THE LAW OF PROPERTY

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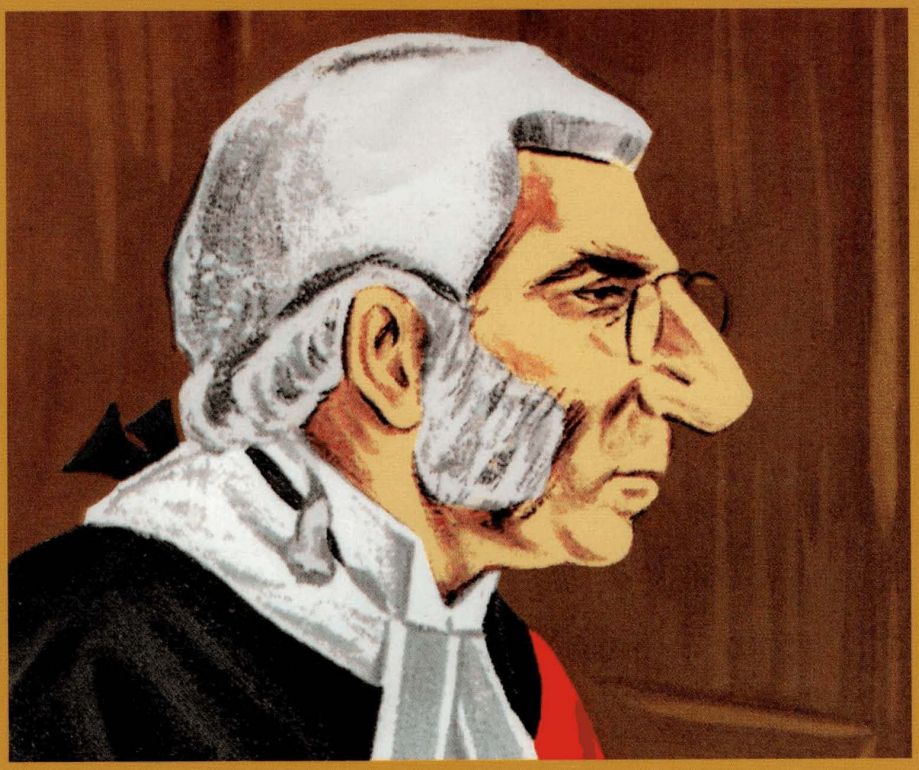

PROPERTY

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CHAPTER 8

JUDICIAL CONTROL OF LAND USE: NUISANCE AND SUPPORT

ChapterScope

This chapter examines control of land use through the tort concept of nuisance, and various ways the judiciary can resolve these claims of nuisance. A related concept, lateral and subjacent support, is also discussed. Here are the most important points in this chapter.

- Nuisance is a relative concept. Nuisance consists of an intentional use of one's property that is unreasonable and substantially interferes with another person's use and enjoyment of their property, or an unintentional use that is negligent, reckless, or inherently dangerous and substantially interferes with another person's use and enjoyment of their property. However, none of this answers the question of which use should be preferred.
  - There are three views of when an intentional use is unreasonable. First, a use is unreasonable if the gravity of the harm it inflicts outweighs its social utility; second, a use is unreasonable if the harm inflicted is serious and the actor could compensate for this and similar harms without ceasing the activity; and, third, a use is unreasonable if the harm it inflicts exceeds some minimal threshold of discomfort that no one should be expected to endure.
- Because nuisance necessarily involves a weighing of the utility of two competing uses courts have begun to experiment with the use of liability rules (which force the transfer of rights upon compensation) as well as property rules (which protect against forced transfer of rights). The result is four possible outcomes of nuisance suits, two of which use property rules and two which use liability rules.
  - Under either of the property rule outcomes, any later transfer of the right must be voluntary and economically efficient transfers may be inhibited by high transaction costs.
    - No nuisance, no remedy.
    - Nuisance enjoined.
  - Under either of the liability rule outcomes, the judicial system forces a transfer of rights upon compensation to the other party. The justification for using liability rules instead of property rules is that this will produce a socially efficient outcome.
    - Nuisance permitted to continue upon payment of full compensation to affected property owners for the past and future damages
    - No nuisance, but the activity is enjoined upon payment of compensation to the enjoined user of the full costs of relocation
- Nuisances can be public or private. A public nuisance is a use that imposes harms on the entire public with no particularized harm on any private landowner.

I. THE SUBSTANCE OF NUISANCE

A. The general principle: An ancient common law maxim, *sic utere tuo ut alienum non laedas* ***(one must use one's property so as not to injure another's property)*** is the root of nuisance. Unfortunately, the maxim is not much help, because often one person's beneficial use is another person's injury and, in practice, some injuries to another's land are permitted and others not. It is more helpful to say that a person may not use his own land in an ***unreasonable manner*** that ***substantially*** lessens another person's ***use and enjoyment*** of his land. A nuisance may be ***private*** or ***public.*** A private nuisance involves interference with purely private rights to the use and enjoyment of land — usually one or more nearby landowners. A public nuisance involves interference with public rights — those held in common by everybody — but a public nuisance can also be a private nuisance.

B. Private nuisances: A private nuisance occurs when there is ***substantial interference*** with private rights to use and enjoy land, produced by ***either*** of the following:

- ***Intentional and unreasonable*** conduct, or
- ***Unintentional*** conduct that is either ***negligent, reckless,*** or so ***inherently dangerous*** that ***strict liability*** is imposed.

★**Example:** High Penn operated an oil refinery that emitted noxious odors several times each week, polluting the air for about a 2-mile radius from the refinery. Along with many other people who owned land located within that radius, Morgan sued to enjoin the refinery's operations, alleging that the noxious odors made him sick and deprived him of use and enjoyment of his property. In ***Morgan v. High Penn Oil Co.,*** 238 N.C. 185 (1953), the North Carolina Supreme Court agreed, applying the hornbook rule that a use is a nuisance if it is *either* ***intentional and unreasonable*** or ***unintentionally produced by negligence, recklessness, or extremely dangerous activity.*** High Penn intended to operate the refinery and knew or should have known that its operation would produce the noxious odors and the court assumed its use was unreasonable but did not explain quite why.

1. Intentional conduct: This is the most common form of nuisance. Intentional conduct is action that is known by the actor to interfere with another's use of land, but which is continued nevertheless. The focus here is upon whether the conduct is an ***unreasonable interference*** with another's land, but what is unreasonable? There are three views.

a. Balancing: Harm and social utility: If the **gravity of the harm** ***inflicted by the conduct outweighs its social utility*** (unconstrained by nuisance law) the conduct is unreasonable. See Restatement (2d) Torts §826(a). To measure the gravity of the harm, the Restatement (2d) of Torts suggests that courts should consider the ***extent*** of the harm, its ***character,*** the ***social value*** of the use, the ***suitability of the use to the location,*** and the ***burden of avoiding the harm.*** See Restatement (2d) Torts §827 (1979). To measure the utility of the offending conduct, the Torts Restatement suggests that courts should consider the ***social value*** of the conduct, its ***suitability to the location,*** and the ***practical difficulty of preventing the harm.*** See Restatement (2d) Torts §828. The first Restatement of Torts, §827, distinguished between harm that damaged property and harm to personal comfort: "Where the invasion involves physical damage to tangible property, the gravity of the harm is ordinarily regarded as great even though the extent of the harm is relatively small. But where the invasion involves only personal discomfort and annoyance, the gravity of the harm is

generally regarded as slight unless the invasion is substantial and continuing." That distinction is discarded by the second Restatement, which applies its balancing formula globally. In practice, this multifaceted balancing test makes the issue of unreasonable use turn on the specific facts: "A nuisance may be merely the right thing in the wrong place — like a pig in the parlor instead of the barnyard." ***Village of Euclid v. Ambler Realty Co.***, 272 U.S. 365 (1926). In theory fault is not an issue — the most careful and prudent use is a nuisance if its harm outweighs its utility. In essence, this test gives judges the opportunity to assess the worth of competing uses and to decide which user should shoulder the costs inherent in two incompatible uses. This becomes quite indeterminate when you consider the possibility that any use inflicts some costs on others, and that the label "nuisance" simply becomes a way of allocating presumptive entitlement to any particular use. Perhaps for this reason the traditional remedies for nuisance have become considerably more sophisticated and capable of nuance, which suggests that some of the work of deciding what constitutes a nuisance has been transferred into the law of remedies for nuisance. See section II, below.

b. Balancing: Uncompensated harm and ruinous liability: A variation on balancing harm and social utility is contained in Restatement 2d Torts §826(b), which holds that an intentional activity is unreasonable if it causes ***serious harm*** **and** ***the actor could compensate for that and similar harm without going out of business.*** This test becomes problematic only when the defendant would be forced out of business by compensating for the harm he causes, for in such circumstances this test would conclude that the activity is not unreasonable and thus not a nuisance. In essence, under those circumstances a court is asked to decide which is worse — uncompensated harm or forcing businesses to close. There are at least two reasons why an actor inflicting serious harm might be excused from liability because he can't afford to pay for the harm: (1) the injured party is able to avoid the harm at less cost than the compensation, and (2) the harm-inflicting activity generates positive externalities — benefits that the actor cannot capture and use to compensate the injured party but which outweigh the harm. The latter point takes you back to harm versus social utility. In theory this test could be used globally but its application inevitably becomes bound up in the remedies for nuisance. When the plaintiff seeks to enjoin a claimed nuisance compensation is not a factor and the general balancing of harm and social utility is applicable, but when the issue is whether a nuisance should continue upon payment of compensation to those harmed (see section II.D. below), this test becomes relevant.

c. Substantial harm: The liability threshold: A number of courts tacitly or explicitly ignore the balancing test if ***substantial harm*** is inflicted. In these jurisdictions a nuisance exists if the injury it inflicts is severe enough to be above some maximum level of interference that a person can be expected to endure without redress -- a "threshold of liability." An old Wisconsin case, *Pennoyer v. Allen*, 56 Wis. 502 (1883), is typical in defining substantial injury as "tangible" injury or a "discomfort perceptible to the senses of ordinary people."

