

# NUISANCE AND THE RIGHT OF SOLAR ACCESS

ADRIAN BRADBROOK\*

Man, since the time of James Watt, has found himself in the position of a farmer who has forgotten how to grow things, but merely goes to a cave and unearths tins of food put up by someone else long ago. If nature had not left us a legacy of coal and oil, we would today be drawing energy full-time from the sun.

It may well be a blessing that man is at last being forced to make use of solar energy directly. As we stand on the threshold of the age of solar energy, a new age of plenty made possible by this most "noble" form of energy, how fortunate it is that "none are hid from his heat".<sup>1</sup>

## Introduction

A new phenomenon in Australia since the mid-1970's has been the rapid growth of a solar energy industry. This industry, which was first established in Western Australia and has since spread to all the other mainland States, now accounts for approximately 1,000 equivalent full-time jobs and has achieved a remarkable degree of market penetration in a very short period of time.<sup>2</sup> In 1973-74 the total Australian production of flat-plate solar water-heaters was only 8,800 square metres (approximately 2,200 units); the total for 1981-82 has been estimated at 205,500 square metres (approximately 51,000 units). The annual growth-rate in production has varied between 25 per cent and 79 per cent.<sup>3</sup> As at June 1981 at least 125,000 dwellings in Australia had solar water-heating appliances installed, the vast majority being in Western Australia, New South Wales and Queensland. In addition, approximately 50,000 square metres of solar collectors had been installed in institutional and commercial buildings.<sup>4</sup>

If the solar industry is to continue to flourish, householders and industries that have installed or are interested in installing solar appliances

\* Reader in Law, University of Melbourne

1. D.S. Halacy *The Coming Age of Solar Energy*, (1973) 219

2. J. Andrews *Solar Jobs in Victoria. The Economic Impact of the Solar Industry* (1982) 27, quotes the figure of 935 equivalent full-time jobs in 1980. This figure includes only direct jobs in the industry and excludes jobs in the supply industries (e.g. metal products).

3. *Id.* at 8

4. *Id.* at 15

must be assured of a legal means of protecting the access of the direct rays of the sun to the solar collector-panels, as without such access all solar energy systems are ineffective. When the sun is directly overhead, no problems of shading of solar collector-panels arise. However, the sun is overhead only at midday in tropical latitudes at certain times of the year. In latitudes of the Tropic of Carriacorn ( $23^{\circ} 37'S$ ), which includes the vast bulk of the populated areas of Australia, the sun's rays always reach the earth at an angle from the vertical. The consequence of this is that the sun's rays have to pass over the airspace of one or more neighbouring properties before reaching the solar collector-panels and may be intercepted by buildings or vegetation situated on those properties.

It is here that the law has a role to play. It is the duty of the law to keep pace with changing times and scientific developments. In the solar context, this means that the right of access to solar collector-panels of the direct rays of the sun (hereafter referred to as the "right of solar access") must be protected by law over neighbouring land. If the law does not provide a legal right of solar access, many potential solar users will be deterred from making the capital investment necessary for the installation of solar appliances.

In the absence of legislation creating a new proprietary interest in land in respect of solar access<sup>5</sup>, a legal right of solar access can be established only by modifying existing legal concepts and remedies. Under the present law it would appear to be possible in individual cases for solar users to safeguard their right of solar access by negotiating with their neighbours for an express easement of sunlight<sup>6</sup> to the collector-panels or for a restrictive covenant<sup>7</sup> preventing the neighbours from developing their properties in such a way as to block the passage over collector-panels. Where this occurs, the solar user will be sufficiently protected. However, such easements and covenants are as yet unknown in this country. Even if they later become widespread, easements and covenants will

5. For legislation creating a solar proprietary right, see e.g. the New Mexico Solar Rights Act, N M. Laws of 1977, c. 169. This legislation is discussed in Hillhouse "New Mexico's Solar Rights Act: A Cloud Over Solar Rights" (1979) 1 *Solar Law Reporter* 751, Kerr "New Mexico's Solar Rights Act: The Meaning of the Statute" (1979) 1 *Solar Law Reporter* 737; Note "Access to Sunlight: New Mexico's Solar Rights Act" (1979) 19 *Natural Resources J* 957; Warren "Common Problems in Drafting State Solar Legislation" (1979) 1 *Solar Law Reporter* 157. See also Spivak *Land-Use Barriers and Incentives to the Use of Solar Energy*, (1979) 23ff
6. See Preece "Solar Energy and the Law" (1981) 6 *Queensland Lawyer* 83, 90ff; Mr. Justice Zelling "Legal Aspects of Solar Energy" in *Solar Realities in Western Australia in the 1980's*, Proceedings of a Conference held at the University of Western Australia, Nov. 1979. For a discussion of express easements of solar access in the United States, see Gergacz "Legal Aspects of Solar Energy: Easements for Sunlight and Individual Solar Energy Use" (1980) 18 *American Business L.J.* 414, 421ff; Spivak supra n.5 (1979) 12 ff; Comment "Access Rights for the Solar User: In Search of the Best Statutory Approach" (1981) 16 *Land and Water L.Rev.* 501, 505ff
7. For a discussion of the role of restrictive covenants in furthering the application of solar appliances, see S.F. Kraemer *Solar Law*, (1978) ch. 5; G.B. Hayes *Solar Access Law. Protecting Access to Sunlight for Solar Energy Systems* (1979) 111; Spivak, supra n.6 6ff, 29; Eisenstadt "Access to Solar Energy: The Problem and its Current Status" (1982) 22 *Natural Resources J* 21, 25-28

not provide a sufficient remedy for solar users as they are both dependent on the successful outcome of negotiations with the neighbours. At present a neighbour can arbitrarily refuse to grant the necessary easement or covenant or can grant the right but only on the payment of an exorbitant price. The result in both cases will be that the potential solar user will be deterred from installing the solar appliance, the growth of the solar industry will be retarded, and the public interest in reducing reliance on fossil fuels by the use of renewable energy resources will be thwarted.

This paper will consider the present legal right of a person who installs a solar appliance without the safeguards provided by an easement or covenant to prevent his neighbours from developing their properties in such a way as to shade his solar collector-panels. The only possible remedy in this situation is the common law action for nuisance which may result in the remedy of an injunction and/or damages. Other tortious remedies are not sufficiently broad to assist the solar user in protecting his right of solar access.<sup>8</sup>

At common law, nuisance is divided into two distinct types, public nuisance and private nuisance. This article will examine each of these legal doctrines separately. In each case the common law position will be examined. Based on this examination, the article will then consider the possibility of the enactment of various alternative types of statutory laws which would modify and codify the doctrines of public nuisance and declare either or both of them to be applicable in the solar context.

### Public Nuisance<sup>9</sup>

Public nuisance has been defined by Luntz, Hambly and Hayes as:

8. The remedy in *Beaudesert Shire Council v. Smith* (1966) 120 C.L.R. 145 of damages and/or an injunction for intentional acts causing economic loss has no application here, as an essential prerequisite for liability is that the defendant did some positive act forbidden by law (see 152, *per* Taylor, Menzies and Owen JJ.). The situation under discussion also falls outside the scope of the tort of negligence, as defined by Baron Alderson in *Blyth v. Birmingham Waterworks Co.* (1856) 11 Exch. 781, 784; 156 E.R. 1047, 1049: "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do". In the United States, a recent report to the Federal Energy Administration has suggested that the common law of trespass to land may provide a remedy for the blocking of solar access: see M. Johnson and T.F. Tiedemann *Solar Energy Commercialization at the State Level The Florida Solar Energy Water Heater Program* (1977) 58. However, under current Anglo-Australian law trespass appears to be entirely irrelevant. Trespass to land has been recently defined as "The voluntary act of entering or remaining upon or directly causing an object or other matter to come into contact with land in the possession of the plaintiff" (H. Luntz, A.D. Hambly and R. Hayes, *Torts Cases and Commentary*, (1980) 826). It thus appears that an invasion of the landowner's possession of his property is necessary for an action for trespass to land to lie. No invasion is committed by the blocking of sunlight
9. For a detailed discussion of the law of public nuisance, see Luntz, Hambly and Hayes, *supra* n.8 ch. 21; P.F.P. Higgins *Elements of Torts in Australia*, (1970) ch. 17; *Winfield and Jolowicz on Tort* 11th ed. (1979) 353ff; *Salmond and Heuston on Torts* 18th ed. (1981) 47ff; J.G. Fleming *The Law of Torts*, 5th ed. (1977) 393ff; and R.A. Buckley, *The Law of Nuisance* (1981) ch. 4

Some act or omission likely to affect the comfort or safety of people generally which is such as to amount to a criminal offence punishable at common law or by statute and which causes greater damage or inconvenience to the plaintiff than to the generality of the public.<sup>10</sup>

As this definition indicates, unlike private nuisance, which is only a tort, public nuisance is a crime. Despite the fact that the breach of the duty to the public is a criminal offence, in certain circumstances an individual can bring a civil action against the wrongdoer. For this to occur the individual must be able to prove that he has suffered "particular" or "special" damage in excess of that likely to be suffered by the general public as a result of the defendant's activities.<sup>11</sup> The reason for this requirement is the need to avoid multiplicity of actions.

In order for a civil action for public nuisance to be successful, the plaintiff, in addition to establishing special damage, must also establish that the defendant's activities have affected a class of Her Majesty's subjects who come within the sphere or neighbourhood of their operation.<sup>12</sup> This is a question of fact to be determined on the facts of each case. According to Lord Denning in *A.-G. v. P. Y.A. Quarries Ltd*, the test applied to determine this is whether the nuisance is:

a nuisance which is so widespread in its range and so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.<sup>13</sup>

Once this element is established, the onus lies on the defendant to negate the nuisance by showing justification or excuse (for example, that his action constituted ordinary use of the land and that he was acting reasonably).<sup>14</sup> This again is determined on the facts of each case.

An essential hallmark of public nuisance is that it is not confined to interference with a person's use or enjoyment of land. For this reason public nuisance has a much wider application than private nuisance. In-

10. Luntz, Hambly and Hayes supra n.8 at 826. Cf. the definitions of "public nuisance" contained in the various State criminal codes: Criminal Code Act 1913-1982 (W.A.), s.207; Criminal Code Act 1899-1982 (Qld.), s.230; Criminal Code Act 1924 (Tas.), s.140

11. See e.g. *Benjamin v. Storr* (1874) L.R. 9 C.P. 400; *Harper v. G N. Haden & Sons* [1933] Ch. 298; *Walsh v. Ervin* [1952] V.L.R. 361

12. *Winfield and Jolowicz* supra n.9 at 353

13. [1957] 2 Q.B. 169, 191

14. *Southport Corporation v. Esso Petroleum Co. Ltd* [1954] 2 Q.B. 182, 197, per Lord Denning

15. See e.g. *Lyons, Sons & Co. v. Gulliver* [1914] 1 Ch. 631. Cf. *Silservice Pty Ltd v. Supreme Bread Pty Ltd* (1950) 50 S.R. (N.S.W.) 127

16. See e.g. *Castle v. St. Augustine's Links Ltd.* (1922) 38 T.L.R. 615

terests which have been protected by public nuisance where the plaintiff has suffered special damage include, for example, economic loss<sup>15</sup> and infringements of personal security.<sup>16</sup>

In the solar context, the requirement that the plaintiff prove that he has suffered "particular" or "special" damage in excess of that likely to be suffered by the general public could be overcome if the solar user proves that the shading caused by buildings or vegetation on his neighbour's land caused him direct economic loss by virtue of his need to rely on alternative non-renewable energy supplies. The shading of his solar energy system would thus cause the solar user to suffer "particular" damage not experienced by the public at large.

