

THE ELEMENT OF FAULT IN PRIVATE NUISANCE*

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Liability for nuisance is often imposed on the ground of defendant's negligence or more grievous fault in causing it. The *Restatement* would impose strict liability only where the nuisance stems from abnormally dangerous activity on defendant's part.¹ But these concepts by no means cover the whole field. There are many instances of nuisance where liability is imposed though defendant has not been negligent (still less wanton) and where his activity is not abnormally dangerous.

If the defendant has conducted his trade or business in a proper manner, *i.e.* as a reasonable man would conduct such a trade or business, he has gone some of the way towards making out a defense, but only some of the way; and, conversely, he will be in danger of losing his case if he has taken no such reasonable care. But even where he has given proof of it, he will still be liable if there has been a sensible (*i.e.* unreasonable) amount of damage caused to the plaintiff.²

A substantial body of authority regards this as an application of strict liability; if the harm to the plaintiff is unreasonable (*i.e.*, a nuisance) then liability will be imposed upon the author of it if he knew or had reason to know that the harm was being caused, even if he has been without fault.³

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This article was originally prepared as a section in a torts textbook which the author is writing. It was first published as Appendix A in American Law Institute, *Restatement of Torts Second*, Tentative Draft No. 16, April 24, 1970, submitted by the Council to the members of the Institute for discussion at the forty-seventh annual meeting in May, 1970, together with proposed sections of the second Restatement and the Reporter's supporting notes. The matter was discussed at the meeting and the Institute voted to resubmit the sections on nuisance with instructions to make changes which would, in effect, bring them into conformity with the views expressed herein. The references to the Restatement in the article are to the proposals submitted to the Institute without regard to the change which is called for by the vote.

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¹ 4 RESTATEMENT OF TORTS § 822(d) and comments *j*, *k*; §§ 826, 831 (1939); RESTATEMENT (SECOND) OF TORTS § 822 and comment *a* (Tent. Draft No. 15, 1969).

² Winfield, *Nuisance as a Tort*, 4 CAMB. L.J. 189, 199 (1931).

³ See, *e.g.*, *Richards v. Washington Term. Co.*, 233 U.S. 546, 556-58 (1914) (on hypothesis that "the damage is not preventable by the employment at reasonable expense of

The *Restatement*, however, finds the basis of liability in these cases to be the intentional infliction of harm, and thus seeks to bring them within one of the categories of liability based on fault.⁴ Where a defendant actually desires to bring about the harm (without justification) this is a familiar enough example of genuine fault; and occasionally this is the case in nuisance, as with a spite fence. But in most situations there is nothing like this. Usually the source of the nuisance is created and maintained by defendant for legitimate enough purposes and the harm to plaintiff is intended only in the sense that defendant knows it is resulting or is substantially certain to result from his conduct.⁵ But under our system of individual liberty and free enterprise, proceeding upon legitimate activities with such knowledge will constitute fault only if it is done in an unreasonable manner or if it is unreasonable to proceed with the enterprise at all, even with the taking of all reasonable precautions.⁶

The first is a clear instance of fault. To the extent that defendant fails to take reasonable precautions to minimize the harmful effects of his activity, there is a case of common negligence.⁷ Such negligence may consist, for example, in the manner of operation⁸ (*e.g.*, overstoking a fire in such a way as to cause unnecessary smoke), or in a failure to install some reasonably available protective device⁹ (*e.g.*, one that will minimize smoke or fumes).

devices such as have been suggested"); *United Verde Copper Co. v. Jordan*, 14 F.2d 299, 304 (9th Cir. 1926) (since harm done by fumes, precautions taken by defendants immaterial); *Koseris v. J. R. Simplot Co.*, 82 Idaho 263, 270, 352 P.2d 235, 239 (1960) (evidence of utility would have been properly excluded on issue of damages); *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 A. 900 (1890); *Bohan v. Port Jervis Gas-Light Co.*, 122 N.Y. 18, 25 N.E. 246, 9 L.R.A. 711 (1890); *Thornburg v. Port of Portland*, 244 Ore. 69, 415 P.2d 750 (1966); *Frost v. Berkeley Phosphate Co.*, 42 S.C. 402, 20 S.E. 280 (1894); *Louisville & N. Term. Co. v. Lellyett*, 114 Tenn. 368, 85 S.W. 881 (1905); *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964). *See also* sources cited notes 15, 28-42 *infra*.