Example: Dairyland Power's electrical generation plant spewed sulphur dioxide into the air, causing tangible but minor property damage to Jost's house and farm (e.g., rusty screens, inability to grow flowers or garden vegetables, and loss of about 5 percent of Jost's alfalfa crop). In *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164 (1969), the Wisconsin Supreme Court ruled that the generation plant was a nuisance. The court invoked the principle, derived from the first Restatement of Torts, §827, that "where the invasion involves physical damage to tangible property, the gravity of the harm is ordinarily regarded

as great even though the extent of the harm is relatively small." To permit a socially useful public utility to "deprive others of the full use of their property without compensation . . . would constitute the taking of property without due process of law." See also *Dolata v. Berthelet Fuel & Supply*, 254 Wis. 194 (1949), in which an admittedly socially and economically useful coal yard was enjoined as a nuisance because it caused substantial damage to an adjacent landowner. Note that although the court in ***Morgan v. High Penn Oil Co.*** did not state why the refinery's operation was unreasonable, a second look at the facts suggests that it was applying the *Jost* threshold invasion test.

2. **Unintentional conduct:** When an actor uses his land in a way that unintentionally injures another's use or enjoyment of land, the action is a nuisance if ***either*** the conduct is below the standard of care commonly required (i.e., it is negligent or reckless) ***or*** the ***risk of harm*** is so great that the conduct ought not be tolerated (i.e., it is inherently dangerous, like the unshielded storage of plutonium or large quantities of dynamite). Here the focus is entirely upon the actor's conduct — does it pose an unreasonable risk of harm either because it is careless or inherently dangerous?

3. **Substantial interference:** The alleged nuisance, whether intentional or not, must be a substantial impediment to the use and enjoyment of land. The average person is the standard measurement for substantial interference. See, e.g., ***Morgan v. High Penn Oil Co.,*** 238 N.C. 185 (1953); *Rose v. Chaikin,* 187 N.J. Super. 210 (1982).

   Example: An operator of a drive-in movie theater sued an adjacent amusement park, on the theory that the bright lights from the amusement park constituted a nuisance. Not so, said the Oregon Supreme Court in *Amphitheaters, Inc. v. Portland Meadows*, 184 Or. 336 (1948); the movie operator's use was "abnormally sensitive." But why should the theater operator's reliance on natural darkness be abnormal? Couldn't the introduction of vast amounts of artificial lighting be considered abnormal? A commonly accepted cultural baseline is required; here, in the midst of the electrified, urbanized industrial economy, the baseline was bright lights at night in an urban area.

   The necessity of using some cultural baseline produces mixed results when cultural attitudes vary or are in flux.

   Example: A halfway house for paroled criminals is established in a residential neighborhood, producing fear of criminal activity and a decline in property values. While one might think that the fear and declining values are indicators of a cultural baseline, courts divide on this issue. In *Arkansas Release Guidance Foundation v. Needler*, 252 Ark. 194 (1972), the Arkansas Supreme Court ruled that such a house was a nuisance, but in *Nickolson v. Connecticut Halfway House*, 153 Conn. 507 (1966), the Connecticut Supreme Court said it was not, even though the fear and the decline in values were present. In *Adkins v. Thomas Solvent Co.*, 440 Mich. 293 (1992), the Michigan Supreme Court ruled that a toxic waste dump did not constitute a nuisance where property values in the area had declined on the strength of well-publicized but unfounded fears of contamination.

C. **Public nuisances:** A public nuisance affects rights held in common by everybody — the public — rather than just private rights of land use held by landowners.

   Example: A factory discharging pollutants into a publicly owned watershed, thereby contaminating the municipal water supply, is likely engaging in a public nuisance. Only the common right to potable water for the municipality is affected.

   A pure public nuisance is rare — more commonly, a public nuisance is also a private nuisance.

Example: A factory discharging pollutants into a stream that supplies drinking water to downstream farmers as well as a municipality even further downstream is likely engaging in both a public and private nuisance.

The substantive test for a public nuisance is the same as for a private nuisance.

1. **Enforcement:** Public nuisances are normally abated by suits brought by public officials, but a ***private citizen*** may bring suit to abate a public nuisance if he has been ***specially injured*** by the nuisance. This means that the private plaintiff has suffered some particularized and personalized injury, but not necessarily in the use and enjoyment of land.

   Example: A factory discharges pollutants into the sea in a quantity sufficient to render the water unsafe for public bathing or fishing, thus creating a public nuisance. Jill, who owns no land, cultivates oysters in the tidal waters and her oyster farming is ruined by the pollution. Jill may maintain suit to abate the public nuisance. She has suffered a particularized injury, one different from the injury inflicted on the public at large.

   This rule of special injury has been relaxed by statute or judicial decision in some states to permit a private person to sue as the representative of affected persons to abate environmental nuisances.

D. Relationship to trespass: Nuisance and trespass are closely related. Trespass involves a physical invasion of a person's land — an interference with his ***exclusive right of possession.*** By contrast, nuisance involves an interference with another person's right to ***use and enjoy his land*** and does not necessarily involve interference with the exclusive right of possession. Of course, there is some overlap: If a viscous sludge of animal waste from a hog farm crosses over the boundary to the neighbor's land, the neighbor can assert both trespass and nuisance. As well, the physical invasion that constitutes trespass can be microscopic.

Example: Reynolds's aluminum plant emitted gases that poisoned Martin's cattle, and Martin prevailed on a trespass theory. On appeal, the Oregon Supreme Court, in *Martin v. Reynolds Metals Co.*, 221 Or. 86 (1959), affirmed, concluding that physical invasion occurred even when the invasion was by "invisible pieces of matter or by energy." Somewhat inexplicably, however, the court applied a balancing test to determine liability. By contrast, in *Wilson v. Interlake Steel Co.*, 32 Cal. 3d 229 (1982), the California Supreme Court ruled that noise alone, unaccompanied by physical property damage or other tangible invasion, did not support a trespass claim. Trespass, once proven, entitles the landowner to damages and an injunction regardless of his lack of any substantial injury. By contrast, a landowner in a nuisance action must prove significant injury in order to recover, as well as unreasonable interference, and (usually) that equity is in his favor. The remedy available to a successful plaintiff in a nuisance action may be an injunction, damages, or even an obligation to pay damages to a defendant as the price for an injunction. See section II, below.

II. REMEDIES: FOUR VIEWS OF NUISANCE

A. Introduction: The economic theory of modern nuisance law: The fundamental problem of nuisance law is that property uses are often incompatible. My beneficial use is your injury, and your beneficial use is my injury. If Eve operates a dairy farm on Blackacre, necessarily producing odors that interfere with Adam's outdoor tanning salon on Whiteacre, the two uses are incompatible. Each use interferes with the other — Eve's dairy farm interferes with Adam's tanning salon (the odors inhibit the spa patrons from tanning) and Adam's tanning salon interferes with Eve's

dairy farm (by preventing Eve from maintaining a dairy farm in order to accommodate the spa patrons). Each use produces ***externalities*** — costs that are not imposed on the person producing them. Eve's dairy farm produces the cost (external to Eve) of inhibiting Adam's use as a tanning salon. Adam's tanning salon produces the cost (external to Adam) of preventing Eve's use as a dairy farm in order to accommodate Adam's tanning spa. Economic theorists argue that decisions are more efficient if all of the costs of the decision are internalized — borne by the decisionmaker. If Adam and Eve were a single unit, the relative costs of these incompatible uses would be weighed by the single decisionmaker, and the more economically desirable use would prevail. But Adam and Eve are not a single unit. Nevermind, said Ronald Coase in his famous Coase Theorem. In a perfect world free of transaction costs, it doesn't matter which of Adam and Eve are entitled to continue their use, because the use right will end up in the hands of the person whose use is the more valuable.

Example: Suppose the damage to Eve from ceasing to use Blackacre as a dairy farm is $100,000 and the damage to Adam from ceasing to use Whiteacre as a tanning salon is $40,000. If the law gives Eve the use right she will continue her dairy farming because Adam will pay her no more than $39,999.99 to stop and that sum is not enough to compensate her for the costs of stopping. But if the use right is given to Adam he will sell that right to Eve for some price greater than $40,000 and less than $100,000, because both Adam and Eve will be better off by such a bargain. Similarly, if Adam suffered a greater damage than Eve from ceasing his activity then the use right would end up in Adam's hands no matter where it was initially assigned. All of this, of course, assumes the absence of any transaction costs.

1. **Transaction costs — The gap between theory and reality:** We do not live in a perfect world free of transaction costs. The cost of moving the right from Adam to Eve or Eve to Adam is not zero; it is not even insignificant. Why? There are three standard answers.

   a. **Bilateral monopoly:** When there are only two persons involved in the transfer there is an inherent bilateral monopoly problem. There is only one seller and only one buyer — dueling monopolies.

      Example: If Adam is given the use right and Eve values it more highly, Adam has only one potential buyer: Eve. And Eve has only one source from which she can acquire the right she desires: Adam. They are forced to deal with only each other, if they are to deal at all. Adam is likely to want to extract as much of the potential gain of $60,000 ($100K – $40K) as he can, but Eve has the same objective. They will haggle; they will bluster; they will hire lawyers to threaten more litigation and thus spend gains before acquiring them. In short they will play negotiation games with each other, expending money and time as they do, thus making it harder to reach a deal and diminishing its value even if reached.

      Paradoxically, some empirical research suggests that bilateral monopoly situations frequently do result in efficient outcomes, perhaps because people recognize in advance the prospect of wasteful haggling. See, e.g., Hoffman & Spitzer, The Coase Theorem: Some Experimental Tests, 25 J.L. & Econ. 73 (1982).

   b. **Free riders:** When there are numerous parties to the negotiation, different problems emerge. One of them is caused by the human impulse to get a free ride at somebody else's expense.