Despite this factor, there is a major shortcoming associated with the public nature of the remedy which will detract from the possible reliance by solar users on public nuisance as a cause of action. It will be very difficult, if not impossible, for the solar user to satisfy the requirement that the defendant's activities must have affected a class of Her Majesty's subjects who come within the sphere or neighbourhood of their operation. This may occur where a very large multi-storey building substantially shades the land of numerous nearby landowners at certain seasons during certain times of the day, but would probably not occur in the usual situation where a large tree or a two-storey house shades the immediately adjoining land. While a decision must be made by the courts on the facts of each case, it is extremely doubtful whether the shading of one, two or even three solar collectors by a large building or tree would constitute an injury sufficiently widespread as to be an injury to the public at large.<sup>17</sup> Similarly it is doubtful whether the Australian courts would declare the blocking of access of direct sunlight to be of "public" concern even in cases where the energy collected by a solar collector system is shared by a number of persons owning separate blocks of land.<sup>18</sup> On this latter point, the Australian courts have not yet followed the lead of the courts in a number of States of the United States in recognizing a public nuisance if there is interference with a considerable number of persons regardless of whether a public "right" is involved.<sup>19</sup>

It might be argued that any amount of interference with the collection of solar energy caused by shading increases the present reliance on fossil fuels, affects the energy supplies of the community and is thus of public concern. This argument may become of increasing force in the years to come, especially when it is linked with the impending crisis in the shor-

17. This conclusion is reinforced by the decision in *R. v. Lloyd* (1802) 4 Esp. 200; 170 E.R. 691. Cf. *R. v. Webb* (1848) 2 Car. & K. 933; 175 E.R. 391; and *R. v. Madden* [1975] 1 W.L.R. 1379

18. See generally G.B. Hayes *supra* n.7 ch. 8

19. See e.g. *City of Phoenix v. Johnson* (1938) 51 Ariz. 115, 75 P. 2d 30; *People v. Brooklyn & Queens Transit Corp.* (1939) 258 App.Div. 753, 15 N.Y.S. 2d 295; *affd.* (1940) 283 N.Y. 484, 28 N.E. 2d 925; *Higgins v. Connecticut Light & Power Co.* (1943) 129 Conn. 606, 30 A. 2d 388.

tage of non-renewable energy resources which is predicted to affect Australia in the late 1980's. Without any significant relaxation by the courts of the requirements for an action for public nuisance, however, this argument will in all probability be regarded by the courts as irrelevant. It should be noted that the impact on the public interest of the blocking of solar access of individual property owners is far more indirect than the impact on the public interest in cases in the past where the action for public nuisance has been successful. Although situations where oil has been discharged from a ship into harbour waters<sup>20</sup> and a statutory vehicle has been left on the highway for a long period with no lights showing<sup>21</sup> have been held to ground actions for public nuisance where private individuals have suffered loss as a consequence, these cases are easily distinguishable from the shading of solar collector-panels.

In conclusion, on the present authorities the action for public nuisance must be discarded as an effective possible cause of action for the enforcement of the right of solar access.

## Private Nuisance <sup>22</sup>

### (a) *Elements of the Tort*

Private nuisance has been described as follows:

where private land or that which is upon it is actually damaged or where the use or enjoyment of it is disturbed, and where that damage or interference results from some kind of "state of affairs" which has come into existence outside the land affected, then it is highly likely that the person in possession will obtain relief in an action of private nuisance; unless (a) there is something special in the circumstances or nature of the interference, e.g. the locality in which an intangible interference with enjoyment has occurred, or the nature of the interest affected (as where the plaintiff is deprived only of a pleasant view) or (b) the defendant's relationship with the "state of affairs" is insufficiently close to warrant imposition of liability upon him (as where, for example, the "state of affairs" was created by someone over whom he had neither authority nor control and where there was nothing he could reasonably have done to contain it).<sup>23</sup>

20. *Overseas Tankship (U.K.) Ltd v. The Miller Steamship Co. Pty.* [1967] A.C. 617

21. *Ware v. Garston Haulage Co. Ltd.* [1944] 1 K.B. 30. Cf. *Maitland v. Raisbeck* [1944] 1 K.B. 689

22. For a detailed discussion of the law of private nuisance, see Luntz, Hambly and Hayes *supra* n.8, ch. 19, Higgins, *supra* n.9 ch. 8; Winfield and Jolowicz *supra* n.9 at 355ff; Salmond and Heuston *supra* n.9 at 48ff; Fleming *supra* n.9 ch. 20, and Buckley *supra* n.9 *passim*

23. Luntz, Hambly and Hayes *supra* n.8 at 895. Private Nuisance has also been judicially described as "unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it": see *Gartner v. Kidman* (1961) 108 C.L.R. 12, 22, *per* Windeyer J.; *Read v. J. Lyons & Co Ltd* [1945] K.B. 216, 236, *per* Scott L.J.; *Howard v. Walker* [1947] 2 All E.R. 197, 199, *per* Lord Goddard C.J.; and *Newcastle-under-Lyme Corporation v. Wolstanton Ltd* [1947] Ch. 92, 107, *per* Evershed J. See also the definition in Higgins *supra* n.9 at 156

In the solar context, the major obstacle for the solar user to overcome before he can succeed in an action for nuisance is to prove that the blocking of solar access from the solar collector-panels constitutes an interference with the reasonable use and enjoyment of the land. As the blocking of solar access is an "intangible interference" with the land it is also necessary to prove that the interference is "substantial".<sup>24</sup>

*(b) Is the Right of Solar Access a Protected Interest?*

It is not every advantage enjoyed by landowners which is protected by the law of nuisance. Some advantages are not protected even though interference with them may cause an economic loss to the landowner. Three well-recognized illustrations of unprotected advantages are the enjoyment of a view<sup>25</sup>, freedom from observation<sup>26</sup>, and the enjoyment of water percolating through undefined channels.<sup>27</sup> The issue arises whether the blocking of solar access will be regarded as an unprotected interest.

*(i) Distinguishing the Right to Light*

In order to determine this issue, in the absence of direct authority the starting point must be an examination of the nature of the right claimed. The basic point which has yet to be resolved is the question of whether the claimed right of solar access is an extension of the traditional right to light or whether it is a distinct right of its own.<sup>28</sup> As will be shown, its classification may have a decisive bearing on the question whether the right of solar access will be protected by the law of nuisance.

It is in the interest of the solar user to claim that the right of solar access is a separate right from the traditional right to light, as the right to light is protected only when it constitutes an easement. At common law this used to arise most frequently under the doctrine of ancient lights, which recognized an easement of light based on prescription after twenty years' continuous and interrupted user.<sup>29</sup> Prescriptive easements of light have been abolished throughout Australia by virtue of separate enactments of the various State legislatures<sup>30</sup>, but the recognition of a right

24. *Munro v. Southern Dairies Ltd.* [1955] V.L.R. 332; *Halsey v. Esso Petroleum Co Ltd* [1961] 2 All E.R. 145. See also *Luntz, Hambly and Hayes supra n.8* at 900

25. *Shepperd v. Municipality of Ryde* (1952) 85 C.L.R. 1 held that the enjoyment of a view may be protected by contract.

26. *Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor* (1937) 58 C.L.R. 479

27. *Chasemore v. Richards* (1859) 7 H.L. Cas. 349; 11 E.R. 140.

28. This issue is discussed in detail in Bradbrook, "The Development of an Easement of Solar Access" to be published in Vol. 4, No. 3, *U N S. W. L. J.*

29. See *Gale on Easements* 14th ed. (1972) chs. 4 and 7; A.J. Bradbrook and M.A. Neave *Easements and Restrictive Covenants in Australia* (1981) chs. 5 and 8

30. Property Law Act 1958 (Vic.), s.195; Conveyancing Act 1919 (N.S.W.), s.179; Law of Property Act 1936-1980 (S.A.), s.22; Property Law Act 1974-1978 (Qld.), s.178; Prescription Act 1934 (Tas.), s.9; Property Law Act 1969-1979 (W.A.), s.121

to light as an easement remains unaltered in other respects. There is case law supporting the creation of an easement of light by express or implied grant or reservation<sup>31</sup> Implicit in all these authorities is the fact that, in the absence of an easement of light, the right to light is not protected by the law of nuisance.<sup>32</sup>

If it can be shown that the right of solar access is a separate right from the right to light, the earlier authorities which require an easement to exist before the right will be enforceable by the remedy of nuisance may be distinguished. Is the distinction between the traditional right to light and the right of solar access valid? The major argument in favour of the distinction is the case law authority to the effect that nuisance will not lie for interference with the traditional right to light as long as sufficient light remains for the purpose of illumination.<sup>33</sup> If the traditional right to light has a fixed standard as to quantum of light and is linked to illumination, then it should be simple to distinguish the light required for solar access purposes. The distinction can be made on scientific grounds, as the sunlight needed for illumination differs both in nature and degree from that necessary for the collection of energy. While visible light covers only a narrow band of the spectrum in wavelengths from  $4 \times 10^{-7}$  metres to  $8 \times 10^{-7}$  metres, sunlight usable for solar energy purposes ranges in wavelengths from  $2 \times 10^{-7}$  metres to  $2 \times 10^{-6}$  metres.<sup>34</sup>

More recent authorities, however, have thrown doubt on whether the standard as to quantum of light under the traditional right to light is a fixed one. For example, in *Lazarus v. Artistic Photographic Co.*,<sup>35</sup> Kekewich J. extended the right to light to photography, which requires extra light from illumination to effect a chemical process. In addition in *Ough v King*<sup>36</sup> the Court of Appeal held that there is no fixed standard of lighting which can be used as a yardstick by which to assess whether the diminution of the right to light is actionable. Lord Denning stated:

I think the notions of mankind on the subject of light have changed and are changing. Possibly it is connected with improvement in electric light; because the standard of artificial light has gone up the stan-

31. *Commonwealth v. Register of Titles for Victoria* (1918) 24 C.L.R. 348; *Birmingham, Dudley and District Banking Co. v. Ross* (1888) 38 Ch.D. 295, *Stevens v National Mutual Life Association of Australasia Ltd* (1913) 32 N.Z.L.R. 1140 It appears, however, that an easement of light cannot be claimed of necessity (*Ray v. Hazeldine* [1904] 2 Ch. 17, 20, *per* Kekewich J.).

32. This conclusion follows inexorably as a matter of logic. An easement must be essential for the protection of a right to light, or else why would anyone bother to acquire such a right as an easement.

33. *Colls v. Home and Colonial Stores Ltd* [1904] A.C. 179; *City of London Brewery Co. v. Tennant* (1873) L.R. 9 Ch. App. 212; *Charles Semon & Co. v. Bradford Corporation* [1922] 2 Ch. 737; *Hortons' Estate Ltd v. James Beattie Ltd* [1927] 1 Ch. 75

34. See Eisenstadt and Utton "Solar Rights and their Effect on Solar Heating and Cooling" (1976) 16 *Natural Resources J.* 363, 374

35. [1897] 2 Ch. 214

36. [1967] 3 All E.R. 859



dard of natural lighting has gone up too. I do not think that ordinary people would accept now for a living room and office on the outskirts of a town like Gravesend, the daylight standard which was accepted twelve years ago for an office in the City of London.<sup>37</sup>

These cases suggesting that the scope of the traditional right to light is broader than was once thought make it more difficult to distinguish the right of solar access.

