Distinguishing Tresspass and Nuisance: A Journey Through a Shifting Borderland

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DISTINGUISHING TRESPASS AND NUISANCE:  
A JOURNEY THROUGH A SHIFTING BORDERLAND

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The line between the torts of trespass and nuisance has been described as having become "wavering and uncertain." What are the basic definitions of these torts and their key distinguishing features? To what extent have the torts now merged? For what purposes is it still necessary to distinguish them? What is the likely future of these torts — merger, separate existence, or a continued state of uncertainty? These are the questions that this article will consider.

Definitions of "Trespass," "Private Nuisance," and "Public Nuisance"

Historically, the tort of trespass required an invasion that interfered with the plaintiff's right of exclusive possession in his real property and that was a direct result of some act of the defendant. The direct-result requirement had its roots in the distinction between the old writs of trespass and trespass on the case and has now been rejected by most courts. Thus, in modern times, the tort of trespass has come to mean simply an intentional and unprivileged use or other invasion of another person's real property.

Nuisance, which has been observed to have "meant all things to all people," is complicated by its division into the torts of public and private nuisance.


2. See PROSSER & KEETON, supra note 1, at 67.

3. See id. at 69-71 (citing Rushing v. Hooper-McDonald, Inc., 293 Ala. 56, 300 So. 2d 94 (1974), as to modern rejection of the direct-invasion requirement); RESTATEMENT (SECOND) OF TORTS § 158 comment h (1964). On the development of the action of trespass on the case, and the distinction between it and the action of trespass according to whether the harm was direct or indirect, see the somewhat differing accounts of Dix, The Origins of the Action of Trespass on the Case, 46 YALE L.J. 1142 (1937); Plucknett, Case and the Statute of Westminster II, 31 COLUM. L. REV. 778 (1931).


5. PROSSER & KEETON, supra note 1, at 616. See generally E. GARRETT & H. GARRETT, LAW OF NUISANCES 4 (3d ed. 1908); Smith, Torts Without Particular Names, 69 U. PA. L. REV. 91, 110-12 (1921).

6. See PROSSER & KEETON, supra note 1, at 618; J. SALMOND, LAW OF TORTS 233 (8th ed. 1934); P. WINFIELD, TEXT-BOOK OF THE LAW OF TORT 466 (1937 ed.).

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Public nuisance, which traditionally entails criminal as well as possible civil liability and involves an unreasonable interference with the plaintiff's enjoyment of life, is a field unto itself that is more thoroughly covered elsewhere. Public nuisance, which traditionally entails criminal as well as possible civil liability and involves an unreasonable interference with the plaintiff's use and enjoyment of his real property. Thus, trespass involves an actionable invasion of a possessor's interest in the exclusive possession of his real property, while private nuisance is an actionable invasion of a possessor's interest in the use and enjoyment of that property. Private nuisance differs from other fields of tort liability in that it is "confined to injuries which primarily affect the use or enjoyment of land."  

In one respect, the old element of trespass that prescribed a direct invasion of the plaintiff's interests still has significance; for it remains true that in trespass, the defendant's act is in itself regarded as wrongful and tortious, while in nuisance, it is only the consequences of the act that create tort liability. Thus, if I walk upon my neighbor's yard without authorization, that is wrongful and gives rise without more to tort liability for trespass. However, if I play loud music on my own property, that is not wrongful, but may become such — and create tort liability for nuisance — if and only if it unreasonably and substantially interferes with my neighbor's use and enjoyment of his real property. The tort of nuisance requires both conduct and consequences following therefrom, while trespass requires only a specified form of conduct.

7. See Prosser, Private Action for Public Nuisance, 52 VA. L. REV. 997 (1966); Reynolds, Public Nuisance: A Crime in Tort Law, 31 OKLA. L. REV. 318 (1978) [hereinafter Crime in Tort Law]. As outlined in these articles, the requisites of tort liability for public nuisance have usually included an obstruction of or interference with a public right (or, under much modern authority, with a considerable number of people); violation of some criminal law; and a showing by the plaintiff of particular harm to him, different in kind (not merely in degree) from that suffered by the general public. There is some recent trend to eliminate the requirement of violation of a criminal law. Section 821B of the Restatement (Second) of Torts lists such a violation as merely one of several factors to be assessed in determining the unreasonableness of defendant's conduct: it is this unreasonableness, not defendant's criminal responsibility, that the Restatement makes a requisite of tort liability. Restatement (Second) of Torts § 821B & comment d (1977). See Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 148 Ariz. 1, 712 P.2d 914 (1985) (regardless of presence of criminal statute, liability for public nuisance depends on whether conduct is unreasonable; the plaintiff's complaint, seeking injunction, should not be dismissed merely for failure to allege criminal violation). See generally Comment, "Feed the Hungry, but Not on Our Block" — Armory Park Neighborhood Association v. Episcopal Community Services in Arizona, 28 ARIZ. L. REV. 121 (1986).

8. See Prosser & Keeton, supra note 1, at 619; 1 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 211-12 (1966); Restatement (Second) of Torts § 822 (1977).


10. Winfield, Nuisance as a Tort, 4 CAMBRIDGE L.J. 189, 195 (1931) [hereinafter Nuisance as a Tort].


12. See Keeton, Trespass, supra note 4, at 464-69.
Clearly an unauthorized use or other invasion of my neighbor's real property may disturb not only his interest in possession, creating trespass liability, but may also simultaneously disturb his use and enjoyment of that property, causing nuisance liability. Therefore, the torts of trespass and nuisance are not mutually exclusive and may coexist in the same set of facts. The plaintiff will then have the option of suing on either theory, or both, so long as he receives no more than one full recovery for all harm suffered. The dual liability may be based on precisely the same conduct of the defendant, with the nuisance cause of action merely having the additional requirement of wrongful consequences from that conduct. Trespass and nuisance may both be present not only when the defendant's conduct consists of a single, "one-shot" act, but also when it is continuing in nature, such as repeatedly sending a bothersome substance onto the plaintiff's land. Indeed, it has been said that in most cases of trespass or nuisance, the other tort is probably present as well.

If the tort of trespass required that the defendant personally enter or otherwise invade the plaintiff's property, the situations of possible dual liability would no doubt be reduced. Yet it has long been recognized that a trespasser need not invade another's property in person but need only have been a substantial factor in causing or permitting such an invasion to occur, as in the situation of directing a bothersome substance onto the neighbor's land. Thus, one who sets in motion a force that is substantially certain to enter, without authorization, another's premises may be liable in trespass. Once the bothersome substance has entered the plaintiff's premises, it may certainly interfere with the plaintiff's use and enjoyment of that property, leading to nuisance liability as well. Physically, the invasion underlying the trespass liability may be by inanimate objects, such as rocks.


17. Note, Torts: Trespass, Nuisance, and E=mc², 19 OKLA. L. REV. 117, 118 (1966) [hereinafter Note, Torts] (observing that while in most cases, the intrusion affects both possession and use or enjoyment, an "arbitrary determination" is nonetheless often made that the intrusion is either trespass or nuisance, and this in turn determines the defenses available).

18. See Gregg v. Delhi-Taylor Oil Corp., 162 Tex. 26, 34, 344 S.W.2d 411, 416 (1961) (entry may be made by causing or permitting a thing to cross the boundary of the premises); RESTATEMENT (SECOND) OF TORTS § 158a (1964); cf. Fairview Farms, Inc. v. Reynolds Metals Co., 176 F. Supp. 178, 188 (D. Or. 1959) (trespasser liable for all natural and proximate results of his invasion).


