

ORDINANCES

Silent Spring, The Sequel—Mosquito's Revenge

by Devala A. Janardan, Associate Counsel

Rachel Carson's book, *Silent Spring*, was a watershed moment in the environmental movement. In her book, Carson details the use of DDT,[1] a synthetic pesticide used in part to control populations of mosquitoes. While DDT was effective in some circumstances of controlling mosquito populations, DDT is a carcinogen and caused reproductive and other defects in other species, including humans. In short, DDT did more harm than good.

Now the Mosquito™ is back in town, this time for revenge on its unsuspecting human population. This Mosquito™, manufactured by Compound Security Systems, is an electronic device used to combat loitering juveniles. Compound's website describes the Mosquito™, as "a device that emits a harmless but highly irritating sound audible only to those aged 13 to 25 . . . . The high frequency modulated tone, ranging from 17 to 18 kHz, which would be activated at night when access to parks and school grounds are restrictive, deters young would-be loiterers within a range of 50 to 130 ft. without harming them."[2] Stated simply, it is as irritating as having a mosquito buzzing in your ear.

How could this product affect you as a local government lawyer? Take the following real-life scenario. A Mosquito™ unit was recently installed by a developer in the District of Columbia, near the Gallery Place Metro station. If you aren't familiar with the District, this station is located in the Chinatown neighborhood, and is one the busiest neighborhoods in the District. It is a major stop for the underground public transportation system, and houses the Verizon Center, home of the District's professional hockey and basketball teams. It is a major retail and entertainment area.

A noticeable increase in the amount of mischief and crime,[3] mainly by teenagers, led the developer to install the Mosquito™ unit on a Verizon Center wall. Spending any length of time on the sidewalks near the machine simply becomes unbearable, so teenagers won't gather in the area. Although the District does not want to get involved in the situation, one must question whether the developer is violating local law.

First, let's examine noise ordinances. As many local government lawyers know, noise ordinances generally are one or a hybrid of two standards: (1) decibel-standard and/or a (2) public disturbance standard.[4] The District uses a decibel standard and states in relevant part that "no person shall cause, suffer, or permit any sound that emanates from an operation, activity, or noise source under his or her control to exceed the maximum permissible sound level . . . as applicable for the time of day or night and the zoning location where the noise originates."[5] For commercial districts, this is between 60-65 dBs depending on the time of day.[6] The law also allows for a private citizen to bring suit under the law.[7] Based on this language, however, it doesn't seem like the sounds emanating from the Mosquito™ would apply here, as the noise emitted is not loud in volume, but instead is high pitched and irritating.

What if the District had a noise ordinance based on a public disturbance standard? An IMLA Model Noise Ordinance, based on a public disturbance standard, states in part that "[n]o person shall . . . cause to be made . . . any noise which unreasonably disturbs, injures, or endangers the comfort, repose, health, peace, or safety of reasonable persons of ordinary sensitivity . . . ."[8] It includes sounds that are "recurrent, intermittent, or constant."[9] In this scenario, loudness or decibel level is not the measure of a violation of the ordinance, but rather whether it is disturbing the general population. If your local ordinance includes similar language, you could be able to pursue a developer under this law.

One might also consider a "public nuisance" claim. In the District, courts have determined it is possible for the government or a private party to pursue a claim under a public nuisance theory, stating that "while a private nuisance claim is thus inherently a private right of action, as a general proposition only governmental authorities or other representatives of the general public have standing to attack a public nuisance in court (absent statutory authorization) . . . . There is, however, a traditional exception: a private party may sustain an action to enjoin or recover damages for a public nuisance if that party can allege and prove special damage, distinct from that common to the public."[10]

There are other laws that come into play, such as the Americans with Disabilities Act.[11] The Verizon Center would certainly fall under the definition of "public accommodation" under Title III.[12] Certain medical conditions, such as tinnitus, hyperacusis, and Meniere's disease, are exacerbated not only by volume of sound, but also by a sound's frequency.[13]

Separate from the legal questions, are policy and societal questions. Is the Mosquito™ a private tool that is replacing a task that should be reserved for public law enforcement? Does it dehumanize our younger generation?[14] Does the product work as advertised? I travelled to the Verizon Center to find out if I could hear the machine itself, since the Compound Security System claims that the sound emitted by the Mosquito™ should not be audible to my ears. I could and it was so irritating I left the area almost immediately. And I'm not 13 years of age, nor am I 25. I'm 31.

