

Legal Spotlight for Resilience of COVID-19: Public Nuisance in Workplaces

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Abstract - The COVID-19 pandemic has already created reflective dreadful effects in each country diversely. Governments have taken strict measures to lessen the shocking consequences of the outbreak and with the intention of combating the deadly virus. Accordingly, litigations which relate with workplaces not complying with COVID-19 health guidelines have been increased as exposure of employees as well as their family members to the virus may fence in employers liable for their infection. The modern notion of the public nuisance cause of action is addressed in these lawsuits, and it has become a trend. Hence, this research follows a doctrinal methodology, which intends to study whether and to what extent new-fangled appearance of public nuisance is applied in the scenario of COVID-19 pandemic, and it discusses optimistic and pessimistic outcomes of such applications as well as the defences. The article concludes by having positioned the workplace policies and practices implemented and enforced in the prevailing legal framework that meet the recommended health guidelines and various existing defences to the focal theory, which can help to set aside public nuisance claims.

Keywords— *COVID-19, public nuisance, workplace*

I. INTRODUCTION

SARS-CoV-2 or COVID-19 is a highly contagious disease which normally spreads by way of close contacts with an infected person. Due to its rapid spread and related threats and seriousness of the virus cannot be inconspicuous. Consequently, the crisis has severely punched countries creating a post pandemic catastrophe which continues to cause social, economic, health and environmental damage. People have inspired to seek compensation through more creative, uncommon mechanisms such as public nuisance claims.

In order to contain the virus, severely heightened mitigation efforts have been immediately implemented all over the world accordance with the recommendations taken by World Health Organization. As lockdowns, curfews and restrictions have begun to slacken off, individuals are in proximity and not having complied with physical distancing practices, relevant health and safety standards and recommended precautionary measures, the vulnerability of virus aggravates radically. With these unprecedented circumstances, application of public nuisance claims have continued to expand with varying extents as a cause of action, especially for employment not taking reasonable steps to protect employees. Thus, these lawsuits are creating a severe threat while businesses try to find a way of the “new normal.”

Therefore, this paper intends to scrutinize the application of public nuisance in order to grant relief to the actual victimized employees who allege that they were exposed to COVID-19 because of the risk created by the employers. And it is noticeable that as a common law right to recover damages from an employer without concerning the defences, public nuisance law would lose its validity as it has gone off the rails of its underlined purpose with the circumstances of the crisis. This paper concludes with concise final views to strengthen the doctrine of public nuisance which can be used more effectively to protect the rights of employers as well as employees which will contribute to constitute a more rewarding legal framework in response to the epidemiologic impact.

II. METHODOLOGY

This doctrinal research based on primary and secondary authorities including existing laws, related cases, books, journal articles and online sources and comprised a deep analysis of the developing legal proposition of public nuisance

theory in the arena of workplace occurrence due to COVID-19. And the main purpose of this theoretical research is, approach the broader objectives of law having applied traditional theories in modern circumstance shaped by the pandemic.

III. DISCUSSION AND ANALYSIS

A. Public Nuisance

The Nuisance is originated from the French word 'Nuire' which denotes to annoy or hurt and it is a common law tort action which relates to the use and enjoyment of land. It is "*sic utera tuo ut alienum non laedas*" which means "a man must not make use of his property unreasonably and unnecessarily to cause inconvenience to his neighbours".

Typically, a nuisance is a wrongful conduct or omission which has been illegally and unreasonably done to a person by another disturbing his previous enjoyment of a property or a common right. The law of nuisance tries to strike a balance between the competing interests of the land owner on the one hand and other who may be adversely affected by his action or omission on the other hand.

According to John Salmond "*The wrong of Nuisance consists in causing or allowing without lawful justification the escape of any deleterious thing from his land or from elsewhere into land in possession of the plaintiff, i.e. water, fumes, smoke, gas, noise, heat, vibration, electricity, disease, germs, animals*"¹

There are two types of nuisance in English Law respectively Public Nuisance and Private Nuisance. Other than to those, Statutory Nuisance also existing as said by Wolf and White who summarize the three categories of nuisance as follows;

*"The tort of private nuisance attempts to reconcile the competing interest of landowners; public nuisance is a crime which protects public rights, although an individual may bring an action where he or she suffered damage over and above that suffered by the public generally; a statutory nuisance is one which is largely controlled by local authorities exercising their statutory powers"*²

¹ Salmond J. (1973). *Salmond on Torts*. 16th ed. Sweet and Maxwell, London, p. 52

² Wolf S. and White A. *Principles of Environmental Law*. p.82

³ H. Wood. (1893). *A Practical Treatise on the Law of Nuisances* section 1. 3d ed. pp.1-3

The common idea of public nuisance is an unreasonable use by a person of his or her own property that works to injure the rights of the public.³ Eventually, the theory has become a more wide-spectrum cause of action used to protect rights common to the public, including environmental pollution, uncontrollable conduct and public health.