⁴ 4 RESTATEMENT OF TORTS §§ 822(d)(i), 825-831 (1939); RESTATEMENT (SECOND) OF TORTS § 822(a) and comment g (Tent. Draft No. 15, 1969). The other sections of the original RESTATEMENT are to remain unchanged. *Id.* at 78-79.

⁵ 4 RESTATEMENT OF TORTS § 825(b) and comments and illustrations.

⁶ The RESTATEMENT proceeds on this assumption and insists on one or the other as a predicate of liability. *See* note 4 *supra*.

⁷ RESTATEMENT (SECOND) OF TORTS § 822(b), comment h (Tent. Draft No. 15, 1969).

⁸ *See, e.g.*, *Ozark Bi-Products, Inc. v. Bohannon*, 224 Ark. 17, 271 S.W.2d 354 (1954); *Gerrish v. Wishbone Farms of N.H., Inc.*, 108 N.H. 237, 231 A.2d 622 (1967); *Demarest v. Hardham*, 34 N.J. Eq. 469 (Ch. 1881) (defendant required to rearrange location of machine within plant).

⁹ Examples are *De Blois v. Bowers*, 44 F.2d 621 (D. Mass. 1930), *noted in* 29 MICH. L. REV. 790 (1931); *Associated Metals & Minerals Corp. v. Dixon Chem. & Res. Inc.*, 82 N.J. Supér. 281, 197 A.2d 569 (App. Div. 1963); *Dunsbach v. Hollister*, 49 Hun. 352, 2 N.Y.S. 94 (Sup. Ct. 1888), *aff'd mem.*, 132 N.Y. 602, 30 N.E. 1152 (1892).

Proceeding in an enterprise with such knowledge of its harmful consequences after all reasonable precautions have been taken, may also constitute genuine fault if it is conducted in an inappropriate location¹⁰ or if it has little or no social utility and a disproportionate tendency to cause harm.¹¹ And, of course, if the enterprise is illegal or antisocial, the fault in conducting it is clear.¹² This is all familiar enough. In the field of nuisance courts have traditionally weighed considerations of this kind both in determining whether there is an actionable nuisance at all¹³ and, if there is, in deciding whether an injunction prohibiting the offending activity is an appropriate remedy.¹⁴ A nuisance, it has been said, may consist of the right thing in the wrong place—"like a pig in the parlor instead of the barnyard."¹⁵

The *Restatement* has built out of such decisions an elaborate edifice for weighing in all cases the utility of defendant's enterprise (including its manner of operation) against the gravity of the harm inflicted on plaintiff's interest.¹⁶ Liability for damages for the harm

¹⁰ See, e.g., *Baltimore & P.R.R. v. Fifth Baptist Church*, 108 U.S. 317 (1883), discussed and distinguished in *Richards v. Washington Term. Co.*, 233 U.S. 546, 555-58 (1914); *Evans v. Moffat*, 192 Pa. Super. 204, 160 A.2d 465 (1960).

¹¹ See, e.g., *Hosmer v. Republic Iron & Steel Co.*, 179 Ala. 415, 60 So. 801 (1913) (foul pond); *Kissel v. Lewis*, 156 Ind. 233, 59 N.E. 478 (1901) (noisy entertainment); *Hubbard v. Preston*, 90 Mich. 221, 51 N.W. 209 (1892) (barking dog).

¹² See, e.g., *Tedescki v. Berger*, 150 Ala. 649, 43 So. 960 (1907); *Crawford v. Tyrrell*, 128 N.Y. 341, 28 N.E. 514 (1891) (houses of prostitution).

¹³ Opinions which include consideration of such factors in the determination of the issue of nuisance *vel non*, include *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608, 122 Eng. Rep. 588 (Q.B. 1863) (oft-quoted charge by Mellor, J.); *Baltimore & P.R.R. v. Fifth Baptist Church*, 108 U.S. 317 (1883); *Helms v. Eastern Kansas Oil Co.*, 102 Kan. 164, 169 P. 208, 1918C L.R.A. 277 (1917). See Smith, *Reasonable Use of One's Own Property as a Justification for Damage to a Neighbor*, 17 COLUM. L. REV. 383 (1917).