      Example: Suppose that in addition to Adam there were 99 other property owners, all using their property for uses incompatible with Eve's dairy farm. Suppose that a cessation of each of those additional uses would damage each affected property owner by $40,000. The total

cost imposed by giving the use right to Eve would thus be $4,000,000 ($40K × 100), but suppose that Eve's use is not a nuisance despite these disparate numbers (perhaps Eve was there first and the other people all "came to the nuisance" fully aware of the problem). The rational response of Adam and his fellow landowners is to contribute something more than $1,000 apiece to amass a fund of more than $100,000 to purchase Eve's use right from her, but some landowners will not contribute because they hope to receive the benefit of Eve's cessation of use without paying for it. The knowledge that this may happen will inhibit other landowners from making their contributions because they dislike giving a free ride to someone else. Moreover, to complete the transfer the contributing landowners will have to contribute the share of the free riders and many of them may balk at this. Because there is no effective way to compel contribution Eve's use right may not be purchased, even though it is clearly economically efficient to do so.

c. **Holdouts:** The mirror image to the free rider problem is the problem of holdouts.

Example: Suppose that the damage to Adam of ceasing his use is only $500 (he can use Whiteacre as an exotic vegetable farm) and there is also damage to 99 other property owners (each in the amount of $500), or total damages of $50,000 (100 × $500). Now suppose that Eve's use is found to be a nuisance and she is ordered to stop. It is efficient for Eve to purchase the use right vested in her 100 neighbors for some amount greater than $500 each and less than $1,000 each, but it does Eve no good to purchase the use right from 99 owners if even one refuses to sell. One owner is almost sure to hold out, because he will know that the marginal value of the last right is higher than $500 to $1,000. To see this, imagine that Eve has purchased 99 use rights for $600 each, or a total of $59,400. The last holdout will realize that Eve will rationally pay as much as another $40,599 to obtain the holdout's right. This simple fact is likely to spur holdouts. Of course, Eve can make her purchases conditional upon obtaining all rights but that condition does not eliminate the incentive to hold out. Because Eve cannot compel everyone to sell on reasonable terms (e.g., three people may each demand $40,000) she may never be able to complete the transaction and the right will stay with Adam and his cohorts, the inefficient outcome.

However, some empirical studies suggest that efficient results may occur by private bargaining even when there are as many as 40 parties involved, so the holdout problem may not be as intractable as it is often thought to be. See, e.g., Hoffman & Spitzer, Experimental Tests of the Coase Theorem with Large Bargaining Groups, 15 J. Legal Stud. 149 (1986).

2. **Who gets the initial entitlement?** Economic theory answers this by stating that the initial entitlement of land use should belong to the party whose use is the more valuable, but there are rival answers, too.

   a. **More valuable use:** The most efficient and economically logical answer is that the ***more valuable use*** should receive the initial entitlement, because this is the outcome that (but for transaction costs) would ultimately result. The prevailing balancing test for intentional and unreasonable use partially addresses these economic efficiency concerns by assessing the relative social utility of competing uses and other issues of practicality.

   b. **First user:** Some would give the initial entitlement to the ***first user,*** on the theory that later users should adapt themselves to existing conditions. This approach is embodied in the ***"coming to the nuisance"*** doctrine, by which courts hold that those who knowingly acquire and use land in a manner incompatible with existing uses have voluntarily assumed the

This pattern is in fact seen in the modern law of nuisance remedies. A court must ***allocate the right*** **and** ***decide whether to protect that right by a*** **property rule** ***(injunction) or a*** **liability rule** ***(damages).***

B. No nuisance: Continue the activity: If a challenged activity is found not to be a nuisance the use right is allocated to the challenged user and is implicitly protected by a property rule. Because it is not a nuisance, the challenged user cannot be forced to stop the use without his consent. The use will continue unless the challenged use is the less valuable one and transaction costs do not inhibit its transfer.

Example: Eve's dairy farm is found not to be a nuisance. She receives the use right and cannot be made to stop unless she agrees to, but if the cost to Adam of ceasing his use is $200,000 and the cessation cost to Eve is $100,000, the use right should voluntarily shift to Adam upon his payment to Eve of something between $100,000 and $200,000 (assuming modest transaction costs).

C. Nuisance: Enjoin and abate the activity: If a challenged activity is found to be a nuisance and the challenger's use is protected by a property rule, the challenged activity will be enjoined and it will thus stop. The challenger can continue his use at his pleasure. If the enjoined activity is the more valuable the use right will likely be shifted to the enjoined user unless transaction costs prevent the transfer.

Example: Eve's dairy farm is found to be a nuisance and she is enjoined from continuing her dairy farming. Adam's tanning use is protected by a property rule, but if the damage to Eve is $100,000 and the cost to Adam of ceasing to operate his tanning spa is $50,000, the use right should shift to Eve upon her payment to Adam of some price between $50,000 to $100,000 (assuming minimal or zero transaction costs).

★**Example:** Estancias Dallas constructed an apartment complex in Dallas adjacent to Schultz's residence. To save $40,000 Estancias located its central air conditioning unit about 5 feet from Schultz's lot line, 55 feet from his house, and 70 feet from his bedroom. The air conditioner was quite noisy ("the unit sounds like a jet plane or helicopter"), prevented Schultz from entertaining outdoors, and even interfered with indoor conversation and his sleep. To change the location of the unit would cost Estancias $150,000 to $200,000. The apartments could not be rented in sweltering Dallas without air conditioning. The value of Schultz's house was $25,000. In ***Estancias Dallas Corp. v. Schultz,*** 500 S.W. 2d 217 (Tex. 1973), the Texas Court of Civil Appeals upheld a trial court's determination that the air conditioner was a nuisance and injunction of its further operation. Why was it a nuisance? Surely the gravity of the harm (the loss of the ***entire value*** of Schultz's house — $25K) was outweighed by the social utility of the air conditioner (measured by the dollar cost of avoiding the harm — $40K at the outset, $150K to $200K after the injunction issued). Although the harm may have been serious and Estancias could have compensated Schultz without ceasing business, that test is used when the plaintiff is seeking compensation. Without saying so the Texas courts were applying the "threshold of harm" test exemplified by *Jost v. Dairyland Power Coop.* Although economic theory says that this result should have resulted in a shift of the use right from Schultz to Estancias upon payment of some amount between $25K and $150K that did not happen, which means that either Schultz was irrational, or transaction costs consumed the entire surplus, or that Schultz simply valued his peace and quiet in his long-time residence far more than an economic gain.

D. Nuisance: Pay damages and continue the activity: It is not possible to ignore the real-world presence of transaction costs. Thus, in situations where there are a large number of landowners affected by a more valuable use that is, on balance, a nuisance, the presence of holdout transaction

costs (see section II.A.1.c, above) may prompt a court to protect the use right of the numerous landowners by a liability rule instead of a property rule. In short, the court may award damages to the affected landowners instead of enjoining the nuisance. The damages awarded are ***permanent damages*** — an amount sufficient to compensate now for all past and future injury that may be inflicted by continuation of the nuisance.

★**Example:** Atlantic Cement's factory produced dirt, smoke, noise, and vibration that substantially interfered with the use and enjoyment of land owned by a large number of neighbors. In ***Boomer v. Atlantic Cement Co.,*** 26 N.Y. 2d 219 (1970), the New York Court of Appeals upheld a trial court's finding that the factory was a nuisance and award of damages instead of an injunction. The case was remanded for determination of the amount of permanent damages to be awarded for the "servitude" thus created over the affected land. The Court's rationale was partly the technological impossibility of abatement, coupled with recognition that the factory was the more valuable use (it produced positive externalities in the form of jobs and other economic benefits to the region) but that the holdout possibility might well frustrate a market transfer of the right if the factory was enjoined from further operation. In essence the court applied the balancing formula that asks whether the defendant could compensate for all the serious harm it causes without ceasing business and concluded that Atlantic Cement could do so. Because we are not clairvoyant there is the possibility of considerable error in ascertaining permanent damages — the present value of future injury that has not yet been inflicted — but if the damage award is not permanent, transaction costs (in the form of repeated litigation to determine future damages as incurred) will be high. An injunction is of dubious efficacy because of the nearly insurmountable transactions costs that would inhibit transfer of the use right from the affected homeowners to Atlantic Cement.

E. Nuisance or not: Enjoin the activity but award damages to the enjoined actor: Under some conditions courts may enjoin an activity but require that the benefitted landowners compensate the enjoined actor for the lost use. Typically, this may occur when (1) the plaintiff asserts that his activity is the more valuable, (2) it is not clear either that (i) the challenged activity is a nuisance or, if it is, that (ii) equity favors an unadorned injunction, and (3) it is unlikely that the plaintiff is able or willing to acquire the use right in the market.

★**Example:** Spur operated a cattle feed lot in a rural part of Arizona. The feed lot necessarily generated enormous quantities of manure, attracting clouds of insects and creating noxious odors, but nobody objected because there were no neighbors. Later, the Del Webb Corporation created Sun City, a retirement city, and expanded Sun City until it was sufficiently close to Spur's feed lot to make the two uses incompatible. In ***Spur Industries, Inc. v. Del E. Webb Development Co.,*** 108 Ariz. 178 (1972), the Arizona Supreme Court enjoined Spur from further operation of the feed lot, but required Del Webb to pay Spur "a reasonable amount of the cost of moving or shutting down." Equity required Del Webb to compensate Spur because Webb came to the nuisance. The older common law view of nuisance (either nuisance and injunction or no nuisance and no remedy) would have dealt with this by declaring Spur's feed lot to be no nuisance and denying any relief to Webb and the retirees it induced to come to the nuisance. That is an unsatisfactory result, especially when the feed lot constituted a public nuisance on health grounds. The court's solution forced Webb to bear the cost of his coming to the nuisance. This remedy also forces the complaining user to "put his money where his mouth is." Because the plaintiff claims to have the more valuable use he ought to be willing to shoulder some of the lesser cost of his adversary's cessation of use, particularly when he bears considerable

responsibility for the use conflict. For this remedy to be effective it is necessary to join all parties who are adversely affected by the use to be enjoined; otherwise, the free rider problem can become insuperable.

