

**TATE & LYLE: PURE ECONOMIC LOSS
AND THE MODERN TORT OF PUBLIC NUISANCE**

J.W. NEYERS* AND ANDREW BOTTERELL**

Professor Lewis Klar criticizes the Canadian approach to the tort of public nuisance for being illogical and incoherent. The authors agree with Klar's assessment of the current state of public nuisance law, but argue that insights drawn from the House of Lords decision in Tate & Lyle Industries Ltd. v. Greater London Council offer a way forward. By conceptualizing the tort of public nuisance as a cause of action that protects subjects from suffering actual loss that is consequential on the violation of their passage and fishing rights over public property, Tate & Lyle offers a coherent and restrained formulation of the tort of public nuisance. This article examines the Tate & Lyle approach to public nuisance and applies it to two infamous Canadian public nuisance cases. It concludes that the coherent, logical approach to public nuisance articulated by the House of Lords in Tate & Lyle should be readopted by Canadian courts.

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I. INTRODUCTION

In his well-respected and highly influential text, Professor Lewis Klar is decidedly critical of the modern Canadian understanding of the tort of public nuisance. He writes:

[T]he private action for public nuisance is initiated in order to protect not the public's interest, but the personal interests of the complainant. The requirement, therefore, that a civil action for public nuisance proceed only on the basis that the nuisance was, in the first instance, a public one is illogical. It is an illustration of the schizophrenic nature of the tort. The odd result is that a public nuisance becomes actionable at the instigation of a private complainant only if the nuisance interfered with the public interest while at the same time damaging the claimant's own interests in a unique way.¹

* Faculty Scholar and Professor of Law, Western University, Canada.

** Associate Professor, Faculty of Law and Department of Philosophy, Western University, Canada. This research was funded in part by a grant from The Foundation for Legal Research. The authors thank Nick McBride, Lewis Klar, and Stephen Pitel for their comments on drafts of this article and Eric Andrews for his research assistance. The usual disclaimer applies.

¹ Lewis N Klar, *Tort Law*, 5th ed (Toronto, Ont: Carswell, 2012) at 749.

While we sympathize with his assessment of the current formulation of the tort, as do others,² we are also of the view that a coherent and logical tort of public nuisance lies obscured just beneath the surface of this formulation. Moreover, we are of the view that the House of Lords' decision in *Tate & Lyle Industries Ltd. v. Greater London Council*³ provides an important landmark on the way to unearthing this coherent and logical tort. Thus, in honour of Professor Klar's retirement, we offer an argument for why *Tate & Lyle* deserves to be recognized as a landmark case in the tort of public nuisance. The argument proceeds in three sections. In the first section, we explain the facts and the decision and discuss why *Tate & Lyle* deserves to be recognized as a landmark case in the law of torts generally. In the next section we turn to an examination of why, more specifically, *Tate & Lyle* also deserves to be recognized as a landmark case in the tort of public nuisance. In the third section, we use the insights gained from this examination to analyze some leading Canadian public nuisance decisions and suggest how these cases should be decided using this coherent and restrained formulation of the tort. We then offer a short conclusion.

II. TATE & LYLE AS A LANDMARK CASE IN THE LAW OF TORTS

A. THE FACTS

The facts in *Tate & Lyle* are somewhat complex, but at bottom they involve a disagreement about who should bear the costs of dredging a shipping channel on the River Thames that became filled and blocked with silt. The plaintiff, Tate & Lyle Industries Ltd. (Tate & Lyle), operated a sugar refinery upstream of the Woolwich Ferry terminals on the Thames River. In 1922, Tate & Lyle was given permission by the defendant Port of London Authority (PLA) to construct a jetty (the refined sugar jetty) next to its sugar refinery. In 1965, it subsequently obtained permission from the PLA for the construction of another jetty (the raw sugar jetty) and for the dredging of a new, deeper channel between the main shipping channel and its jetties. Around this same time, new terminals for the Woolwich Ferry were approved by the second defendant Greater London Council (GLC). Unfortunately, the inadequate design of the ferry terminals slowed the flow of the river, causing siltation which reduced the depth of the water adjacent to Tate & Lyle's jetties. As a result, Tate & Lyle was forced to incur substantially higher dredging costs between 1967 and 1974 (in the amount of £540,000) to continue using its jetties until further alterations to the river ended the siltation problem. Tate & Lyle sued both the GLC and PLA for negligence, private nuisance, and public nuisance. At trial, Tate & Lyle's claims in private and public nuisance were unsuccessful but its claim in negligence succeeded. In the Court of Appeal, all of the plaintiff's claims were dismissed.⁴

² See e.g. Michael A Jones, "Public Rights, Private Rights and Particular Damage" (1983) 34:4 N Ir Leg Q 341 at 341: "Public nuisance is a peculiar tort. By definition the defendant's conduct must have interfered with some public right, yet the particular damage that enables the private individual to maintain an action somehow converts the nuisance into a private wrong.... Breach of public right shades into private wrong with little to mark the transformation" [footnotes omitted]; John PS McLaren, "Nuisance in Canada" in Allen M Linden, ed, *Studies in Canadian Tort Law: A Volume of Essays on the Law of Torts Dedicated to the Memory of the Late Dean C.A. Wright* (Toronto: Butterworths, 1968) 320 at 325–27.

³ [1983] UKHL 2, [1983] 2 AC 509 (HL (Eng)) [*Tate & Lyle*].

⁴ *Tate & Lyle Food Distribution Ltd v Greater London Council* (1982), 80 LGR 753 (CA).

B. THE DECISION

The plaintiff appealed to the House of Lords. The “engaging simplicity”⁵ of the plaintiff’s argument (put with “artless elegance”⁶) was that since it was reasonably foreseeable that the construction of the ferry terminals would cause the siltation, the GLC was legally responsible for its losses. This was a responsibility that the PLA shared as a result of approving the project. Their Lordships unanimously agreed with the Court of Appeal that the claims in private nuisance and negligence must fail, but disagreed with the Court of Appeal on the issue of public nuisance.⁷

The House of Lords’ analyses of the private nuisance and negligence claims are instructive for several reasons, but what stands out is the Court’s determination that those claims failed because there was no primary right of the plaintiff with which the defendants had improperly interfered. As Lord Templeman stated: “Tate & Lyle can only succeed if they establish that they were obstructed by the [defendants] in the exercise by Tate & Lyle of rights over the river bed vested in Tate & Lyle.”⁸ As riparian owners, Tate & Lyle were “entitled to access to the water in contact with their frontage, and to have the water flow to them in its natural state in flow, quality and quantity.”⁹ However, their riparian status did not include an entitlement to any particular depth of the water in the adjacent river. Lord Templeman therefore concluded that: “Tate & Lyle cannot maintain an action in negligence because they did not possess any private rights which enabled them to insist on any particular depth of water in connection with the operation of their licensed jetties.”¹⁰ He also added that “[a]n action in private nuisance must also fail if Tate & Lyle have no private rights in connection with the depth of the river Thames.”¹¹

The majority of the House of Lords, however, allowed the plaintiff’s appeal in respect of its public nuisance claim against the GLC for £405,000 (which represented three-quarters of the overall cost of the dredging).¹² Relying on the distinction between private riparian rights and the public right of navigation, their Lordships held that the public right to navigate on the River Thames included the right to navigate the river at its natural depth (which was to be interpreted in a river such as the Thames to mean the depth after statutorily authorized dredging). As Lord Templeman explained: “The Thames is a navigable river over which the public have the right of navigation, that is to say, a right to pass and repass over the whole width and depth of water.”¹³ Their Lordships also concluded that the siltation caused by the ferry terminals interfered with this right and that three-quarters of this interference was not justified by the animating statute since the terminals might have been designed in such a way as to eliminate that portion of the siltation. They also held that Tate & Lyle had suffered special damage “because vessels of the requisite dimensions were unable to pass and repass

⁵ *Tate & Lyle*, *supra* note 3 at 529.

⁶ Jones, *supra* note 2 at 342.

⁷ *Tate & Lyle*, *supra* note 3 at 544, 547, 548.

⁸ *Ibid* at 531.

⁹ *Ibid*.

¹⁰ *Ibid* at 536.

¹¹ *Ibid*.

¹² *Ibid* at 545. Lord Diplock dissented on the twin bases that (1) the natural depth of the River Thames did not include the depth created through artificial dredging; and (2) the plaintiff had caused its own damage by choosing to use the river to receive large vessels (*ibid* at 545–46).

¹³ *Ibid* at 537.