¹⁴ See, e.g., *New York City v. Pine*, 185 U.S. 93 (1902); *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 So. 192 (1889); *Koseris v. J.R. Simplot Co.*, 82 Idaho 263, 352 P.2d 235 (1960); *Riter v. Keokuk Electro-Metals Co.*, 248 Iowa 710, 82 N.W.2d 151 (1957); *York v. Stallings*, 217 Ore. 13, 341 P.2d 529 (1959); *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S.W. 658 (1904); *Galveston, H. & S.A. Ry. v. De Groff*, 102 Tex. 433, 118 S.W. 134 (1909); *Bartel v. Ridgfield Lumber Co.*, 131 Wash. 183, 229 P. 306 (1924); *Keeton & Morris, Notes on "Balancing the Equities,"* 18 TEX. L. REV. 412 (1940). Compare *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

¹⁵ *Sutherland, J.*, in *Euclid v. Ambler Co.*, 272 U.S. 365, 388 (1926).

¹⁶ 4 RESTATEMENT OF TORTS §§ 827, 828 (1939), sets forth the following factors to be considered:

Gravity of harm: (a) the extent of the harm involved, (b) its character, (c) the social value which the law attaches to the type of use or enjoyment invaded, (d) the suitability of the particular use or enjoyment invaded to the character of the locality, and (e) the burden on the person harmed of avoiding the harm.

Utility of the activity: (a) the social value which the law attaches to the primary purpose of the conduct, (b) suitability of the conduct to the character of the locality, and (c) the impracticability of preventing or avoiding the invasion.

is to be imposed only if, on striking this balance, defendant's conduct is found to be unreasonable and therefore to constitute fault.¹⁷

This line of reasoning is, of course, quite in keeping with the late nineteenth and earlier twentieth century urge to reduce all tort liability to terms of fault.¹⁸ Moreover, it does account for many of the decisions and it does reflect reasoning traditionally associated with the law of nuisance which seeks to adjust problems created by competing land uses—a kind of judicial zoning as Prosser aptly puts it.¹⁹ But this reasoning unduly simplifies the matter by leaving out of account a basis of liability without fault the recognition of which gives greater flexibility to the law of nuisance and better explains some lines of cases than the *Restatement's* procrustean insistence on fault (except where conduct is abnormally dangerous).

We have seen that where an actor's conduct will inevitably cause damage to another he may nevertheless be privileged to pursue it if its social utility is great enough. But where the actor is also the beneficiary of the conduct, the law may render his privilege incomplete; it may make him pay for the actual harm caused by its exercise. This, it is submitted, is the proper explanation of liability in some cases of nuisance. Acceptance of this proposition would by no means eliminate fault as a basis for liability where genuine fault is found. Fault would be a proper basis, for example, where defendant's legitimate enterprise is conducted without reasonably adequate precautions to eliminate or minimize the harm, or where the enterprise has little or no utility or is conducted in an inappropriate location. But if all these things are eliminated there will still be situations where the invasion of plaintiff's interest is so substantial that he should not be compelled to suffer it without compensation even though defendant's conduct entails no fault and is not abnormally dangerous.²⁰

Two lines of cases are better explained in terms of incomplete privilege than by the *Restatement's* fault scheme. In one of them courts have refused to enjoin defendant's conduct but have suggested or held that damages are appropriate.²¹ The denial of injunction rests on the exercise of discretion to "balance the equities" where the utility of the activity is great and the harm caused relatively small. The *Restatement* mentions these cases and suggests that the tests of what is

¹⁷ See authority as cited note 1 *supra*.

¹⁸ See, e.g., *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911), wherein an elaborate attempt is made to reduce many rules of strict liability to terms of fault.

¹⁹ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 621 (3d ed. 1964).

²⁰ See cases cited notes 3, 14 *supra*; notes 25-39 *infra*.