III. SUPPORT RIGHTS

A. Introduction: Every landowner has the right to continued physical support of his land by abutting land. In essence, the natural topography may be altered only insofar as a neighbor's land is left with sufficient support. There are two types of support. ***Lateral support*** is the right to support from adjacent land — like the support supplied by a bookend to a row of books. ***Subjacent support*** is the right to support from underneath one's land — like the support supplied by the bookshelf to a row of books.

B. Lateral support: The scope of the right of lateral support is different for ***land itself*** and ***structures*** placed on the land.

1. **Land itself:** A landowner who alters his land by removing the lateral support from his neighbor's land is strictly liable for any resulting damage to his neighbor's land. No matter how careful the alteration, if lateral support is removed, strict liability follows. The same principle applies to artificial supports, like retaining walls. Once an artificial support is substituted for natural support the landowner and any successor in interest is obligated to keep the artificial support in place and effective.

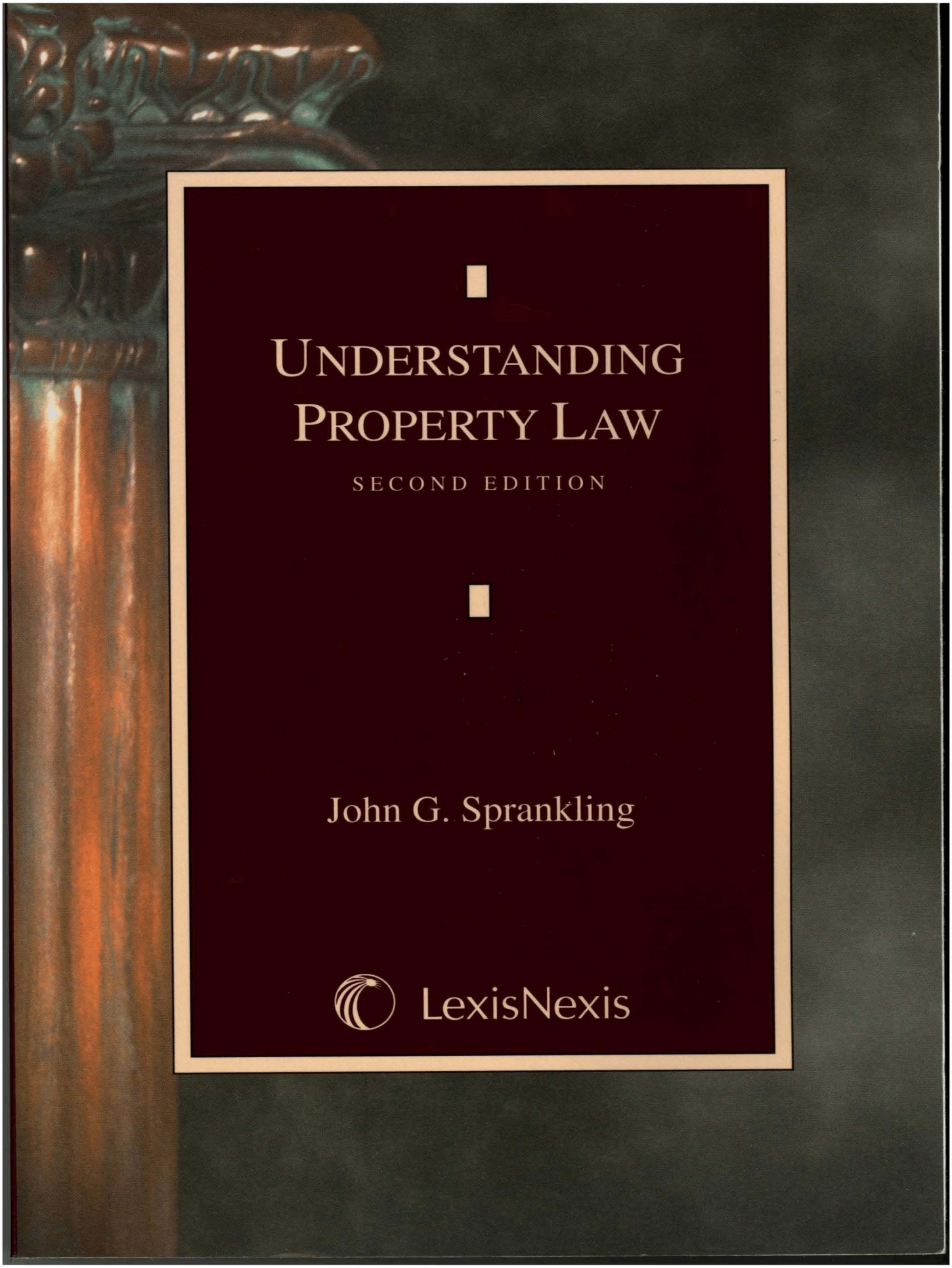
2. **Structures:** Most states hold that a landowner is liable for damage to structures from withdrawal of lateral support if either of two conditions is met: (1) the landowner was ***negligent*** and the ***collapse would not have occurred but for the added weight of the structures,*** or (2) the ***collapse would have occurred whether or not the structures were there.*** If the withdrawal of lateral support is so extensive that the natural contours would have collapsed, the excavating landowner is strictly liable for all resulting injury to land or structures, but if the withdrawal of lateral support was not enough to cause the natural contours to collapse (i.e., the collapse was due to the added weight of the structures) the excavating landowner is liable only if he is negligent.

   a. **Minority rule:** Some jurisdictions hold that a landowner is strictly liable for removal of lateral support to adjacent buildings. This rule makes sense in dense urban locales, but probably not in rural locations. It is also justified on the ground that the second landowner to build can more easily avoid the costs of collapse, but this rule does give a boon to the first to build.

C. Subjacent support: The right of subjacent support is never an issue unless ownership has been split into two parts: (1) ownership of the surface and (2) ownership of the right to mine under the surface. When this happens the owner of the underground mineral rights is ***strictly liable*** for any damage caused to land or structures on the surface resulting from withdrawal of subjacent support.

Exam Tips on JUDICIAL CONTROL OF LAND USE: NUISANCE AND SUPPORT

- Nuisance issues can easily be combined with other issues involving use, such as defeasible fees, servitudes, or quiet enjoyment by leasehold tenants.
- Even more than in some other areas, nuisance requires you to assess policy. Because either of two competing and incompatible uses can be a nuisance you must have some theory to explain why the use you prefer should be protected. Economic theory may be useful to you, but other theories will work, too. Decide in advance which theory makes the most sense to you, apply it consistently and accurately to the facts, and be prepared to defend it and explain why other alternatives are less satisfactory.
- If economic theory is your preferred theory, be certain you understand the Coase Theorem and how transaction costs manifest themselves. If other theories suit your taste better, be able to explain why economic efficiency is not so important when resolving the problem of incompatible uses.
- Lateral and subjacent support are rarely tested.



UNDERSTANDING PROPERTY LAW

SECOND EDITION

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LexisNexis

Chapter 29

NUISANCE

SYNOPSIS

§ 29.01 "An Impenetrable Jungle"?

§ 29.02 What Is a Private Nuisance?

[A] Nuisance Defined

[B] Distinguishing Nuisance from Trespass

[C] Categories of Nuisances

[1] Nuisance *Per Se* or Nuisance *Per Accidens*?

[2] Temporary Nuisance or Permanent Nuisance?

§ 29.03 Evolution of Nuisance Law

§ 29.04 Elements of Private Nuisance

[A] Overview

[B] "Intentional" Interference

[C] "Unreasonable" Interference

[1] Overview

[2] Traditional Approach

[3] Restatement Approach

[a] Basic Test: Balance of Utilities

[b] Alternative Test: Severe Harm

[D] "Substantial" Interference

[E] Interference with "Use and Enjoyment of Land"

§ 29.05 Defenses to Liability for Private Nuisance

[A] Generally

[B] "Coming to the Nuisance"

[C] Right-to-Farm Statutes

§ 29.06 Remedies for Private Nuisance

[A] Injunction

[1] "Balance of Equities" Approach

[2] *Boomer v. Atlantic Cement Co.*

[a] Overview

[b] Rationale

[c] Reflections on *Boomer*

[3] An Alternative Approach: The Compensated Injunction

[B] Damages

§ 29.07 Public Nuisance

§ 29.08 Special Problem: Landowner Liability for Hazardous Substance Contamination

§ 29.01 "An Impenetrable Jungle"?

A's factory emits foul odors onto B's farm; noise from C's tuba practice routinely pervades the quiet of D's bookstore; and E's smelter produces

vibrations that make it impossible for F to sleep in her home.[1] Can B, D, and F assert any claim? As a general rule, an owner is free to use his land as he sees fit. But this freedom is not unlimited. For example, it is often said that one may not use land in a manner that injures the land of others.[2] This precept is the foundation of the law of nuisance, which governs the rights of B, D, and F.

The common law divided nuisances into two categories: private nuisances and public nuisances. Broadly speaking, a *private nuisance* arises when one uses his land in a manner that injures a private owner or occupant in the use or enjoyment of that person's land. The Restatement (Second) of Torts offers a more precise definition: "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[3] A's odors, C's noise, and E's vibrations are all considered to be private nuisances under this standard. This chapter—and most of the law in the field—deals primarily with the private nuisance. Indeed, when judges, scholars, and attorneys use the term "nuisance," this is usually a shorthand reference to the private nuisance. In contrast, a *public nuisance* is an activity that interferes with the rights of the public in general, usually by threatening the public health, safety, or morals.

The modern law of nuisance is complex and confusing. As one authority observed, "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' "[4] Two key issues arise: (a) what constitutes a nuisance? and (b) what is the appropriate remedy? Traditional English law was straightforward on these points: virtually any conduct that seriously injured another's land constituted a private nuisance and was automatically enjoined. American nuisance law has gradually moved away from this rigid, pro-owner view toward more flexible standards founded on utilitarian principles. The utility of the defendant's conduct is increasingly considered in determining whether nuisance liability exists; thus, for example, socially-beneficial conduct that clearly interferes with the plaintiff's use of land may not constitute a nuisance. And even if nuisance liability is found, the plaintiff may be unable to obtain an injunction against the offending conduct.