... between the main shipping channel”¹⁴ and the plaintiff’s jetties, and that the costs of dredging represented the amount of the loss sustained from this interference.¹⁵ As there were no facts or circumstances that should have alerted the PLA to the “unforeseen and disastrous amount of siltation which took place”¹⁶ they held that the PLA could not be said to have adopted or continued the GLC’s nuisance and therefore the case against it was dismissed.¹⁷

In a previous article, one of us argued that *Tate & Lyle* deserves to be viewed as a landmark decision in the law of torts.¹⁸ This is a somewhat surprising claim, since *Tate & Lyle* is not usually recognized as such — indeed, many tort lawyers are probably not familiar with the case at all. Nonetheless, the argument of that article was that *Tate & Lyle* ought to be considered a landmark case on the grounds that the decision, at least as it concerns the torts of private nuisance and negligence, exhibited certain important conceptual and legal truths. As it was put in that article, “*Tate & Lyle* explicitly recognises what is implicit in every tort law decision — namely that ... tort liability requires the claimant to prove *both* the existence of a right *and* interference that is wrongful in relation to that right.”¹⁹ This two-step approach to negligence and private nuisance, where one first determines whether the plaintiff enjoys a primary right that has been interfered with by the defendant before turning to consider whether any such interference is wrongful, has been called the rights-based approach.²⁰ That article also claimed that this approach, exemplified in the reasoning of the House of Lords in *Tate & Lyle*, is superior to the standard process employed by academics and modern courts where one first determines whether the defendant’s wrongful conduct caused loss before turning to consider whether there are any policy reasons to limit or negate the imposition or scope of liability. While this is not the place to engage in sustained argument, the claim was that this superiority resided in the fact that the rights-based approach could accommodate the pockets of “no liability” that are found in the common law (such as for prevention nuisances, pure economic loss, and rescue) more easily than the standard policy approach and in a way that ensured essential coherence between the law of property or persons and the law of torts.²¹

To be clear, we remain of the view that the assessment of *Tate & Lyle* as a landmark case in the law of torts is defensible and important. All the same, there remains something dissatisfying about that assessment. This is because, while the torts of private nuisance and negligence were at the forefront of the litigation in *Tate & Lyle*, as we have seen the tort of public nuisance also played an important role. However, given that the focus in the previous article was almost exclusively on private nuisance and negligence, one could be forgiven for wondering whether *Tate & Lyle*’s explicit recognition of “what is implicit in every tort law

¹⁴ *Ibid.*

¹⁵ *Ibid* at 537, 543.

¹⁶ *Ibid* at 542.

¹⁷ *Ibid.*

¹⁸ JW Neyers, “*Tate & Lyle Food & Distribution Ltd v Greater London Council* (1983)” in Charles Mitchell & Paul Mitchell, eds, *Landmark Cases in the Law of Tort* (Oxford: Hart, 2010) 227 [Neyers, “*Tate & Lyle*”].

¹⁹ *Ibid* at 228 [footnotes omitted].

²⁰ See Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012); Arthur Ripstein, “Philosophy of Tort Law” in Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 656; Allan Beever, *Rediscovering the Law of Negligence* (Portland: Hart, 2007); Robert Stevens, *Torts and Rights* (New York: Oxford University Press, 2007); Andrew Botterell, “Rights, Loss and Compensation in the Law of Torts” (2015) 69 SCLR (2d) 135.

²¹ Neyers, “*Tate & Lyle*,” *supra* note 18 at 236–48.

decision”²² extends to the analysis engaged in by the House of Lords with respect to the tort of public nuisance and in what way. Moreover, given that the ultimate conclusion in *Tate & Lyle* was that the defendant was liable in public nuisance, but not in private nuisance or negligence, it would be disappointing to learn that the House of Lords’ analysis of public nuisance was misleading or just plain wrong. In fact, given the relatively lukewarm reception that the Court’s analysis of public nuisance received in the immediate post judgment literature,²³ one could also be forgiven for thinking that if *Tate & Lyle* deserves to be seen as a landmark decision this has little to do with any truths it elucidates in relation to this tort.²⁴ The purpose of the next section is to counter this widely held perception.

III. *TATE & LYLE* AS A LANDMARK CASE IN THE TORT OF PUBLIC NUISANCE

Beyond negligence and private nuisance, *Tate & Lyle* deserves to be recognized as a landmark case in the tort of public nuisance for three reasons. First, it offers a more compelling view of the rights that the tort protects — its rights-base — than do either the orthodox Anglo-American understanding or the modern Canadian formulation. Second, it provides a workable definition of the concept of “particular damage,” one that better accords with the traditional case law on special damage than do other modern formulations of its meaning. Third, it correctly allows for the recovery of pure economic loss and therefore provides, by implication, valuable guidance for courts as to when such damages should be recoverable.

A. THE RIGHTS-BASE

Under the orthodox Anglo-American understanding of public nuisance, the tort of public nuisance and the crime of public or common nuisance are virtually indistinguishable. As William Prosser argued in his formative article: “A public or ‘common nuisance’ is always a crime. It may also be a tort, provided that the plaintiff can plead and prove that he has suffered some ‘special’ or ‘particular’ damage.”²⁵ Thus, while many well-established torts have both a criminal and tortious nature and can therefore be said to run in “parallel,”²⁶ the liability envisioned for the tort of public nuisance is seen to be “parasitic” on the existence of the crime. Phrased differently, the commission of the crime is seen as “both a necessary and a sufficient condition for civil liability for public nuisance” whereas for all other torts “the commission of a crime is neither a necessary nor a sufficient condition for tort liability.”²⁷ As John Murphy explains in his treatise on nuisance: “In order for there to be an actionable *tort* of public nuisance ... two things must be shown: first, that a public nuisance *simpliciter* has been committed; and, secondly, that the claimant has suffered particular

²² *Ibid* at 228.

²³ See e.g. Stephen Tromans, “A Tale of Sugar and Silt, or, Muddy Waters in the House of Lords” (1984) 43:1 Cambridge LJ 21; Geoffrey Samuel, “Public Law and Private Loss (2)” (1983) 99:4 Law Q Rev 529; Jones, *supra* note 2; Peter Paulden, “Ferry Terminals as a Public Nuisance” (1986) 1:1 Intl J Estuarine & Coastal L 70.

²⁴ See e.g. Nicholas J McBride & Roderick Bagshaw, *Tort Law*, 5th ed (Harlow, UK: Pearson Education, 2015) at 672, n 65.

²⁵ William L Prosser, “Private Action for Public Nuisance” (1966) 52:6 Va L Rev 997 at 997.

²⁶ See JR Spencer, “Civil Liability for Crimes” in Matthew Dyson, ed, *Unravelling Tort and Crime* (Cambridge: Cambridge University Press, 2014) 304 at 305; McBride & Bagshaw, *supra* note 23 at 658–59.

²⁷ Thomas W Merrill, “Is Public Nuisance a Tort?” (2011) 4:2 J Tort L, Article 4 at 11.

damage in consequence.”²⁸ That this is not merely an academic conceptualization can be seen in Lord Bingham’s examination of the issue in *R. v. Rimmington*:

Unusually, perhaps, conduct which could found a criminal prosecution for causing a common nuisance could also found a civil action in tort. Since, in the ordinary way, no individual member of the public had any better ground for action than any other member of the public, the Attorney General assumed the role of plaintiff, acting on the relation of the community which had suffered. This was attractive, since he could seek an injunction and the abatement of the nuisance was usually the object most desired.... It was, however, held by Fitzherbert J, as early as 1536 ... that a member of the public could sue for a common or public nuisance if he could show that he had suffered particular damage over and above the ordinary damage suffered by the public at large. To the present day, causing a public nuisance has been treated as both a crime and a tort, *the ingredients of each being the same*.²⁹

As one of us pointed out before,³⁰ viewing the commission of the crime as the tort’s rights-base is deeply problematic for at least three reasons. “First, allowing recovery violates the general [common] law principle ... that there [can be] no liability for merely causing loss through the commission of a criminal offence or other unlawful action.”³¹ As J.R. Spencer notes: “The courts may be wrong in refusing to accept the idea that damages should be generally recoverable for losses caused by breaches of the criminal law, but as long as they do so, giving the plaintiff damages for any type of loss merely because the defendant has caused it by committing the crime of public nuisance is anomalous.”³² Thus, the existence of the tort of public nuisance under this formulation renders the common law internally incoherent, since it anomalously allows liability for damages for one crime but not for others.

Second, allowing recovery for private individuals also violates the privity principle that “[t]he only person who can enforce a right is the right-holder.”³³ As Justice Cardozo elegantly stated in *Palsgraf v. Long Island R. Co.*, a plaintiff must sue “in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.”³⁴ Since the gravamen of the crime is conceived to be interference with a public right, only the holder of that right, namely the public, represented by the Attorney General,

²⁸ John Murphy, *The Law of Nuisance* (New York: Oxford University Press, 2010) at para 7.51 [emphasis in original]. See also Allan Beever, *The Law of Private Nuisance* (Oxford: Hart, 2013) at 103.