²¹ All of the cases cited in note 14 *supra* were of this kind.

reasonable may differ in law and equity.²² But the weakness of this reasoning is revealed in a comment: "It may be reasonable to continue an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying."²³ This of course is quite true but it describes a situation where defendant's only "fault" lies in failure to pay for what he does rather than in doing the thing itself. It describes a case of incomplete privilege rather than fault.²⁴

Another line of cases makes the point even more clearly. When defendant's activity is so important to the public that he is given the power of eminent domain, then his conduct in performing that activity carefully cannot be called unreasonable by any stretch of the imagination. Yet if it causes an unreasonable invasion of plaintiff's property interests, defendant will be liable for damages for the nuisance although denial of an injunction against the activity would clearly be required.²⁵ In such a case the nuisance action serves as a sort of inverse condemnation proceeding,²⁶ again involving the incomplete privilege concept rather than fault.

²² RESTATEMENT (SECOND) OF TORTS § 822, comment *d* (Tent. Draft No. 15, 1969).

²³ *Id.*

²⁴ This is what Professor Keaton calls "conditional fault." Keaton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959). If one feels a compulsion to find fault in these cases this seems to be the most sophisticated and defensible way to do it. Whether one has that urge is, I suppose, a matter of temperament. The step taken by Professor Keaton seems to me to add nothing helpful. "Conditional fault" in these cases exists only if one *ought* to pay for what one has done; surely it is no fault to be unwilling to pay what one has no duty to pay. But the *reason* for defendant's underlying obligation to pay and for the feeling he ought to have about that obligation does not here rest on fault, and once this is reasoned out (in terms of unjust enrichment, incomplete privilege, or inverse condemnation), the basis for the imposition of liability is complete. Professor Keaton's "conditional fault" has always seemed to me a good deal like the "super se assumpsit" in a common law declaration in general assumpsit for money had and received. Both appear quite superfluous, and both probably reflect in part at least a shrinking from an imposition of liability in the social interest without the defendant's having undertaken or incurred it in the conventional way.

²⁵ *Richards v. Washington Term. Co.*, 233 U.S. 546, 556-58 (1914) (on hypothesis that "the damage is not preventable by the employment at reasonable expense of devices such as have been suggested"); *Healey v. Citizens' Gas & Elec. Co.*, 199 Iowa 82, 201 N.W. 118, 38 A.L.R. 1226 (1924); *Simmons v. Mayor, etc. of City of Paterson*, 60 N.J. Eq. 385, 45 A. 995 (Ct. Er. & App. 1900); *Thornburg v. Port of Portland*, 233 Ore. 178, 376 P.2d 100 (1962), and on later appeal, 244 Ore. 69, 415 P.2d 750 (1966); *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964); cf. *United States v. Certain Parcels of Land*, 252 F. Supp. 319 (W.D. Mich. 1966); *Board of Education v. Palmer*, 88 N.J. Super. 378, 212 A.2d 564 (App. Div. 1965). But cf. *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963). The RESTATEMENT suggests the use of an injunction in these cases until the utility resorts to statutory condemnation. 4 RESTATEMENT OF TORTS § 941, comment *d* (1939). This seems unnecessary under modern procedures.

²⁶ This term is used in the more recent of these cases. See, e.g., *Thornburg v. Port of*

There is substantial authority for the position urged here. The *Restatement* position was at one time embraced by the English court of common pleas,²⁷ but in later cases repudiated by the Exchequer Chamber²⁸ and the House of Lords.²⁹ In *St. Helen's Smelting Co. v. Tipping*³⁰ defendant's plant was in a manufacturing locality. Fumes from it caused material injury to hedges, trees and shrubs on an estate about a mile and a half from defendant's works, bought by plaintiff after defendant's and other works were already established. Mellor, J., charged the jury that

the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That, in determining that question, the time, locality, and all the circumstances should be taken into consideration; that in counties where great works have been erected and carried on, which are the means of developing the national wealth, persons must not stand upon extreme rights and bring actions in respect of every matter of annoyance, as, if that were so, business could not be conducted in those places.³¹

The plaintiff had a verdict for substantial damages. On appeal, defendant contended that since its operations were lawful and carefully conducted in a suitable place it should not be liable. The higher courts sustained the instruction as given. In the House of Lords, the Lord

Portland, 233 Ore. 178, 376 P.2d 100 (1962); *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964); Lester, *Nuisance—As a "Taking" of Property*, 17 U. MIAMI L. REV. 537 (1963); Note, 3 TULSA L.J. 169 (1966). Some of the cases cited in this and the prior note arise under constitutional provisions for compensation only where there has been a "taking" for a public purpose; others under provisions which include "damaging" as well as "taking". But under the view that a non-trespassory nuisance may constitute a taking, nothing seems to turn on the distinction even where sovereign immunity would bar a nuisance action but for the constitutional provision. See *Martin v. Port of Seattle*, *supra*.