20. See B & R Luncheonette, Inc. v. Fairmont Theatre Corp., 278 App. Div. 133, 103 N.Y.S.2d 747 (1951) (spray from the cooling tower on the roof of defendant's theater fell onto the rear yard of the plaintiff's adjoining luncheonette, depriving the plaintiff of the use of the yard as a summer garden).
that are thrown\textsuperscript{21} or the foundation of a building that encroaches,\textsuperscript{22} so long as the defendant is a substantial driving force behind the invasion. In many such cases, there is, again, interference both with possessory interests and with rights of use and enjoyment; thus, both the tort of trespass and the tort of nuisance may arise.\textsuperscript{23}

It has been noted that the theories behind these torts are "not inconsistent" and that it is therefore proper to allow the plaintiff to proceed under both.\textsuperscript{24} However, neither are the theories coterminous nor the terms synonymous; for if the invasion is not an intentional interference with possession, then trespass will not lie. Yet there may be acts bothersome to the use and enjoyment of land that do not disturb the possession thereof. Even if intentional, these acts will create liability only if they unreasonably interfere with use and enjoyment, thus causing a nuisance.

If an interference with any rights of either possession or use of property is unintentional, negligence is the appropriate theory of recovery, again requiring application of a reasonableness standard.\textsuperscript{25} Intentional invasions of possession are thus treated with a severity which reflects the seriousness with which the law historically regarded them and which is not accorded invasions that are either accidental or that do not disturb possession. These less serious intrusions must be found unreasonable before liability will apply.

Indeed, the essence of private nuisance may be considered a disturbance that would bother the reasonable person or, as often said in the American cases, that would "affect the ordinary comfort of human existence as understood by the American people in their present state of enlightenment."\textsuperscript{26} The cases of such disturbances overlap not only the boundaries of trespass liability, but also those of public nuisance liability, which involves criminal interference with the use of a public place or the activities of a large portion of a community.\textsuperscript{27} This may occur, for example, when a person is insulted or interfered with while using a public street.\textsuperscript{28} An individual harmed by a public nuisance can recover in tort only by showing that his harm was different from that suffered by the community as a whole, but

\textsuperscript{21} North Jellico Coal Co. v. Helton, 187 Ky. 394, 219 S.W. 185 (1920) (coal company threw rocks and slate upon the plaintiff's land).
\textsuperscript{22} See Milton v. Puffer, 207 Mass. 416, 93 N.E. 634 (1911) (continuing trespass found).
\textsuperscript{23} Note, Deposit of Wastes, supra note 4, at 878.
\textsuperscript{25} See Keeton & Jones, Tort Liability and the Oil and Gas Industry II, 39 Tex. L. Rev. 253, 256 (1961).
\textsuperscript{28} See Wilson v. Parent, 228 Or. 354, 365 P.2d 72 (1961) (obscene words and gestures toward the plaintiff on a public street).
is not required to show that the harm was connected with his use and enjoyment of his real property. In effect, the plaintiff must merely show that there was interference with his enjoyment of life. 29

Again, there is overlap, because the same activity, such as operation of an airport, may affect the rights to peace and quiet enjoyed generally by a community and may also affect an individual’s use and enjoyment of his particular real property. Thus there may in such a situation be both public and private nuisance liability. 30 There is, indeed, so much overlap between the activities that constitute private nuisances and those that amount to public nuisances that the term “nuisance” is often defined without indication of which type of nuisance is meant. For example, nuisance has been defined as anything that unlawfully causes harm, inconvenience, or damage, 31 and it has been concluded that a “nuisance dispute” may arise whenever a person injures his neighbor in a continuing way. 32 It has thus been observed that “[a] nuisance, public or private, arises when a person uses his own property in such a manner as to cause injury to the property of another.”33 Yet because public nuisance is generally a crime that only incidentally may also lead to tort liability, the main concern of tort law and the main area of possible overlap with trespass liability is with private nuisance. Trespass and private nuisance are the two principal torts fundamentally concerned with protecting rights of private ownership in real property.

**Distinctions Between Trespass and Private Nuisance**

What, then, are the traditional distinguishing characteristics of these two torts, and what changes in the distinctions have occurred in recent years? One of the most frequently mentioned distinctions is that trespass requires an invasion of the plaintiff’s property by some tangible matter, while nuisance does not. 34 One authority notes that it is “reasonably clear that the mere intentional introduction onto the land of another of smoke, gas, noise, and the like” is not actionable as a trespass, but only as a possible

29. See Comment, Nuisance or Negligence: A Study in the Tyranny of Labels, 24 IND. L.J. 402, 404 (1949) [hereinafter Comment, Nuisance or Negligence] (noting that an action for public nuisance will lie “for injury to person or chattel completely unconnected with the use or enjoyment of the plaintiff’s land.” Thus, the plaintiff can sue on a public nuisance that is not a private nuisance as to him.

30. See Annotation, Airport Operations or Flight of Aircraft as Nuisance, 79 A.L.R. 3d 253, 259 (1977) [hereinafter Annotation, Airport Operations].

31. See Comment, Nuisance: Contributory Negligence or Assumption of Risk as Defense, 28 TENN. L. REV. 561 (1961) [hereinafter Comment, Contributory Negligence] (citing BLACK’S LAW DICTIONARY 1215 (6th ed. 1951)).


33. Fairlawn Cemetery Ass’n v. First Presbyterian Church, 496 P.2d 1185, 1187 (Okla. 1972).

nuisance. Certainly the shouting of obscene or insulting words at the plaintiff, though directed at him while he stands on his own land, cannot be a trespass to the real property. What is lacking for trespass liability in these situations is the essential physical invasion by a tangible substance, such as is present in the piling of dirt on the plaintiff's land or knowingly allowing gasoline to seep onto the plaintiff's property.

So long as there is a physical invasion, trespass has been found in a great variety of occurrences: projecting shotgun pellets across the land of another; dropping particles of molten lead on the plaintiff's land; and permitting baseballs to be knocked over the fence of a ballpark onto the plaintiff's adjacent premises. However, all of these situations involve entry or other invasion by a tangible substance. When there is, for instance, merely the emission of sound waves onto the plaintiff's property, traditional principles do not allow trespass recovery but only recognize the possibility of a nuisance. The same is true even if the invasion is continuing or recurrent, as when dust and smoke are repeatedly released over the plaintiff's land. Environmental legislation has not changed such results, because statutes and regulations on smoke and other pollutants merely declare certain occurrences to constitute nuisances, whether or not they would have been such at common law, but make no attempt to impose trespass liability. Similarly, the casting of light onto another's premises might create a nuisance but not a trespass.