²⁹ [2005] UKHL 63, [2006] 1 AC 459 at para 7 (HL (Eng)) [citation omitted] [emphasis added].

³⁰ JW Neyers, “Divergence and Convergence in the Tort of Public Nuisance” in Andrew Robertson & Michael Tilbury, eds, *Divergences in Private Law* (Oxford: Hart, 2015) 69 [Neyers, “Divergence”].

³¹ See also *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* (1981), [1982] AC 173 (HL (Eng)); *R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205; *OBG Ltd v Allan*, [2007] UKHL 21, [2008] 1 AC 1; *Al Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12, [2014] 1 SCR 177. Even in the tort of unlawful means conspiracy it is not the criminality alone which allows relief but rather the combination of criminality and conspiracy, see *Revenue and Customs Commissioners v Total Network SL*, [2008] UKHL 19, [2008] 1 AC 1174 at para 221; *Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd*, [1983] 1 SCR 452.

³² JR Spencer, “Public Nuisance: A Critical Examination” (1989) 48:1 Cambridge LJ 55 at 83 [footnotes omitted] [Spencer, “Public Nuisance”]. See also Samuel, *supra* note 22 at 531.

³³ Stevens, *supra* note 19 at 173. He continues: “Privity is a principle most commonly considered within the law of contract, but it is applicable to all rights” (*ibid*). See also Benjamin C Zipursky, “Rights, Wrongs, and Recourse in the Law of Torts” (1998) 51:1 Vand L Rev 1 at 3:

For all torts, courts reject a plaintiff’s claim when the defendant’s conduct, even if a wrong to a third party, was not a wrong to the plaintiff herself. For example, an injured plaintiff can win in fraud only if she was defrauded, in defamation only if she was defamed, in trespass only if her land rights were violated, and so on. Courts reach these results even where the defendant acted tortiously, the plaintiff suffered a real injury, and the plaintiff’s injury was reasonably foreseeable.

³⁴ 162 NE 99 at 100 (NY Ct App 1928).

should be able to sue. Therefore, as Nicholas McBride and Roderick Bagshaw note, if judges were taking privity seriously, they should have said “that public nuisances were not civilly actionable because committing a public nuisance involved a wrong to the public, and not [to] any particular private individual.”³⁵ Indeed, this focus on public rights has caused some commentators to suggest that public nuisance cannot be a tort at all under the Anglo-American conception. Thus, according to Murphy, “[b]ecause the rights that are violated in cases of public nuisance are public rights, it can be argued that civil actions in respect of public nuisance are not properly to be regarded as tort actions.”³⁶ Similarly, in Thomas Merrill’s view since public nuisance “protects public rights, not private rights” and “liability was historically said to lie only for activity indictable as a crime ... public nuisance, as conventionally conceived, is not a tort.”³⁷

Third, there is the practical problem that under the orthodox Anglo-American view the scope of the tort automatically changes with each amendment or variation in the criminal law. As Jamie Cassels points out: “If proof of criminal conduct by the defendant is a precondition to civil liability for public nuisance, the scope of the modern law must be defined and limited by existing criminal legislation.”³⁸ Thus, if the crime were abolished it necessarily means that the current tort would go with it. As Murphy notes in relation to the position in the United Kingdom: “Perhaps ironically, one of the strongest arguments that can be made in favour of retaining the common law crime of public nuisance is the fact that, without it, there would be no prospect of an individual obtaining a civil law remedy in respect of such interferences.”³⁹

Perhaps sensing these problems, Canadian tort law has slowly been moving away from the orthodox Anglo-American view. Rather than seeing the tort as being parasitic on the crime, and asking first whether the crime of common nuisance under section 180 of the *Criminal Code*⁴⁰ has been committed before moving on to an examination of special damage, modern Canadian courts have instead been treating the tort and crime as separate entities that merely run in “parallel.”⁴¹ Relying on the work of academics such as Professor Klar and G.H.L. Fridman, they have therefore begun to ask themselves merely whether an activity unreasonably interferes: (1) with “the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference”;⁴² or (2) with “the public’s interest in questions of health, safety, morality, comfort or convenience.”⁴³ Thus, if only by happenstance, Canadian courts have come to the conclusion that “[w]hile a public nuisance may also be a crime” it is now an independent tort with its own set of doctrinal

³⁵ McBride & Bagshaw, *supra* note 24 at 659. See also the discussion in FH Newark, “The Boundaries of Nuisance” (1949) 65:4 Law Q Rev 480 at 483.

³⁶ Murphy, *supra* note 28 at 137, n 36.

³⁷ Merrill, *supra* note 27 at 19.

³⁸ Jamie Cassels, “Prostitution and Public Nuisance: Desperate Measures and the Limits of Civil Adjudication” (1985) 63:4 Can Bar Rev 764 at 780.

³⁹ Murphy, *supra* note 28 at para 7.51.

⁴⁰ RSC 1985, c C-46.

⁴¹ See Klar, *supra* note 1 at 750–51 (discussing the Canadian move away from seeing criminality as the lynchpin of the tort). For a detailed discussion, see Cassels, *supra* note 38 at 780–82; Neyers, “Divergence,” *supra* note 30.

⁴² *Ryan v Victoria (City)*, [1999] 1 SCR 201 at para 52 [*Ryan*] citing GHL Fridman, *The Law of Torts in Canada*, vol 1 (Toronto: Carswell, 1989) at 168.

⁴³ *Ryan*, *ibid* at para 52 citing Lewis N Klar, *Tort Law*, 2nd ed (Toronto, Ont: Carswell, 1996) at 525 [footnotes omitted].

requirements.⁴⁴ While this eliminates the incoherence and privity problems of the orthodox Anglo-American view, it creates a different problem. As others have noted, a tort of this nature is extraordinarily wide, protecting a right not to have one's life unreasonably interfered with.⁴⁵ Indeed, if these vague rights or "social interests" are taken seriously as grounding liability,⁴⁶ the tort of public nuisance threatens to swallow much of the rest of the law of torts, obliterating longstanding distinctions between the traditional personal and proprietary causes of action.⁴⁷ As Spencer rhetorically asked: "With such a broad concept in existence, backed with such broad remedies, what need have we of any other ... torts?"⁴⁸ Thus, we seem to be left with a choice between a rights-base for the tort that is incoherent and inconsistent with principle or one that is overbroad and impermissibly vague.

What does *Tate & Lyle* have to say on the matter? Surprisingly, given its English origins, one would search in vain in the majority decision for any mention of the word "crime" or any discussion of the criminal law dimensions of the tort.⁴⁹ In fact, the lack of any such discussion was one of the primary criticisms made by Geoffrey Samuel in his comment on their Lordships' decision.⁵⁰ Nor is there any wide-ranging discussion of the health, safety, morality, comfort, or convenience of the public. Instead of these being the foundation for the Court's attention, the decision is clear on the rights-base protected by the tort. As Lord Templeman stated: "The Thames is a navigable river over which the public have the right of navigation, that is to say, a right to pass and repass over the whole width and depth of water in the river."⁵¹ He continued: "The construction of the ferry terminals interfered with the public right of navigation over the Thames.... This interference with the public right of navigation caused particular damage to *Tate & Lyle* because vessels of the requisite dimensions were unable to pass and repass over the bed and foreshore between" its two jetties.⁵² Thus, in their Lordships' view, the tort of public nuisance protected the public right to pass and repass on navigable waters.

Although to modern ears talk of "public rights" seems to open the possibility of "broad" and far-reaching claims,⁵³ in traditional common law the concept of a public right is one that is restrained and limited. The common law only clearly recognizes three public rights

⁴⁴ *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38, [2004] 2 SCR 74 at paras 67–68. See also *Ryan*, *ibid* at para 52; *Susan Heyes Inc v Vancouver (City)*, 2011 BCCA 77, 329 DLR (4th) 92 at para 37.

⁴⁵ Osborne M Reynolds Jr, "Public Nuisance: A Crime in Tort Law" (1978) 31:2 Okla L Rev 318 at 339. Cassels, *supra* note 38 at 784.

⁴⁷ See Murphy, *supra* note 28 at paras 1.46. For a similar view, see Beever, *supra* note 27 at 103.

⁴⁸ Spencer, "Public Nuisance," *supra* note 32 at 55.

⁴⁹ Lord Diplock's dissent, however, does frame the matter in a more traditional way: see *Tate & Lyle*, *supra* note 3 at 545 where he states:

In order to succeed in a claim for particular damage caused to them by a public nuisance *Tate & Lyle* must first establish that the L.C.C. ... did an act of which every member of the public wishing to exercise his public right of navigation on the Thames at the place where the additional silting occurred could complain, and in respect of which the Attorney-General, either ex officio or on the relation of such a member of the public, would be entitled to bring a civil action to restrain.

⁵⁰ Samuel, *supra* note 23.