Those who insist on some kind of fault as a predicate of liability can perhaps find it here in the defendant's failure to condemn enough land or easements. See Keaton & Morris, *Notes on "Balancing the Equities,"* 18 TEX. L. REV. 412, 421 (1940). The tort suit may then be regarded as compelling a sort of specific performance of this unfulfilled duty. But this, like Keaton's "conditional fault" (see note 24 *supra*) is an entirely different thing from the blameworthiness in performing the conduct or maintaining the condition which the *RESTATEMENT* insists on.

²⁷ *Hole v. Barlow*, 4 C.B. (N.S.) 334, 140 Eng. Rep. 1113 (C.P. 1858). Here the court left it to the jury to determine whether defendant's operations were carried on in a suitable place and whether they were unreasonable under all the circumstances.

²⁸ *Bamford v. Turnley*, 3 B. & S. 66, 122 Eng. Rep. 27 (Ex. 1862); *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608, 616, 122 Eng. Rep. 588, 591 (Ex. 1864).

²⁹ *St. Helen's Smelting Co. v. Tipping*, 11 H.L. 642, 11 Eng. Rep. 1483 (1865).

³⁰ *Id.*

³¹ *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608, 610-11, 122 Eng. Rep. 588, 589 (Q.B. 1863).

Chancellor recognized the importance of locality in determining whether plaintiff's injury is substantial, at least where the disturbance was productive of personal discomfort rather than physical injury, and that a plaintiff must put up with more in a manufacturing district than in the country. But where plaintiff's harm involved a very considerable diminution of the value of his property then it is no defense that plaintiff's operation is suitably located. "[A]ny place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place."³²

The reasoning has been accepted in a number of American decisions. A rather dramatic example is *Madison v. Ducktown Sulphur, Copper & Iron Co.*,³³ where the court specifically found that defendant's activity (open-air roasting of ores) was lawful and the only known method of conducting the operation; that defendant had used every method to eliminate the emissions, spending large sums for the purpose; and that "there is no place more remote to which the operations referred to could be transferred."³⁴ The lands of the farmer-plaintiffs were "all thin mountain lands, of little agricultural value" located from two to eight miles from the plants in the mountains around Ducktown.³⁵ Fumes and smoke from defendant's operations badly damaged the plaintiffs' timber and crops. Defendant showed the utility of their operations and their economic value to the community. The court denied the injunction sought but ordered the award of damages, explaining:

[I]n a case of conflicting rights, where neither party can enjoy his own without in some measure restricting the liberty of the other in the use of property, the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances.³⁶

This reasoning is surely inconsistent with a finding of fault on Ducktown's part; yet it was held in damages. In a number of other American cases defendants have been held liable in damages for substantial harm inflicted on plaintiff's property interest, although their operations have been lawful and carefully conducted in a suitable place.³⁷ Many of

³² *St. Helen's Smelting Co. v. Tipping*, 11 H.L. 642, 651, 11 Eng. Rep. 1483, 1487 (1865).

³³ 113 Tenn. 331, 83 S.W. 658 (1904).

³⁴ *Id.* at 342-43, 83 S.W. at 660.

³⁵ *Id.* at 339, 83 S.W. at 659.

³⁶ *Id.* at 367, 83 S.W. at 667.