Before the widespread adoption of zoning ordinances in the early twentieth century, nuisance was the principal tool used to reconcile incompatible land uses. Indeed, nuisance law is sometimes called "judicial zoning." Its importance has diminished as land use regulation has expanded. As one observer summarized, nuisance law has been "relegated to marginal cases,

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[1] *See generally* Raymond R. Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes,* 48 Ohio St. L.J. 414 (1987); Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future,* 54 Alb. L. Rev. 189 (1990); John Copeland Nagle, *Moral Nuisances*, 50 Emory L.J. 265 (2001); Stewart E. Sterk, *Neighbors in American Land Law*, 87 Colum. L. Rev. 55 (1987).

[2] This is a loose translation of the ancient Latin maxim that is the foundation of nuisance law—*sic utere ut alienum non laedas.*

[3] Restatement (Second) of Torts § 821D.

[4] W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 86, at 616 (5th ed. 1984).

involving small-scale, localized land use conflicts."[5] If the zoning process permits a use that neighbors dislike, nuisance law may provide a basis for attacking the use through litigation. And the doctrine also remains useful in rural regions that have little or no zoning.

Despite the declining importance of nuisance law, academic interest in the topic has grown in recent decades. In particular, the efforts of Guido Calabresi, Robert Ellickson, and other disciples of the law and economics movement to apply economic principles to this area have helped to shape the law's modern evolution.[6] Insights from law and economics scholarship have been especially useful on the question of the appropriate remedy for a private nuisance.

§ 29.02 What Is a Private Nuisance?

[A] Nuisance Defined

A leading authority once suggested that nuisance was "incapable of any exact or comprehensive definition."[7] The term "nuisance" simply means "harm" in old French. Of course, this literal definition is far too broad to be helpful. Centuries of legal evolution have produced a complex and unwieldy body of nuisance law that defies quick explanation.

Our starting point is the Restatement (Second) of Torts, which defines the private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[8] Even this definition is overbroad: only *some* nontrespassory invasions of another's interest in the private use and enjoyment of land are private nuisances, not *all* such invasions (*see* § 29.04). However, the Restatement definition is useful because it focuses on the key factors that distinguish nuisance from other legal doctrines. First, nuisance involves a special type of harm—interference with the interest of an owner, tenant, or other land occupant in the *use and enjoyment of land.* Suppose F's factory emits an unpleasant odor. Although the odor may offend P, a pedestrian who walks by the factory, it does not affect P's use or enjoyment of his land; hence, P cannot bring a nuisance claim. Conversely, if the odor makes it difficult for N to live in his home which adjoins F's factory, N may be able to sue F in nuisance; the foul odor interferes with N's use and enjoyment of his home. Second, nuisance involves a special type of conduct—a *nontrespassory invasion.* A physical entry onto land owned or occupied by another is a trespass, not a nuisance. A nuisance involves conduct *other than physical entry*—such as producing

[5] Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future,* 54 Alb. L. Rev. 189, 230 (1990).

[6] *See, e.g.,* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 Harv. L. Rev. 1089 (1972); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls,* 40 U. Chi. L. Rev. 681 (1973).

[7] W. Page Keeton, et al., Prosser and Keeton on the law of Torts § 86, at 616 (5th ed. 1984).

[8] Restatement (Second) of Torts § 821D.

dust,[9] fumes, gases, light, noise,[10] odors,[11] shadow,[12] smoke, or vibration—that interferes with the use or enjoyment of land.

[B] Distinguishing Nuisance from Trespass

The traditional distinction between nuisance and trespass hinges on the *nature of the intrusion*: is there a physical entry or not? A physical entry onto the land of another interferes with the occupant's right to possession and hence constitutes a trespass. For example, if F stands on his factory site and throws a rock into the back yard of N's adjacent house, this is a physical entry of N's land and thus a trespass. Any conduct that interferes with the use and enjoyment of land, other than a physical entry, is governed by nuisance law. Suppose F's factory routinely emits loud noises throughout the night, making it difficult for N to sleep. This noise is not a physical entry onto the land, and accordingly N's claim is governed by nuisance law.

However, scientific progress has blurred the once-clear boundary line between nuisance and trespass (*see* § 30.02[B]). Common law courts considered only a *visible* intrusion to be a physical entry. For example, throwing a rock onto N's land was a trespass, while emitting an invisible gas was a nuisance. This distinction reflected the primitive science of the era. Modern science teaches that odors, fumes, and other gasses consist of microscopic particles. Thus, we now know that when F's factory emits a smelly gas, small particles of matter physically enter N's land. Should such an intrusion be considered a trespass? Many courts now extend trespass liability to include air pollution, toxic contamination, and other entries by microscopic particles, effectively allowing the injured plaintiff to sue on either theory.

[C] Categories of Nuisances

[1] Nuisance *Per Se* or Nuisance *Per Accidens*?

Private nuisances are usually divided into two types: the nuisance *per se* and the nuisance *per accidens*. The nuisance *per se* is an act or condition that is always considered to be a nuisance, regardless of the surrounding circumstances; most commonly, this is some type of activity that is prohibited by law (e.g., an illegal garbage dump).[13] The nuisance *per accidens*,

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[9] *Cf.* Boomer v. Atlantic Cement Co., 309 N.Y.S.2d 312 (N.Y. 1970) (emissions of dirt, smoke, and vibration from cement plant).

[10] *Cf.* Estancias Dallas Corp. v. Schultz, 500 S.W.2d 217 (Tex. Ct. Civ. App. 1973) (noise from air conditioning equipment).

[11] *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (odors and flies from cattle feedlot); Penland v. Redwood Sanitary Sewer Service Dist., 965 P.2d 433 (Or. Ct. App. 1998) (odors from sewage composting facility).

[12] *See, e.g.*, Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982) (observing that structure on adjacent land that blocks sunlight from plaintiff's solar heating system might be a nuisance). *But see* Fountainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. Dist. Ct. App. 1959) (hotel project that cast shadow on beach of plaintiff's adjacent hotel was not a nuisance).

[13] *See* Luensmann v. Zimmer-Zampese & Assocs., 103 S.W.3d 594 (Tex. App. 2003) (drag racing strip not nuisance *per se*).

in contrast, is a nuisance only because of the surrounding circumstances, such as its location and manner of operation. For example, a hog farm in the city probably constitutes a nuisance, while a hog farm in a rural area may not. The bulk of private nuisance law—and of this chapter as well—concerns the nuisance *per accidens*.

[2] Temporary Nuisance or Permanent Nuisance?

The law also distinguishes between the *temporary* or *continuing nuisance* and the *permanent nuisance*. In general, a permanent nuisance exists where the nuisance is certain or likely to continue in the future due to the physical nature of the condition, the cost of abatement, or other factors; any other nuisance is deemed temporary. For example, if B's cement plant has emitted dust every day since its operations began 20 years ago and there is no technology available to remedy this problem, it is probable that the emissions will continue in the future. The cement plant is a permanent nuisance. On the other hand, if B's cement plant emitted dust for only two years—before modern air pollution control technology was installed—the plant was only a temporary nuisance. The distinction is important in two settings: (1) the appropriate measure of damages (*see* § 29.06[B]) and (2) the running of the statute of limitations.[14]

§ 29.03 Evolution of Nuisance Law

As it evolved in post-medieval England, the law governing private nuisances was relatively straightforward. Only one factor was considered to determine whether nuisance liability existed: the *gravity of harm* to the land owner or occupant. A nuisance occurred when a person used his land in a manner that caused substantial harm to another's use and enjoyment of land. And the remedy for a nuisance was equally simple: the court issued an injunction against the harmful conduct. For example, suppose F started a pig farm in the backyard of his city house; if the resulting odor was so offensive that F's neighbors could not reasonably live in their homes, they could obtain an injunction closing the farm.[15] Thus, the law strictly protected the neighbors' property rights to use and enjoy their lands free from any nuisance.

These simple rules made sense in an agricultural society, but proved unduly rigid as industrialization proceeded. The main problem was that this approach failed to consider the utility of the conduct in question, and thereby tended to prevent new development. For instance, a new railroad might be shut down merely because its noise caused one farmer's chickens

[14] For example, assume the jurisdiction has a three-year limitations period for bringing an action against a private nuisance. If the nuisance is permanent, the statute of limitations starts running on the first day the nuisance begins; thus, if such a nuisance began in 2007, a suit commenced in 2011 is too late. If the nuisance is temporary, the limitations period begins anew each day that the nuisance continues; a suit against a temporary nuisance that exists in 2011 is timely, regardless of when the nuisance began.

[15] *Cf.* Pendoley v. Ferreira, 187 N.E.2d 142 (Mass. 1963) (pig farm near residential subdivision was a nuisance).

to stop laying eggs. The benefits that the railroad provided to society in general were seen as irrelevant. In this manner, the law provided absolute protection for property rights regardless of the resulting social cost.

Early American courts accepted the English view. During the late nineteenth century, however, the law began to shift toward a more flexible approach: only an *unreasonable* land use would be considered a nuisance. The gravity of harm was important in assessing reasonableness, but courts tended to consider other factors as well (e.g., the locality of the use, the nature of the wrongful conduct). The evolution of American nuisance law during the twentieth century brought another major change, as courts gave increasing weight to *utility*. This affected both (1) the liability standard for determining when a private nuisance existed and (2) the appropriate remedy if a nuisance were found.

On the liability side, this change was sparked by the adoption of the first Restatement of Torts in 1939. The Restatement proposed a new liability standard known as the *balance of utilities* test: a use was unreasonable unless the utility of the actor's conduct outweighed the gravity of the harm.[16] The 1977 Restatement (Second) of Torts repeated this standard, but added an alternative basis for unreasonableness that ignores utility. Similarly, an injunction is no longer the automatic remedy once nuisance liability is established. Rather, most courts will *balance the equities* between the parties to determine if an injunction is appropriate; this process inevitably considers the utility of the defendant's conduct as a factor in the balance. Accordingly, the successful plaintiff may be awarded only damages.

