentle this is the view taken in West Virginia. In Severt v. Beckley Coals, Inc., the court held that the plaintiffs had a full, complete, and adequate remedy at law and, therefore, equity did not have jurisdiction of the case. This conclusion was reached despite the intangible aspects in the case incapable of direct measurement. For example, according to uncontroverted testimony, the defendant coal company began operations within sixty feet of plaintiffs' property and 120 feet of their home with the installation of an exhaust fan, crusher, belt carrier, and transport trucks, all of which operated from six o'clock in the morning until two o'clock in the morning the following day. The plaintiffs complained of such intangibles as loud and disturbing noise that disrupted rest and sleep and disturbed peace and comfort, and dust on the property that prevented the usual use and enjoyment of the yard. In light of this, the court concluded that the plaintiffs had a remedy at law for reduced property value.

The second area of nuisance remedy involving damages operates when the remedy at law is clearly inadequate, but denies injunctive relief because the hardship on the defendant outweighs the benefit to the plaintiff. During this process, numerous factors are considered. One of these—the amount of redress that can be afforded by the payment of money—is material to a decision whether an injunction should be granted. Thus, in cases where an injunction is sought and the granting of that injunction would impose hardship upon the defendant business, in addition to inconvenience and hardship upon the public, the fact that substantial, if not total, redress is possible by an award of damages will be a sufficient basis to deny the injunction against the business. Even in cases where there is no adequate remedy at law.
hardship upon the defendant and public is compelling, the injunction will be denied.65

The public interest is another factor wisely considered by courts trying to resolve conflicting interests in private nuisance cases. Often when an injunction is granted, individuals not parties to the suit will be affected adversely. Some authorities group the rights of third parties not parties to the action within the concept of public interest.66 Although this factor could theoretically benefit either the plaintiff or the defendant in a proper case, the public interest is usually reflected in jobs supplied, taxes paid, and services performed by a business enterprise, and, therefore, consideration of the public interest usually supports the business position in defeating the injunction. For example, in one case the court refused to enjoin a rendering plant that processed dead animals and residue from slaughter houses, saying in effect that the rendering plant was the only one in the county and that it promoted better sanitary conditions for 75,000 people, even though it was an inconvenience and hardship on those who lived nearby.67

The West Virginia court will also consider the interest of the public in an application of the comparative injury doctrine, even though there is some uncertainty regarding this principle. In Powell the court noted that the silencing of a costly factory could have a serious impact upon the State and town.68 Nevertheless the vagueness began to grow in Ritz, in which the club owner contended the club served a valuable function to the public.69 The court rejected the argument by bluntly stating that it was mani-

66 RESTATEMENT OF TORTS § 942 (1936). See also 43 U. COLO. L. REV. 225, 233 (1971) which defined “public interest” as “the effect of granting an injunction upon persons or groups of persons other than the parties to the action.”

An injunction was denied where a business investment was $5,500,000, payments to other local businesses amounted to $1,030,000 yearly, taxes contributed to the community were $130,000, and, one thousand employees and their dependents relied upon the operations of the plant. Koseris v. J.R. Simplot Co., 82 Idaho 263, 352 P.2d 235 (1960). This example clearly shows the impact an injunction could have upon the public interest. See also RESTATEMENT OF TORTS § 942, comment b, c (1936).

festly unfair to require the plaintiffs to bear the nuisance merely because the public might benefit indirectly.\textsuperscript{60} In other jurisdictions this factor is often so compelling that some routinely state they will consider "the injury which may result to the defendant and the public" if the injunction is granted, as well as the injury sustained by the plaintiff if the injunction is denied.\textsuperscript{61} This one-sided approach is a frequent criticism of the comparative injury doctrine.\textsuperscript{62} The criticism is justified in cases where the business interferes with civic beauty, fire prevention, or the public health, and the community purpose would be furthered by granting the injunction; yet the injunction is denied.\textsuperscript{63} Rarely is the public interest stated as a reason for granting the injunction. However, in Elm Grove Mining Co., the court helped the private landowner close the mine by weighing the damage to public health on the side of the landowner, and further stating that no measure of public benefit will protect the nuisance if it interferes with the public health.\textsuperscript{64} Notwithstanding this case, the public interest is a significant factor in the denial of many injunctions.\textsuperscript{65} Unfortunately, it does not greatly support parties seeking relief from unpleasant nuisances.\textsuperscript{66}

Another common factor in the balancing process is a comparison of the economic impact an injunction would have upon a business if granted, as opposed to the economic impact upon the complaining party if denied. This comparison is so basic to a balancing determination that at least one court has looked solely to economic impact to justify denial of the injunction.\textsuperscript{67} This process of balancing economic effects has been labeled the doctrine of "disparity of economic consequences."\textsuperscript{68} More particularly described, the doctrine states that economic consequences to the business owner and the public are compared to the damage to the complaining prop-