³⁷ In *Richards v. Washington Term. Co.*, 233 U.S. 546, 557 (1914), Congress had "in

these decisions refer with approval to the British decisions which culminated in the *St. Helen's* case. Several of them use the reasoning of

effect commanded . . . defendant to construct its tunnel with a portal located in the midst of an inhabited portion of the city", but the Court held it would be liable for inflicting substantial "special and peculiar damage" even if its method of expelling smoke and gases from the tunnel was the only feasible one. In *New York City v. Pine*, 185 U.S. 93 (1902), the impounding of water for a reservoir in New York entitled lower riparians in Connecticut to compensation for diminished flow, but not to an injunction. The Court assumed there could have been no condemnation. Apparently nothing done by defendant was in any way unreasonable. In *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 A. 900, 25 Am. St. R. 595, 9 L.R.A. 737 (1890), the trial court refused to charge that if defendant's operations were suitably located it would be liable only for results of improper operation, but did charge that plaintiff must endure such disturbances as were "not unreasonable or excessive in view of the locality". The charge was upheld. The court declared that if the harm caused was substantial the defendant would be liable,

[a]nd this, too, without regard to the locality where such business is carried on; and this, too, although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business.

Id. at 276, 20 A. at 900. The court relied on the English cases described in the text at notes 27-32 *supra*. Its decision and language were in turn relied upon in *Frost v. Berkeley Phosphate Co.*, 42 S.C. 402, 20 S.E. 280 (1894). Both these cases involved fertilizer works which emitted smoke, gas and dust of suffocating character and charged with acids. In *Louisville & N. Term. Co. v. Lellyett*, 114 Tenn. 368, 85 S.W. 881 (1905), plaintiff's property was invaded by smoke, soot, dust, and noise from defendant's nearby terminal yard and roundhouse. The trial court charged that it would be no defense

to prove that the yards . . . [were] at a suitable locality, or that the business is a lawful business and one useful to the public, or that the best and most approved appliances and methods are used in the conduct and management of the business.

Id. at 388-89, 85 S.W. at 886. This charge was upheld on reasoning like that in the *Susquehanna* case.

In a similar situation the Texas court pointed out that if the railroad yards were moved to another locality "the same nuisance to other people would be caused by the necessary operation . . ." and concluded: "These conflicting interests call for a solution of the question by the application of the broad principles of right and justice, leaving the individual to his remedy by compensation and maintaining the public interests intact" by denying an injunction. *Galveston, H. & S.A. Ry. v. De Groff*, 102 Tex. 433, 443, 118 S.W. 134, 139 (1909). In *Bartel v. Ridgefield Lumber Co.*, 131 Wash. 183, 229 P. 306 (1924), defendant's lumber mill was located in the manufacturing district of a small mill town in the lumbering region. The emission of smoke, sawdust, and burned or half-burned embers materially damaged plaintiff's nearby farm. The trial court found no negligence and denied both an injunction and damages. The judgment was affirmed as to the former, reversed as to damages. The court noted the conflicting nature of the uses of the land, both legitimate, and concluded:

Where a trade or business is carried on in such manner as to materially interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done for which an action for damages will lie, without regard to the locality where such business is carried on, and notwithstanding the business be entirely lawful, and notwithstanding the best and most approved appliances and methods may be used in the construction and management of the business.

131 Wash. at 189, 229 P. at 308. *See also* *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 So. 192

incomplete privileges or inverse condemnation.³⁸ And recently there have been similar rulings made on this basis awarding damages against airports for serious invasions of nearby land caused by low non-trespassory flights necessary for landing and taking off.³⁹

The decisions cited in the notes supporting the tentative draft of the second *Restatement* do not involve situations where defendant knew his operations would cause the harm complained of; they were not cases of intentional nuisance in the *Restatement's* own sense.⁴⁰ Their requirement of either fault or abnormally dangerous activity as a predicate of liability does not, therefore, militate against the rule found in the cases cited above and suggested here.⁴¹ Moreover, this

(1889); *Koseris v. J. R. Simplot Co.*, 82 Idaho 263, 352 P.2d 235 (1960); *Demarest v. Hardham*, 34 N.J. Eq. 469, 472-73 (Ch. 1881); *Bohan v. Port Jervis Gas-Light Co.*, 122 N.Y. 18, 25 N.E. 246, 9 L.R.A. 711 (1890); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

³⁸ See, e.g., *Richards v. Washington Term. Co.*, 233 U.S. 546 (1914); *Louisville & N. Term. Co. v. Lelleyett*, 114 Tenn. 368, 397, 402, 85 S.W. 881, 888, 889 (1905) (see text at note 47 *infra*). A classic statement is that of Baron Bramwell in *Bamford v. Turnley*, 3 B. & S. 66, 84-85, 122 Eng. Rep. 27, 33 (Ex. 1862):