The most recent and significant case on this issue is *Allen v. Greenwood*.<sup>38</sup> In this case the plaintiffs and the defendants were neighbours. The plaintiffs had constructed a greenhouse alongside the boundary over twenty years ago. The defendants later parked a caravan alongside the greenhouse on their side of the boundary and erected a fence only six inches from the greenhouse. The combined effect of the fence and caravan was to deprive half of the greenhouse of direct sunlight and to make it unsuitable for the growing of tomatoes and pot plants. The plaintiffs sought by injunction the removal of the fence and the caravan, arguing that they had a prescriptive right to the amount of light required to enable the greenhouse to be used for the cultivation of plants and vegetables. To achieve this purpose the direct rays of the sun were required. At first instance, Blackett-Ord, V.-C. dismissed the action on the ground that a greenhouse requires a special amount of light and that the amount of light reaching the greenhouse was still sufficient to enable it to be used for the ordinary purposes of a room in a house. On appeal, however, this decision was reversed by the Court of Appeal on the basis that the plaintiffs had acquired by prescription the right to that degree of light, including the direct sun's rays necessary for the growth of plants in the greenhouse. The court held that the correct test as to the quantum of light which must remain in order to avoid liability for nuisance differs according to the nature of the building. If the building is a dwelling-house, the measure of light must be sufficient to maintain reasonable standards of comfort as a dwelling-house. Similarly, if the building is a greenhouse the measure must be related to the reasonably satisfactory use of the building as a greenhouse. Buckley L.J. continued:

It is true that the satisfactory use of a greenhouse may require a freer access of light than a room in a dwelling-house, just as the comfortable use of a dwelling-house may require more light than the satisfactory use of a warehouse but this in my view is of no significance. It would in my judgment, and with deference to those who have sug-

37. *Id.* at 861

38. [1980] Ch. 119

gested otherwise, be ridiculous to say that a greenhouse had enough light because a man could read a newspaper there with reasonable comfort.<sup>39</sup>

In reaching this conclusion the Court of Appeal did not disagree with the dictum of Lord Lindley in *Colls v. Home and Colonial Stores Ltd* that the test is whether sufficient light is left “according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house” but disagreed with the meaning of the test. Whereas earlier cases had held that there is only one standard of an ordinary amount of light which does not vary with the type of building, Goff L.J. stated:

I confess for my own part that I do not wholly understand the conception of an ordinary amount of light in the abstract. It seems that what is ordinary must depend on the nature of the building and to what it is ordinarily adapted. If, therefore, the building be, as it is in this case, a greenhouse, the normal use of which requires a high degree of light, then it seems to me that that degree is ordinary light.<sup>40</sup>

In the solar context based on this dictum it could be argued that as the normal use of a solar collector requires a very high degree of light, that degree is ordinary light. This again suggests that the right of solar access would be regarded as falling within the scope of and traditional right to light. This conclusion is reinforced by the decision in *Allen v. Greenwood* that under the traditional right to light the owner of the dominant tenement is entitled to receive the direct rays of the sun where he can prove that this is necessary for the use of the building on the dominant land.

Despite these factors, however, there are passages in two of the judgments in *Allen v. Greenwood* which strongly suggest that the court did not intend its decisions to apply in the solar energy context. In two separate passages there are dicta to the effect that a distinction must be drawn between the heat and other properties of the sun and the light which emanates from it. Goff L.J. with whom Orr L.J. agreed, stated:

on other facts, particularly where one has solar heating . . . it may be possible and right to separate the heat, or some other property

39. Id. at 135. See also 134, *per* Goff L.J.

40. Id. at 131

of the sun, from its light and in such a case a different result might be reached.<sup>41</sup>

Goff L.J. referred to this issue again in another part of his judgment when dealing with a hypothetical argument made by counsel for the defendants that an owner of a swimming-pool, part of which is fortuitously warmed by sunlight coming through a window, could have no cause of action based on the easement of light if the sunlight was blocked and the benefit of the heat or radiant properties of the sun were lost. Goff L.J. agreed that in these circumstances the owners of the swimming-pool would have no cause of action for the removal of the chance warmth, provided that fully adequate light for the enjoyment of the swimming-pool remained.<sup>42</sup>

On the basis of these dicta, it must be considered highly doubtful whether the easement of light is sufficiently broad to include the right of solar access for solar energy purposes. These doubts are strengthened by cases deciding that indirect light or light entering through skylights is relevant in determining whether an easement of light has been obstructed to such an extent as to amount to an actionable nuisance<sup>43</sup>. These cases are further indications of the courts' intention to disregard the heating properties of the sun in assessing the scope of the easement of light.

It is thus submitted that it is not necessary for the solar user to prove that he has the benefit of an easement of solar access before he can sue in nuisance. In other words, the courts will examine the issue of whether the right of solar access should be regarded as a protected or unprotected interest in land quite separately from considerations relating to the traditional right to light.

### *(ii) Possible Analogies*

If this conclusion is correct, in the absence of any direct authorities the courts will employ analogies to determine whether the right of solar access should be regarded as a protected interest. Perhaps the closest analogy would be with the traditional right to light, which may be applied by analogy even if it is held to have no direct application in the solar context by virtue of the fact that the right to light and the right of solar access are quite distinct. Many other analogies may be drawn however.

The right of solar access may be likened to a claim for privacy. In this

41. *Id.* at 134, *per* Goff, L.J.; 134, *per* Orr, L.J.

42. *Id.* at 133

43. *Tisdall v. McArthur & Co. (Steel and Metal) Ltd* [1951] I.R. 228; *Smith v. Evangelization Society (Inc.) Trust* [1933] Ch. 515. The latter case is discussed in (1933) 49 *L.Q.R.* 476

event, on the basis of *Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor*<sup>44</sup> the right will be regarded as unprotected. The relevant facts of this case were that the defendants broadcast on a radio station without the plaintiff's permission a description of races taking place on the plaintiff's racecourse. The description was made by an observer situated on a high platform erected on adjoining land. The plaintiff suffered financial loss as the attendance at the race-meetings decreased and sought an injunction to restrain further broadcasting of races. The plaintiff based its case on nuisance, claiming that the observation of the races from neighbouring land and the broadcasting constituted an interference with its proprietary right in the spectacle conducted on the land. The High Court held by a 3-2 majority (Rich and Evatt JJ. dissenting) that such a proprietary right did not exist at law. Latham C.J. commented that however desirable some limitation upon invasions of privacy might be, no authority exists which shows that any general right of privacy exists.<sup>45</sup>

The right of solar access may also be likened to a claim for an uninterrupted view. Such an analogy would be similarly unhelpful for the solar user as English and Australian courts have consistently held that a view is an unprotected interest.<sup>46</sup>

A further analogy to the right of solar access might be the claimed right to receive television and radio reception without interference.<sup>47</sup> This analogy may be regarded as particularly close as both solar energy and radio and television transmissions are forms of electro-magnetic radiation.

In the English case of *Bridlington Relay Limited v. Yorkshire Electricity Board*<sup>48</sup> the plaintiff company unsuccessfully sought a *quia timet* injunction to prevent the completion of an overhead power line which, it claimed, would interfere with the reception of its radio and television transmissions. The plaintiff provided a relay system of sound and television broadcasts and had erected a mast for that purpose. The court decided the case on certain aspects of the law relating to *quia timet* injunctions but obiter went on to consider whether the plaintiff could successfully maintain an action in nuisance if the interference at the plaintiff's mast were in-

44 (1937) 58 C L R 479

45 *Id.* at 496

46 Aldred's case (1610) 9 Co. Rep 57b, 77 E R 816, *Palmer v Board of Land and Works* (1875) 1 V L R (E) 80, *Harris v De Pinna* (1885) 33 Ch D 238, *Chastey v Ackland* (1895) 11 T L R. 460 Cf *Wentworth v Woollahra Municipal Council* (1982) 56 A L J R 745 Cf also *Freeman v Shoalhaven Shire Council* [1980] 2 N S W L R 826 in which Kearney J awarded damages to the plaintiff whose commanding view of the ocean had been blocked based on "loss of amenity" in addition to damages for reduction in the value of the land

47 See the discussion of this possible analogy in Comment, "The Legislative Response to Solar Access: A Lesson for Michigan?" (1979) 2 *Detroit College of Law Rev* 261, 264ff, Preece supra n 6 at 86-87, and Myers "The Common Law of Solar Access: An Insufficient Protection for Users of Solar Energy" (1978) 6 *Real Estate L J* 320, 330-331

eradicable. The plaintiff contended that television is an ordinary use of land and that causing electro-magnetic radiation which results in the prevention or interference with the satisfactory reception of television transmissions is something which unwarrantably interferes with the legitimate and reasonable enjoyment of neighbouring property by its owners. Buckley J. rejected this argument on the basis that the ability to receive television free from occasional, albeit recurrent and severe, electrical interference is not so important a part of an ordinary householder's enjoyment of his property that such interference should be regarded as a legal nuisance.<sup>49</sup> His Honour added that the plaintiff's use of its land amounted to a sensitive or unusual use of the land and was therefore unprotected at law by reason of the principle in *Robinson v. Kilvert*.<sup>50</sup>

A similar result was reached in the United States in the case of *People ex rel. Hoogasian v. Sears, Roebuck and Co.*<sup>51</sup> In this case an injunction was sought from the Supreme Court of Illinois against the continued construction of a multi-storey building which would interfere with the television reception of property in the surrounding area. The injunction was refused, the court determining that the poor reception was caused not by the height of the defendant's building but rather by the location of the television station. The court reiterated the general rule that there is no right to light passing over another property and then extended that rule to include television signals.

### (iii) Nuisance Causing Material Injury to Property

The application of any of these possible analogies does not bode well for the solar user. However, possible assistance for the solar user comes from the line of cases on the application of the law of nuisance which draw a distinction between alleged nuisance which produces material injury to the property and other types of alleged nuisance. The significance of this distinction was explained by Lord Westbury, L.C. in *St. Helen's Smelting Co. v. Tipping* as follows:

. . . in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely the per-

48. [1965] 1 Ch. 436. This decision was disapproved in the Canadian case of *Nor-Video Services Ltd v Ontario Hydro* (1978) 84 D.L.R. (3d) 221 (Ont.H.C.). In this case, Robbins J. concluded (at 231) that television is now an important incident of the enjoyment of property.

49. [1965] 1 Ch. 436, 447

50. (1889) 41 Ch.D. 88. See *infra* n. 60 and accompanying text

51. (1972) 52 Ill. 2d 301, 287 N.E. 2d 677

sonal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the things complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.<sup>52</sup>

This dictum has been applied in numerous cases. A useful illustration is *Halsey v. Esso Petroleum Co. Ltd.*,<sup>53</sup> where the plaintiff, a landowner adjoining an oil depot, claimed damages and an injunction in respect of alleged physical injury and discomfort caused by foul odours, excessive noise and oily smuts and drops emanating from the depot. Veale J. held that the claim in respect of a smell and noise fell into the second category of nuisance in Lord Westbury's analysis and required closer judicial scrutiny than the claim in respect of the actual deposits of oily smuts and drops, which caused actual injury to the property itself.

The distinction between nuisances causing "material injury to the property" and those causing "sensible personal discomfort" appears to reflect the importance granted by the courts to proprietary rights and the fact that that it is easier for the courts to assess property damage than to compensate the plaintiff in respect of personal discomfort.<sup>54</sup> A distinction of

52. (1865) 11 H.L. Cas. 642, 650; 11 E.R. 1483, 1486. See also *Kraemers v. A-G (Tas.)* [1966] Tas. S.R. 113.

53 [1961] 2 All E.R. 145

54. See *Markesinis and Tettenborn, "Cricket, Power Boat Racing and Nuisance"* (1981) 131 *New L.J.* 108.

this nature is not drawn in civil law systems and its merit has recently been questioned.<sup>55</sup> Despite this fact, however, Lord Westbury's dictum still represents good law.