35. PROSSER & KEETON, supra note 1, at 71.
37. Fairlawn Cemetery Ass'n v. First Presbyterian Church, 496 P.2d 1185 (Okla. 1972) (church piled dirt on adjoining cemetery's land).
41. Hennessy v. City of Boston, 265 Mass. 559, 164 N.E. 470 (1929). Hennessy was criticized in Keeton & Jones, supra note 25, at 258-59, on the ground it is doubtful there was trespass by the proprietor of the ballpark since he would not know that any particular ball player who stepped up to bat would hit the ball onto the plaintiff's land.
42. Wilson v. Interlcke Steel Co., 32 Cal. 3d 229, 649 P.2d 922, 185 Cal. Rptr. 280 (1982) (noise waves not a trespass, at least in absence of damage, but must be dealt with as possible nuisance).
43. See Thackery v. Union Portland Cement Co., 64 Utah 437, 231 P. 813 (1924) (cement plant released dust and smoke over farm).
44. See Annotation, Validity of Regulation of Smoke and Other Air Pollution, 78 A.L.R. 2d 1305, 1327 (1961) noting that "[m]ost smoke regulations specifically declare that the emission of smoke under the circumstances described in the regulation is a nuisance; other enactments prohibit the emission of such smoke without specifically declaring it to be a nuisance.")
45. See Shepler v. Kansas Milling Co., 128 Kan. 554, 278 P. 757 (1929); The Shelburne, Inc. v. Crossan Corp., 95 N.J. Eq. 188, 122 A. 749 (1923); Amphitheaters, Inc. v. Portland Meadows, 184 Or. 336, 198 P.2d 847 (1948) (also discussing trespass but concluding that the
Gradually, however, the cases have come to emphasize that the requirement of a tangible invasion is really just a corollary of the basic limitation on trespass, which is that trespass must involve an intrusion interfering with the plaintiff's right of exclusive possession. Such a shift in emphasis opens the door for possible recognition of trespasses by some substances usually regarded as intangible, such as gases containing fluorides and particulates, because entry by such substances may arguably be an invasion of possessory rights.

Closely related to the traditional requirement that a trespass be by a tangible substance is the rule that in trespass the intruding agency must be visible to the naked human eye. However, this has been recognized as an outgrowth of the now-discarded restriction that a trespass must involve a "direct" and substantial intrusion by the defendant: "If the agent could not be seen, it was considered indirect and less substantial, hence, a nuisance." Again, it has increasingly been recognized as only a corollary to, or usual result of, the basic rule that trespass must invade a possessor's interest in exclusive possession of real property, which may sometimes be satisfied even though the invasion is invisible to the naked eye and even though the intrusion might also qualify as a nuisance.

The fundamental distinction between trespass and nuisance, underlying such other distinctions as the requirements that a trespass be tangible and visible, is the definitional idea of trespass as an invasion of possessory interests in real property and of nuisance as an invasion of the use and

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law of nuisance should govern — then finding no nuisance in the particular case). See generally Annotation, Casting of Light on Another's Premises as Constituting Actionable Wrong, 5 A.L.R. 2d 705 (1949) [hereinafter Annotation, Casting of Light].

46. See Annotation, Recovery in Trespass for Injury to Land Caused by Airborne Pollutants, 2 A.L.R. 4Th 1054, 1055 (1980) [hereinafter Annotation, Recovery in Trespass] (commenting in regard to the cases in this area that "some courts now hold that the test for whether an invasion of a property interest is a trespass or a nuisance does not depend upon whether the intruding agent is an intangible or tangible substance, but whether the invasion interferes with the right to the exclusive possession of property, and that an injury caused by an airborne pollutant may be a trespass.").

47. See Fairview Farms, Inc. v. Reynolds Metals Co., 176 F. Supp. 178 (D. Or. 1959) (operator of dairy farm had trespass action against aluminum plant for damages caused by airborne gases, liquids, and solids settling on the dairy farm). The court notes that odors and gases were historically not trespasses, only possible nuisances, but points out that a trespass may be committed by casting even a grain of sand on another's land. Id. at 185 (citing Sleep v. Morrill, 199 Or. 128, 260 P.2d 487 (1953) (small quantity of limbs and brush deposited on the plaintiff's land; damages recovered for trespass)). See generally infra notes 91-108 and accompanying text.

48. See Martin v. Reynolds Metals Co., 221 Or. 86, 93-94, 342 P.2d 790, 793-94 (1959) (discussing but rejecting the traditional view requiring that a trespass involve some "thing" which can be seen with the naked eye"), cert. denied, 362 U.S. 918 (1960).

49. Borland v. Sanders Lead Co., 369 So. 2d 523, 527 (Ala. 1979) (citing 1 F. Harper & F. James, THE LAW OF TORTS § 1.23 (1956)).

50. See Borland, 369 So. 2d at 530 (concluding that even an indirect invasion of the plaintiff's premises can amount to an actionable trespass if it interferes with the plaintiff's interest in exclusive possession, as when a substance is deposited on the plaintiff's land).
enjoyment of land, with possibly some incidental harm to possessory interests. Setting in motion a force that is substantially certain to damage real property leads to trespass liability, while unreasonable interference with a possessor's use and enjoyment of that property creates nuisance liability. The one tort damages the property itself; the other damages the possessor's use thereof. Of course, the same conduct may damage both the property and its use. If the defendant creates a breeding ground for flies on his premises and the flies intrude on the plaintiff's property, the resulting situation shows the possible presence of both torts. There may certainly be unreasonable interference with use and enjoyment. Additionally, at least a prima facie case of setting in motion a force that damages possessory rights, and thus causes a trespass, is also established.

The modern trend is to de-emphasize absolute rules requiring that trespass involve a tangible, visible agent and to emphasize instead an analysis of the interest that is disturbed or harmed. Trespass is described as a wrong against actual possession, while nuisance is often described in terms of the disturbing consequences to the plaintiff's senses (sight, hearing, smell, etc.) in connection with his use of real property. Thus, it has been suggested that decisions on whether water, oil, or gasoline invading a plaintiff's land can be regarded as trespasses should turn on whether or not the invasion interferes with the plaintiff's possession. Often such interference can be found in these cases, as when the defendant pumped contaminated water upon the plaintiff's yard, causing the plaintiff to develop polio; or when the defendant constructed a dam in such a way as to cause water to flood the plaintiff's land. Yet these illustrations again show the frequent overlap of trespass and nuisance, for it would surely be arguable in these cases that there was, in addition to the interference with possession, also interference with use and enjoyment of the plaintiff's property.

51. See Ryan v. City of Emmetsburg, 232 Iowa 600, 4 N.W.2d 435 (1942).
53. See id. (failure of defendants to remove chicken manure from underneath their chicken house resulted in obnoxious odors, caused breeding of flies, and produced a home for mice and rats; all of this was relevant as to possible nuisance liability, and the invasion of the plaintiff's premises by the flies could be basis of trespass liability).
54. See Borland, 369 So. 2d at 529.
56. See Seagraves v. Portland City Temple, 269 Or. 28, 522 P.2d 893 (1974) (discussing the evidence that may be used to prove a nuisance in a nuisance action against an airstrip).
58. Wardrop v. City of Manhattan Beach, 160 Cal. App. 2d 779, 326 P.2d 15 (1958). But cf. Phillips v. Sun Oil Co., 307 N.Y. 328, 121 N.E.2d 249 (1954) (no trespass liability when the plaintiff's water well was contaminated by gasoline from defendant's pump since defendant did not know or have substantial certainty as to the seepage of the gasoline).
59. Bobo v. Young, 258 Ala. 222, 61 So. 2d 814 (1952); Winchester Waterworks Co. v. Holliday, 241 Ky. 762, 45 S.W.2d 9 (1931); cf. Humphreys-Mexia Co. v. Arseneaux, 116 Tex. 603, 297 S.W. 225 (1927) (riparian landowner may construct a dam to create a reservoir but may not flood the land of other riparians).
It has been observed, "While the distinction between invasions that constitute an interference with possession and those that do not is fundamental and important, the line of demarcation cannot be drawn, as is so often true with other legal dichotomies, with mathematical exactness."\(^{60}\) It is not surprising then that cases and other authorities fall back on rules of thumb, such as the rule stating that trespass ordinarily involves physical damage to property,\(^{61}\) while nuisance involves activities that are offensive, annoying, unpleasant, or obnoxious to neighboring property owners.\(^{62}\) It has also been observed that a nuisance, unlike a trespass, will generally involve a continuing or repeated disturbance. A trespass, on the other hand, may be a "one-shot" occurrence, but if continued, it too will usually become a nuisance.\(^{63}\) Dust, for example, sent onto the plaintiff's premises may constitute a nuisance, but such liability will normally be found only if the occurrence is frequent, not merely occasional.\(^{64}\) These rules of thumb serve only to reach the fundamental determination of whether, as with the physical entry, there has been an interference with possession, or whether, as with the repeated disturbances, there has been interference with use and enjoyment, or whether there have been both interferences.