§ 29.04 Elements of Private Nuisance

[A] Overview

The existence of a private nuisance is a question of fact that turns on the unique circumstances of each case. For instance, a halfway house for parolees might be deemed a nuisance under some circumstances, but not under others. Examples of land uses found to be nuisances on the facts of the particular case include: airports, bakeries, cement plants, cemeteries, dairies, dog kennels, feed lots,[17] funeral parlors, gas stations, halfway houses,[18] hog farms, hospitals, laundries, lumber mills, music stores, rifle ranges, roosters, slaughter houses, smelters, soup kitchens, stables, trees, and windmills.

Five elements are required to establish liability for a private nuisance. The plaintiff must prove that the defendant's conduct produced an

(1) intentional,[19]

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[16] Restatement of Torts § 826.

[17] *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972).

[18] *See, e.g.*, Arkansas Release Guidance Found. v. Needler, 477 S.W.2d 821 (Ark. 1972).

[19] Under narrow circumstances (*see* [B], *below*), liability for a private nuisance may be based on unintentional conduct.

(2) nontrespassory,

(3) unreasonable, and

(4) substantial interference

(5) with the use and enjoyment of the plaintiff's land.

The second element—a nontrespassory interference—has already been discussed (*see* § 29.02[B]). The remaining elements are discussed below.

[B] "Intentional" Interference

As the Restatement (Second) of Torts explains, a person's harmful conduct is deemed "intentional" if *either* (a) he acts for the purpose of causing the harm *or* (b) he knows that the harm is resulting or is substantially certain to result from his conduct.[20]

Suppose that E's factory routinely emits extremely loud noise that keeps N, the owner of an adjacent house, awake all night. N complains, but the noise continues. It is possible that E's conduct is motivated by malice; perhaps E desires to harm N. If so, E's conduct is considered "intentional" under the first prong of the Restatement test. It is more likely, however, that E does not actually intend to harm N. Yet under the second prong of the Restatement test, E's conduct is still deemed "intentional," because E knows from N's complaint that the noise from the continued operation of the factory will cause harm to N.

For instance, in *Morgan v. High Penn Oil Co.*,[21] the defendant operated an oil refinery that periodically emitted nauseating gases and odors that sickened plaintiffs and other nearby landowners. Plaintiffs notified defendant about these problems and demanded that it stop the emissions. Thus, defendant knew that plaintiffs would be harmed, but continued to operate the refinery without stopping the emissions. Applying the second prong of the Restatement test, the North Carolina Supreme Court held that this conduct was intentional; the defendant "intentionally . . . caused noxious gases and odors to escape onto the nine acres of the plaintiffs to such a degree as to impair in a substantial manner the plaintiffs' use and enjoyment of their land."[22]

Under limited circumstances, a private nuisance may arise from unintentional conduct. The Restatement (Second) of Torts provides that nuisance liability may be premised on conduct that is "unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities."[23] In this special situation, it is not necessary to show that the defendant's conduct

[20] Restatement (Second) of Torts § 825.

[21] 77 S.E.2d 682 (N.C. 1953).

[22] *Id.* at 690. *But see* Waschak v. Moffat, 109 A.2d 310, 316 (Pa. 1954) (emission of gas from coal processing facility that discolored paint on plaintiffs' house was not intentional interference because defendants "did not know, and had no reason to be aware, that this particular gas would be so emitted and would have the effect upon the painted house").

[23] Restatement (Second) of Torts § 822(b).

is either intentional or unreasonable. For example, if E stores a large quantity of explosives in the backyard of his suburban house, this is probably an abnormally dangerous condition—and hence a nuisance—regardless of E's intent or the reasonableness of his conduct.

[C] "Unreasonable" Interference

[1] Overview

If nuisance law is indeed an "impenetrable jungle," the heart of the jungle is the concept of unreasonable interference. In the typical case, the other nuisance elements are easily proven; thus, the outcome usually hinges on whether the interference was unreasonable.

[2] Traditional Approach

Many states still follow the traditional, pre-Restatement approach to unreasonableness.[24] Some seem to equate unreasonableness with serious injury to the plaintiff, a view that harkens back to the gravity of harm approach.[25] Others employ a multi-factor test to assess unreasonableness, although the factors considered vary widely from state to state. Sample factors include: the character of the neighborhood; the nature of the wrongful conduct; its proximity to plaintiff's property; its frequency, continuity, and duration; and the nature and extent of resulting injury to the plaintiff.[26] A number of states also consider the utility of the defendant's conduct as one factor.

[3] Restatement Approach

[a] Basic Test: Balance of Utilities

Under the basic Restatement approach—adopted in about one-third of the states—an intentional interference is deemed "unreasonable" if the "gravity of the harm outweighs the utility of the actor's conduct."[27] In order to apply this standard, a court must compare (a) the "utility" of the

[24] *See generally* Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future,* 54 Alb. L. Rev. 189, 234–35 (1990). *See also* Jost v. Dairyland Power Coop., 172 N.W.2d 647, 653 (Wis. 1969) (noting that whether the "economic or social importance" of defendant's power plant "dwarfed the claim of a small farmer is of no consequence in this lawsuit").

[25] *Cf.* Morgan v. High Penn Oil Co., 77 S.E.2d 682 (N.C. 1953); Estancias Dallas Corp. v. Schultz, 500 S.W.2d 217 (Tex. Ct. Civ. App. 1973).

[26] *See, e.g.,* Escobar v. Continental Baking Co., 596 N.E.2d 394 (Mass. App. Ct. 1992) (bakery that generated noise was not a nuisance, because it was located in a industrial district and existed before plaintiff moved into area); Bove v. Donner-Hanna Coke Corp., 258 N.Y.S. 229 (App. Div. 1932) (coke oven that produced steam, dust, gases, and odors was not an unreasonable use because it was situated in an industrial district); Blanks v. Rawson, 370 S.E.2d 890 (S.C. Ct. App. 1988) (neighboring family's dog pen, basketball goal, and ten-foot fence were not nuisances).

[27] Restatement (Second) of Torts § 826(a).

defendant's conduct with (b) the "gravity of the harm" that this conduct causes to the plaintiff.[28] Thus, unreasonableness is determined on a case-by-case basis after considering the particular facts of each dispute.

The Restatement lists eight factors to be used in this balancing process. Five factors bear on the gravity of harm: the extent of the harm (mainly in terms of degree and duration); the character of the harm (physical damage or personal discomfort); the social value of the plaintiff's use and enjoyment; the suitability of the particular use or enjoyment invaded to the character of the locality; and the burden on the plaintiff of avoiding the harm.[29] The remaining three factors help assess the utility of the defendant's conduct: the social value of the primary purpose of the defendant's conduct; the suitability of the conduct to the character of the locality; and the impracticability of preventing or avoiding the interference.[30]

Consider a hypothetical application of the Restatement standard. Suppose that A operates a cement factory in a rural and uninhabited area.[31] The factory regularly emits large quantities of cement dust into the atmosphere, and there is no technological method of preventing these emissions. B purchases a tract of land next to the factory, builds a home, plants a flower garden, and soon discovers that the cement dust stunts the growth of one particular type of flower.

Under the Restatement standard, this interference is not unreasonable. The overall gravity of harm to B is quite low. The extent of harm is minor because B can grow other types of flowers in the garden. Although the nature of the harm is physical damage, it is almost trivial in character, and B still has almost all of the use and enjoyment of the property. The area appears to be unsuitable for a residential flower garden; B might be better off trying to grow this type of flower inside his home or perhaps in a small greenhouse. On the other hand, the utility of A's conduct is high. Cement production is crucial to the construction of homes and other buildings; the uninhabited area is well-suited to cement production; and A is unable to prevent the emissions without closing the factory.

[b] Alternative Test: Severe Harm

In 1977, the Restatement (Second) of Torts added an alternative test for "unreasonableness" that seemed to turn the law back toward the traditional

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[28] *See, e.g.,* Hendricks v. Stalnaker, 380 S.E.2d 198 (W. Va. 1989) (using Restatement test to conclude that water well was not a nuisance); *cf.* Page County Appliance Ctr., Inc. v. Honeywell, Inc., 347 N.W.2d 171 (Iowa 1984) (discussing use of Restatement-like standard to determine whether computer that produced radiation interfering with television reception was a nuisance); Rose v. Chaikin, 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982) (applying variant of Restatement standard to conclude that noisy windmill in residential area was a nuisance).

[29] Restatement (Second) of Torts § 827.

[30] Restatement (Second) of Torts § 828.

[31] Of course, these facts are quite different from those at issue in the celebrated Boomer v. Atlantic Cement Co., 309 N.Y.S.2d 312 (N.Y. 1970), discussed in § 29.06[A][The trial court in *Boomer* apparently did not apply the Restatement standard for unr ness, while the Court of Appeals considered only the appropriate remedy, not li

"gravity of harm" approach, and thereby generated extensive controversy. An intentional interference is deemed unreasonable under this test if "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the activity not feasible."[32] The utility of the defendant's conduct is irrelevant under this alternative test.[33]

For example, imagine that N's steel factory produces noxious fumes that reach F's nearby farm, killing his entire corn crop. This harm is sufficiently severe to trigger the alternative test for unreasonableness, entitling F to relief if the other nuisance elements are established, as long as N can bear the cost while remaining in business.

[D] "Substantial" Interference

Slight inconveniences or petty annoyances are insufficient to establish nuisance liability. "The law does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff's interests before he can have a cause of action for . . . a private nuisance."[34] If a normal person living in the community would regard the interference as strongly offensive or seriously annoying, then the level of interference is substantial enough to impose liability. However, nuisance law does not protect hypersensitive persons.[35]

Suppose L's lemon-processing factory occasionally emits a mild lemon odor that wafts over nearby homes. The odor does not disturb normal residents, and thus is not a substantial interference; nearby residents A, B, and C, for example, cannot sue L for a private nuisance. Moreover, even if the odor causes severe discomfort to resident D, who is allergic to lemons, D cannot sue L on a private nuisance theory either, because D's discomfort stems from a unique sensitivity to lemons.