⁵¹ *Tate & Lyle*, *supra* note 3 at 537.

⁵² *Ibid*.

⁵³ See e.g., the discussion in Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 9th ed (Markham: LexisNexis, 2011) at 572; Wilfred Estey, "Public Nuisance and Standing to Sue" (1972) 10:3 Osgoode Hall LJ 563 at 564.

properly so-called. These are: (1) the right to pass and repass on public highways;⁵⁴ (2) the right to pass and repass on navigable waters;⁵⁵ and (3) the right to fish in the high seas and other public bodies of water.⁵⁶ Attempts to have the number of public rights expanded have, so far, been decisively rebuffed.⁵⁷ Interestingly, the passage rights have often been described as being in the nature of, or akin to, easements.⁵⁸ They are said “to be akin to” since unlike an easement proper, this easement does not require a dominant tenement but rather is enjoyed by all Her Majesty’s subjects.⁵⁹ Similarly, the fishing right has often been described as being akin to, or in the nature of, a profit à prendre or common of piscary.⁶⁰ Thus, when one abstracts away from the particulars of *Tate & Lyle*, a conceptually coherent and properly limited tort appears to take shape: the tort of public nuisance protects rights, akin to easements and profits, that subjects enjoy over public property that arise merely by their being resident in the jurisdiction.⁶¹ Viewed in this way, private nuisance and public nuisance are analogues of each other. Private nuisance protects rights that people have both over their own land and the privately held land of others (such as easements and profits); public nuisance protects rights that people have (in the nature of easements and profits) over public property.

What about the concern with privity mentioned earlier? Does a tort centred on public rights mean that the only proper plaintiff would be the Attorney General suing as representative of the public? This result does not flow inexorably from the fact the rights are called ‘public’ since public is an ambiguous term when used to describe this form of liability. These rights are *public* in the sense that they (1) affect public land and (2) are vested in every member of the public because those members of the public are resident in the jurisdiction.

⁵⁴ See e.g. *Vancouver (City of) v Burchill*, [1932] SCR 620, Rinfret J (“[i]t is idle to say that the municipality has no ... rights upon its streets. It holds them as trustee for the public. The streets remain subject to the right of the public to ‘pass and repass’; and that character, of course, is of the very essence of a street” *ibid* at 625); *Jacobs v London County Council*, [1950] AC 361 (HL (Eng)) at 375; and the authority cited in note 58, below.

⁵⁵ See *Steamship Eurana v Burrard Inlet Tunnel and Bridge Co.*, [1931] 1 AC 300 at 305 (PC); *Denaby and Cadeby Main Collieries Ltd v Anson* (1910), [1911] 1 KB 171 (CA) [*Denaby and Cadeby*] and authority cited in note 58, below.

⁵⁶ See e.g. *Malcomson v O’Dea* (1863), 10 HLC 593; *British Columbia (AG) v Canada (AG)*, [1914] AC 153 (PC) [AG BC]; *Canada (AG) v Quebec (AG)* (1920), [1921] 1 AC 413 (PC); *R v Gladstone*, [1996] 2 SCR 723; *Isle of Anglesey County Council v Welsh Ministers*, [2009] EWCA Civ 94, [2010] QB 163.

⁵⁷ See *Blundell v Catterall* (1821), 106 ER 1190 (subjects do not have a public right to pass over the foreshore for the purpose of bathing in the sea); *Lord Fitzhardinge v Purcell*, [1908] 2 Ch 139 (subjects do not have a public right to enter upon the foreshore or bed of navigable waterways for the purpose of killing wild fowl, nor a public profit à prendre to take such fowl); *Denaby and Cadeby*, *supra* note 55 (subjects do not have a public right to permanently moor supply ships in navigable waterways). In *Denaby and Cadeby*, Fletcher Moulton LJ forcibly held: “there is no authority whatever for the proposition that the lands under the sea are subject to any other public rights than those of navigation and fishing” (*ibid* at 201).

⁵⁸ See e.g. *DPP v Jones*, [1999] 2 AC 240 at 268 (HL (Eng)) [*Jones*]; see also *Harrison v Duke of Rutland* (1892), [1893] 1 QB 142 at 154 (CA); *Wood v Esson* (1883), [1884] 9 SCR 239 at 252; *Ward v Grenville (Township of)* (1902), 32 SCR 510 at 528; *Tanguay v The Canadian Electric Light Co* (1908), 40 SCR 1 at 20; *Quyon Milling Co v EB Eddy Co*, [1926] SCR 194 at 196; *Saumur v Quebec (City of)*, [1953] 2 SCR 299 at 325; *Upper Ottawa Improvement Co v Hydro-Electric Power Commission (Ontario)*, [1961] SCR 486 at 501.

⁵⁹ *Jones*, *ibid* at 268–69.

⁶⁰ See Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade: The Law of Real Property*, 8th ed (London, UK: Sweet & Maxwell, 2012) at § 27-069 the “public right which most closely resembles a profit is the right of the public to fish in the sea and all tidal waters” [footnotes omitted]. See also *Reference re British Columbia Fisheries (British Columbia)*, [1913] 47 SCR 493 at 513 (Anglin J); *AG BC*, *supra* note 56 at 168; *Johnston v O’Neill*, [1911] AC 552 at 605 (HL); *Loose v Lynn Shellfish Ltd*, [2014] EWCA Civ 846, [2015] Ch 547 (Eng) at para 5.

⁶¹ For a similar view, see Cassels, *supra* note 38 (noting “that at the core of public nuisance lies a concern to protect the use and enjoyment of public resources and facilities” at 784).

These rights are *private* in the sense that every member of society can enforce their passage or fishing rights in the civil courts and be awarded damages for their infringement (provided, as we will see, that certain prerequisites are met). That this view of the tort is implicit in their Lordships' decision in *Tate & Lyle* is confirmed when one examines the criticism made by Michael Jones:

First, did the siltation even amount to a public nuisance? ... There was no indication in the report of the extent of the siltation, or whether other members of the public were obstructed in their use of the highway for passage and re-passage. The main shipping channel was apparently clear; at least, the plaintiffs did not complain of any obstruction to it. Thus, there was no indication that the public had in fact been impeded in their right of passage, as opposed to a technical infringement of the right. It is a strange interference with public rights that only affects one individual.⁶²

Here we see Jones essentially criticizing the Court for allowing an action when there was no evidence that a representative and large enough group of people had been interfered with. Therefore, one could not say that this representative group constituted “the public” nor that “the right of the public” had been interfered with. If, however, one views an action in public nuisance as one that protects a right that each and every subject enjoys merely because he or she is a member of a given polity, then the fact that other subjects did not share in this discomfort is neither here nor there — the fact that the right of one subject was interfered with is enough for that person to sue. Thus, given that their Lordships allowed the plaintiff to succeed on these facts, they implicitly accepted that ‘public rights’ are simultaneously public and private in the way we suggest. Understood in this way, the rights-base recognized in *Tate & Lyle* is coherent, properly limited, and consistent with the basic private law principle that only the right holder is entitled to bring an action to vindicate a right (unlike the current Anglo-American or Canadian formulations of the tort).

B. SPECIAL DAMAGE: PARTICULARITY

It is trite law “that an individual who is adversely affected by a public nuisance may not sue in tort unless he can show that he has suffered [special damage] over and above that suffered by the general public.”⁶³ What constitutes special damage, however, has been clouded with uncertainty “for more than four centuries”⁶⁴ and is “far from [a] clear-cut concept.”⁶⁵ Moreover, as the Ontario Court of Appeal noted in *Drake v. Sault Ste Marie Pulp and Paper Co.*, “[i]t is not easy to reconcile all the cases which have been decided on this subject.”⁶⁶ According to the traditional judicial formulations of the test, damage will qualify as special if it is substantial, direct, and particular.⁶⁷ One of the main debates surrounds the requirement of ‘particularity’ — for example, does the plaintiff have to prove that their injury

⁶² Jones, *supra* note 2 at 345 [footnote omitted].

⁶³ Gilbert Kodilinye, “Public Nuisance and Particular Damage in the Modern Law” (1986) 6:2 LS 182 at 182.

⁶⁴ *Walsh v Ervin*, [1952] VLR 361 (Sup Ct) at 367.

⁶⁵ Murphy, *supra* note 27 at para 7.18.

⁶⁶ (1898), 25 OAR 251 at 256 [*Drake*]. See also *Overseas Tankship UK Ltd v Miller Steamship Co Pty*, [1967] 1 AC 617 (PC) [*The Wagon Mound No 2*] (“[t]he authorities ... are numerous and exceedingly difficult to reconcile” at 635).

⁶⁷ *Benjamin v Storr* (1874), 9 LR CP 400 at 406; *Ireson v Holt Timber Co.* (1913) 18 DLR 604 at 608–609 (Ont CA); *The Wagon Mound No 2*, *ibid* at 635–36; *BC Express Co v Grand Trunk Pacific R Co* (1916), 27 DLR 497 (BCCA).

is different in kind from that suffered by the rest of the public or does proof that the damage is greater in extent or degree suffice?