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streets and commercial door hangers on residences, abandoned natural gas lines, and drafting language in service contracts that defined ownership of the written materials and drawings created from the contract. An inquiry about suspending an employee with or without pay pending an investigation morphed into questions about last-chance agreements and suspending employees who failed to earn education credits for recertification to continue performing their essential functions.

The list proves that it must a creed in the municipal attorney kingdom that the interruptions become the agenda for the day. The immediacy of the resources, including the listserve, assist getting closer to "quitting time."

For those of you who would like to join the listserv, go to http://www.municode.com and select the *Listservs* link to get the page on *Mailing Lists*. Click on *Municipal Attorneys* to bring up the subscription page. Fill it out and hit Subscribe. To sign up for the Water Cooler, send an e-mail to MunicAttyWaterCooler@yahoogroups.com that identifies you and the local government you represent. You will get a response from YahooGroups asking if you want to join. Respond to the message as directed.

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Ordinances

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Notes

1. DDT is the commonly used name for the chemical dichlorodiphenyltrichloroethane.
2. Available at http://www.compoundsecurity.co.uk/. If you are curious as to how sensitive your ears are, go to the Mosquito's USA distributors site, http://www.movingsoundtech.com and listen to the different frequencies.
3. Valerie Strauss, *Amid Metro Brawl, Family's Night Out Turns Into Pandemonium*, Washington Post, Aug. 9, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/201%8/08/AR2010080802755.html.
4. "Public disturbance" standard is also referred to as a "nuisance" or "reasonableness" standard.
5. D.C. Municipal Regulations § 20-2701.01.
6. *Id.*
7. D.C. Municipal Regulations § 20-2714.01.
8. IMLA Model Ordinance Service, Art. 11-4.
9. *Id.*
10. B & W Management, Inc. v. Tasea Inv. Co., 451 A.2d 879 (D.C. 1982) (citation omitted).
11. 47 U.S.C. § 12101, *et seq.* (2006).
12. *Id.* at § 12181.
13. For more information about these ear-related medical conditions, see http://www.aafp.org/afp/ 2004 /0101/p127.html; see also http://www.ncbi.nlm.nih.gov/pmc/articles/PMC539655/.
14. Eric Fidler, *Teens and Young Adults aren't Mosquitoes* (Sept. 2, 2010), available at http://greatergreaterwashington.org/post.cgi?id=7008. ML

Inside Canada

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is what must be pursued. The court did hold, however, that if those responsible for enforcing the legislation do not meet their duties under the Act, the applicants could bring a judicial review application for mandamus or an application for mandatory injunctive relief.

Lucy still resides at the Valley Zoo.

(Scott McAnsh is the Municipal Prosecutor for the City of Edmonton. Steve Phipps is a Solicitor with the City of Edmonton.) ML

Supreme Court

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blood evidence and the infringement of Thompson's right to testify in his own defense at the murder trial violated his constitutional rights. Addressing *Monell* liability, the district court found the claims survived summary judgment: it appeared the assistant attorneys were authorized to create the office's policy on the nature of *Brady* duties and the DAO "knew to a moral certainty" that the assistants would acquire *Brady* material. Without training, it was not always obvious what *Brady* required, and withholding *Brady* material would always lead to a substantial violation of constitutional rights. Accordingly, "a reasonable jury could find that the need for training in this situation [was] so obvious that the failure to offer it could properly be characterized as 'deliberate indifference.'" After a jury trial, the trial court found liability predicated on the district attorney's failure to train, monitor, or supervise, and awarded Thompson $14 million in damages. On a motion for rehearing, the Fifth Circuit en banc panel split evenly, resulting in an affirmation of the district court decision.

The DAO sought Supreme Court review on the basis that imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravened the culpability and causation standards established by *City of Canton* and *Bd. of County Comm'rs of Bryan County*, and undermined the prosecutors' absolute immunity recognized by the Court more recently in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009). However, certiorari was granted on the *Canton* and *Bryan County* issue only.

As can be expected, a large number of *amicus* briefs have been filed in this case. IMLA has signed onto a brief in support of the petitioners prepared by the State and Local Legal Center. An *amicus* brief filed on behalf of the Alliance Defense Fund and the CATO Institute in support of the respondent, Thompson, states that amici "believe the *Monell* rule unfairly circumscribes the protections of 42 U.S.C. § 1983 by imposing a restriction on municipal liability that is unwarranted by either the text or history of the statute." It urges the Court to overturn the *Monell* rule "so that municipalities hereafter may be subject to liability for the constitutional violations of their agents and employees according to the ancient common law rule of *respondeat superior*," adding "[e]very basis" for applying *respondeat superior* "to a corporate employer applies with equal logical and practical force to a municipal employer." ML