Effectively, there are generally four basic elements to claims of public nuisance: the existence of a public right, a substantial and unreasonable interference with that right, proximate cause, and injury. But these elements are less well-defined than in other causes of action, which is part of the appeal for plaintiffs⁴

To constitute "public nuisance," an interference with a right common to the public should be sustained including public health, the public peace, the public safety, the public convenience or the public comfort or a right enshrined by a stipulated law. And this interference must be substantial and unreasonable.

In Sri Lanka, Section 98 of Chapter IX of the Code of Criminal Procedure Act has specified the public nuisance and Chapter XIV of the Penal Code of Sri Lanka, section 261, a definition to the theory can be found and it states "*a person is guilty of a public nuisance who does any act or is guilty of any legal omission, which causes any common injury danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury obstruction danger or annoyance to persons who may have occasioned to use any public right. A public nuisance is not excused on the ground that it causes some convenience or advantage.*" Chapter IX of the Code of Criminal Procedure Act No. 15 of 1979 cope with judicial orders pertaining to removal or abatement in such cases and Magistrate has the power to issue a conditional order or an order of Injunction.

B. Public Nuisance shaped by Covid-19

As each country is seeking better measures which can mitigate the epidemiological impact adopting necessary precautionary measures and follow the recommended health guidelines implemented in the

⁴ COVID-19: The Next Public Nuisance? [online]

Available at:

<<https://www.jdsupra.com/legalnews/covid-19-the-next-public-nuisance-83133/>> [Accessed 10 Jun. 2021].

domestic legal system having collaborated with international law are obvious. It is the emerging trend of applying public nuisance based on forming unreasonable risk of the virus to the public or those who often getting contacted specifically in which the employer's failure to obey with COVID-19 safety guidelines.

As aforementioned, an unreasonable interference with a right common to the general public should be proved so as to constitute public nuisance and in the context of COVID-19, public health imperative to combat the spread of an infectious, dangerous disease is enough to meet the terms to the public right requirement. This has opened new arena of public nuisance particularly against employers that allegedly fail to comply public health guidelines.

This emerging movement is vastly applying in United State of America in the phenomenon of the pandemic. Under the California Civil Code, section 3479 "nuisance" is "anything which is injurious to health, ... or is indecent or offensive to the senses, ... so as to interfere with the comfortable enjoyment of life or property." and section 3480 defines "public nuisance" as any nuisance that "affects at the same time an entire community or neighbourhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

Therefore, the court granted preliminary and permanent injunctive relief enjoining Defendant from continuing to engage in, and from refraining from engaging in, the wrongful acts, omissions, and practices alleged herein whose commission and omission constitute a public nuisance, unfair business practice, and/or violation of law.⁵

For instance, a case decided in 2020 by the United States District Court, Eastern District of California, *Maria Pilar Ornelas v. Central Valley Meat Co., Inc.* 1:20-cv-01017-AWI-SKO, is a landmark suit where court decided the defendant's acts and omission substantially and unreasonably created the risk of spread and transmission of COVID-19 all of which form a public nuisance. In this case the plaintiff sued against her employer claiming several infringements of California state law, Family and Medical Leave Act and California Family Rights Act, as employer is a meat packing plant and was unable to comply with

minimum health and safety standards and adopt recommended precautions in order to combat COVID-19 virus and avoid its spreading and consequently employees became very sick and fearful of their health and safety. Plaintiff supported her public nuisance claim by showing the ultimate result by the failure of the defendant to defend its employees from the virus and number of COVID-19 cases could have been increased in the community in so doing. The defendant allegedly;⁶

- (a) intentionally failing to timely notify employees of their exposure to COVID-19;
- (b) refusing to send home employees with COVID-19 symptoms;
- (c) pressuring employees who call in sick with COVID-19 symptoms to report to work with threats of termination for job abandonment;
- (d) instituting a No-Fault Attendance Policy that pressures employees to work even when they are sick, out of fear of earning points toward discipline;
- (e) instituting a Bonus Appreciation Policy and Inventive Pay Policy for workers to lose incentive pay and/or bonuses for missing any work, even if it's because they are sick or disabled because of COVID-19;
- (f) with the fast-paced production line, disabling employees from taking adequate breaks to wash their hands or otherwise allow for heightened cleaning and disinfecting of the workstations;
- (g) refusing to implement adequate engineering controls to prevent the spread of SARS-CoV-2 (e.g., forcing employees to work in close proximity without adequate masks, gloves, or facial shields and without sufficient or effective sanitization); and
- (h) allowing and pressuring workers exposed to SARS-CoV-2 and who test positive for COVID-19 to return to work without proper quarantining, screening, monitoring, and/or other protective measures.