On Lord Westbury's analysis, it is submitted that the blocking of solar access should be regarded as a case of material injury to the property rather than a case of sensible personal discomfort. If this conclusion is correct, then the courts will be more likely to treat the right of solar access as a protected interest. It must be admitted, however, that the issue is contentious. The exact meaning of "material injury to property" was not explained by Lord Westbury and has not been considered by any subsequent court. At least three possible interpretations of "material injury to property" can be advanced. The phrase could be construed, first, as meaning any activity done on neighbouring land which reduces the value of the plaintiff's land;<sup>56</sup> secondly, as any activity done on neighbouring land which has physical consequences on the plaintiff's land and which reduces the value of that land; or thirdly, the phrase could be limited to injury caused by actual physical deposits on the plaintiff's land.

The first interpretation would probably be rejected as too wide, since any form of nuisance (for example, by smell or noise) would satisfy a test of this nature. The same objection could not be made to the second (the broad) or the third (the narrow) possible interpretations, and the effective choice is between these two alternatives. The blocking of solar access would fall within the broad interpretation in that the solar energy appliance, once installed, forms part of the real estate by the doctrine of fixtures and would normally enhance the value of the property; the blocking of solar access would have physical consequences on the plaintiff's land and would undoubtedly reduce the value of the property. On the other hand, the blocking of solar access would not fall within the narrow construction of "material injury to property" as the obstruction of sunlight does not cause any actual deposits on the plaintiff's land. From the standpoint of the public interest in furthering the application of solar energy technology, it is to be hoped that the broad construction prevails.

(c) *Sensitive or Unusual Use of the Land*

As already stated, if the right of solar access is regarded, like the right

55. *Id.*

56. There is still some doubt as to whether a cause of action will lie in private nuisance for economic loss, but the better view appears to be that it does. See *Dunton v. Dover District Council* (1977) 76 L.G.R. 87, 93, *per* Griffiths J., *British Celanese Ltd v. A.H. Hunt (Capacitors) Ltd* [1969] 1 W.L.R. 959, 969, *per* Lawton J., and the discussion in *Buckley* *supra* n 9 at 108-109. Damages for economic loss can definitely be claimed in an action for public nuisance: see e.g. *Fritz v. Hobson* (1880) 14 Ch.D.542; *Harper v. G.N. Haden & Sons* [1933] Ch. 298; *Smith v. Warringah Shire Council* [1962] N.S.W.R. 944.

to light, as an unprotected interest, the remedy of nuisance will lie only when the right is created as an easement. Even if the right of solar access overcomes this threshold difficulty and is regarded as a protected interest, nuisance will not necessarily lie for a substantial breach of the right. The reason for this is that the solar user who sues his neighbour in nuisance for blocking the direct rays of the sun may be met by the defence that he is making an especially sensitive or unusual use of the land. It is necessary to examine in detail the nature of this defence and its relevance in the solar context.<sup>57</sup>

There appear to be two relevant propositions of law governing sensitive or unusual use of land. The first proposition has been stated as follows:

If, as a result of the defendant's actions or omissions, an interference with the plaintiff's land has occurred — in the sense that e.g. noise, heat or vibrations are penetrating the plaintiff's boundaries — but if the damage flowing from this penetration is caused solely because of the unusual sensitivity of the plaintiff's property or the uses to which he has put it, then it seems that the "default of the plaintiff" will be regarded as a complete excuse.<sup>58</sup>

The second proposition acts as an exception to this proposition:

If some damage, however minor, would have occurred as a result of the interference to any normal or usual property or operation, the effect of the plaintiff's sensitive user being merely to increase the damage which he sustains in his particular circumstances, then the defendant will be liable for the full extent of the damage.<sup>59</sup>

The major authority on this area of law is *Robinson v. Kilvert*.<sup>60</sup> In this case, the landlord of commercial premises let the ground floor to the plaintiff tenant and retained possession of the cellar. At the time of the signing of the lease both parties understood that the tenant would use the premises as a warehouse for paper and twine. Subsequently the landlord commenced business as a manufacturer of paper boxes. This manufacturing process required warm and dry air. The use by the landlord of the boiler in the cellar caused the floorboards of the plaintiff's warehouse to heat up and resulted in his stock of brown paper drying out and becom-

57. See generally Winfield and Jolowicz *supra* n.9 at 366ff; Salmond and Heuston *supra* n.9 at 52ff; Buckley *supra* n.9 at 12ff.

58. Luntz, Hambly and Hayes *supra* n.8 at 933-934

59. *Id.* at 934

60. (1889) 41 Ch.D. 88. See also *Eastern and South African Telegraph Co. v. Cape Town Tramways Cos. Ltd* [1902] A.C. 381; *Grandel v. Mason* [1953] 3 D.L.R. 65, *Amphitheatres v. Portland Meadows* (1948) 198 P. 2d 847; *Whyce v. Urry* [1955] C.L.Y. 1939



ing commercially worthless. The plaintiff sued for damages based on nuisance. Both at first instance and in the Court of Appeal it was held that, although the plaintiff had proved damage, the defendants were not liable. Cotton, L.J. explained the decision on the issue of nuisance in the following terms:

Now the heat is not excessive, it does not rise above 80° at the floor and in the room itself it is not nearly so great. If a person does what in itself is noxious, or which interferes with the ordinary use and enjoyment of a neighbour's property, it is a nuisance. But no case has been cited where the doing something not in itself noxious has been held a nuisance, unless it interferes with the ordinary enjoyment of life, or the ordinary use of property for the purposes of residence or business. It would, in my opinion, be wrong to say that the doing something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life. Here it is shewn that ordinary paper would not be damaged by what the defendants are doing, but only a particular kind of paper, and it is not shewn that there is heat such as to incommode the workpeople on the plaintiff's premises. I am of opinion, therefore, that the plaintiff is not entitled to relief.<sup>61</sup>

This decision should be read together with the decision of the Privy Council in *McKinnon Industries Ltd v. Walker*.<sup>62</sup> In this case, the plaintiff's use and enjoyment of his land was affected by sulphur dioxide gas and fumes emitted by an industrial plant on the defendant's land. The defendant argued that no remedy of injunction or damages should be ordered in respect of the orchids which the plaintiff was cultivating as the growing of orchids is horticulturally a difficult operation and therefore amounts to a sensitive use of the land. This argument was rejected by the Privy Council. The court held that once a plaintiff has proved that the defendant has interfered with the normal use and enjoyment of the plaintiff's land, he may be awarded additional damages sustained in respect of any sensitive or unusual use of the land.

If the use of a solar appliance can be regarded as an especially sensitive or unusual use of land, then the first proposition stated above will be applicable, as without the solar appliance the blocking of sunlight would cause no damage to the solar user's property. There is no case law in

61 (1889) 41 Ch D 88, 94

62 [1951] 3 D L R 577 Cf. *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd* [1973] Q B. 27

any common law jurisdiction determining whether solar appliances fall within the rule relating to sensitive or unusual use of land.<sup>63</sup> Although solar collector-panels are sensitive in that they require the direct rays of the sun for their efficient operation and cannot operate on diffused or reflected light,<sup>64</sup> it could be argued that they are not unduly sensitive in that they do not require access to the sun during all the daylight hours. Research in mechanical engineering has shown that modern types of solar collectors can operate efficiently with as little as six hours direct access to sunlight, provided that this six-hour period is centered on the zenith position of the sun (i.e. three hours on each side of solar noon).<sup>65</sup> Thus, solar collector panels can be blocked for as much as fifty per cent of daylight hours without damage to the solar user. This fact reduces the strength of the argument that solar energy collection is an especially sensitive use of land.

When determining this issue the court will also be likely to be concerned with the incidence of the use of solar appliances in Australia. The greater the incidence of use, the less likely it is that the courts will allow the defence under discussion to prevail. It is in this respect that the weakness of the case of the solar user must be admitted. While the growth rate of solar appliances in recent years has been impressive, the fact remains that the vast majority of residential and commercial premises in Australia have no solar appliances. The most recent study on the market penetration of solar appliances shows that as at June 1981 in Australia as a whole only 2.7 per cent of dwellings were fitted with a solar water heater. On a State by State analysis, the extremes were 17.1 per cent in Western Australia and 0.4 per cent in Victoria and Tasmania.<sup>66</sup> These statistics are limited to solar water heaters in residential premises and do not include solar space-heating in the domestic sector or any type of solar application in the commercial sector. However, even if these applications were included it is unlikely that the 2.7 per cent market penetration figure mentioned above would be increased much above 3 per cent as solar space heating is in its infancy and the present industrial use of solar energy is very restricted. While the situation may change dramatically in the years to come if the development of solar energy proceeds at its present pace, in light of the current low incidence of use of solar appliances it is likely that in an action for nuisance the defence of sensitive or unusual use of the land will prevail in the solar context. This

63 The courts have applied *Robinson v Kilvert* fairly narrowly in the past. see, e.g., *Hoare & Co. v. McAlpine* [1923] 1 Ch. 167, *Barrette v Franki Compressed Pile Co. of Canada Ltd* [1955] 2 D L R. 665.

64 Some solar collectors can capture diffuse radiation from the sun, but only a very small amount of energy can be obtained in this manner

65. *Hayes supra* n.7 at 22-24

66. *Andrews supra* n.2 at 11-13

is not necessarily conclusive of the issue, however, as the following discussion shows.

(d) *Malice*<sup>67</sup>

So far in this discussion no mention has been made of the motive of the neighbouring landowner who interferes with the solar user's right of access to the direct rays of the sun by erecting a building or other obstruction or permitting vegetation to grow until it shades the collector-panels. It has been tacitly assumed that when blocking the solar access the neighbour was making a legitimate use of his own property. However, what is the situation if the neighbour blocks the right of solar access purely out of malice?

As a general proposition of the law of torts, motive is irrelevant. As stated by Lord Macnaghten in *Bradford Corporation v. Pickles*:

It is the act, not the motive for the act that must be regarded. If the act apart from motive gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element.<sup>68</sup>

Despite this dictum, there are authorities to the effect that damages may be awarded even where the plaintiff is making an especially sensitive use of his land if the defendant's acts which cause the damage are motivated by malice. This principle thus operates as an exception to situations such as in *Robinson v. Kilvert*<sup>69</sup> and may allow the solar user to obtain a remedy in nuisance for the blocking of solar access in the limited circumstances in which the "malice" principle applies.

There are three major authorities supporting the validity of the "malice" exception. In *Christie v. Davey*,<sup>70</sup> the parties to the dispute were neighbours in semi-detached houses. The plaintiff's family was very interested in music. Mrs Christie was a music teacher and conducted lessons throughout the day. The defendant took exception to the sound of the music and in retaliation disturbed the lessons by beating trays and rapping on the wall. The plaintiff brought an application for an injunction to restrain the defendant from causing or permitting any sounds or noises in his house so as to annoy the plaintiffs or the occupiers of their house. North J. justified the granting of the injunction in the following terms:

In my opinion the noises which were made in the defendant's house were not of a legitimate kind. They were what, to use the language

67 See generally Winfield and Jolowicz supra n.9 at 369ff; Salmond and Heuston supra n.9 at 53ff; and Buckley supra n.9 at 14ff

68. [1895] A.C. 587, 601 See also *Allen v. Flood* [1898] A.C. 1, 124, per Lord Herschell

69 (1889) 41 Ch.D. 88

70 [1893] 1 Ch. 316

of Lord Selborne in *Gaunt v. Fynney*, "ought to be regarded as excessive and unreasonable". I am satisfied that they were made deliberately and maliciously for the purpose of annoying the plaintiffs. 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. But I am persuaded that what was done by the defendant was done only for the purpose of annoyance, and in my opinion it was not a legitimate use of the defendant's house to use it for the purpose of vexing and annoying his neighbours.<sup>71</sup>

Similar reasoning was adopted by Macnaghten J. in *Hollywood Silver Fox Farm Ltd v. Emmett*.<sup>72</sup> In this case, the plaintiff company used its land for the purpose of breeding silver foxes. A large notice-board advertising this business was erected by the owner of the farm on his land. The notice-board was visible from the neighbouring land as well as the adjoining road. The defendant, who owned the neighbouring land, was about to develop his land as a building estate and believed that the notice-board would deter potential purchasers. The defendant threatened the owner of the farm that if he did not remove the notice-board he would discharge firearms on his property during the breeding-season and scare the vixen. Both parties knew the effect of this would be very injurious to the plaintiff's business and would cause the vixen either to miscarry or to devour their young. The defendant later carried out his threat, causing the anticipated damage to the plaintiff. The plaintiff sought an injunction to prevent this situation from recurring, and based his claim on nuisance. The injunction was granted on a finding that the sole purpose of the shooting by the defendant was to frighten the vixen. Macnaghten J. cited the passage of North J. in *Christie v. Davey* extracted in the preceding paragraph and held that because of the malicious motive of the defendant nuisance would lie despite the plaintiff's sensitive and unusual use of his land.