The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. But whenever this is the case,—whenever a thing is for the public benefit, properly understood,—the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site; and accordingly no one thinks it would be right to take an individual's land without compensation to make a railway. It is for the public benefit that trains should run, but not unless they pay their expenses. If one of those expenses is the burning down of a wood of such value that the railway owners would not run the train and burn down the wood if it were their own, neither is it for the public benefit they should if the wood is not their own. If, though the wood were their own, they still would find it compensated them to run trains at the cost of burning the wood, then they obviously ought to compensate the owner of such wood, not being themselves, if they burn it down in making their gains.

³⁹ *Thornburg v. Port of Portland*, 233 Ore. 178, 376 P.2d 100 (1962), and on later appeal, 244 Ore. 69, 415 P.2d 750 (1966); *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964). On the later appeal in *Thornburg, supra*, the court made it clear that if harm to plaintiff was substantial and peculiar, there would be no room for considering the airport's utility in determining whether compensation should be made. 244 Ore. at 74, 415 P.2d at 753.

⁴⁰ See cases cited in RESTATEMENT (SECOND) OF TORTS, p. 74 (Tent. Draft No. 15, 1969). An illustrative case is *Wright v. Masonite Corp.*, 368 F.2d 661 (4th Cir. 1966), wherein defendant did not know or have reason to know that his operations were causing damage. Contrast *Norfolk & W. Ry. v. Amicon Fruit Co.*, 269 F. 559 (4th Cir. 1920) (applying rule of strict liability where defendant did have such knowledge).

⁴¹ Some of the decisions express approval of the RESTATEMENT rule, however, in terms broad enough to cover its departure from the position taken here. See, e.g., *Wright*

rule is preferable to the *Restatement's* on grounds both of logic and policy.

The *Restatement* accepts abnormal danger as an appropriate basis for strict liability.⁴² The justification for it is the high degree of *risk* of injury caused by legitimate but dangerous activity.⁴³ But if high risk of harm is a sufficient basis for strict liability, then the certainty (or substantial certainty) of harm in the cases under discussion is an even stronger basis for it.⁴⁴

So far as policy goes, it should be noted how the progressive industrialization of our society increases both the danger of pollution and the means to meet it, and how the larger problems posed are essentially political, calling for political solutions. But this process may well be slow and incomplete. In the meantime, individuals will be in need of

v. Masonite Corp., 368 F.2d 661 (4th Cir. 1966); Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954).

⁴² RESTATEMENT (SECOND) OF TORTS §§ 519-20 (1965).

⁴³ Harper, *The Foreseeability Factor in the Law of Torts*, 7 NOTRE DAME LAW. 468 (1932); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 509-10 (3d ed. 1964). Prosser also seeks however to refer this liability to a sort of fault basis by suggesting it will be imposed only where defendant's thing or activity is "*unduly* dangerous and *inappropriate* to the place where it is maintained . . ." *Id.* at 522 (emphasis added). This, it is submitted, misses the point. Locality is of course an important factor in determining when the risk of injury is high. Blasting in a city carries such risk; blasting in a remote mountain region may not. But that is not to say that the risk of blasting in a city is "undue" or the place "inappropriate." The skyscrapers and subways of New York could not have been built feasibly without blasting, and these things pass muster as socially useful under our current value judgments. Surely then blasting in the city with the blessing of the civil authorities and the exercise of all due care does not deserve the oblique charge of fault which Prosser levels against it. This attempt and that of the RESTATEMENT in nuisance to reduce all tort liability to fault simply show how hard it is for a generation imbued with the fault principle to accept fully the notion of incomplete privilege—that it may be just to require an actor who has commanded another's property for his own purposes to pay for what he has taken, no matter how faultless and socially useful his conduct has been.