[E] Interference with "Use and Enjoyment of Land"

Nuisance liability arises only from interference with the interests of an owner, tenant, or other land occupant in the use and enjoyment of the land. This element is clearly met when the defendant's conduct causes physical injury to the land itself (e.g., if fumes from defendant's plant destroy plaintiff's apple orchard) or to tangible personal property located on the

[32] Restatement (Second) of Torts § 826(b).

[33] *See also* Restatement (Second) of Torts § 829A (setting forth a similar alternative test); Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, 384 N.W.2d 692 (Wis. 1986) (finding nuisance liability under § 826(b) test). *But see* Carpenter v. Double R Cattle Co., 701 P.2d 222 (Idaho 1985) (reversing court of appeal decision that endorsed § 826(b) test).

[34] Restatement (Second) of Torts § 821F cmt. c. For example, most courts are unwilling to impose nuisance liability based only on aesthetic concerns.

[35] *See, e.g.*, Page County Appliance Ctr., Inc. v. Honeywell, Inc., 347 N.W.2d 171 (Iowa 1984) (where radiation emitted by defendant's computer interfered with television reception at plaintiff's appliance store, case was remanded to trial court for consideration of claim that appliance store was an unusually sensitive use).

land (e.g., if the fumes ruin the paint on plaintiff's truck).[36] The same is true when the offending conduct causes death, bodily injury, sickness, or substantial discomfort or annoyance, to persons who are physically present on the land.[37]

§ 29.05 Defenses to Liability for Private Nuisance

[A] Generally

The range of defenses available in private nuisance cases is fairly broad. A plaintiff cannot recover if he consented or acquiesced to the nuisance. And the defense of laches may be available if the plaintiff seeks equitable relief. Similarly, if the defendant has continued the nuisance for a sufficiently long period to acquire a prescriptive easement for the conduct at issue, this is a complete defense. The statute of limitations may also bar the plaintiff's claim. Beyond this point, two additional defenses have special importance: the historic doctrine of "coming to the nuisance" and the modern "right-to-farm" statutes.[38]

[B] "Coming to the Nuisance"

Suppose B establishes a boat-manufacturing factory in a rural, uninhabited area; for 20 years, the factory routinely emits fumes, noise, and odors. H now purchases an adjacent parcel, builds a home on the land, and promptly complains that the emissions constitute a private nuisance. Can B assert any defense?

At one time, many courts recognized a defense known as "coming to the nuisance." A plaintiff like H who moved into the region after the offending conduct began was not entitled to recover; rather, the law protected the first-in-time use. Today, however, almost all courts reject this defense because it effectively allows first-in-time residents to stifle new development in the community.[39] Instead, a number of courts consider the plaintiff's "coming to the nuisance" as one factor in determining reasonableness.[40]

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[36] *See also* Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982) (suggesting that interference with plaintiff's right to receive sunshine for his solar heating system might be a nuisance).

[37] *See* Powell on Real Property § 64.02[4] (Michael Allan Wolf ed., Matthew Bender).

[38] *See* Powell on Real Property § 64.05 (Michael Allan Wolf ed., Matthew Bender).

[39] *Cf.* Carpenter v. Double R Cattle Co., Inc., 669 P.2d 643 (Idaho Ct. App. 1983). *But cf.* Spur Industries, Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (suggesting that the defense would have barred recovery by developer who constructed new residential subdivision near existing cattle feedlot).

[40] *See* Powell on Real Property § 64.05[2] (Michael Allan Wolf ed., Matthew Bender).

[C] Right-to-Farm Statutes

"Right-to-farm" statutes in about two-thirds of the states create a special defense to nuisance liability.[41] Although the details vary from state to state, the general approach of these statutes is the same: farms and other agricultural activities are immune from nuisance liability if the facts giving rise to the claim have existed for a specified period of time. The goal of these statutes is to protect farms in urbanizing areas against nuisance claims.[42] In a sense, these statutes revive the "coming to the nuisance" defense in the specialized context of agricultural nuisances. For example, suppose that F owns a large farm in an agricultural area; he installs an irrigation system and operates it for 25 years. Fleeing the pressures of urban life, C purchases an adjacent farm; C soon discovers that F's irrigation pumps emit ear-splitting noise during the early morning hours. When C complains, F informs her that the pumps have been making the same amount of noise for 25 years. In all probability, the state's right-to-farm statute will prevent C from successfully suing F on a private nuisance theory.

§ 29.06 Remedies for Private Nuisance

[A] Injunction

[1] "Balance of Equities" Approach

The traditional remedy in private nuisance cases was an injunction against the offending conduct. This rule reflected an absolutist view of property rights: every owner was entitled to enjoy his land free from any nuisance. If a person creating a nuisance could take away this right simply by paying compensation to the owner in the form of damages, this would be the equivalent of eminent domain—an owner would be compelled to sell the right over his objection. Because only the government has eminent domain power, courts reasoned that an injunction was necessary to protect the owner's right. The social utility of the defendant's conduct was seen as irrelevant.

This view began to break down in the late nineteenth century, as courts became increasingly concerned that it would disrupt industrial development.[43] In almost all jurisdictions today, the plaintiff no longer has an automatic right to an injunction. Instead, the court will use a balancing test—usually called "balancing the equities"—to determine if an injunction is appropriate on the facts of the case. By far, the single most important factor in this process is the relative economic impact of the injunction on the parties. All other things being equal, then, a court will issue an

[41] *See, e.g.*, Tex. Agric. Code Ann. § 251.004. *But see* Bormann v. Board of Supervisors, 584 N.W.2d 309 (Iowa 1998) (holding right-to-farm law was a regulatory taking that violated the Takings Clause of the Fifth Amendment).

[42] *See, e.g.*, Buchanan v. Simplot Feeders Ltd. Partnership, 952 P.2d 610 (Wash. 1998).

[43] *See generally* Paul M. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 Wm. & Mary L. Rev. 621 (1976).

injunction only if the resulting benefit to the plaintiff is greater than the resulting damage to the defendant. However, the public interest in continuing or preventing the defendant's conduct is usually weighed in the balance as well. If an injunction is refused, the plaintiff receives compensatory damages (*see* [B], *below*).

For example, suppose a court determines that D's noisy dance studio is a nuisance. It will cost D $100,000 to install soundproofing materials to eliminate the noise. But the noise problem only lowers the value of P's land by $1,000. The social value of D's use is relatively low and no other neighbors are disturbed by the noise, so the public interest is a neutral factor. Granting an injunction here would impose $100,000 in costs on D, but only confer $1,000 in benefits on P. Because the costs outweigh the benefits, the court will deny an injunction and instead award $1,000 in damages to P.

[2] *Boomer v. Atlantic Cement Co.*

[a] Overview

The well-known New York decision of *Boomer v. Atlantic Cement Co.*[44] exemplifies the current approach. Before *Boomer* was decided in 1970, some courts had already adopted the "balance of equities" standard. But New York still followed the view that an injunction was automatic if a nuisance caused substantial continuing harm. In *Boomer,* the New York Court of Appeals adopted the emerging modern rule and thereby created a precedent that greatly influenced the evolution of nuisance law in other jurisdictions.

The facts of *Boomer* are simple. Defendant, Atlantic Cement Co., operated a large cement plant near Albany, New York. The facility emitted dirt, smoke, and vibrations that injured lands owned by Boomer and other plaintiffs. Apparently without considering the utility of Atlantic's conduct, the trial court concluded that the plant was a private nuisance; but it refused to issue an injunction. Instead, the court awarded plaintiffs compensatory damages for their injuries to date and authorized them to bring suits in the future as further injury was suffered. For the guidance of the parties, however, the court determined that plaintiffs' total permanent damages were $185,000. Plaintiffs appealed.

[b] Rationale

The court of appeals stressed that compliance with the traditional rule would close the plant immediately. There was no known technological method to control the dust and other by-products from the plant. Accordingly, the only way to comply with an injunction to abate the emissions would be to stop operations altogether. This would eliminate most of the value in Atlantic's $45,000,000 plant and put more than 300 employees out of work. With little analysis, the court announced that it was "fully agreed" to avoid the "drastic remedy" of closing the plant.[45] The court apparently

[44] 309 N.Y.S.2d 312 (N.Y. 1970).

[45] *Id.* at 316.

reached this result by balancing the equities between the parties, although its opinion is remarkably vague. The harm to the defendant and the public caused by granting an injunction (loss of the $45,000,000 plant, elimination of 300 jobs, and—presumably—higher cement prices for the public) vastly outweighed the benefits to plaintiffs (avoidance of $185,000 in damages). As the court expressed it, there is "large disparity in economic consequences of the nuisance and of the injunction."[46]

Thus, the court considered alternative remedies that would avoid plant closure. One option was granting an injunction, but postponing its effect to allow research on technology that would prevent the emissions. But this technology was unlikely to be developed in the short run, and Atlantic had no ability to control the rate of research. In addition, such an injunction would give plaintiffs immense and unfair economic leverage over Atlantic. If research efforts were unsuccessful, Atlantic might be forced to pay plaintiffs a price far in excess of their actual damages in order to settle the case and thus eliminate the injunction. Accordingly, the court chose a second option: directing the trial court to grant an injunction to be vacated when Atlantic paid permanent damages to plaintiffs. In effect, this essentially awarded plaintiffs compensatory damages in lieu of an injunction.

[c] Reflections on *Boomer*

Boomer is probably the most celebrated decision in modern nuisance law. It generated immediate scholarly controversy which continues today;[47] and it is customarily included in property casebooks. Why?

The main reason is that *Boomer* marks a turning point in our approach to the appropriate remedy for a private nuisance. The basic scenario in *Boomer*—a socially-valuable factory causing comparatively minor damage to a small group of plaintiffs—was a common one. In many jurisdictions, pre-*Boomer* courts confronted with this scenario could choose from only two outcomes: (a) find no nuisance (thereby allowing the factory to continue harming plaintiffs) or (b) issue an injunction against the nuisance (thereby either closing the socially-valuable factory or, more likely, forcing the factory owner to pay plaintiffs a "windfall" settlement to eliminate the injunction). Neither option was entirely palatable. *Boomer* provided a third option—the payment of permanent damages in lieu of an injunction—essentially by shifting the "balancing" standard from liability analysis into remedy analysis. It became an important precedent that influenced other jurisdictions to adopt the same approach.[48]

At the same time, *Boomer* sparked new scholarly interest in the application of economic principles to nuisance law. The damages remedy is usually

[46] *Id.* at 315.