The definition of trespass as an invasion of possessory rights in real property leaves open the question concerning the extent of those rights. Assuming that a person has rights in the surface of land, do these extend to the subsurface beneath and the airspace above that land? The old common-law maxim was "cujus est solum ejus est usque ad coelum," meaning that ownership of the surface included with it everything under it and over it, up to the heavens and down to the center of the earth.\(^{65}\) This meant that a physical invasion of airspace gave rise to a trespass action in the surface owner.

However, the development of aviation forced the courts to modify their view, initially by often recognizing a privilege to trespass for otherwise

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\(^{60}\) Keeton, Trespass, supra note 4, at 466.


\(^{63}\) Id. at 175 (citing York v. Stallings, 217 Or. 13, 341 P.2d 529 (1959)).

\(^{64}\) Several courts have refused to enjoin a dust-producing activity when the dust was only occasional. See Heppenstall Co. v. Berkshire Chem. Co., 130 Conn. 485, 35 A.2d 845 (1944) (fertilizer plant); Hofstetter v. George M. Myers, Inc., 170 Kan. 564, 228 P.2d 522 (1951) (asphalt plant); Hart v. Wagner, 184 Md. 40, 40 A.2d 47 (1944) (burning trash); Bentley v. Empire Portland Cement Co., 48 Misc. 457, 96 N.Y.S. 831 (Sup. Ct. 1905) (cement plant). See generally Annotation, Dust as Nuisance, 24 A.L.R. 2d 194 (1952) [hereinafter Annotation, Dust].

lawful flights, at least if there were no unreasonable interference with surface use. Gradually, it came to be recognized that the trespass rule that assumed liability for every unauthorized entry was simply inappropriate to modern-day invasions by aircraft, and most courts came to the view that any liability should be in nuisance and should thus depend on whether there was unreasonable and substantial interference with the surface. This was, in effect, the standard applied even by courts that continued to speak in "trespass" terms. In above-surface invasion cases, these courts merely redefined trespass to bring it into line with the standard meaning of "nuisance." Thus, some authorities have continued to speak of the surface owner owning the air column above his land as far as is necessary for the full enjoyment of the land itself — a theory often called the doctrine of "effective possession." This doctrine received the support of the United States Supreme Court in a case in which a governmental "taking" of property rights was found to have resulted from repeated, low-level overflights of land by government aircraft. The Court stated, "The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense — by the erection of buildings and the like — is not material." However, most courts in the past few decades have altogether forsaken trespass terminology for the reasoning and language of nuisance law and have concluded that liability in the overflight cases should depend on the unreasonableness and substantiality of disturbance to surface use. Because flight thousands of feet above a person's land generally poses no threat of interference with any ongoing or contemplated activities, it is thought inappropriate, and burdensome to commercial progress, to recognize a cause of action in such situations unless an unreasonable disturbance to the surface owner is found. And "[a]t the point where 'reasonableness' enters the judicial process we take leave of trespass and steer into the discretionary byways of nuisance." Trespass analysis is still used in an occasional case

of injury caused by crop-dusting or crop-spraying, when generally there is an entry onto the plaintiff's premises of the substance sprayed as well as the aircraft. Yet even here some authorities regard nuisance as more appropriate, allowing a balancing of the rights of the parties. Courts also seem inclined toward using the nuisance analysis, balancing public need against private harm, when sonic booms have allegedly caused or threatened damage to surface owners.

When an invasion has occurred below rather than above the surface, the old common law also regarded the surface owner as having a trespass action for interference with his possessory rights. Here, there has been no impetus for change quite so compelling as that provided by aviation in the above-surface cases, but there has nonetheless been gradual recognition that there is no reason or need for allowing recovery unless there is harm to surface uses. Thus, it is increasingly suggested that a nuisance approach, allowing a balancing of the interests involved, is the desirable one. The orthodox rules applied to surface invasions are again not appropriate to subsurface invasions, just as they are not in above-surface invasions, because harm or threat of harm to the reasonably practical uses of the surface will be rare. The surface owner's rights are said to extend only to the depth to which he may reasonably use the land. Of course,


77. See Boehringer v. Montalto, 142 Misc. 560, 254 N.Y.S. 276 (Sup. Ct. 1931) (sewer 150 feet below surface not an invasion of landowner's rights); West Edmond Salt Water Disposal Ass'n v. Rosecrans, 204 Okla. 9, 226 P.2d 965 (1950) (plaintiff had no right to prevent adjoining landowner from causing migration of water beneath the plaintiff's land or to recover quantum meruit therefor).

78. See Keeton & Jones, supra note 25, at 269. See generally PROSSER & KEETON, supra note 1, at 83.

79. See Railroad Comm'n of Texas v. Manzierl, 361 S.W.2d 560 (Tex. 1962) (when railroad commission permits injection of water into well, no trespass occurs).

80. See Boehringer v. Montalto, 142 Misc. 560, 254 N.Y.S. 276 (Sup. Ct. 1931); cf.
mineral interests, such as coal or oil and gas, may, if owned by the surface owner, be possessed as part of that owner's bundle of rights, and an invasion of such sub-surface minerals may therefore be treated as a trespass. Yet as with surface invasions, such sub-surface interference may often constitute a nuisance also; and thus a court may speak of balancing the interests and determining whether there has been "unreasonable interference." 

Changes in the Traditional Distinctions

In recent decades, there have been changes in the traditional distinctions between trespass and nuisance, particularly regarding the rule that trespass must involve a tangible, visible invasion while nuisance need not. In the 1920s, it was considered definitely established that smoke and dust entering the plaintiff's premises might give rise to nuisance liability but could not constitute a trespass. This meant that any relief accorded the plaintiff, whether by way of injunction, damages, or some combination thereof, was subject to the court's balancing of the equities — i.e., weighing the interests of each party, including such factors as each one's amount of investment, the social importance of each property owner's use of his land, and the diligence with which the plaintiff brought his action. When the defendant's investment was large and the economic importance of the defendant's operation to the community was great, the plaintiff could be denied an injunction despite suffering serious harm and could, if given any relief, be required to accept permanent damages, precluding any future recovery.

Tidewater Oil Co. v. Jackson, 320 F.2d 157 (10th Cir.), cert. denied, 375 U.S. 942 (1963) (injecting water found to interfere unreasonably with the plaintiff's use of property, justifying recovery; unnecessary to decide whether this should be based on trespass or nuisance).


Tidewater Oil Co., 320 F.2d at 163 (action for damages to the plaintiffs' oil wells due to flooding operations by defendant on adjoining property; liability found for intentional and unreasonable interference with the plaintiffs' property rights).


McCleery v. Highland Boy Gold Mining Co., 140 F. 951 (10th Cir. 1904) (dust and vapor from defendant's smelter damaged the plaintiffs' farms; the plaintiffs entitled to relief despite their investment being slight in comparison with defendant's investment, but because of the plaintiffs' delay they would be granted an injunction only on condition of defendant's refusal to pay damages).