Palmer .v Amazon.com, Inc., 2020 WL 6388599 (E.D.N.Y. 2020); appears to be another example where public nuisance complaint was filed against Amazon in New York, accusing the company of failing to protect them from Covid-19 by not put into effect proper hygiene or social distancing.

⁵ *Maria Pilar Ornelas v. Central Valley Meat Co., Inc.* 1:20-cv-01017-AWI-SKO. p.56

⁶ Ibid 5. p.21

In India Section 268 of Indian Penal Code, 1872 defines Public nuisance⁷ and Under Section 291 of the IPC, this kind of nuisance is punishable with six months imprisonment, a fine or both. One of the most fundamental segments of containment of public nuisance is the quarantine provision of Indian Penal Code. Its Section 188, 269, 270, and 271 and Section 133 of Criminal Procedure Code, assumes pivotal significance in the present scenario of the COVID-19 pandemic and lock-down orders.⁸

In milieu of Sri Lanka, Five residents of Palamunai have filed a public nuisance case at the Akkaraipattu Magistrate's Court against the Palamunai Divisional Hospital being used to treat Covid patients and claimed that their groundwater is contaminated by waste water from the hospital that carries body secretions and excretions including stools of the Covid patients which has led to public nuisance⁹ and this case can be shown as a gateway towards the public nuisance case which guise the Covid-19.

C. Defences to Public Nuisance Claims in the phenomenon of Covid-19

While some courts are giving wider interpretation to this doctrine, some courts and defendants have avoided from it by having put forward the defences. As the novel outer shell of public nuisance has come into sight from United States of America, defences also can be found from that jurisdiction.

⁷ Section 268, Indian Penal Code, 1872: Public nuisance: A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

⁸ [Jonahshiny. Covid-19: The Current Legal Challenges And Important Strategies Of World Health Organization Global.](http://www.legalserviceindia.com/legal/article-2189-covid-19-the-current-legal-challenges-and-important-strategies-of-world-health-organization-global.html) [Online] Available at <<http://www.legalserviceindia.com/legal/article-2189-covid-19-the-current-legal-challenges-and-important-strategies-of-world-health-organization-global.html>> [Accessed 10 Jun. 2021].

⁹ *Public nuisance case filed against Covid treatment facility in Palamunai over groundwater contamination.* [Online] Available at <<https://www.newswire.lk/2020/12/21/public-nuisance-case-filed-against-covid-treatment-facility-in-palamunai-over-groundwater-contamination/>> [Accessed 11 Jun. 2021].

¹⁰ *Exclusive Remedy Rule Law and Legal Definition.* [Online] Available at

It is essential to rely on all applicable laws, bylaws, regulations and orders pertaining to COVID-19 public health guidance when defending public nuisance claims. When safety measures taken by employer are in line with a piece of legislation cope with the situation, employer can have a safe from such claims. Exclusive Remedy Rule also can be elucidated in this manner where limited benefits include in workers' compensation statutes such as by employees only to recover for work-related injuries. The court have carved out wider-interpretation and exceptions to the exclusive remedy rule such as dual capacity doctrine and these exceptions allow employees to recover more from employers than merely the statutorily prescribed benefits.¹⁰

Primary-Jurisdiction Doctrine is significantly applying discretionary doctrinal defence in the countries like United States of America that court may invoke to stay or dismiss a party's claims.¹¹ This judge-made doctrine allows a judge to transfer an entire claim or individual issues of a claim to an administrative agency for resolution and Courts use this to balance the relationship between courts and administrative agencies when their jurisdictions overlap.¹² In *Palmer .v Amazon.com, Inc.*, 2020 WL 6388599 (E.D.N.Y. 2020) judge Brian M. Cogan granted Amazon's motion to dismiss the public-nuisance claim under the primary-jurisdiction doctrine. In *Hernandez v. VES McDonald's* (No.

<<https://definitions.uslegal.com/e/exclusive-remedy-rule/>> [Accessed 09 Jun. 2021].