If one examines Canadian textbooks, one will generally find a discussion of this issue that takes the following form: in earlier times a difference of degree seemed to suffice whereas in modern Canadian law, as a result of *Hickey v. Electric Reduction Co. of Canada Ltd.*⁶⁸ and *Stein v. Gonzales*,⁶⁹ a difference in kind must be established.⁷⁰ It is then usual to have some criticism of this aspect of the special damage rule for rendering the tort “ineffective” and some indication that a different rule should prevail.⁷¹ For example, as Collins and McLeod-Kilmurray state:

From the environmental policy perspective, the special injury rule has the perverse effect of narrowing the range of possible plaintiffs as the scale of harm (and therefore the number of persons similarly affected by it) increases. It may therefore be time for common law courts to consider creating a form of public interest standing in the context of public nuisance.⁷²

What does the majority decision in *Tate & Lyle* say about this debate? Interestingly, it bypasses it altogether. Rather than engage in an attempt to classify the damage suffered as different in kind or extent, it instead utilizes a different rule: “An individual who suffers damage resulting from a public nuisance is, as a general rule, entitled to maintain an action.”⁷³ In his case note, Jones is markedly critical of this move by the Court, saying that this statement of the law was both “laconical” and “inaccurate.”⁷⁴ He continues:

Only the individual who has sustained damage over and above that suffered by the rest of the public has an action, and it has been an open question whether the plaintiff’s damage has to be different in kind from that suffered by the public or merely different in degree. . . . Lord Templeman considered that *Tate & Lyle* had sustained particular damage How did [*Tate & Lyle*’s] injury differ from that suffered by the public, who, had they wished to navigate that particular part of the river with similar vessels, would have been unable to do so? No doubt the plaintiffs’ inconvenience was greater in degree than that of the public at large, since they wanted to use that part of the river more than anyone else, but is that sufficient?⁷⁵

While we agree with Jones that the statement of their Lordships is inaccurate if it was meant to accommodate all three aspects of the special damage inquiry (i.e., substantiality, directness, and particularity), we do not agree that it is an inaccurate understanding of the concept of particularity. In fact, we contend that it is a return to the true principles that were once applied by the common law courts.

⁶⁸ (1971), 2 Nfld & PEIR 246 (SC (TD)) [*Hickey*].

⁶⁹ (1984), 14 DLR (4th) 263 (BCSC) [*Stein*].

⁷⁰ See e.g. Klar, *supra* note 1 at 753–56; GHL Fridman et al, *The Law of Torts in Canada*, 3rd ed (Toronto: Carswell, 2010) at 194–97; Philip H Osborne, *The Law of Torts*, 4th ed (Toronto, Ont: Irwin Law, 2011) at 399–400; Lynda Collins & Heather McLeod-Kilmurray, *The Canadian Law of Toxic Torts* (Toronto: Canada Law Book, 2014) at 52–55.

⁷¹ Klar, *ibid* at 753. See also Osborne, *ibid* at 400 and the discussion in Denise E Antolini, “Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule” (2001) 28:3 Ecology LQ 755.

⁷² Collins & McLeod-Kilmurray, *supra* note 70 at 55. For a similar view, see John P S McLaren, “The Common Law Nuisance Actions and the Environmental Battle: Well-Tempered Swords or Broken Reeds?” (1972) 10:3 Osgoode Hall LJ 505 at 515; Estey, *supra* note 53 at 582.

⁷³ *Tate & Lyle*, *supra* note 3 at 537.

⁷⁴ Jones, *supra* note 2 at 346.

⁷⁵ *Ibid* [footnotes omitted].

In a largely forgotten two-part article published in 1915, Jeremiah Smith, one of “the leading torts theorists of the late nineteenth century,”⁷⁶ extensively examined the traditional English cases (such as *Rose v. Miles*,⁷⁷ *Iveson v. Moore*,⁷⁸ *Maynell v. Saltmarsh*,⁷⁹ *Hart v. Basset*,⁸⁰ *Greasly v. Codling*,⁸¹ and *Chichester v. Lethbridge*⁸²) in relation to particularity.⁸³ He concluded that the best understanding of these cases was that a plaintiff could bring an action in public nuisance “consequent upon his exercise of a public right being interfered with, and distinct from the [mere] fact that it is interfered with” provided that the plaintiff could prove that he or she suffered actual pecuniary loss.⁸⁴ Thus, the important distinction for Smith was between theoretical damage (for which no recovery was allowed) and actual pecuniary loss (for which recovery was allowed). Therefore, public nuisance was similar to private nuisance or negligence in that it was not actionable per se; “[A]ctual loss, proved as a matter of fact, is the gist of the private action.”⁸⁵ He argued that later Anglo-American courts had misinterpreted the distinction between theoretical and actual damage and been led astray by sterile and misleading appeals to concepts like “kind” or “degree” of damage. But as Smith stated, “all these expressions ... are objectionable, as giving some color to the erroneous idea that the damage must be exclusive; *i.e.*, that the plaintiff must be the only one to suffer damage of that description from the same cause.”⁸⁶

That the Canadian law was once wholly consistent with Smith’s understanding can be demonstrated by an examination of the appellate jurisprudence prior to the conclusion of the First World War. In several cases, the Ontario appellate courts clearly allowed recovery for damages that would have been disallowed under the “difference in kind” mantra employed in *Hickey* and *Stein*.⁸⁷ Perhaps the leading decision of that group is *Rainy River*.⁸⁸ The defendant utilized its dam to pen back water from entering into the Rainy River in order to generate electricity. The plaintiff owned and operated a steamship that transported passengers and goods along the river. As a result of the defendant’s actions, the water level was lowered to such an extent that it was impossible for the plaintiff to navigate its steamship on the river. The plaintiff sued to recover its lost profits. The defendant contended that “the injury complained of by the plaintiffs was not different from that suffered by all persons navigating the river”⁸⁹ and consequently the conduct of the defendants was not actionable by the plaintiff. The Court disagreed and relied on the principles explained in *Rose v. Miles*. In that

⁷⁶ See G Edward White, “The Integrity of Holmes’ Jurisprudence” (1982) 10:3 Hofstra L Rev 633 at 643.

⁷⁷ (1815), 105 ER 773 (KB).

⁷⁸ (1792), 91 ER 1224 (KB).

⁷⁹ (1685), 83 ER 1278 (KB).

⁸⁰ (1729), 84 ER 1194 (KB).

⁸¹ (1824), 130 ER 307 (CP).

⁸² (1738), 125 ER 1061 (CP).

⁸³ Jeremiah Smith, “Private Action for Obstruction to Public Right of Passage” (1915) 15:1 Colum L Rev 1 [Smith, Part One]; Jeremiah Smith, “Private Action for Obstruction to Public Right of Passage II” (1915) 15:2 Colum L Rev 142.

⁸⁴ Smith, Part One, *ibid* at 11 (citing Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law: To Which is Added the Draft of a Code of Civil Wrongs prepared for the Government of India*, 6th ed (London, UK: Stevens and Sons, 1901) at 612).

⁸⁵ *Ibid* at 13 citing *Piscataqua Navigation Co v New York, NH & HR Co*, 89 F 362 at 363 (Mass D 1898), Brown J.

⁸⁶ *Ibid* at 11.

⁸⁷ See e.g. *Crandell v Mooney* (1873), 23 UCCP 212 (Ont CP) [*Crandell*], *Drake*, *supra* note 66; *Rainy River Navigation Co v Ontario and Minnesota Power Co* (1914), 26 OWR 752 (SC (AD)) [*Rainy River*]; *Rainy River Navigation Co v Watrous Island Boom Co* (1914), 26 OWR 456 (Sup Ct (AD)) [*Watrous*].

⁸⁸ *Ibid*.