⁴⁴ While *Fletcher v. Rylands*, 3 H. & C. 774, 159 Eng. Rep. 737 (Ex. 1865), did not involve an intentional invasion in the RESTATEMENT sense no doubt its reasoning is broad enough to cover cases where the harm is foreseeably certain, or actually known. *See, e.g., Norfolk & W. Ry. v. Amicon Fruit Co.*, 269 F. 559 (4th Cir. 1920). And if activity which produces *any* kind of nuisance is brought within this principle of strict liability, then indeed it would be broad enough to account for all the cases cited above (*e.g., in notes 3, 14, 25-39 supra*). *See W. PROSSER, HANDBOOK OF THE LAW OF TORTS* 528 n.85 (3d ed. 1964). But of such a possible explanation, two points should be noted:

- (1) These cases—if explained on this basis—show that the requirement of unreasonable conduct by defendant which the RESTATEMENT makes for intentional nuisances is not made where the defendant's activity is abnormally dangerous. *Contrast note 43 supra.*
- (2) If *all* conduct productive of nuisances (including *e.g., smoke, excessive light, noise, odors, etc.*) is to be regarded as abnormally dangerous, then no area is left in which the RESTATEMENT's requirement of unreasonableness would operate.

protection against serious abuse and they will have to rely largely on the private nuisance action to get it. The *Restatement* view would seriously impair the courts' ability to afford needed protection in that action. It would, as an English court observed, "carry with it this consequence" that a socially useful enterprise carefully conducted in a suitable location may bring about "injury and destruction to the neighbouring property" without making any compensation therefor.⁴⁵

The foregoing reasoning would lead to the following rules:

In all cases the harm to plaintiff's interest must be substantial to constitute a nuisance⁴⁶ but what is substantial will vary, within limits, according to circumstances.

Where the harm is inadvertently or unintentionally caused, liability will be imposed only if the invasion is negligent or reckless or actionable as an abnormally dangerous activity. This is the same as the *Restatement* rule.

Where the invasion is intentional, liability will be imposed if the defendant's conduct has been unreasonable. This will include cases where the condition or conduct causing the invasion has little or no social utility, as where it serves only spite or some trivial or unlawful purpose. It will also include cases where the condition or conduct is lawful and useful but is maintained or conducted in a negligent or reckless manner or in an inappropriate place. Again, this is the same as the *Restatement* rule and will call for the same kind of weighing of utility and harm in determining the appropriateness of the location.

Where the invasion is intentional, liability will be imposed even where the condition or conduct causing it is socially useful, is maintained and conducted with all due care and in a suitable and convenient location, if the harm caused is unreasonably great. This departs from the *Restatement* rule but accords with what is believed to be the weight of judicial authority. This again involves weighing of utility against harm but within limits. Where defendant's enterprise meets the conditions described above it is reasonable to expect plaintiffs to put up with more. Persons who live in business or manufacturing districts must not, in Mellor's often quoted words, "stand on extreme rights and bring actions in respect of every matter of annoy-

⁴⁵ *St. Helen's Smelting Co. v. Tipping*, 11 H.L. 642, 651-52, 11 Eng. Rep. 1483, 1487 (1865). See also Case Comment, 24 WASH. & LEE L. REV. 314, 319 (1967).

⁴⁶ RESTATEMENT (SECOND) OF TORTS § 821 F, and comment *c* (Tent. Draft No. 15, 1969) ("more than slight inconvenience or petty annoyance. [A] real and appreciable invasion . . . of the plaintiff's interests.") *Id.* at 59.

ance ”⁴⁷ But where material physical injury is inflicted upon persons or property or where annoyance is serious and long continued so as “visibly to diminish the value of the property and the comfort and enjoyment of it”⁴⁸ then “a thing of value has been taken from the plaintiff for the benefit of defendant as the representative of the public, and for that thing compensation must be made.”⁴⁹

⁴⁷ From instructions to the jury by Mellor, J., in *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608, 611, 122 Eng. Rep. 588, 589 (Q.B. 1863).

⁴⁸ *Id.* at 610, 122 Eng. Rep. at 589.

⁴⁹ *Louisville & N. Term. Co. v. Lellyett*, 114 Tenn. 368, 397, 85 S.W. 881, 888 (1905), quoting from *Cumberland Tel. & Tel. Co. v. United Elec. Ry.*, 93 Tenn. 492, 520-21, 29 S.W. 104, 111, 27 L.R.A. 236, 243 (1893).