Some balancing, of course, occurs in any case of possible equitable relief (such as an injunction), regardless of the nature of the underlying tort. However, when the alleged tort is private nuisance, the balancing extends to the determination of whether that tort even exists — a balancing that has not normally occurred in the finding of a trespass. Gradually, however, a tendency has developed to recognize that the discharge onto a plaintiff’s premises of such substances as cinders may amount to a trespass, despite the lack of sizable bulk or ready visibility. Some authorities have persisted in relying largely on nuisance precedents even while speaking partially in trespass terms. Some have allowed a trespass action with little discussion, despite the entry having apparently been by something intangible and invisible such as gases, while others have declared a trespass to exist in the face of the court’s own clear statement that the invasion was intangible and/or invisible.

Florides discharged by aluminum plants have particularly raised the question of whether the resulting entry onto neighboring land may be a trespass. Cases decided as recently as the early 1950s usually refused to find trespass liability, sometimes relying partly on the old idea that trespass required direct injury. However, a leading case from Oregon in 1959 clearly rejected this requirement and held that invasion by fluoride compounds in the form of gases and particulates could, though the invading matter was invisible to the naked eye, constitute a trespass. Relying on


88. See Hall v. De Weld Mica Corp., 244 N.C. 182, 93 S.E.2d 56 (1956) (suit for damages from dust; trespass alleged and found, but nuisance cases examined by court in its discussion).


91. See Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (W.D. Wash. 1954), aff’d, 236 F.2d 224 (9th Cir. 1956), cert. denied, 352 U.S. 968 (1957) (suit for damage from fluorides discharged from aluminum plants; action described as common-law trespass on the case, requiring a showing of actual harm, rather than trespass, where at least nominal damages must be awarded; court denies relief, finding any possible injury to the plaintiffs outweighed by social and economic importance of defendant’s operations). See generally Note, The Viability of Common Law Actions for Pollution Caused Injuries and Proof of Fact, 18 N.Y.L.F. 935 (1973); Note, Actions for Damages for Air Pollution Injuries, 24 S.C.L. Rev. 818 (1972).

92. Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790 (1959), cert. denied, 362 U.S. 918 (1960), noted in Note, Trespass: Liability for Invasion by Fluoride Gases, 45 Cornell
nuclear science, the court concluded that "mass and energy are equivalents and that our concept of 'things' must be reframed." An intrusion involving energy or force was therefore deemed sufficient for trespass liability, regardless of the size or visibility of the intruding agency, and trespass by fluoride particles was thus found in this case.

The court recognized its holding as making trespass subject to somewhat the same weighing process as had traditionally occurred in nuisance, but here the weighing was for the purpose of defining the possessor’s interest in exclusive possession, while in nuisance the weighing helps define the possessor’s interest in use and enjoyment. A few days prior to the Oregon court’s decision, a federal court applying Oregon law correctly “guessed” the state court’s decision on such facts and ruled that entry by fluorides and gaseous liquids could be found to be a trespass, at least if some solid matter was present. A few years later, it was considered established that the settling of fluorides on the plaintiff’s land constitutes trespass as a matter of law in Oregon. If the settling of such a substance continues, it becomes a “continuing trespass” and very well may then be a nuisance also.

A number of cases outside Oregon have allowed trespass to lie for an intangible and/or invisible invasion, such as by dust from a California cement plant or lead particulates and sulfoxide gases from an Alabama smelter. Conduct that results in the breeding and multiplication of flies which then enter the plaintiff’s premises has been found to be a sufficient basis for a trespass claim, as has the discharge of encroaching cinders and the creation of clouds of dust containing invisible particles of silicon dioxide. All of these cases have basically agreed with Oregon that bulk is

L.Q. 836 (1960); Keeton & Jones, supra note 25, at 259-60; Recent Decision, 35 Wash. L. Rev. 474 (1960).
93. Martin, 221 Or. at 93, 342 P.2d at 793.
94. Id. at 94, 342 P.2d at 794.
95. Id. at 96, 342 P.2d at 795.
97. Reynolds Metals Co. v. Lampert, 324 F.2d 465, 466 (9th Cir. 1963) (settling of fluorides on land is trespass as a matter of law in Oregon). See generally Annotation, Recovery in Trespass, supra note 46, at 1054.
98. See Renken v. Harvey Aluminum (Inc.), 226 F. Supp. 169 (D. Or. 1963) (continued settling of fluorides on the plaintiff’s property is continuing trespass in Oregon and may well be a nuisance).
101. Miller v. Carnation Co., 33 Colo. App. 62, 516 P. 2d 661 (Colo. App. 1973). The flies, of course, were visible and tangible but were individually small; the court indicated lack of bulk was irrelevant.
immaterial so long as there is entry by some force or energy. However, some authorities have, while recognizing a possible trespass in the absence of a tangible, visible entry, relaxed the traditional requirements only if actual harm is shown.\textsuperscript{104} The mere entry of noise and vibrations has, despite the obvious presence of force and energy and despite actual damage, generally been regarded as too far removed from traditional notions of trespass to support such an action.\textsuperscript{105} There is, after all, in such a situation, just the stirring-up of air waves rather than the emission of some new substance. There is certainly a stronger argument for trespass when, for instance, a poisonous substance is sent onto the plaintiff’s land\textsuperscript{106} or a fire is allowed to spread thereto\textsuperscript{107} than when energy alone is unleashed. Yet there is even some authority finding the creation of vibrations sufficient for trespass liability.\textsuperscript{108}

In opposition to these developments, it may be argued that nuisance is the more appropriate remedy for intangible or invisible invasions because


\textsuperscript{105} See Celebrity Studios, Inc. v. Civetta Excavating, Inc., 72 Misc. 2d 1077, 340 N.Y.S.2d 694 (Sup. Ct. 1973) (contractor excavating near the plaintiff’s property caused damage by noise and vibrations).

\textsuperscript{106} See Schrunk v. Gilliam, 380 S.W.2d 743 (Tex. Civ. App. 1964) (defendant’s aircraft deposited a poison, intended to be used for spraying cotton on other lands, on the plaintiff’s crops and pasture; actionable trespass held established, with no need to allege negligence).


any injury is likely to be only occasional and slight in these cases, and it is therefore appropriate that the interests of the parties in the use and enjoyment of their respective properties be balanced in determining whether or not a tort exists.\textsuperscript{109} Undoubtedly, the majority view remains that entry by dust or fumes or other intangible substances does not suffice for trespass.\textsuperscript{110} Casting light on another person's premises has almost universally been regarded as insufficient for trespass, though amounting to a possible nuisance.\textsuperscript{111} Even Oregon has held that verbal insults hurled onto the plaintiff's premises do not form the basis of trespass liability.\textsuperscript{112} There is certainly room for argument that the term "nuisance" is often too loosely and broadly applied and that "[t]he need for a complete analysis and re-evaluation of the concept of nuisance is apparent."\textsuperscript{113} It is doubtful, however, that the situation will be improved by treating traditional situations of nuisance liability as trespasses, particularly where so many allegations of nuisance now arise from industrial activity when it may be considered highly appropriate to allow the defendant to raise the public interest as a possible defense to its intrusions.\textsuperscript{114} Further, even if the activity is found to be a nuisance, this does not compel the issuance of an injunction shutting down the defendant's operation. A court of equity has wide powers to frame an appropriate remedy, as by denying an injunction but awarding damages, by issuing a conditional injunction (perhaps dissolvable on the defendant's payment of damages to the plaintiff), or by issuing an order that the defendant take certain remedial steps to curtail further harm (noise, light, odors, or whatever), perhaps conditioned on the plaintiff paying the cost of such action.\textsuperscript{115} Any such relief may be granted against a nuisance.