⁸⁹ *Ibid* at 851.

case, which involved a bargeman being put to extra expense by a defendant who wrongfully blocked a navigable waterway, Lord Chief Justice Ellenborough said:

[T]he damage might be said to be common to all, but ... the plaintiff was in the occupation, if I may so say, of the navigation; he had commenced his course upon it, and was in the act of using it when he is obstructed. It did not rest merely in contemplation. Surely this goes one step farther; this is something substantially more injurious to this person, than to the public at large.... If a man's time or his money are of any value, it seems to me that this plaintiff has shewn a particular damage.⁹⁰

As the Court in *Rainy River* noted, the plaintiff should prevail since “[t]he general principle thus laid down in *Rose v. Miles* has been generally adopted as a correct exposition of the law and is, I think, applicable to the present case.”⁹¹

Thus, *Tate & Lyle* deserves to be seen as a landmark case since it cuts through the current misleading tendency to think of particularity through the lens of differences in kind that seems to have been imported into Canada under the influence of American cases and the attempted academic rationalizations of that law.⁹² Rather than following this view, *Tate & Lyle* re-establishes the distinction that has always been implicit in Anglo-Canadian tort law between theoretical damage to a public right (for which no recovery is allowed) and actual pecuniary loss consequential on the infringement of a public right (for which recovery is allowed).⁹³

As we mentioned above, however, particularity is only one of three aspects of the special damage inquiry and a complete picture of the doctrine requires an examination of the concept of directness as well. This is a task to which we will turn to in our next section on pure economic loss. Before moving on, we should indicate (for the sake of completeness) that the substantiality criteria of special damage goes not to quantum, as is sometimes thought, but to whether what the plaintiff actually encountered was more than a trivial interference with his or her passage or fishing rights.⁹⁴ Much like claims in private nuisance relating to private easements and profits, these rights are only protected from interferences that have a modicum of seriousness.⁹⁵ This recognizes that these rights are shared among all of the public and therefore the legal system's rule must accommodate the shared use of all its subjects. As the Court in *Crandell* held:

Every person has an undoubted right to use a public highway, whether upon the land or water, for all legitimate purposes of travel and transportation; and if, in doing so ... he necessarily and unavoidably

⁹⁰ *Rose v Miles*, *supra* note 77 at 774.

⁹¹ *Rainy River*, *supra* note 87 at 756.

⁹² See especially Prosser, *supra* note 25. For an early judicial rejection of this importation, see *Drake*, *supra* note 66 at 259–61.

⁹³ Accord Linden & Feldthusen, *supra* note 53 at 574; Carolyn Sappideen & Prue Vines, eds, *Fleming's The Law of Torts*, 10th ed (Pyrmont, NSW: Lawbook, 2011) at 491. For a similar view, see GHL Fridman, “The Definition of Particular Damage in Nuisance” (1953) 2:3 U West Austl Annual L Rev 490 at 503.

⁹⁴ For examples of trivial interference, see *Whaley v Kelsey*, [1928] 2 DLR 268 (Ont SC (AD)) (stairs and verandah built so as to encroach on the sidewalk was not a public nuisance in light of municipality's offer to widen the footpath); *R v Betts* (1850), 16 QB 1022.

⁹⁵ See *Colls v Home and Colonial Stores Ltd*, [1904] AC 179 (HL (Eng)); *Nicholls v Ely Beet Sugar Factory Ltd*, [1936] 1 Ch 343 (CA); *Fallowfield v Bourgault* (2003), 68 OR (3d) 417 (CA); Donal Nolan, “A Tort Against Land?: Private Nuisance as a Property Tort” in Donal Nolan & Andrew Robertson, eds, *Rights and Private Law* (Oxford: Hart, 2012) 459 at 464.

[impedes or obstructs] another temporarily, he does not thereby become a wrongdoer, his acts are not illegal, and he creates no nuisance for which an action can be maintained.⁹⁶

C. SPECIAL DAMAGE: PURE ECONOMIC LOSS AND DIRECTNESS

One of the most surprising features of *Tate & Lyle*, at least for those who do not subscribe to a rights-based view of tort law, was that it allowed £405,000 in damage for pure economic loss without any mention of the proximity or policy factors that are usually examined when dealing with these issues in the tort of negligence.⁹⁷ As a result, some commentators (both judicial and academic) have suggested that the courts should be more attuned to the overlap between public nuisance and negligence in the future.⁹⁸ For example, in *Ball v. Consolidated Rutile Ltd.* the Court stated: “It would be a quite unsatisfactory state of affairs if upon the same facts by pursuing an action for damages for public nuisance the plaintiffs were able to avoid satisfying the test of proximity and recover in nuisance damages for economic loss ... which would not be recoverable in negligence.”⁹⁹ Others have attempted to explain the absence of such discussions by suggesting that perhaps the policy factors are implicit in the special damages inquiry. As Professor Klar argued in relation to *Tate & Lyle*:

Economic loss recovery, which poses such a conundrum for the law of negligence, is evidently not of concern here. This may be explained by the fact that since the scope of recovery for public nuisance is already severely limited by the special damage requirement, the fear of indeterminate liability, which is present in the negligence law area, does not concern the courts in this area.¹⁰⁰

In any event, modern Canadian courts, under the influence of *Hickey* and *Stein*, have largely denied recovery for pure economic loss on the theory that such damage is not direct enough to be the subject matter of compensation.¹⁰¹ Directness is a word, much like that of “public,” which is susceptible to multiple meanings.¹⁰² Sometimes the word is seemingly used to capture the old distinction between trespass and case. In *McRae v. British Norwegian Whaling Ltd.* the Court stated:

It is not enough for the plaintiffs to show that their business is interrupted or interfered with, by the public nuisance, to enable them to maintain a private action against the defendants in respect thereof, for such

⁹⁶ *Supra* note 87 at 221, citing *Davis v Winslow*, 51 Me 264 at 297 (Sup Jud Ct 1863). See also *Harper v GN Haden & Sons Ltd* (1932), [1933] Ch 298 at 320 (CA):

The law relating to the user of highways is in truth the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others.

⁹⁷ See Jones, *supra* note 2 (the author criticizes Lord Templeman’s failure to “differentiate between particular damage involving personal injury or breach of private rights of property, and intangible or purely financial loss” at 347).

⁹⁸ See e.g. Spencer, “Public Nuisance,” *supra* note 32 at 83; Paulden, *supra* note 23 at 74; *Hickey*, *supra* note 68 at 251–52.

⁹⁹ (1990), [1991] Qd R 524 at 546.

¹⁰⁰ Klar, *supra* note 1 at 755–56. For a similar view, see Estey, *supra* note 53 at 574–75.

¹⁰¹ Klar, *ibid* at 755.

¹⁰² For a discussion of some of these meanings, see Estey, *supra* note 53 at 571–72.

interruption or interference is not a direct but merely a consequential damage resulting to them from the nuisance.¹⁰³

That this cannot be the correct understanding of the concept in relation to the tort of public nuisance is pointed out by Kodilinye. As he argues,

the nuisance action has always been supposed to lie for consequential injury, in contrast with trespass which lies for direct damage. It might therefore be thought that it is of the essence of a nuisance action that the damage complained of will be consequential.... If injury must be direct and not consequential in order to qualify as particular damage, the words 'direct' and 'consequential' in this context must bear different meanings from those which they bear in differentiating between trespass and nuisance.¹⁰⁴

In *Hickey* itself, the Court relied on the then recent English case of *SCM (United Kingdom) Ltd. v. WJ Whittall and Son Ltd.*¹⁰⁵ for the proposition "that economic loss without direct damage is not usually recoverable at law."¹⁰⁶ The distinction posited in *SCM* was that economic loss was, as a general matter, recoverable as 'direct' if it interfered with the property or person of the plaintiff and unrecoverable as 'indirect' if the loss flowed from the injury to the property or person of someone other than the plaintiff. Applied to the facts of *Hickey*, the Court's reasoning seemed to be that since the plaintiffs did not own the fish, their losses were indirect. As the Court stated: "it would be a matter of extreme difficulty to say what direct damages the plaintiffs could pin-point as deriving from the defendant's operations."¹⁰⁷

The mistake of the Court in *Hickey* was to think in purely factual terms (property as opposed to not property, pure as opposed to consequential economic loss) without examining the underlying reasons why those facts matter. Properly interpreted, the common law does not generally have a problem with awarding pure economic losses since it does so routinely in actions for defamation or where the plaintiff and defendant are in a special relationship.¹⁰⁸ What the common law finds problematic is awarding damages that do not flow from the violation of a right, situations of *damnum absque injuria*.¹⁰⁹ Thus, the reason an action for pure economic loss fails in a typical negligence case is that the plaintiff cannot point to any right of his or hers (to bodily integrity or property, for example) that has been interfered with by the defendant. Conversely, the reason plaintiffs succeed in actions for defamation is that their reputation rights have been wrongfully interfered with by defendants.¹¹⁰ Therefore, in situations where there has been a violation of the plaintiff's passage or fishing rights that causes consequential economic loss, courts such as those in *Tate & Lyle* and *Rainy River*

¹⁰³ (1929), [1927-31] Nfld LR 274 (SC (AD)) at 283 [*McRae*].

¹⁰⁴ Kodilinye, *supra* note 63 at 191.

¹⁰⁵ (1970), [1971] 1 QB 337 (CA) [*SCM*].

¹⁰⁶ *Hickey*, *supra* note 68 at 372.

¹⁰⁷ *Ibid.*

¹⁰⁸ As recognized in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963), [1964] AC 465 (HL (Eng)).