Both *Christie v. Davey* and *Hollywood Silver Fox Farm v. Emmett* were cited with approval in *Pratt v. Young*,<sup>73</sup> the most recent Australian case on this issue. In this case the adjoining landowners were farmers. The defendant made alterations to the dividing fence in such a way that it provided no obstacle to the foraging or migratory rabbit. He also ploughed his land. The uncontraverted evidence was that freshly ploughed land attracts rabbits. The plaintiff's rabbit population increased markedly and he suffered some damage as a result. The plaintiff alleged that the defendant had undertaken this work in order to entice the foraging or migratory

71. *Id.* at 326-327

72. [1936] 2 K.B. 468. See also *Ibbotson v. Peat* (1865) 3 H. & C. 644, 159 E.R. 684

73. (1952) 69 W N (N.S.W.) 214

rabbit onto his land and sued in nuisance for damages. The defendant argued that this work was a normal farming practice. On finding that the defendant was motivated by malice in carrying out the work, Brereton D.C.J. awarded damages to the plaintiff.

These three cases did not purport to affect the rule in *Bradford Corporation v. Pickles*. It appears that these seemingly contradictory authorities can be reconciled in the following manner. Unlike in the three cases discussed above, where the defendant had interfered with a legally protected interest of the plaintiff, this was not the case in *Bradford Corporation v. Pickles*. The facts of that case were that the defendant had deliberately drained his land in order to reduce the amount of water reaching the neighbouring land of the plaintiff. The reason that the defendant's malice in this case was held to be irrelevant was that at common law there is no interest in percolating water until it is appropriated. The plaintiff thus had no interest which could have been infringed.<sup>74</sup>

As already discussed in detail, it is uncertain whether a right of solar access is a legally protected interest. If the conclusion tentatively reached above that such a right is a protected interest is correct, then the difficulties raised for the solar user by *Bradford Corporation v. Pickles* can be overcome. In this situation, depending on whether or not the right of solar access is regarded as an especially sensitive or unusual use of land, nuisance will lie for a substantial interference with the right of solar access either in all cases (if the land use is held not to be sensitive) or in cases where the blocking of access is caused by a malicious act of the defendant (if the land use is held to be sensitive). In the event that the right of solar access is held to be an unprotected interest, it seems that nuisance will not lie in any circumstances.

Even though the rule in relation to malice appears to offer some encouragement to the solar user, the rule will have only a very limited application. Although there are no English or Australian authorities directly on point it appears likely that the rule will apply only where it can be shown that the building or tree which shades the solar collector-panels has no utility value to the defendant who erected or planted it.<sup>75</sup> There is case law in the United States to this effect.<sup>76</sup> In the vast majority of cases the defendant will be able to prove benefit from the tree or building even if he erected or planted it partially out of malice.<sup>77</sup>

74. Cf. the analysis of these cases by Salmond and Heuston *supra* n.9 at 53-54

75. See Fridman "Motive in the English Law of Nuisance" (1954) 40 *Virginia L. Rev.* 583, 585.

76. See e.g. *Daniel v. Birmingham Dental Manufacturing Co.* (1922) 207 Ala. 659, 93 So. 652; *D'Inzillo v. Basile* (1943) 180 Misc. 237, 40 N.Y.S. 2d 293, *affid.* 266 App.Div. 875, 43 N.Y.S. 2d 638; *Green v. Schick* (1944) 194 Okla. 491, 153 P. 2d 821

77. It has been suggested that a finding of malice by a court is most unlikely in cases where a building has been erected in conformity with the relevant local planning and zoning regulations. See Becker "Common Law Sun Rights: An Obstacle to Solar Heating and Cooling?" (1976) 3 *J. Contemp. L.* 19, 29; Hayes *supra* n.7 at 99

*(e) Other Possible Arguments by the Defendant*

If the solar user who wishes to sue an adjoining landowner in nuisance for blocking the right of solar access can overcome the major legal obstacles discussed above, the remaining propositions of law concerning nuisance should cause him no difficulties.

First, the defendant in an action for nuisance cannot advance the argument that he was making an ordinary or reasonable use of his own property.<sup>78</sup> A useful illustration of this point is *Lester-Travers v. City of Frankston*.<sup>79</sup> In this case, the plaintiff owned land abutting both at the front and the rear on municipal golf links. On numerous occasions golf balls struck by golfers on the links had entered the plaintiff's land, some causing slight damage. The plaintiff sued in nuisance for an injunction and damages. One of the arguments put by counsel for the defendant was that the defendant was merely making reasonable use of the land it occupied and controlled. He contended that it was not uncommon for municipal golf links to be constructed on relatively small pieces of land, and that the plaintiff, because she lived next to the links, should be prepared to tolerate the intrusion of golf balls from time to time, because to do otherwise was to interfere with the enjoyment of golfers playing on the golf links which the municipality had provided for them. Anderson J., in finding for the plaintiff, declared that this argument had no merit.

Exceptions to this principle exist in the case of "natural use" by the defendant of his land and in the case of non-feasance.<sup>80</sup> In the solar context, non-feasance may be argued by the defendant in respect of a naturally seeded tree which casts shadows on the plaintiff's solar collector-panels. The vast majority of cases will amount to misfeasance, however. Thus, the exception will not operate where the shading is caused either by buildings or trees constructed or planted by the defendant or any former occupier of the defendant's land, or by naturally seeded trees which have been fertilized, pruned or otherwise tended by the defendant or any former occupier of the defendant's land.<sup>81</sup>

The exception in the case of "natural use" by the defendant is sometimes referred to as the "give and take" rule. As was stated by Baron Bramwell in *Bramford v. Turnley*,<sup>82</sup> "those acts necessary for the common and or-

78. See Luntz, Hambly and Hayes supra n.8 at 913ff; Higgins supra n.9 at 163ff.

79. [1970] V.R. 2

80 See e.g. *Kraemers v. A-G (Tas.)* [1966] Tas. S.R. 113, and Luntz, Hambly and Hayes supra n.8 at 918.

81. The defendant will be liable for a nuisance created by any former occupier of the land if he "adopts" the "state of affairs" for his own purposes (*Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880, 894, per Viscount Maugham; *Burchett v. Commissioner for Railways* (1958) 58 S.R. (N.S.W.) 366, 368, per curiam). See Luntz, Hambly and Hayes supra n.8 at 925. Cf. *Torette House Pty. Ltd. v. Berkman* (1939) 62 C.L.R. 637

82. (1862) 3 B & S 66, 83-84; 122 E.R. 27, 33. This dictum was cited with approval by Windeyer J. in *Gartner v. Kidman* (1961) 108 C.L.R. 12, 44.

dinary use and occupation of land may be done, if conveniently done, without subjecting those who do them to an action". At first glance, it might appear that the case of shading caused by buildings or trees would be encompassed by this exception as the erection of buildings and the planting of trees is a common and ordinary use of urban and suburban properties. It appears, however, that the exception only applies to cases of interference with the enjoyment of land and does not apply where injury is caused to the plaintiff's land. For this reason the exception appears to be irrelevant in the solar context if the argument stated earlier, that the blocking of solar access is a "material injury to property" within the definition of Lord Westbury, L.C. in *St. Helen's Smelting Co. v. Tipping*, is accepted.<sup>83</sup>

Secondly, it is no defence to an action for nuisance that the plaintiff "came to the nuisance".<sup>84</sup> The argument could be made against the solar user that in erecting solar collector-panels in a city or suburban environment or in such a position as to make it likely that problems of shading may arise in the future, he was deliberately engaging a known risk of interference and should not succeed in nuisance if shading of the panels later occurs. This argument may be put in any situation but would be most likely to occur in areas zoned for high-density residential use or commercial use or in environmentally sensitive areas where many tall trees exist. On the basis of the decision in *Lester-Travers v. City of Frankston*,<sup>85</sup> it appears that the argument, although it may be regarded by many as reasonable, will never succeed. In this case, the facts of which are discussed earlier,<sup>86</sup> the plaintiff had bought her property in 1944, some seven years after the municipal golf links had been laid out. The fact that the plaintiff must have realized the likelihood of some mis-struck balls entering her property was not regarded as material. An unsuccessful attempt to revive the defence was recently made by Lord Denning in *Miller v. Jackson*.<sup>87</sup> In this case the plaintiff, who had recently bought a house adjoining a cricket field, claimed that balls hit for six out of the ground onto his property constituted an unreasonable interference with the use and enjoyment of his house and garden. Lord Denning stated that the plaintiff should have guessed that there was a risk that a ball hit for six might possibly land on his property. If he did not like it, he should go out when cricket was being played, take advantage of the offer made by the cricket club of fitting unbreakable glass, or sell his house and move elsewhere. This line of reasoning was not adopted by the majority of the

83. (1865) 11 H.L. Cas. 642, 650; 11 E.R. 1483, 1486. See *supra*, n.52 and accompanying text.

84. See Luntz, Hambly and Hayes *supra* n.8 at 932ff; Buckley *supra* n.9 at 97ff.

85 [1970] V.R. 2

86. *Supra* n.79 and accompanying text

87. [1977] Q.B. 966. Discussed in (1977) 93 L.Q.R. 481; (1978) 94 L.Q.R. 178; and (1978) 41 M.L.R. 334. Cf. *Bolton v. Stone* [1951] A.C. 850; *Kennaway v. Thompson* [1981] Q.B. 88.

Court of Appeal, however; they considered themselves bound by nineteenth-century authorities<sup>88</sup> and refused to consider changing the law, though conceding that it did not seem just that a long-established innocuous activity should be brought to an end because someone chooses to build a house nearby and so to turn an innocent pastime into an actionable nuisance.<sup>89</sup>

(f) *The Nature of the Remedy*

The final problem relating to an action for private nuisance in the solar context concerns the nature of the remedy. The court has a discretion to award either damages<sup>90</sup> or an injunction (or both) if it concludes that the blocking of solar access is actionable in nuisance. From the standpoint of the solar user, an injunction is essential and damages are clearly unsatisfactory.<sup>91</sup> While the award of damages would allow the solar user to recover the cost of the solar appliance and the increased cost of substitute fuel,<sup>92</sup> this is only of minor consequence. The denial of an injunction would leave the solar user with the solar energy system incapable of functioning. Many solar users install their solar appliances for reasons other than to achieve savings in the cost of fuel, and these interests cannot be taken account of in the award of damages. Prime factors motivating conversion to solar energy in many cases include the control it gives individual persons over their energy source, and the desire to reduce pollution problems and preserve the community's supplies of fossil fuels. The award of damages would not advance either the solar user's purpose or the society's interest in the development of solar energy.