\textsuperscript{109} See Annotation, Dust, supra note 64, at 199 (noting cases in which limited, or no, relief has been given against the creation of dust when the disturbance was only occasional and the harm slight).

\textsuperscript{110} See Metzger v. Pennsylvania, Ohio & Detroit R.R., 146 Ohio St. 406, 66 N.E.2d 203 (1946) (smoke); Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954); cf. Fritz v. E.I. Du Pont de Nemours & Co., 45 Del. 427, 75 A.2d 256 (1950) (gas and fumes; trespass noted as possible theory but not adopted); Riblet v. Spokane-Portland Cement Co., 41 Wash. 2d 249, 248 P.2d 380 (1952) (dust from cement plant; nuisance theory adopted). See generally Prosser & Keeton, supra note 1, at 71-72; Annotation, Operation of Cement Plant as Nuisance, 82 A.L.R. 3d 1004, 1014 (1978) (hereinafter Annotation, Cement Plant) (cases in which dust settled on residential property usually treated as possible nuisances); Annotation, Landowner's or Occupant's Liability in Damages for Escape, Without Negligence, of Harmful Gases or Fumes from Premises, 54 A.L.R. 2d 764, 778 (1957) (invasion by gases or odors generally held not a trespass); Note, Deposit of Wastes, supra note 4, at 879 (industrial dust or noxious fumes usually found insufficient for trespass).

\textsuperscript{111} See Shepler v. Kansas Milling Co., 128 Kan. 554, 278 P. 757 (1929); The Shelburne, Inc. v. Crossan Corp., 95 N.J. Eq. 188, 122 A. 749 (1923); Amphitheaters, Inc. v. Portland Meadows, 184 Or. 336, 198 P.2d 847 (1948), all applying the law of nuisance, not trespass, to offending lights; cf. Akers v. Marsh, 19 App. D.C. 28 (1901) (glare and odor from torch lamps would not annoy person of ordinary sensibilities and thus was not a nuisance). See generally Annotation, Casting of Light, supra note 45, at 705.


\textsuperscript{113} Comment, Nuisance or Negligence, supra note 29, at 402.

\textsuperscript{114} See Note, Tort, supra note 17, at 122.

Nuisance, whatever the problems created by its broad sweep, does have certain advantages. It is in accord with the modern tort trend to base liability not so much "on individual fault, but on a standard of conduct which is a corollary of social responsibility." Indeed, even if fault is still preferred as a basis of tort liability, it can be argued that nuisance is as much based on "fault," in the modern sense, as is trespass, because fault can be found in choosing a location for an activity that creates a likelihood of the activity unreasonably disturbing other people. So there seems to be no compelling reason for reducing the use of nuisance as applied to intangible invasions or for preferring trespass over nuisance when both are possible actions.

A compromise between the approaches of either allowing trespass for all intangible invasions or disallowing it for any such invasion is allowing the trespass action if, and only if, the invasion is shown to have caused actual harm — i.e., requiring actual damage as an element of intangible trespass even though it is not ordinarily required for tangible trespass. This is the approach taken in a Washington case brought against a copper smelter whose operations deposited airborne particles on the plaintiff's property. A few other authorities appear to support this approach. Just as the Oregon court has sometimes redefined trespass so as to require some degree of balancing in the determination of liability, thus bringing the trespass action closer to nuisance, so the Washington court is here redefining trespass in the intangible entry cases so as to require something that is not normally a requisite of that action: actual harm.

While many of the above-discussed cases involved attempts to find trespass liability when nuisance might more easily be established, there are also cases that seem to bend over backward to achieve the opposite result — to apply nuisance law despite the clear presence of a tangible, visible invasion of possessory rights. Thus, when a water supply was contaminated by the defendant's knowingly allowing pollutants to be introduced into it, or when a landowner caused water to percolate or seep onto adjoining land,

117. See Keeton, Trespass, supra note 4, at 458; cf. Jost v. Dairyland Power Coop., 45 Wis. 2d 164, 172 N.W.2d 647 (1969) (defendant emitted gases into atmosphere near the plaintiffs' farms; could be nuisance despite defendant's conforming to industry standards of due care).
120. See supra note 95 and accompanying text.
122. See Healey v. Citizens Gas & Elec. Co., 199 Iowa 82, 201 N.W. 118 (1924); Aldworth v. City of Lynn, 153 Mass. 53, 26 N.E. 229 (1891); cf. Humble Pipeline Co. v. Anderson,
some courts have applied the law of nuisance. Intentional flooding of the plaintiff's farmland and leakage of gasoline into the plaintiff's well have been ruled nuisances, and trespass liability has been rejected. Similar treatments have been accorded the diversion of a stream, resulting in the deposit of sand and rocks on the plaintiff's land or simply causing an overflow of water onto the plaintiff's land. In all these situations, there clearly was an intentionally-caused tangible, visible invasion of the plaintiff's premises; yet each court rejected or ignored the trespass possibility, preferring nuisance.

Practical Effects of Using One Tort or the Other

What difference does it make to the parties whether a cause of action for trespass or for nuisance is alleged? One obvious difference — and one that sometimes forces courts to choose between the two actions — is when the statute of limitations starts to run. With trespass, the statute will begin to run from the moment of the physical invasion. With nuisance, the period will commence with the unreasonable and substantial interference with the plaintiff's use and enjoyment of real property. Pinpointing the start of the statute's running may obviously be more difficult when nuisance is involved, since the action cannot be said to have accrued at a precise moment. It is a matter of judgment as to when, if at all, the interference became unreasonable and substantial. Courts have often been lenient, however, in applying the statute of limitations to nuisance actions —

339 S.W.2d 259 (Tex. Civ. App. 1960) (leakage of oil from pipeline and its percolation to land of another was, as a matter of law, insufficient for trespass — but defendant may not have known of the leakage). But see, applying trespass theory, Conner v. Woodfill, 126 Ind. 85, 25 N.E. 876 (1890) (water flowed from defendant's to the plaintiff's premises); City of Barberton v. Miksch, 128 Ohio St. 169, 190 N.E. 387 (1934) (defendant knew that his conduct was making the plaintiff's land wet and soggy; could be trespass liability).


127. See Fairlawn Cemetery Ass'n v. First Presbyterian Church, 496 P.2d 1185 (Okla. 1972). Leading cases holding that the statute on trespass runs from the time of invasion include National Copper Co. v. Minnesota Mining Co., 57 Mich. 83, 23 N.W. 781 (1885); Williams v. Pomeroy Coal Co., 37 Ohio St. 583 (1882). Leading cases on the nuisance statute running from the time of the required harm include Hooker v. Farmers' Irrigation Dist., 272 F. 600 (8th Cir. 1921); Heckaman v. Northern Pac. Ry., 93 Mont. 363, 20 P.2d 258 (1933). See generally Note, Limitation of Actions — Accrual of Cause of Action — Injuries to Land, 21 Minn. L. Rev. 334 (1937).