¹⁰⁹ For a discussion, see Stevens, *supra* note 20 at 20–56; Peter Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law" in David G Owen, ed, *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 427; Beever, *supra* note 28 at 69–106. As Russell Brown argues: "Canadian courts' failure to insist that claimants seeking to recover pure economic loss demonstrate injury to a legally cognizable right is at the root of much of the difficulty that lawyers and judges have encountered in litigating and adjudicating such claims": Russell Brown, *Pure Economic Loss in Canadian Negligence Law* (Markham: LexisNexis, 2011) at xi.

¹¹⁰ See Arthur Ripstein, *Private Wrongs* (Cambridge: Harvard University Press, 2016) at ch 7 (for a detailed examination of the right involved and what counts as a violation of it).

(and the other similar Ontario appellate cases¹¹¹) are correct to award damages for pure economic loss. The fact that the plaintiff cannot also recover in negligence or private nuisance is neither here nor there. Consequently, *Tate & Lyle* deserves to be seen as a landmark case since the recovery it allows instantiates the correct view of the recovery of pure economic loss in public nuisance, one that coheres with the best understanding of its recovery throughout the whole of the law of torts.

What then of the concept of directness? Does it have a role to play in the analysis of pure economic loss in public nuisance or in the special damage inquiry? The answer is that it does, but one that is different than the role that directness or remoteness plays in other areas of tort law.¹¹² When one follows all the citations and vague references to “a long series of cases under Expropriation Acts”¹¹³ back to their ultimate sources as one of us has done,¹¹⁴ one arrives at the House of Lords decision in *Ricket v. Directors of the Metropolitan Railway Company*.¹¹⁵ The plaintiff was a publican in London. Under statutory authority granted to the defendants, the most convenient access to the plaintiff’s pub was blocked for twenty months during the construction of a rail line. Although steps were taken to provide alternate access, the plaintiff suffered business losses since the construction dissuaded customers from frequenting the pub.¹¹⁶ Since his private law claims were foreclosed by the statutory authority granted to the railway, he brought a claim for “injurious affection” under the *Lands Clauses Consolidation Act*.¹¹⁷ This required him to prove, amongst other things, that the defendants’ actions would have constituted the tort of public nuisance but for the statutory authority granted to them. A majority of their Lordships held that the plaintiff could not recover since his loss of customers was a “consequential damage ... too remote to be the foundation of an action” in public nuisance.¹¹⁸

What did their Lordships mean by remoteness? As Lord Chelmsford explained, agreeing with the decision of Chief Justice Erle in the Exchequer Chamber,¹¹⁹ a successful claim in public nuisance required the plaintiff to prove that the loss in question flowed from a violation of his right to pass and repass on the closed highway rather than from the violation of the passage rights of his customers.¹²⁰ As the plaintiff could not demonstrate this in *Ricket*, his claim necessarily failed. Thus, in the tort of public nuisance plaintiffs cannot sue if they suffer losses due to the violation of someone else’s right to navigate or fish.¹²¹ This loss

¹¹¹ See e.g. *supra* note 87.

¹¹² See e.g. *The Wagon Mound No 2*, *supra* note 65 at 636. Lord Reid writes: “Such cases have nothing to do with measure of damages.... When the word ‘direct’ is used in determining that question [of special damages], its meaning or connotation appears to be narrower than when it is used in determining whether damage is too remote.”

¹¹³ *Fillion v New Brunswick International Paper Co*, [1934] 3 DLR 22 (NBSC (AD)) at 26 [*Fillion*].

¹¹⁴ See JW Neyers & Eric Andrews, “Loss of Custom and Public Nuisance: The Authority of *Ricket*” [2016] LMCLQ 135.

¹¹⁵ (1867) 2 LRHL 175 [*Ricket*].

¹¹⁶ *Ibid* at 176.

¹¹⁷ 1845 (UK), 8 Vict VIII, c 18.

¹¹⁸ *Ricket*, *supra* note 115 at 188.

¹¹⁹ *Ricket v The Metropolitan Railway Company* (1865), 122 ER 790 [*Ricket* (Ex Ch)].

¹²⁰ *Ricket*, *supra* note 115 at 196.

¹²¹ For a forceful application of the privity principle, see *Denaby and Cadeby*, *supra* note 54 where the English Court of Appeal refused to enjoin a harbour master from removing the plaintiff’s permanently moored ship. The plaintiff had claimed that it had a right to remain since its coal supply ship was necessary for others to enjoy their rights of navigation (coal being a necessity for the operation of steamships). The Court refused the injunction since the plaintiff had to base its claim to stay in the harbour on its own right of navigation (which it could not do since it was permanently moored rather than passing and repassing) rather than on the rights of navigation of others.

would be consequential on a violation of that other person's right and would therefore not be direct. Phrased differently, damages are "direct" if they flow from an interference with the plaintiff's public rights and are "indirect" if they flow from an interference with the public rights of someone other than the plaintiff. Thus, if the concept is correctly understood, there is nothing "obscure" and "shrouded in mystery,"¹²² or "specious" and "peculiarly Canadian"¹²³ about what is meant by directness in public nuisance — it is a question of privity.¹²⁴ Although the concept of directness is not mentioned in *Tate & Lyle*, as Paulden notes "their Lordships were prepared to assume that this ... requirement ... was satisfied,"¹²⁵ the result of the case is perfectly consistent with the principle as it is elucidated in *Ricket* since *Tate & Lyle*'s agents had been obstructed by the siltation of the shipping channels in delivering and taking away sugar on *Tate & Lyle*'s behalf.¹²⁶

IV. APPLICATION

Thus far, we have argued that *Tate & Lyle* deserves to be seen as a landmark case since it properly conceptualizes the tort of public nuisance as a cause of action that protects subjects from suffering actual loss that is consequential on the violation of their passage and fishing rights over public property. Phrased in more traditional language, defendants commit the tort of public nuisance if they interfere with public rights and cause plaintiffs damage that is substantial, direct, and particular. We have also argued that *Tate & Lyle* is consistent with the results of the leading Canadian appellate cases decided prior to the conclusion of the First World War and thus returns the law of public nuisance to its traditional roots. In this section we apply the *Tate & Lyle* understanding of public nuisance to two modern Canadian fact patterns to suggest how these cases should be decided using this coherent and restrained formulation of the tort.

The first case examined is *Hickey*.¹²⁷ The defendant was alleged to have destroyed a commercially viable fishing ground in Placentia Bay through the discharge of poisonous material from its phosphorous plant. The defendant was sued in public nuisance by local fishermen for interfering with their right to fish. The plaintiffs' case was dismissed on a preliminary motion as disclosing no cause of action. As we have seen, the reasoning of the Court was that the plaintiffs' claim was destined to fail because they could not show that they suffered damage that was different in kind than that suffered by the rest of the public. As the Court held: "The plaintiffs' right, as one of the public, to fish may be affected to a greater extent than that of others, but they have no ground of complaint different from anyone else who fishes or intends to fish in these waters."¹²⁸ Thus, the Court found that the plaintiffs had suffered "differently from the rest of the public only in degree" and that the case was therefore not maintainable.¹²⁹ As we have seen, the Court also thought that the damage claim

¹²² Kodilinye, *supra* note 63 at 193–94.

¹²³ Estey, *supra* note 53 at 572, 569.

¹²⁴ For a more detailed discussion, see Neyers & Andrews, *supra* note 113; JW Neyers & Jordan Diacur, "What (is) a Nuisance? *Antrim Truck Centre Ltd v Ontario (Minister of Transportation)*" (2012) 90:1 Can Bar Rev 213.

¹²⁵ Paulden, *supra* note 23 at 72.

¹²⁶ As Chief Justice Erle made clear in *Ricket* (Ex Ch), *supra* note 119 at 791, a plaintiff must only prove that either "himself [or someone] standing in a legal relation to him, such as servant, [or] agent ... has been obstructed."

¹²⁷ *Supra* note 68.

¹²⁸ *Ibid* at 249, citing *McRae*, *supra* note 103 at 283.