[47] *See, e.g.*, Daniel A. Farber, *The Story of* Boomer: *Pollution and the Common Law*, 32 Ecology L.Q. 113 (2005); *Symposium on Nuisance Law: Twenty Years After* Boomer v. Atlantic Cement Co., 54 Alb. L. Rev. 171 (1990).

[48] As Joel Dobris summarized, "no *Boomer*, no change." *See* Joel C. Dobris, Boomer *Twenty Years Later: An Introduction, with Some Footnotes About "Theory,"* 54 Alb. L. Rev. 171, 172 (1990).

seen as a more efficient solution than an injunction, because it helps to allocate resources to the most valuable use. The *Boomer* court properly concluded that a damages award was the cheapest method of resolving the conflict between the parties, thereby maximizing overall utility. It was more efficient to have Atlantic pay permanent damages to plaintiffs (estimated at $185,000) than to issue an injunction that would solve the problem by shutting down the factory (at the cost of the $45,000,000 plant, the 300 jobs, and higher cement prices to the public). But why not issue an injunction and then allow the parties to negotiate their way to a settlement, consistent with the Coase Theorem (*see* § 2.05[A], *supra*)? Richard Posner explains that this approach would be inefficient due to high transaction costs. The parties in *Boomer,* he argues, were locked into a bilateral monopoly. Any price for settling the case between $185,000 and $45,000,000 would have benefited both sides more than if an injunction were issued. Because of this large bargaining range, "it would have paid each party to invest substantial resources to engross as much of it as possible."[49] For example, Atlantic might have spent $2,000,000 in attorneys fees to negotiate the settlement, while the Boomer side could have spent the same amount. The court's solution—an award of permanent damages—reached an efficient outcome without the need for the parties to incur such high transaction costs. Inspired in part by *Boomer,* an extensive body of law and economics scholarship has contributed to the continued evolution of American nuisance law.

[3] An Alternative Approach: The Compensated Injunction

Another remedial option is to issue an injunction against the nuisance, but require the plaintiff to compensate the defendant for costs of compliance. The pioneer decision adopting this alternative is *Spur Industries, Inc. v. Del E. Webb Development Co.*[50] Defendant Spur operated a commercial feedlot for up to 30,000 cattle in an agricultural area. Plaintiff later developed a residential community on nearby land, and sued to enjoin the feedlot as a nuisance because of the flies and odor that it produced. The Arizona Supreme Court agreed that the public interest justified an injunction closing the feedlot. Yet, because plaintiff was the direct cause of the problem, the court exercised its equitable powers to require plaintiff to indemnify the defendant for the costs of moving or shutting down. "It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result."[51] *Spur* is a controversial decision that has attracted much scholarly interest,[52] but has not been followed by other courts.

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[49] Richard A. Posner, Economic Analysis of Law 71 (6th ed. 2003).

[50] 494 P.2d 700 (Ariz. 1972).

[51] *Id.* at 708.

[52] *See* Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 Iowa L. Rev. 775 (1986); *see also* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

[B] Damages

The appropriate measure of compensatory damages turns on whether the nuisance is deemed permanent or temporary. If the nuisance is permanent, the plaintiff receives all damages—covering both past and future harm—in one lawsuit. Damages are measured by the extent to which the nuisance diminishes the fair market value of the affected property. For example, suppose the court determines that D's noisy smelter is a nuisance and further concludes that the noise will never be abated. If this permanent noise problem reduces the value of P's land from $200,000 to $150,000, P recovers $50,000 in damages.

On the other hand, if the nuisance is temporary or "continuing," the plaintiff only recovers damages that compensate for past harm; the plaintiff may bring successive lawsuits in the future as additional damages are incurred. In this setting, the plaintiff recovers damages equal to the diminished rental or use value of the property, together with any special damages. Suppose that D installs new noise suppression equipment at the smelter, completely eliminating the problem. If the noise problem lasted two years and reduced the rental value of P's land from $15,000 to $12,000 per year, P recovers $6,000 in compensatory damages.

§ 29.07 Public Nuisance

A *public nuisance* is "an unreasonable interference with a right common to the general public."[53] Although it sometimes overlaps with private nuisance law, the public nuisance doctrine is fundamentally different. A private nuisance merely interferes with the rights of a particular person or small number of persons in the use and enjoyment of their land. In contrast, the public nuisance doctrine involves conduct that interferes with the rights of the public in general, in situations that go far beyond the use and enjoyment of land. However, under some circumstances, the same conduct may create both a public nuisance and a private nuisance.[54]

Virtually any intentional conduct that unreasonably interferes with the public health, safety, welfare, or morals may constitute a public nuisance. Factors that bear on unreasonableness include:

(1) whether the conduct "involves a significant interference" with the public heath, safety, peace, comfort, or convenience;

(2) whether the conduct is prohibited by a statute, ordinance, or regulation; and

(3) whether the conduct is continuing or permanent and has a "significant effect upon the public right."[55]

Examples of conduct that normally constitutes a public nuisance include keeping diseased cattle, running a house of prostitution, operating an

[53] Restatement (Second) of Torts § 821B(1).

[54] *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (finding that cattle feedlot was both a public nuisance and a private nuisance).

[55] Restatement (Second) of Torts § 821B(2).

unlicensed casino, maintaining a vicious dog, holding a very loud rock concert, and detonating explosives on a residential street.[56]

The typical plaintiff in a public nuisance action is a city or other governmental entity that brings suit on behalf of the general public and seeks damages, an injunction, or an abatement order. A private party may sue on this theory only if "special injury" can be demonstrated.[57] In this context, special injury means a "harm of a kind different from that suffered by the general public."[58] The rationale for the special injury rule is that it prevents a multiplicity of identical lawsuits from being filed against the same defendant, which is seen as an unfair burden.

Suppose F's factory routinely emits invisible radiation that completely disrupts television reception in Town T; as a result, no one in town can watch television. Because the radiation unreasonably interferes with the public welfare, it probably constitutes a public nuisance; Town T may accordingly sue F. Here, resident V has not suffered harm that is different in kind from the harm suffered by other residents; true, V cannot watch television, but neither can anyone else in town. Accordingly, V cannot demonstrate special injury and hence cannot bring suit. Suppose instead that the radiation tragically causes V to contract lung cancer. Because this harm is different in kind, V may sue F.

§ 29.08 Special Problem: Landowner Liability for Hazardous Substance Contamination

The United States enjoyed an unprecedented economic boom after World War II. But this post-war prosperity came at a price. Industries such as chemical manufacturing, plastics, petroleum refining, electronics, mining, and agriculture began generating large quantities of chemical wastes that threatened both human health and the environment. The vast bulk of these hazardous wastes were disposed of improperly, often through "midnight dumping" in remote regions. As a result, DDT, dioxin, PCBs, formaldehyde, vinyl chloride, and similar toxic substances contaminated the land surface and imperiled supplies of drinking water. Nuisance and other common law doctrines were blunt weapons against this new danger.

Faced with a potential public health crisis, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").[59] CERCLA imposes *strict liability* for the cleanup of hazardous substances on four categories of persons:

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[56] Would the emission of greenhouse gasses that contribute to global climate change constitute a public nuisance? For a discussion of this question, see Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293 (2005).

[57] *See, e.g.*, Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 712 P.2d 914 (Ariz. 1985) (neighbors of center that provided free meals to indigent had suffered special injury and thus had standing to maintain a public nuisance action); Mark v. Oregon, 974 P.2d 716 (Or. Ct. App. 1999) (residents near state-owned beach area where public nudity occurred could sue on both private and public nuisance theories).

[58] Restatement (Second) of Torts § 821C.

[59] 42 U.S.C. §§ 9601 et seq. For an overview of CERCLA, see John G. Sprankling & Gregory S. Weber, The Law of Hazardous Wastes and Toxic Substances in a Nutshell (1997).

(1) the current "owner" or "operator" of the land;

(2) persons who were owners or operators of the land at the time of disposal;

(3) persons who arranged for disposal or treatment; and

(4) persons who transported the substances to the land.

However, under limited circumstances, an owner may qualify for protection under the *innocent landowner* or *innocent buyer* defense.[60] This defense arises when the owner

(1) acquires the land after the disposal of the hazardous substance;

(2) conducts a pre-purchase investigation into the previous ownership and uses of the land "in accordance with generally accepted good commercial and customary standards and practices";[61]

(3) has no reason to know about the contamination; and

(4) meets various other criteria.

Suppose B, a developer, is considering the purchase of an abandoned industrial site owned by I. B walks across the land—which is covered with grass and wildflowers—and observes no contamination. She purchases the land for $100,000, begins grading the site in preparation for building a condominium project, and discovers toxic contamination in the soil from I's past operations. The federal Environmental Protection Agency investigates the site and estimates that the cleanup will cost $5,000,000. If EPA cleans up the site and then sues B for reimbursement, B will be personally liable for the entire cleanup cost as the current owner *unless* she qualifies for the innocent landowner defense. The main issue here is the adequacy of B's pre-purchase inspection. Given B's sophistication as a developer and the past industrial use of the land, her visual inspection was probably insufficient. Of course, if the I-B sales contract contains a warranty from I that the land is uncontaminated—and I is still solvent—B will be able to obtain indemnity from I. But B's indemnity right against I is not a defense to EPA's action for recovery of cleanup costs.

Now suppose that the toxic contamination on B's land pollutes the underlying groundwater; the plume of toxic groundwater eventually reaches and contaminates N's adjacent parcel. N might sue B for private nuisance. However, CERCLA also creates a cause of action in private parties. Therefore, N may prefer to clean up the contamination and sue B for reimbursement under CERCLA.

[60] 42 U.S.C. §§ 9601(35), 9607(b)(3).

[61] 42 U.S.C. § 9601(35)(B).