Because of the discretionary nature of the remedies, it is impossible to predict with certainty when the court will award damages rather than an injunction. The courts appear to regard an injunction as the normal remedy for nuisance as they are concerned that the award of damages effectively licenses the defendant to commit unlawful acts in the future subject to the payment of compensation.<sup>93</sup> This effectively amounts to

88. *Sturges v. Bridgman* (1879) 11 Ch.D. 852; *Bliss v. Hall* (1838) 4 Bing. N.C. 183, 132 E.R. 758. See also *Elliotson v. Feetham* (1835) 2 Bing. N.C. 134; 132 E.R. 53.

89. [1977] Q.B. 966, 986, *per* Geoffrey Lane, L.J.

90. The plaintiff has the option of claiming common law or equitable damages. At common law, damage is the ground of the action for nuisance. In the case of a continuing nuisance (as the blocking of solar access would be regarded) a fresh action accrues each time fresh damage occurs, and legal damages can be assessed only up to the date of the proceedings. In contrast, equitable damages can cover future as well as past damage. See *Bradbrook and Neave* supra n. 29 para. 1875.

91. The issue of the nature of the remedy in the solar context is discussed in *Becker* supra n. 76 at 30-31; *Hayes* supra n. 7 at 99-100; and Note, "Obtaining Access to Solar Energy: Nuisance, Water Rights and Zoning Administration" (1979) 45 *Brooklyn L Rev* 357, 366.

92. The measure of damages in tort is "that sum of money which will put the party who has been injured ... in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation" (*Livingstone v. Rawyards Coal Co.* (1880) 5 App Cas. 25, 39, *per* Lord Blackburn; *Evans v. Balog* [1976] 1 N.S.W.L.R. 36, 39, *per* Samuels, J.A.)

93. See e.g. *Black v. Scottish Temperance Life Assurance Co.* [1908] 1 I.R. 541, 560, *per* Barton J.; *Cowper v. Laidler* [1903] 2 Ch. 337, 341, *per* Buckley J.; *Sefton v. Tophams Ltd* [1965] Ch. 1140, 1169ff, *per* Stamp J.; *Kennaway v. Thompson* [1981] Q.B. 92-93, *per* Lawton L.J.



a form of compulsory acquisition. The best-known attempt to formulate the circumstances in which an award of damages will be granted rather than an injunction is to be found in *Shelfer v. City of London Electric Lighting Co.*<sup>94</sup> A.L. Smith L.J. stated the following proposition as a “good working rule”:

- (1) If the injury to the plaintiff's legal rights is small,
- (2) And is one which is capable of being estimated in money,
- (3) And is one which can be adequately compensated by a small money payment,
- (4) And the case is one in which it would be oppressive to the defendant to grant an injunction: —  
then damages in substitution of an injunction may be given.<sup>95</sup>

This working rule is, of course, subject to various other factors traditionally recognised in equity, such as laches or acquiescence by the plaintiff, whether the defendant has hastened the completion of a building so as to steal a march on the court, and the hardship that could be caused to the defendant by the grant of an injunction.<sup>96</sup> Any one or more of these factors may justify the award of damages in lieu of an injunction.

While the general rule in favour of an injunction rather than damages clearly favours the solar user, the terms of the “good working rule” above give some ground for concern. Using the traditional grounds for quantifying damage in private actions, the neighbouring landowner could mount a strong argument that the injury to the solar user's rights is small and easily compensable. Much will depend on whether the court would be prepared to take into account the nature of the public interest in furthering the application of solar technology in determining the nature of the remedy. Although arguments of this nature are generally regarded as irrelevant, there is at least one recent authority supporting the relevance of the public interest. In *Wrotham Park Estate Co. Ltd v. Parkside Homes Ltd*<sup>97</sup> Brightman J. granted damages rather than a mandatory injunction ordering the demolition of certain houses erected in breach of a restrictive covenant on the ground that such an injunction would be “an un-

94. [1895] 1 Ch. 287. See also *Kennaway v. Thompson* [1981] Q.B. 88, discussed in (1981) 44 *M.L.R.* 212

95. *Id.* at 322ff. Cf. the approach of Lindley L.J. (at 316) who refused to specify the circumstances in which the judicial discretion should be exercised: “Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances. I will not attempt to specify them, or to lay down rules for the exercise of judicial discretion”.

The “good working rule” has been cited with approval in numerous cases: see e.g. *Carpet Import Co. Ltd. v. Beath & Co. Ltd* (1927) 46 *N.Z.L.R.* 37, 65; *Kelsen v. Imperial Tobacco Co. (of Great Britain and Ireland) Ltd* [1957] 2 Q.B. 334, 346; *Owen v. O'Connor* [1964] *N.S.W.R.* 1312, 1335

96. See *Bradbrook and Neave supra* n.29 para. 1885.

97. [1974] 2 *All E.R.* 321

pardonable waste of much needed houses".<sup>98</sup> While this argument was advanced as a justification for the award of damages rather than an injunction there would appear to be no reason why it could not be advanced in the reverse situation in appropriate circumstances. As the public interest is the prime concern in furthering the use of solar energy, it is to be hoped that the courts will consider the public interest to be sufficient justification for awarding an injunction rather than damages if nuisance is held to lie in cases of blocking of solar access.<sup>99</sup>

### Possible Legislation on Nuisance

Aside from cases where a solar appliance is obstructed purely out of malice, the above discussion indicates that under existing common law rules it is uncertain whether and under which circumstances the solar user has a remedy in nuisance against his neighbours for the blocking of his right of solar access. The only situation in which the solar user has an assured remedy in nuisance is where the right of solar access is protected by an easement.

In order to encourage private individuals to invest in solar appliances, it is submitted that it is essential for the law to provide solar users with a remedy in other circumstances where solar access to solar collector panels is blocked by buildings or trees on neighbouring land. Unlike the situation where the right of solar access is protected by an easement, the remedy in other circumstances cannot be assured as the law must balance the interests of the solar user with the right of the neighbours to develop their property. Despite the fact that the right of solar access cannot be guaranteed, however, the law could provide significantly greater protection to the solar user than is currently given him by the law of nuisance.

One possible method of achieving this result would be to enact suitable modifications to the laws on public and private nuisance designed to remove the deficiencies and uncertainties in the present common law position affecting the application of the remedies in the solar context. Given the limited role of judicial law-making and the past conservatism of the Australian courts, the necessary changes are unlikely to develop through the case-law process. For this reason it appears that the only certain method of achieving the desired result would be by way of legislative amendment to the common law.

The possible methods in which the existing law on public and private nuisance could be amended to provide the desired remedy for the solar user will now be considered.

98 *Id.* at 337

99. For a recent discussion of the relevance of the public interest in the decision whether to grant an injunction, see the judgments of Lord Denning, M.R. and Cumming-Bruce, L.J. in *Miller v. Jackson* [1977] Q.B. 966. See also *Kennaway v. Thompson* [1981] Q.B. 92-94.

(a) *Legislation on Public Nuisance*

In the United States, a number of States have enacted a legislative declaration that it is in the public interest that solar energy appliances should be encouraged. For example, s.801.5 of the Californian Civil Code states in part:

- (2) The legislature hereby finds and declares that:
- (a) Solar energy is a renewable, non-polluting energy source.
  - (b) The use of solar energy systems will reduce the state's dependence on non-renewable fossil fuels, supplement existing energy sources, and decrease the air and water pollution which results from the use of conventional energy sources. It is, therefore, the policy of the state to encourage the use of solar energy systems. In order to ensure uniform application of this policy in all parts of California, the provisions of this Act shall be applicable to charter cities.
  - (c) The purpose of this Act is to promote and encourage the widespread use of solar energy systems and to protect and facilitate adequate access to the sunlight which is necessary to operate solar energy systems.

Although a legislative declaration of this nature might encourage the courts to declare void or contrary to public policy restrictive covenants which impede or prevent the installation of solar collector-panels on roof-tops, it is unlikely to have any effect in the context of civil actions for public nuisance. While the courts might possibly be more willing to accept that there is a public interest involved in the furtherance of solar energy technology, it is submitted that such a legislative declaration would be likely to be regarded by the courts as too vague to justify overturning established precedents on the law of public nuisance.

A more effective alternative would be for the State governments to enact legislation equivalent to the Californian Solar Shade Control Act of 1978.<sup>100</sup> This legislation appears as ss.25980-25986 of the California Public Resources Code. The relevant parts of this enactment read as follows:

25982. After January 1, 1979, no person owning, or in control of property, shall allow a tree or shrub to be placed, or, if placed, to

100. This legislation is discussed in Johnson, "State Approaches to Solar Legislation: A Survey" (1979) 1 *Solar Law Reporter* 55, 119ff; Miller "Legal Obstacles to Decentralized Solar Energy Technologies (Part 1)" (1979) 1 *Solar Law Reporter* 595; Comment "Access Rights for the Solar User: In Search of the Best Statutory Approach" (1981) 16 *Land and Water L Rev.* 501, 512; Eisenstadt, "Access to Solar Energy: The Problem and its Current Status" (1982) 22 *Natural Resources J.* 21, 34ff

grow on such property, subsequent to the installation of a solar collector on the property of another so as to cast a shadow greater than 10 per cent of the collector absorption area upon that solar collector-surface on the property of another at any one time between the hours of 10 a.m. and 2 p.m., local standard time; provided, that this section shall not apply to specific trees and shrubs which at the time of installation of a solar collector or during the remainder of that annual solar cycle cast a shadow upon that solar collector. For the purposes of this chapter, the location of a solar collector is required to comply with the local building and setback regulations, and to be set back not less than five feet from the property line, and no less than 10 feet above the ground. A collector may be less than 10 feet in height only if in addition to the five feet setback, the collector is set back three times the amount lowered.

25983. Every person who maintains any tree or shrub or permits any tree or shrub to be maintained in violation of Section 25982 upon property owned by such person and every person leasing the property of another who maintains any tree or shrub or permits any tree or shrub to be maintained in violation of Section 25982 after reasonable notice in writing from a district attorney or city attorney or prosecuting attorney, to remove or alter the tree or shrub so that there is no longer a violation of Section 25982, has been served upon such person, is guilty of a public nuisance . . . For the purpose of this chapter, a violation is hereby deemed an infraction. The complainant shall establish to the satisfaction of the prosecutor that a violation has occurred prior to the prosecutor's duty to issue the abatement notice. For the purpose of this section, "reasonable notice" means 30 days from receipt of such notice. Upon expiration of the 30-day period, the complainant shall file an affidavit with the prosecutor alleging that the nuisance has not been abated if the complainant wishes to proceed with the action. The existence of such violation for each and every day after the service of such notice shall be deemed a separate and distinct offence, and it is hereby made the duty of the district attorney, or the city attorney of any city the charter of which imposes the duty upon the city attorney to prosecute state infractions, to prosecute all persons guilty of violating this section by continuous prosecutions until the violation is corrected. Each and every violation of this section shall be punishable by a fine not to exceed five hundred dollars (\$500).

25984. Nothing in this chapter shall apply to trees planted, grown, or harvested on timberland as defined in Section 4526 or on land devoted to the production of commercial agricultural crops. Nothing in this chapter shall apply to the replacement of a tree or shrub which

had been growing prior to the installation of a solar collector and which, subsequent to the installation of such solar collector, dies. 25985. Any city, or for unincorporated areas, any county, may adopt, by majority vote of the governing body, an ordinance exempting their jurisdiction from the provisions of this chapter.

25986. Any person who plans a passive or natural solar heating system or cooling system or heating and cooling system which would impact on an adjacent active solar system may seek equitable relief in a court of competent jurisdiction to exempt such system from the provisions of this chapter. The court may grant such an exemption based on a finding that the passive or natural system would provide a demonstrably greater net energy savings than the active system which would be impacted.<sup>101</sup>

An alternative form of solar shade control legislation has been advanced by Kraemer.<sup>102</sup> This proposed legislation incorporates many of the features of the Californian legislation but differs in respect of the circumstances in which the shading of the solar collector would be protected. Kraemer would replace s.25982 of the Californian Code with the following section:

No owner, occupier or person in control of property shall allow a tree or shrub to be placed or grow so as to cast a shadow on a Solar Collector surface which is greater than the shadow cast by a hypothetical wall ten feet high located along the boundary line of said property between the hours of 9.30 a.m. and 2.30 p.m. Standard Time, provided, however, this law shall not apply to specific trees and shrubs which cast a shadow upon a Collector at the time of installation of said Collector.