¹²⁹ *Hickey*, *ibid* at 250, citing *Fillion*, *supra* note 113 at 26.

was ill-conceived since “economic loss without direct damage is not usually recoverable at law” and it therefore “would be a matter of extreme difficulty to say what direct damages the plaintiffs could pin-point as deriving from the defendant’s operations.”¹³⁰ Moreover, the Court considered that *Rose v. Miles* was a marginal decision that “was applicable only to the particular facts of that case.”¹³¹

What should the result be applying the law as understood in *Tate & Lyle*? The first question to ask would be whether a public right had been interfered with by the defendant. In *Hickey*, this step is easy to satisfy since in Canadian law there is an undoubted right to fish in public water, akin to a profit à prendre or common of piscary, supported by the highest authority.¹³² The next question is whether the interference was substantial. Given that the pleadings, which were assumed to be true, alleged that the fishery had been rendered “of no commercial value” due to the poisoning of the stocks, this element of the analysis is also satisfied.¹³³ This conclusion might be contrasted with the facts of *McRae* in which the Court held that although there had been pollution of the fishing grounds by a blanket of whale oil and grease, this did not cause “a serious obstacle to the successful conduct of the fishery.”¹³⁴ The next step in the analysis is whether the loss suffered by the fishermen was particular, that is did they incur actual pecuniary loss. Given the pleadings, this step in the analysis is also satisfied (though in other cases proof of this loss might be more difficult).¹³⁵ The final question then would be whether the loss suffered by the fishermen was direct. As we have seen, directness in the tort of public nuisance requires the loss to flow from the violation of the plaintiffs’ rights as opposed to the rights of someone other than the plaintiffs. Here the losses are clearly direct since they were consequential on the fishermen being denied their public right to fish in Placentia Bay. Thus, the fact that the loss was purely economic is not an impediment to the action. In contrast, if restaurateurs or fishmongers sued for economic losses due to a shortage of fish to sell, their action would fail at this stage of the analysis. Their losses would be indirect since they would be consequential on the violation of the fishermen’s right to fish, not on the rights of restaurateurs or the fishmongers.¹³⁶ This means that *Hickey* is wrongly decided and the results of the traditional Ontario appellate cases,¹³⁷ which allowed recovery for directly caused pure economic losses, are to be preferred. While this conclusion might be troubling for some, many commentators,¹³⁸ and even some modern courts,¹³⁹ also share this opinion of *Hickey*.

¹³⁰ *Hickey*, *ibid* at 252.

¹³¹ *Ibid*.

¹³² See e.g. *supra* note 56.

¹³³ *Hickey*, *supra* note 68 at 247.

¹³⁴ *McRae*, *supra* note 103 at 280.

¹³⁵ See *Drake*, *supra* note 66 in which the Court held that the plaintiff had exaggerated his fishing losses since the evidence was that he had largely retired from the trade after the loss of his nets the previous year.

¹³⁶ This is largely the result reached by the American cases: see *Union Oil Co v Oppen*, 501 F (2d) 558 (9th Cir 1974); *Burgess v M/V Tamano*, 370 F Supp 247 (D Me 1973); *In re Exxon Valdez*, 767 F Supp 1509 (D Alaska 1991), though they reach this result somewhat unconvincingly through proximity and policy-based reasoning. For a discussion, see Linden & Feldthusen, *supra* note 53 at 575; Stevens, *supra* note 53 at 188.

¹³⁷ See e.g., *Crandell*, *supra* note 87; *Drake*, *supra* note 66; *Rainy River*, *supra* note 87; *Watrous*, *supra* note 87.

¹³⁸ See e.g. Linden & Feldthusen, *supra* note 53 at 575; Estey, *supra* note 53 at 569–75; McLaren, *supra* note 2 at 514.

¹³⁹ See e.g. *Gagnier v Can Forest Prod Ltd* (1990), 51 BCLR (2d) 218 (SC).

The next case to examine is *Stein*.¹⁴⁰ The plaintiffs were proprietors of businesses located in downtown Vancouver and sought an order enjoining local prostitutes from working in the nearby streets and alleys. The plaintiffs claimed that these activities caused them special damage in the form of loss of customers since the deteriorating neighbourhood made “their premises less desirable to guests and prospective tenants.”¹⁴¹ Relying on *Hickey*, Justice McLachlin denied the plaintiffs’ application. Her reasoning was as follows:

The right to carry on business in Vancouver is a public right, just as the right to fish in Placentia Bay was a public right. Any member of the public may pursue this right.... The rights which the plaintiffs claim have been infringed are rights which they possess as members of the public, and they have suffered the same damage which any other citizen who exercised those rights would suffer. The finances of many businesses in the area may be adversely affected by the defendants’ activities.... But the injuries suffered, in so far as they are of the same type as those suffered by other members of the public exercising their public rights, remain public injuries in the eyes of the law.¹⁴²

As she succinctly put it earlier in her judgment: “The onus is on the plaintiffs to demonstrate that their loss is special and unique. This they have failed to do.”¹⁴³

Was the conclusion reached by the Court in *Stein* correct? The answer is yes but not for the reasons given. Applying the *Tate & Lyle* template, the first question is whether the defendants have violated a public right of the plaintiff. While Justice McLachlin stated that the “right to carry on business ... is a public right”¹⁴⁴ this cannot be correct. There can be no public right to trade in a capitalist economy since there is no concomitant duty on anyone to respect that right.¹⁴⁵ People have a liberty to trade, not a right to trade. Thus, Justice McLachlin made the easy mistake of confusing liberties with rights.¹⁴⁶ Just because something is not prohibited does not mean one has a public right to do it, otherwise we would say that a person has a public right “to run his head against a brick wall, if he pleases.”¹⁴⁷ Thus, since the plaintiffs did not ground their claims in any violation of a public right properly understood, their claim should fail.

A possible rejoinder might be: “But surely the interference with the public right to pass and repass could ground a tort action on the facts of *Stein*!” It might, but we would first need to know whose passage right was impaired. From the facts, it appears that the allegation was that the actions of the prostitutes dissuaded customers from coming to the plaintiffs’ premises. Consequently, it was the passage right of the customers that was infringed by the actions of the prostitutes, not the right of the plaintiffs to pass and repass. Accordingly, no matter how substantial the interference or particular the losses suffered by the plaintiffs, their losses would be unrecoverable since they were an indirect damage “too remote to be the

¹⁴⁰ *Supra* note 69.

¹⁴¹ *Ibid* at 267.

¹⁴² *Ibid* at 267–68.

¹⁴³ *Ibid* at 267.

¹⁴⁴ *Ibid*.

¹⁴⁵ See e.g. Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23:1 Yale LJ 16; *Allen v Flood*, [1898] AC 1 (HL (Eng)); Murphy, *supra* note 28 at paras 1.49, 7.22–7.23; JW Neyers, “Rights-Based Justifications for the Tort of Unlawful Interference with Economic Relations” (2008) 28:2 LS 215 at 220–22.

¹⁴⁶ See the critique by Hohfeld, *ibid* at 36–37 of *Quinn v Leathem*, [1901] AC 495 (HL (Eng)) and Lord Lindley’s right to trade theory of conspiracy enunciated therein.

¹⁴⁷ *Froom v Butcher* (1975), [1976] QB 286 (CA) at 293 (Lord Denning MR).

foundation of an action.”¹⁴⁸ The only possible avenue of recovery on a proper analysis of the tort would be if the plaintiff-proprietors could prove that there were some economic losses that flowed from an interference with the plaintiff-proprietors’ ability to get to or from their property. The classic example of this is being a permanent diminution in the capital value of the property.¹⁴⁹ Given that such a loss was not alleged in *Stein*, and in any event is difficult to prove outside of the expropriation context, the lack of liability in the case is justifiable and consistent with the *Tate & Lyle* understanding of the tort.

V. CONCLUSION

Public nuisance remains a maligned and misunderstood tort and will remain so until the insights outlined in the landmark case of *Tate & Lyle* are recognized and readopted by Canadian courts. And yet those insights are not hard to understand. The tort of public nuisance deserves its place in tort law textbooks because it is a coherent cause of action with determinate boundaries and scope. It is designed to protect rights that are vested in individuals (as opposed to groups of persons collectively) by virtue of the fact that those persons are present in the jurisdiction or polity in question. Moreover, these rights have remained coherent and stable over time, and will not disappear if the associated crime of public or common nuisance disappears. What are these rights? They are (1) the right to pass and repass on public highways; (2) the right to pass and repass on navigable waters; and (3) the right to fish in the high seas and other public bodies of water. While these are *public* rights in the sense that they accrue to every member of the public and affect public land, they are *private* rights in the sense that they are vested in individuals, that is, each person has an individual right to pass and repass on public highways and navigable waterways, and to fish in public waters. Thus, tort liability quite properly arises when the ability of these individuals to exercise these rights is wrongfully interfered with, and where these individuals suffer damage that is direct, substantial, and particular (as described above). Although the rights-base identified by the tort of public nuisance may be unfamiliar, the form and structure of liability that the tort reflects surely is not. When viewed with the insights gleaned from *Tate & Lyle*, concerns that the tort is “schizophrenic” or “peculiar” ultimately disappear.¹⁵⁰

¹⁴⁸ *Ricket*, *supra* note 115 at 188.

¹⁴⁹ See e.g. *Chairman of the Metropolitan Board of Works v McCarthy* (1874), 7 LRHL 243; *R v McArthur* (1904), 34 SCR 570. For an analysis of these cases see Neyers & Andrews, *supra* note 114; Neyers & Diacur, *supra* note 124.

¹⁵⁰ See Klar, *supra* note 1 at 749; Jones, *supra* note 2 at 341.