\textsuperscript{60} Id. at 678, 173 S.E. at 565.
\textsuperscript{61} E.g., Storey v. Central Hide & Rendering Co., 148 Tex. 509, 514, 225 S.W.2d 615, 619 (1950).
\textsuperscript{62} E.g., Mahoney v. Walter, 205 S.E.2d 692, 698 (W. Va. 1974).
\textsuperscript{63} Restatement of Torts § 942, comment c (1936).
\textsuperscript{64} 122 W. Va. at 492, 9 S.E.2d at 817.
\textsuperscript{66} But see Mahoney v. Walter, 205 S.E.2d 692 (W. Va. 1974); Board of Comm'rs v. Elm Grove Mining Co., 122 W. Va. 442, 9 S.E.2d 813 (1940).
\textsuperscript{68} Mahoney v. Walter, 205 S.E.2d 692, 698 (W. Va. 1974).
Whether the doctrine is merely a factor in the balancing process or sufficiently independent to justify the denial or grant of an injunction is arguable. At least one commentator contends the majority rule is that no injunction will lie in a nuisance case if the resultant economic hardship to the defendant greatly outweighs the economic benefits the plaintiff will realize by having the nuisance enjoined. Whatever the merits of the argument, the better position is that economic disparity is one of many factors considered in balancing the comparative hardships.

There is little case law in West Virginia regarding the role economic disparity plays in the balancing equation. In one case, the court actually stated that the closing of a business would be costly because it employed sixty people and would cost thirty thousand dollars to move. Based upon this factor, the injunction was denied. The court recently addressed itself to the role of economic disparity without resolving the question. In Mahoney v. Walter an automobile salvage yard was located in a predominantly residential community that was unzoned. After the lower court had declared the business a nuisance and granted an injunction, the defendant appealed, contending that the doctrine of the “balancing of conveniences” should be applied and the injunction dissolved or modified. The court recognized that the “balancing of hardships” had been in American law for sometime, but cited no West Virginia authority. The court then, however, referred to the “balancing of conveniences” and equated this to the “disparity of economic consequences” as applied in Boomer v. Atlantic Cement Co. The court justifiably criticized the disparity rule because

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69 Id. at 698.
70 43 U. Colo. L. Rev. 225, 228 (1971).
71 See, e.g., Mahoney v. Walter, 205 S.E.2d 692 (W. Va. 1974); Schlotfelt v. Vinton Farmers’ Supply Co., 252 Iowa 1102, 109 N.W.2d 695 (1961). The primary reason for confusion in this area is the need to find tangibles to compare. It is difficult to weigh, for example, fourteen jobs against the inability of the plaintiff to get a good night’s rest because of excessive noise. As a result of this impossible comparison, a common escape is to compare the economic loss, reducible to dollars and cents. Such an approach is unwise. As the RESTATEMENT OF TORTS § 941, comment a (1936) indicates, the “balance of convenience” is not the proper test, because the term suggests a nice measurement of relative advantages and denial of injunction if the scales tip in the defendant’s favor.
74 Id. at 698.
75 Id.
some of the harm to the landowner was general and could not be translated into economic damages. Furthermore, the court in Mahoney stated that "regardless of the judicial soundness of the doctrine," there was no public economic interest in the business and the business's only economic interest was its location, and this was minimal because the business was mobile. Obviously, the court, believing the defendant could readily move his business to another location, did not think the impact significant enough to deny the injunction. What the court would have done had there been a public economic interest and a business that was not mobile is still an open question; however, in light of the court's criticism, it could fairly be concluded that economic impact is one factor among many to be considered in resolving the issue.

The Mahoney case placed particular emphasis upon the terms "location" and "mobility" while recognizing habitation rights as superior to business rights whenever they conflict in a residential area. The location of the nuisance is a primary factor in the balancing scheme, and West Virginia, like many other jurisdictions, will consider this principle. Generally, locations are either residential, commercial, industrial, or a combination of the three. The Iowa Supreme Court denied injunctive relief when the polluting industry was located in a heavy industrial district that never had been anything but a heavy industrial district occupied by such industries as sawmills, planing mills, a quarry, a packing house, and a weed killer factory. Against this background, the court properly considered the location and granted damages, rather than injunctive relief, to the injured property owners. The courts have

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76 Id.
77 The court, after criticizing the "disparity of economic consequences," confuses the issue further by stating near the end of the opinion:
   Although it was not mentioned in the trial court's memorandum opinion, it must be assumed that it considered the effect on the defendants' business and the economic effect on his private affairs and compared them to the present and prospective harm to the defendants [plaintiffs?] in the event the injunction was denied.
205 S.E.2d at 700. Does this mean that trial courts should consider this aspect in the future? The answer is difficult to determine. Perhaps more light could have been cast on the matter had the court cited some West Virginia authority for its propositions.
78 Mahoney v. Walter, 205 S.E.2d 692, 698 (W. Va. 1974).
also applied the locality factor in favor of the defendant. The reason for such equal treatment stems from the concrete determinations possible from a view of every location. Demonstrative of this even-handed application is another Iowa decision, in which the court said that a plaintiff who found his clean and quiet residential neighborhood invaded by a business enterprise that caused loud noises and polluted the air with dust and other matters had the equities all on his side.\textsuperscript{41} These two decisions support the soundness of a direct application of the locality factor. Another aspect of the location factor is the mobility of the business. Clearly, a coal mine operates where the coal is located or it does not operate. On the other hand, an automobile salvage yard is highly mobile. To ignore these principles, as some courts have done,\textsuperscript{42} and to decide the justness of any given private nuisance action solely on the "disparity of economic consequences" is to distort the basic concepts of equity.