The major difference between the Californian Solar Shade Control Act and this proposed form of legislation is that the latter introduces the concept of shading caused by a model hypothetical wall situated on the boundary line of the solar user's property. The purpose of the clause proposed by Kraemer is to avoid the imposition of severe restrictions on trees and shrubs on neighbouring property caused by solar collectors placed at or near ground level close to the property boundary line.<sup>103</sup> The model hypothetical wall is, however, a highly artificial concept and, it is submitted, is unnecessary if the type of restrictions as to the placement of the solar collector as appear in the final two sentences of s.25982 of the

101. See *infra* n 130 for the difference between passive and active solar energy systems.

102. S.F. Kraemer *supra* n.7 at 128

103. *Id.* at 125-126

Californian Code are enacted. For this reason further discussion will be limited to the existing Californian legislation.

The major advantage of the solar shade control legislation is that it is far more specific than the legislative declaration of public interest discussed above. It replaces the present judicial discretion to determine whether the blocking of solar access is a public nuisance by legislation declaring this to be the result. Solar access is thus guaranteed, provided that the other requirements of the legislation are satisfied.

Despite this clear advantage, however, various weaknesses exist in the Californian Solar Shade Control Act. Possibly the major weakness is its limited scope. The Act does not seek to codify or modify the common law requirements of public nuisance, but merely replaces the need for the court to determine whether the shading of a solar collector is actionable as a public nuisance. Another important restriction is that it does not protect potential sites for solar collectors, but only protects solar collectors from shading once they have been legally constructed. Most significantly of all the Act applies solely to shading caused by trees and shrubs and does not encompass shading by buildings or other structures. It has been suggested that potentially harsh results would ensue if the legislation were extended in this manner and that it is more desirable to limit any legislative proposals based on nuisance law to shadows from trees and shrubs.<sup>104</sup> This view is supported by two arguments: first, that the owners of trees and shrubs have less money invested in them than the owners of buildings or other structures have in those buildings, and secondly, that the community is to date familiar with the regulation of buildings or other structures by building codes, zoning and planning laws and is not familiar with regulation by legislation on nuisance.<sup>105</sup>

Various other criticisms of the solar shade control type of legislation have been made. First, s.25983 of the Code has been criticized for removing the right of a private individual under the common law of public nuisance to bring a civil action against the wrongdoer.<sup>106</sup> The Californian legislation takes the issue of enforcement out of the hands of the solar user and places it in the hands of public authorities. It has been suggested that some degrees of private enforcement would give more security to the solar user, as the potential exists for a public official to delay an action perhaps through overwork, or in the belief that the matter is so trivial as not to demand the immediate attention and effort of prosecution.<sup>107</sup> If legislation equivalent to the Californian Solar Shade

104 Hayes *supra* n 7 at 99

105. *Id.* at 100

106. See Comment "Access Rights for the Solar User: In Search of the Best Statutory Approach" (1981) 16 *Land and Water L Rev.* 501, 513.

107 This point has been raised by a number of writers, including Miller, *supra* n 100 at 608, Hayes *supra* n 7 at 100, and Comment "Solar Rights: Guaranteeing a Place in the Sun" (1977) 57 *Oregon L Rev.* 94, 129

Control Act is enacted in Australia, this criticism could easily be met by rewording the equivalent of s.25983 to provide for a private right of action.

Secondly, the extent to which the neighbour's use and enjoyment of his property is affected is subject to the location chosen by the solar user for the solar collector-panels. There is no requirement that the solar user locate the panels so as to minimise problems of shading caused by potential obstructions on neighbouring land.<sup>108</sup> The nearer to the boundary fence the solar user locates his collector-panels, the greater the burden is on the neighbouring land. The final two sentences of s.25982 prevent the solar user from imposing an excessive burden on his neighbour by erecting the collector-panels next to the boundary fence at or near ground level, but the legislation does not provide for a consideration of the neighbour's interests in all situations.

Thirdly, the rigidity of the height and setback requirements in s.25982 has been criticised in that they do not recognise the extent to which the local topography affects the shading caused by buildings or trees.<sup>109</sup> The length of shadows on a solar user's land caused by trees or buildings on neighbouring property will vary significantly if the terrain is undulating. In some circumstances an undulating terrain will exacerbate the problems caused by shading, and in other circumstances it will reduce it. Compared with equivalent flat terrain, shadows caused by trees or buildings will be longer where the neighbouring land is higher than the solar user's land. Conversely, the shadows will be shorter where the neighbouring land is lower than the solar user's land. The variation in the length of the shadows will increase in proportion to the slope of the terrain. The present Californian legislation applies one inflexible rule to all locations, regardless of whether the terrain is flat or undulating.

The final criticism relates to the scope of the immunity for existing trees. Pursuant to s.25982, trees and shrubs are exempt from the legislation if they cast a shadow upon a solar collector "at the time of installation of a solar collector or during the remainder of that annual solar cycle". This section has been said to be too restrictive of the rights of neighbours. It is a form of retrospective legislation in that it applies to trees planted before the enactment of the legislation, and it is open to criticism on this issue.<sup>110</sup> To counteract this criticism, it has been suggested that the exemption should extend to all trees planted before the date of proclamation of the legislation. If legislation of this nature is introduced in Australia, this criticism could easily be met by a simple legislative change. However, some degree of retrospective application is

108 See Williams "The Dawning of Solar Law" (1977) 29 *Baylor L Rev* 1013, 1021

109 Johnson *supra* n 100 at 120

110 *Id* at 119

surely essential in these circumstances if the legislation is to have any significant impact in the near future.

While all these criticisms have some force, they do not justify the rejection of the notion of legislation declaring shading by trees to be a public nuisance. The various criticisms could all be met by careful amendment to the wording of the Californian Code.

*(b) Legislation on Private Nuisance*

It has already been shown that except (possibly) in certain cases where an obstruction is erected out of malice, it is doubtful whether the solar user can sue in private nuisance for the blocking of his right of solar access by a neighbour.

To date, there is no comprehensive legislation in any common law jurisdiction which alters the common law on private nuisance in order to provide a remedy for the solar user in this situation. However a detailed discussion of the need for such legislation has been made by the Minnesota Energy Agency (hereafter referred to as "the Agency").<sup>111</sup>

The Agency considered the relevance of legislation on private nuisance in the context of a report prepared for the Minnesota legislature in 1977. The report was designed as a "comprehensive legislative proposal dealing with the legal, institutional and financial issues surrounding solar energy in Minnesota . . .". The Authority proposed the enactment of the following provisions<sup>112</sup> by way of amendment to the existing Minnesota Statute s.166H.127 (1976):

- (2) Except as provided in sub-section 3 of this section, no owner or person in control of property shall allow a tree or shrub to be placed or to grow so as to cast a shadow between the hours of 9 a.m. and 9 p.m. Local Apparent Time, upon a solar energy system capable of generating more than 5 million British thermal units per year, and which supplies a part of the energy requirements for improvements on the property where the solar energy system is permanently located.
- (3) Owners or persons in control of property with trees and shrubs which, during the designated hours, cast a shadow upon a solar energy system at the time of installation of such system need not comply with the provisions of sub-section 2 of this section.
- (4) Any violation of any of the provisions of sub-section 2 of this section shall constitute a private nuisance, and any owner or occupant whose solar energy system is shaded because of such violation, so that performance of the solar energy system is significantly impaired, may

111. Minnesota Energy Agency *Legislative Options for Encouraging Solar Energy Use in Minnesota* (1977)

112. *Id.* at 21ff



have an action in tort for the damages sustained thereby and may have such nuisance abated.

- (5) The Legislature hereby finds, determines, and declares that the use of solar energy systems is a reasonable use of land, and no cause of action arising under this section shall be unenforceable on the ground that the use of sunlight for solar energy constitutes an abnormally sensitive use of land.<sup>113</sup>

Sub-section 2 is designed to ensure that the solar energy system is of a specified minimum capacity and efficiency before its installation can affect the rights of neighbouring landowners to develop their land.<sup>114</sup> A provision of this nature is clearly desirable as a matter of equity and commonsense. Sub-section 3, which is equivalent to s.25982 of the Californian Public Resources Code in the public nuisance context, likewise seeks to achieve a fair balance between the interests of the solar user and his neighbours.<sup>115</sup> Sub-section 5 is intended to overcome the difficulty which arises under the present law of private nuisance of solar energy collection being deemed by the Courts to be an abnormally sensitive use of land and as such an obstacle to the granting of an injunction or damages. The Agency included the blanket statement in sub-section 5 specifically to overcome concern voiced by various commentators to this effect.<sup>116</sup>

The Agency alluded to the possibility of enacting legislation along the lines of the Californian Solar Shade Control Act but stated its preference for legislation affecting private nuisance on the ground that some legal authorities will argue that the shade does not damage the public but only the owner of the solar energy system actually harmed.<sup>117</sup>

The Agency made the following three observations on the impact of its proposed legislation. First, while there would be a degree of interference with the right of a landowner to develop his property in whatever manner he saw fit, such legislative interference would be no greater than the interference contained in most zoning ordinances.<sup>118</sup> Secondly, a landowner can probably avoid shading his neighbour's solar energy system by shifting the location of a tree or shrub a few feet, and "this minimal interference with the landowner's property rights can be justified by an overriding public purpose to further solar energy utilization".<sup>119</sup> In addition, simply relocating or pruning trees or shrubs which shade a solar collector after its installation is "much less severe a sanction than an outright prohibition of physical development".<sup>120</sup> Finally, the impact of

113. Cf. the similar form of legislation proposed by Kraemer *supra* n.7 at 142

114. Minnesota Energy Agency *supra* n.111 at 12

115. *Id.* at 13

116. *Id.* at 13

117. *Id.* at 13

118. *Id.* at 12

119. *Id.* at 12

120. *Id.* at 4

the proposed legislation could be substantially reduced by limiting its application to roof-top solar energy systems or to roof-top solar energy systems installed on the buildings which they service. However, if the purpose of the legislation is to facilitate solar access, such restrictions are inconsistent. The Agency argued that restrictions to this effect tend to ignore those situations where solar energy systems cannot be installed on roof-tops because available roof-tops are already shaded or where the roof-top is not strong enough to support a solar energy system. "If the Bill is to have wide applicability in highly developed areas, where retrofiting<sup>121</sup> is frequently the only way to utilize solar energy systems, its scope should not be reduced".<sup>122</sup>

Another possible option would be for the various State legislatures to enact legislation similar to that in Massachusetts:<sup>123</sup>

A fence or other structure in the nature of a fence which unnecessarily exceeds six feet in height and is maliciously erected or maintained for the purpose of annoying the owner or occupiers of adjoining properties shall be deemed a private nuisance.

The effect of this legislation is to expand the operation of the common law malice rule in nuisance. As already discussed, whereas at common law the malice rule only operates in respect of interferences with legally protected interests, under the statutory form above it would operate in all situations. In light of the present doubt as to whether the right of solar access is a legally protected interest, the enactment in Australia of legislation along these lines would assist the solar user to a limited extent, although as explained earlier the malice rule would have only a narrow application in the solar context in any event.