128. See Thackery v. Union Portland Cement Co., 64 Utah 437, 231 P. 813 (1924) (recurring annoyance by dust and smoke from cement plant; extent of annoyance depended on extent to which plant was operated and on the elements).
allowing damages, if the nuisance is a continuing one, for the statutory period preceding the filing of suit, even though the unreasonable interference had been occurring for a much longer period. Courts also allow damages for the permanent injury to the use and enjoyment of the property if the nuisance is a recurring one, even though it had been recurring at intervals for longer than the statutory period. In trespass, a stricter view is sometimes taken, with the court denying money damages, or any comparable relief, once the statutory period has elapsed from the time of the original entry. Aside from the difference as to the time of commencement of the statute’s running, a jurisdiction may simply have different statutory periods for the torts of trespass and nuisance. The trespass period is longer in some jurisdictions, again reflecting the seriousness with which the law has historically regarded intentional invasions of real property. Sometimes nuisance is governed by old statutory provisions regarding the limitations period for actions of "trespass on the case," and these tend to be shorter than the period for trespass on realty and other actions growing out of the writ of trespass.

Another practical difference between the two actions is the aforementioned fact that liability in trespass follows automatically from the intentional invasion of the real property of another, while nuisance liability does not follow ipso facto from intentional interference with use and enjoyment but only if the interference is judged substantial and unreasonable. This means that nuisance liability involves "a weighing process — the broad balancing


131. See Fairlawn Cemetery Ass’n v. First Presbyterian Church, 496 P.2d 1185 (Okla. 1972) (encroachment of piling dirt on the plaintiff’s land was trespass, not nuisance; two-year statute of limitations on trespass barred any claim for damages or for relief in the nature of damages, such as requiring defendant to remedy the harm done). Often, however, the courts will regard such an encroachment as a continuing trespass for which the statute begins anew each day that the defendant fails to remedy the invasion. See 509 Sixth Ave. Corp. v. New York City Transit Auth., 15 N.Y.2d 48, 255 N.Y.S.2d 89, 203 N.E.2d 486 (1964); RESTATEMENT (SECOND) OF TORTS § 161 (1964).

132. See Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790 (1959), cert. denied, 362 U.S. 918 (1960) (six-year statutory period on actions for trespass to land; two-year statutory period for nontrespassory injuries to land).


134. See supra notes 11-12 and accompanying text.

135. See PROSSER & KEETON, supra note 1, at 67.

136. See id. at 623, noting that it is not defendant’s conduct that must be unreasonable for nuisance liability but rather the interference with the plaintiff’s use and enjoyment of his real property.
of interests between the reasonableness of the defendant’s conduct and the
gravity of the landowner’s injury.’’137 Thus, a number of cases note that in
nuisance, social considerations are relevant, and the court is justified in
denying relief on the ground that any harm to the plaintiff is outweighed
by the social utility of the defendant’s conduct.138

In trespass, on the other hand, no general defense of social utility exists.
Only the very limited defenses of self-defense, defense of others, necessity,
etc. that are customarily applicable to the intentional torts, are available.139

Nuisance, unlike trespass, requires the consideration of a wide variety of
factors. If noise that disturbs sleep is the alleged basis of the action, it is
crucial to consider such matters as the number of persons disturbed thereby,
the public value of the activities creating the noise, and whether the noise’s
presence is more-or-less permanent or merely temporary, as when associated
with construction work of limited duration.140 The basic question must be
whether the noise constitutes an unreasonable disturbance; unusually sen-
sitive or nervous persons will be denied relief and told they “must seek
refuse in sound proof rooms, if they can afford them, or take their chances
of the padded cell.”141

Of course, if the noise is created by conduct that is not considered
essential, such as sports or recreational activity, a stricter standard will be
applied to those who create the noise,142 and the disturbance may be found
unreasonable even though it is otherwise perfectly lawful143 and even though
it is not the only such disturbance in the neighborhood.144 If, however, the
noise or other disturbance is caused by an enterprise of great benefit to the
public and the economy, a finding of unreasonableness, and thus of nui-
sance, may be very difficult to obtain, as in the case of airport operations.145

137. Note, Torts, supra note 17, at 117.
1927).
139. See Note, Depost of Wastes, supra note 4, at 878-79 (noting that defenses may be
available if an invasion was intended to save life or property or was necessary to permit a
vital public activity).
140. See Wheat Culvert Co. v. Jenkins, 246 Ky. 319, 55 S.W.2d 4 (1932); Devers v. Land,
697, 63 A. 1093 (1906); Andrews v. Perry, 127 Misc. 320, 216 N.Y.S. 537 (Sup. Ct. 1926);
Phelps v. Mayor, 2 Ch. 255 (1916). See generally Lloyd, Noise as a Nuisance, 82 U. Pa. L.
Rev. 567, 572-73 (1934).
141. Lloyd, supra note 140, at 582; see Smilie v. Taft Stadium Bd. of Control, 201 Okla.
303, 205 P.2d 301 (1949) (denying an injunction against a midget automobile race track, the
noise from which was alleged to disturb the plaintiffs; others living in the area testified,
however, that they did not find the noise bothersome).
142. See First Methodist Episcopal Church v. Cape May Grain & Coal Co., 72 N.J. Eq.
257, 67 A. 613 (1907). See generally Note, Nuisance: Noise and the Queue, 4 Okla. L. Rev.
501 (1951).
143. See Meadowbrook Swimming Club v. Albert, 173 Md. 641, 644, 197 A. 146, 147 (1938)
(noise from “amusement place”).
145. See Oberhaus v. Alexander, 28 Ohio App. 2d 60, 274 N.E.2d 771 (1971); Batcheller
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The balancing of interests inherent in nuisance has been cited as a reason why the nuisance theory has come to be considered more appropriate than trespass in aviation cases. While balancing often makes it difficult to establish nuisance liability and certainly to obtain injunctive relief against a large public airport, relief, even an injunction, is sometimes possible against a private airstrip, the social value of which may be considered rather limited. In any case, the "formalistic trespass analysis" has now largely been abandoned in the airport-noise cases in favor of the balancing analysis of nuisance.

As the noise cases illustrate, the test that the plaintiff must meet in establishing the unreasonableness necessary to nuisance is the effect of the alleged nuisance on a normal person of ordinary habits and sensibilities. The effect on an abnormally sensitive person or unusually sensitive use of property is irrelevant. Thus, it may be difficult for a landowner whose use of his property is particularly sensitive to light — as is a drive-in movie theater, for instance — to obtain relief against the defendant creating the light. Similarly, plaintiffs attempting to make use of solar energy may have little success obtaining relief against someone blocking their access to this source.


148. Note, Airplane Noise, supra note 67, at 1583 (commenting that "[m]ost courts faced with the question find it unnecessary to pass upon the trespass allegation and decide the liability issue solely in terms of nuisance."). See Mace, supra note 65, at 343.
149. See Amphitheaters, Inc. v. Portland Meadows, 184 Or. 336, 198 P.2d 847 (1948), noted in Recent Cases, 62 HARV. L. REV. 704 (1949); Recent Decisions, 24 NOTRE DAME LAW. 254 (1949); Recent Cases, 28 OR. L. REV. 193 (1949).
150. Id. (denying damages to a drive-in movie theater for the harm caused by its business by defendant horse-race track's casting of light, through the use of numerous floodlights, on the theater's screen). See generally Holzer, And Then There Was Light — Light as a Nuisance, 51 CHI. B. REC. 403 (1970).
151. See Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357, 359
Yet as the use and economic importance of solar energy increase, relief under nuisance law may become more likely because the social importance will be considered greater and the use will no longer be regarded as peculiarly sensitive. Nuisance law has a flexibility that allows activities once considered reasonable to become unreasonable, and vice versa, and that also allows changes over the years as to the relief — damages, injunction, etc. — that is considered justified. Increasing concern for the environment is likely to be reflected in many cases in the near future; but even when the environment is threatened, it has sometimes been held appropriate to weigh the interests of both sides in a dispute. The location of an alleged nuisance is of particular importance in most nuisance cases, and a person living or owning property in a basically industrial area is not entitled to the same degree of protection as a person in a predominantly residential neighborhood.