¹¹ Gary P. Gengel, Kegan A. Brown, and Robert J. Denicola. *Use of the Primary Jurisdiction Doctrine to Defend Litigation Involving Contaminated Sites.* [Online] Available at

<<https://www.lw.com/thoughtLeadership/use-of-the-primary-jurisdiction-doctrine-to-defend-litigation-involving-contaminated-sites>> [Accessed 11 Jun. 2021]. "There is no "fixed formula" governing application of the doctrine, in general, the factors that courts evaluate include (1) whether the issue is a question within an agency's particular field of expertise, (2) whether the issue is particularly within the agency's discretion, (3) whether there is a substantial risk of inconsistent rulings, and (4) whether a prior application to the appropriate agency has been made..."

¹² Penney M. *Application of the Primary Jurisdiction Doctrine to Clean Air Act Citizen Suits.* [Online] Available at <https://www.bc.edu/content/dam/files/schools/law/law-reviews/journals/bcealr/29_2/06_TXT.htm> [Accessed 14 Jun. 2021].

RG20064825, Superior Court of California, County of Alameda) McDonald was sued on the failure of providing sufficient safety training or protective equipment to employees. The family members of employees also alleged that they were exposed to the virus when infected employees came home. The Cook County court denied McDonald's motion to dismiss on the grounds that regulatory agencies have primary jurisdiction, allowing the public nuisance claims to proceed.

Implementing reasonable safety measures and enforcing compliant workplace policies and practices is another potential defence. *In Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, No. 5:20-CV-06063-DGK, 2020 public nuisance claim was dismissed as the employer Smithfield has taken momentous precautionary measures to cope with preventing further infection.

Although Control over the nuisance as a strong defence, is generally used where manufacturers argued that they were not in control of the alleged nuisance at the time it caused harm, it is used differently in the pandemic related cases having developed that the defendants do have control over the premises, but do not have control over the virus or potentially over the actions of employees.¹³

Causation is another practicable defence as the requirement of proximate cause or the affiliation between cause and effect is mandatory to such suits. It is hard to prevail a public nuisance action by having proved that one person has suffered special loss.

D. Advantages and Disadvantages

It is essential to follow the recommended health guidelines in order to combat to the outbreak and applying this theory to the current cohesion has clear potential to ensure worker safety and created a legal inspiration for the mindful employers to carry on such public health measures and a employee successfully proves to a court that employer has or will cause them harm, that person can be ordered to pay damages to compensate for the harm suffered and/or prevent causing the harm as a precautionary measure.

On the other hand, such restraining order compelling the business to be shutdown could be destructive to a business and this process may weird by having filed unnecessary mere cases with a hidden purpose of an employee and where employees have attempted to use public nuisance law to evade the requirements of other causes of action. This can be lighten through the defences pertaining to the doctrine and it will discourage alleging such claims as it is unclear whether courts will allow the claims or plaintiffs must seek recourse another way.

IV. CONCLUSION

In sum, COVID-19 pandemic possibly will imply that these cases are novel, but they really like a new-fangled outer shell of the public nuisance and the covid-19 suits are therefore the most recent manifestation of a larger trend of guise of public nuisance.

Seeing that the challenges of the deadly virus has created and will continue to twist for employers in future as well, public nuisance is going to be an imperative as it can be expected more will be alleged similar pattern in this context. Consequently, public nuisance claims based upon an employer's supposed failure to heed public health orders may soon find itself in more employment cases also in Sri Lanka in the continuing nature of the pandemic.

Although the defences have carved confusion how certain courts will ultimately rule on the issue and where courts have barred such suits, adhering to the health measures will be an important defence and in response to defending a public nuisance action is to differentiate the genuine cause of action the employee should have brought from public nuisance, both in terms of the elements and the purpose of each.

These public nuisance claims are challenging but paramount and prospectively a perfect fit for the new normal as such actions advancing the interests of large numbers of citizens in the pandemic context by adopting reasonable measures which devastated workplace exposure to Covid-19 can be used as a legal tool to fill the gap between law and challenges posed by the crisis.

¹³ Cialkowski A; Nilan M.; Reichard C; Salveson E; Sylvester C; and Lewis P.A. *COVID-19: The Next Public Nuisance?*. [Online] Available at

<<https://www.jdsupra.com/legalnews/covid-19-the-next-public-nuisance-83133/>> [Accessed 12 Jun. 2021].

Conversely, public nuisance claims are an additional risk which could create profound consequences for employers as well as employees and success of such claims depends on how courts choose to extend public nuisance doctrine to the workplace to achieve the ultimate purpose of the doctrine. To manage the risk, a progressive and effective legal mechanism inevitably based on judicial intervention in advance of legislative authority is still needed which forces business is to take reasonable measures to protect employees and the public during the COVID-19 outbreak and in order to make the balance between the competing interests of the employers and employees.

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