In addition to balancing the hardships in a private nuisance action in which injunctive relief is sought, most courts will balance the equities of the various parties involved.\textsuperscript{43} When this balancing of equities is utilized, it is limited, unlike the balancing of hardships, to the conduct of the parties actually before the court. Among the elements involved in the balancing of equities is the bad faith or misconduct of each party.\textsuperscript{44} Bad faith properly involves the issue of "coming to a nuisance." The majority of courts will consider the equities involved in a case where the plaintiff "comes to a nuisance," but this factor alone will not prevent injunctive

\textsuperscript{43} There is a difference between the "balancing of equities" and the "balancing of hardships." The "balance of hardships" properly involves those aspects heretofore discussed. On the other hand, "balancing of equities" has nothing to do with injuries, but concerns misconduct, bad faith, or unclean hands. The "balancing of equities" is not a factor to be considered in the comparative injury process, but is a collateral concept that may artificially affect an otherwise appropriate injunction. \textit{Restatement of Torts} § 940, comment \(b\) (1938) gives an example where a speculator buys land, knowing it to be a dumping ground for debris from a mine, primarily in order to use the threat of an injunction against dumping to coerce purchase by the mine owner at an extortionate price. Whatever the merits of the "balancing of hardships," the injunction will be denied because of the plaintiff's misconduct. Courts have consistently confused these two concepts. \textit{E.g.}, Gunther v. E.I. Du Pont De Nemours & Co., 157 F. Supp. 25, 33 (N.D.W. Va. 1957).
\textsuperscript{44} \textit{D. DoBbs, Handbook of the Law of Remedies} § 5.7, at 359 (1973).
relief from being granted by the court.\textsuperscript{85} Evidently no West Virginia case has decided whether "coming to a nuisance" is a proper consideration in balancing the equities, but at least one case has recognized that if one does come to a nuisance, it does not prevent him from bringing legal proceedings to recover damages.\textsuperscript{86} Additionally, misleading conduct is somewhat different than "coming to a nuisance" in that the complaining party stands by silently while a nuisance is being created.\textsuperscript{87} If the plaintiff acquiesces in a nuisance, he will in most instances be estopped from asserting the nuisance.\textsuperscript{88} In such a case, injunctive relief will usually be denied\textsuperscript{89} because of laches or estoppel, but again the extent of the acquiescence must be looked at in the perspective of the entire problem.\textsuperscript{90}

Misconduct of the parties is another aspect of balancing of equities that courts must be careful not to overlook. In fact, if the misconduct is wilful or wanton, the injunction will be granted notwithstanding the outcome of the balance of hardships or harm to the defendant. The courts in these cases reason that a wrongdoer will not be entitled to the benefit of any consideration in a court of equity.\textsuperscript{91} In essence, the balancing of equities is something distinctly different from the comparative injury doctrine. The fact not to lose sight of in these cases is that there is an interaction between conflicting interests, and courts that balance both the hardships and equities have a better opportunity to reach a sound decision.

V. CONCLUSION

The comparative injury doctrine has been both praised and criticized; nonetheless it is now a definite part of the law, adhered to by the majority of jurisdictions. The exact mechanics of the application of the rule are not yet distinct, but each jurisdiction that applies the doctrine looks upon numerous factors in each ap-

\textsuperscript{85} Dolata v. Berthelet Fuel & Supply Co., 254 Wis. 194, 201, 36 N.W.2d 97, 100 (1949). \textit{See also} Brede v. Minnesota Crushed Stone Co., 143 Minn 374, 173 N.W. 805 (1919), wherein the court indicated that "no great weight should be given to the fact that a person complaining of a nuisance came to it."

\textsuperscript{86} Richards v. Ohio River R.R., 56 W. Va. 592, 593, 49 S.E. 385, 386 (1904).

\textsuperscript{87} D. Dobbs, \textit{supra} note 84, § 5.7, at 359.


\textsuperscript{89} See Brokaw v. Carson, 74 W. Va. 340, 81 S.E. 1133 (1914).

\textsuperscript{90} D. Dobbs, \textit{supra} note 84, § 5.7, at 360.

Application of the rule. The best overall statement respecting the factors involved is probably that each case must be determined upon its own particular facts. Confusion still exists regarding the "disparity of economic consequences," especially in West Virginia since the Mahoney case, but neat, fine lines have never been a characteristic of nuisance law. However, two principles in West Virginia are abundantly clear: (1) no one is entitled to injunctive relief as a matter of right; and (2) when private interest conflict with business interests, the hardships and the equities will be balanced, but the particular facts and businesses involved will dictate how the balance is to be interpreted.

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