It has been suggested that this form of legislation could be expanded by substituting the requirement that the plaintiff need only prove that the fence or structure is unnecessary.<sup>124</sup> Even in this suggested expanded form, however, it may validly be queried whether such legislation would serve any useful function in the solar context. It would have no application at all to the vast majority of disputes involving shading where no malice is alleged. While such a reform may be thought desirable as an aspect of the general reform of the law of nuisance, it cannot be justified by reference to the requirements of the solar user.

121. "Retrofitting" means the addition of solar collector-panels to an existing hot water service in an established house or commercial building. The majority of solar energy systems are installed at the time the house or commercial building is erected. The economics of retrofitting are marginal: see Andrews *supra* n.2 at 5-6, 20ff.

122. Minnesota Energy Agency *supra* n 111 at 12

123. Mass. Ann. Laws, ch. 49, s.21 (1966). See also Me. Rev Stat. Ann tit 17, s.2801 (1965); Pa. Stat. Ann. tit. 53, s.15171 (1957).

124 See Comment "Securing Solar Access in Maine" (1980) 32 *Maine L Rev.* 439, 451

## An Alternative Proposal

It is clear that without substantial legislative modification the common law of private and public nuisance is incapable of providing an effective remedy for the blocking of solar access. As is stated by one commentator:

A right to an action in nuisance is not an adequate expedient legal remedy for a nation or community seeking to encourage the development of and reliance on solar energy. Crucial to widespread solar utilisation is the availability of a legal scheme that ensures predictability. Nuisance law's primary deficiency is the tentative nature of the right and the unreliability of attaining a sufficient remedy.<sup>125</sup>

Another commentator has observed that if the solar user is to rely on nuisance as a remedy for the blocking of solar access, he would be relying "on a body of law that offers little guidance and no security".<sup>126</sup>

The legislative changes to the laws on private and public nuisance discussed above are designed to improve the position of the solar user and provide a guarantee of solar access. While such measures would undoubtedly assist the solar user, it is a matter of conjecture whether either of the possible reforms considered earlier is worth enacting in Australia. Several difficulties exist. First, the proposed reforms do not solve the problems inherent in the discretionary nature of the remedy. The solar user would still be faced with the possibility that the court would award damages rather than an injunction where the right of solar access is infringed. Secondly, there is the problem of cost for the solar user. Neither of the proposed changes would alter the existing situation that injunctions are granted only by the Supreme Court.<sup>127</sup> The legal costs inherent in making such an application may well deter many solar users from enforcing their right of solar access by the legal process.

There is a more fundamental objection to these proposed reforms. There is no precedent in English or Australian law for the legislature to declare any activity or event to be a public or private nuisance and to be actionable accordingly. Unlike in the majority of areas of contract and property law, in relation to the law of nuisance the common law has been allowed to reign supreme. If pioneering legislation interfering with the common law of nuisance is to be introduced, it would seem more appropriate for the legislature to attempt to codify the circumstances in which

125. Note "The Right to Light: A Comparative Approach to Solar Access" (1978) 4 *Brooklyn J. Int.L.* 221, 234

126. Note "Assuring Legal Access to Solar Energy: An Overview with Proposed Legislation for the State of Nebraska" (1978) 12 *Creighton L.Rev.* 567, 593

127. In Victoria, the County Court also has jurisdiction to grant injunctions where the amount in dispute or the value of the property affected does not exceed \$2,000 (County Court Act 1958, s.41). In practice, this jurisdiction is never invoked.

a nuisance is created or to make a broad-ranging declaration as to what constitutes a nuisance rather than to make a specific rule for the benefit of the solar user. As a political matter it is highly unlikely that solar users will be singled out by parliamentarians for privileged treatment of this nature when at the present time they constitute only a small minority in the community.

Perhaps the most persuasive argument against the proposed changes discussed above is as follows: why is it necessary to declare the shading of solar collector-panels to be a nuisance and so import all the complexities of that body of law into the resolution of any dispute when it would be possible to create legislation providing a simple remedy without resorting to the law of nuisance at all? There are useful precedents for legislation of this nature in the area of environmental protection.<sup>128</sup> In some instances where a legislature has considered it necessary to provide a remedy to an affected landowner for protection against excessive noise and unpleasant or dangerous emissions, it has not declared such activity to be a public or a private nuisance actionable under common law rules but has provided for a separate statutory remedy. It has done this even though the activities against which the remedy is sought fall within the scope of nuisance at common law. Although most Acts of this nature provide for the prosecution of offenders by a statutory authority and the imposition of a penalty instead of civil liability, this will usually be satisfactory for the complainant as in most cases if he brought an action for nuisance he would be seeking an injunction rather than damages.

It would be comparatively simple to provide for similar specific legislation in the solar context. Based on existing legislation in other contexts,<sup>129</sup> the following draft legislation is tentatively suggested. This legislation could be incorporated into the existing State property law legislation.

(1) For the purposes of this section,

“Court” means a Magistrates’ Court.

“Occupier” means a person who is entitled to occupy the land and who satisfies the Court that he is residing or intends within a reasonable time to reside in a building erected or to be erected on the land.

“Solar energy system” means a solar collector or other device or a structural design feature of a structure which provides for the collec-

128. See e.g. Environmental Protection Act 1970 (Vic.), ss.38-53; Health Act 1935-1980 (S.A.), ss.82-126. In some situations the legislature has defined certain activities to be a “statutory nuisance” (e.g. Health Act 1958 (Vic.), s.43; Public Health Act 1936 (U.K.), s.92ff; Control of Pollution Act 1974 (U.K.), Part III), against which various statutory penalties are provided. Despite the similarity of wording, a “statutory nuisance” is totally separate from the common law torts of public and private nuisance both conceptually and in respect of the available remedies.

129. See especially Property Law Act 1952 (N.Z.), s.129C.

tion of sunlight and which comprises part of a system for the conversion of the sun's radiant energy into thermal, chemical, mechanical or electrical energy.

"Structure" means any building, wall, fence, or other improvement erected on the land by any person otherwise than pursuant to a building permit issued by the local authority concerned.

"Tree" includes any shrub or plant.

- (2) The occupier of any land may at any time apply to a court for an order requiring the occupier of any other land to remove or trim any trees growing or standing on that other land, or to remove or alter any structure erected on that land.
- (3) On any such application the Court may make such order as it thinks fit, if, having regard to all the circumstances of the case, and, where required, to the matters specified in sub-section (4) of this section, the Court considers the order to be fair and reasonable, and to be necessary to remove or prevent, or to prevent the recurrence of any actual or potential obstruction to the direct sunlight reaching a solar energy system installed or to be installed within a reasonable time on the land of the occupier.
- (4) In any case where the applicant alleges that a tree is obstructing the direct sunlight reaching a solar energy system installed on his land, the Court, in considering whether to make an order under this section, shall have regard to the following matters:
  - (a) the interests of the public in the maintenance of an aesthetically pleasing environment;
  - (b) the desirability of protecting public reserves containing trees; and
  - (c) the likely effect (if any) of the removal or trimming of the tree on ground stability, the water table, or run-off.
- (5) The court shall not make an order under this section unless it is satisfied that the hardship that would be caused to the applicant or to any other person residing with the applicant by the refusal to make the order is greater than the hardship that would be caused to the defendant or to any other person by the making of the order.
- (6) Where the application relates to any land on which a solar energy system has not been erected, the Court shall not make an order under this section unless it is satisfied that such a system will be erected on the land within a reasonable time. Unless the Court, having regard to all the circumstances of the case, otherwise determines an order made in such a case shall not become operative unless and until the solar energy system is erected, and, if no such system is erected within a reasonable time, the order may be discharged on the application of any interested person.
- (7) An order may be made under this section whether or not the wrong

- being caused by the tree or structure constitutes a legal nuisance, and whether or not it could be the subject of any proceedings otherwise than under this section.
- (8) Every order made under this section shall provide that the reasonable cost of carrying out any work necessary to give effect to the order shall be borne by the applicant for the order, unless the Court is satisfied, having regard to the conduct of the defendant, that it is just and equitable to require the defendant to pay the whole or any specified share of the cost of such work.
- (9) If an order made under this section in respect of the removal or trimming of any tree, or of the removal or alteration of any structure, is not duly complied with within one month after the date of the order, or within such longer period as may be specified in the order or allowed by the Court, the applicant for the order may at any time thereafter cause the land in respect of which the order was made to be entered upon and the work necessary to give effect to the order to be carried out; and, unless the Court otherwise orders, any order of the Court made under sub-section (8) of this section (not being an order requiring the defendant to meet the whole of the cost referred to in that sub-section) shall be discharged, and the applicant shall be entitled to recover from the defendant the whole of the reasonable cost of the work necessary to give effect to the Court's order.
- (10) This section shall bind the Crown.

Three points should be noted concerning this draft proposed legislation. First, unlike the American legislation declaring the shading of solar collector-panels to be a nuisance, by its definition of "solar energy system" in sub-section (1) this proposed legislation would protect all types of solar energy systems. Thus, for example, the requirement in the Californian Solar Shade Control Act that the solar energy system be capable of generating at least five million British thermal units per year has been omitted in the draft proposal. While this may suffer from the disadvantage of possibly providing protection for inefficient solar systems, it is submitted that this consideration is outweighed by the advantage of protecting passive as well as active systems.<sup>130</sup> Even though the definition of "solar energy system" in sub-section (1) is sufficiently broad to include inefficient active solar systems, such systems may be excluded in some cases by the operation of sub-section (5). This sub-section requires the court to withhold a remedy unless the solar user can prove that he would

130. A passive solar energy system involves designing a building so that its materials absorb and store solar heat when it is wanted, and reject it when it is not. Thus the building itself is the solar collector. On the other hand, an active solar energy system, has separate solar collectors on the outside of the building to heat water or air which is then piped into the building for direct heating or heat storage. See I. Pausacker and J. Andrews *Living Better with Less* (1981) 46.

suffer greater hardship by the refusal to make the order than the hardship which would be caused to the defendant by the making of the order. If his system is inefficient, it will be difficult for the solar user to prove that he will suffer the requisite degree of hardship.

Secondly, the definition of "structure" in sub-section (1) prevents the Magistrates' Court from making an order where the building responsible for shading the solar collector-panels is erected pursuant to a building permit issued by the local authority concerned. This provision is designed to ensure that the legislation is not invoked in such a way as to interfere with existing planning and zoning laws. Its overall effect will be to restrict severely the application of the proposed legislation to buildings and in most cases limit its operation to shading caused by trees.

Thirdly, sub-section (3) gives the court a discretion to refuse to order the removal or alteration of trees or structures even where an obstruction to direct sunlight can be clearly proved. This discretion is included so as to enable the court to take into account whether the location of the solar collector panels imposes an unreasonable restriction on the neighbouring land. This may well occur in some cases if the panels are located close to the boundary line at or near ground level. The only alternative to the suggested form of sub-section (3) would be to include an inflexible proviso to the operation of the legislation such as appears in s.25982 of the Californian Public Resources Code. It is submitted that it is preferable to give the magistrates' court a discretion in this matter in light of the deficiencies in the Californian provision discussed earlier.

This proposed legislation does not provide the solar user with a guaranteed remedy in the event that his right of solar access is blocked by a neighbour. This can be achieved only if the solar user protects his interest by an easement or a restrictive covenant. It is submitted that a guaranteed right of solar access can never be achieved in other circumstances without causing injustice to the legitimate interests of neighbouring landowners. If it is to operate fairly, any new legislation must balance the interests of the solar user with the interests of the neighbouring landowners. Even though there is a public interest in the furtherance of the use of solar energy technology, there is also a public interest in ensuring the preservation of trees and the maintenance of an aesthetically pleasing environment. Thus, as in all matters of land use planning legislation, the law must achieve a fair compromise between conflicting interests. Although the proposed legislation is not ideal for the solar user, if it is viewed in this light it should be regarded as the best form of legislation that the solar user could reasonably hope for under the circumstances.