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(153) See Polinsky, supra note 32, at 1076-77 (applying to a pollution situation the analysis of Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972)). See also, applying the same authors' analysis to a situation of light as a possible nuisance (as in the Amphitheaters case at supra note 149), Rabin, supra note 115, at 1299-1300.

(154) See Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334 (1933) (discharge of sewage into creek); Sussex Land & Live Stock Co. v. Midwest Ref. Co., 294 F. 597 (8th Cir. 1923) (crude oil allowed to escape into creek); cf. Virginians for Dulles v. Volpe, 344 F. Supp. 573 (D. Va. 1972) (noise created by aircraft landing and taking off from airport). But cf. Crushed Stone Co. v. Moore, 369 P.2d 811, 815-16 (Okla. 1962) (operation of quarry constituted nuisance; when damages at law will not give adequate remedy to the plaintiffs who are caused substantial and irretrievable injury by nuisance, the plaintiffs are entitled as a matter of right to an injunction regardless of comparative benefits or comparative injury resulting therefrom). See generally Annotation, Law of Nuisances, supra note 121, at 137 (discussing in § 5(a) cases in which balancing the equities was held appropriate in environmental disputes in which an injunction was sought and discussing in § 5(b) cases in which such balancing was considered inappropriate).

To what extent does the plaintiff's own conduct enter into the balancing process in nuisance? While there has been considerable confusion as to the availability of contributory (or comparative) negligence as a defense in nuisance, generally the defense is available if the nuisance action is based on negligence but not if it is founded on intent or strict liability.¹⁵⁶ Some authorities state that contributory (or comparative) negligence is a defense if the nuisance is based on negligence but not if it is an absolute nuisance, an annoyance that causes unreasonable disturbance even though the defendant is conducting the activity with due care.¹⁵⁷ It has been noted that the first case in which the doctrine of contributory negligence was applied was in fact a nuisance case.¹⁵⁸

Assumption of the risk is also a possible defense in nuisance cases based on negligence. Thus, the plaintiff may be denied relief for an injury if he knowingly and voluntarily undertook the risk of being so injured by the nuisance.¹⁵⁹ Even in cases of nuisance based on intentional conduct, such as flooding, the plaintiff has sometimes been denied relief for harm to his property that could have been averted by due care and with little effort or expense on his part.¹⁶⁰

One defense often asserted in nuisance cases is "coming to the nuisance." This defense may be considered a variant on assumption of the risk in that it involves the assertion that the plaintiff moved, or developed his property, near the defendant's alleged nuisance after the nuisance already existed and therefore should not be heard to complain of it.¹⁶¹ The attempted defense


¹⁵⁹ See Comment, *Contributory Negligence, supra* note 31, at 568-69 (assumption of risk may be defense even against an absolute nuisance); Annotation, *Modern Views*, supra note 156, at 1399.

¹⁶⁰ See Crommelin v. Coxe & Co., 30 Ala. 318 (1857) (the plaintiff was injured by water improperly released on his land when the plaintiff could easily have prevented the harm); Lisko v. Uhren, 134 Ark. 430, 204 S.W. 101 (1918) (same); Morrison v. Queen City E.L. & P. Co., 193 Mich. 604, 160 N.W. 434 (1916) (same); Galveston, H. & S.A. Ry. v. Ware, 67 Tex. 635, 4 S.W. 13 (1887) (same); Jenkins v. Stephens, 71 Utah 15, 262 P. 274 (1927) (same). See generally Seavey, *supra* note 27, at 989.

¹⁶¹ See *Crime in Tort Law, supra* note 7, at 338. See generally Note, *Torts: Nuisance*:
is thus based on priority in time. In public nuisance, this is generally agreed not to be a defense at all, since by definition the nuisance involves a violation of criminal law. In private nuisance, "coming to the nuisance" does not necessarily prevent the plaintiff from obtaining relief (unless he came for the sole purpose of a vexatious lawsuit) but is a relevant factor to weigh in the balancing process of deciding what, if any, relief the plaintiff may obtain. "Coming to the nuisance" often overlaps other factors employed in the balancing, such as consideration of the basic nature of the area in which the alleged nuisance is located and the promptness with which the plaintiff has sought relief. There is also the overlapping possibility that the defendant may have acquired prescriptive rights to operate the alleged nuisance, but such rights are acquired only if the use has been adverse as to the plaintiff for the prescribed statutory period.

Another difference in what the plaintiff must prove, depending on whether he alleges trespass or nuisance, concerns the basis of liability. Trespass is an intentional tort, though the intent required is minimal. The requisite intent is to be at the place where the trespass occurred, not the intent to cause any resulting harm. Thus, there may be trespass liability even if the defendant in good faith came upon the real property believing it to be his own or believing he had the owner's permission to be there. However, if the defendant had no intent to be, in person or through some agency, at the place of the alleged trespass, there can be no trespass liability but rather only liability for negligence or (if an abnormally dangerous activity is

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163. See Nuisance as a Tort, supra note 10, at 200-01.

164. See Madison v. Ducktown Sulphur Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904) (delay of ten years in complaining of nuisance prevented relief in equity when defendants had in meantime spent large sums increasing their operation).

165. See Stouts Mountains Coal & Coke Co. v. Ballard, 195 Ala. 283, 70 So. 172 (1915); Fansler v. City of Sedalia, 189 Mo. App. 454, 176 S.W. 1102 (1915); North Point Consol. Irrigation Co. v. Utah & Salt Lake Canal Co., 16 Utah 246, 52 P. 168 (1898); Koch v. Eastern Gas & Fuel Assocs., 142 W. Va. 386, 95 S.E.2d 822 (1956).

166. See RESTATEMENT (SECOND) OF TORTS § 163 comment b (1964); PROSSER & KEETON, supra note 1, at 73. But cf. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (Colo. App. 1973) (one who sets in motion a force that in normal course of events would cause damage to property of another may be held liable in trespass).


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present) strict liability, as held in a case in which the defendant accidentally allowed gasoline to seep from his land onto his neighbor's property. In such a case, there will then ordinarily be liability only for a lack of due care; but if the requisite intent for trespass liability is present, due care is no defense. Liability for private nuisance, on the other hand, can traditionally be founded on any one of the three principal bases of tort liability: intent, negligence, or, if an abnormally dangerous activity is pursued, strict liability.

It has sometimes been stated sweepingly that negligence is unnecessary to nuisance. However, it has also been pointed out that negligence is, in fact, very often present in nuisance cases and may be considered a requisite to nuisance liability except in those cases in which the defendant is aware of the harmful effects of his conduct (so that intent to disturb may be found) or when the activity is so dangerous as to justify strict liability. In many nuisance cases, liability can, however, be based on intent because the requisite intent is present in the eyes of the law not only when the defendant acts with the purpose of causing an interference with the plaintiff's use and enjoyment of his real property but also when the defendant knows that the interference is resulting from his conduct or knows that it is substantially certain to result. Thus, it seems accurate to conclude that "negligence is merely one type of conduct which may give rise to a nuisance." Whether the basis is negligence or some other theory will then determine the defenses that are available.

If the basis is negligence, the action, though it may be termed a "negligent nuisance," is really no more than an ordinary negligence action in nuisance clothing and should be treated as such. Accordingly, it has been urged that nuisance itself should now be regarded, aside from rare situations of strict liability and aside from occasional statutory modifications, as excul-
sively an intentional tort, requiring that the defendant have the purpose of causing unreasonable and substantial interference with the plaintiff’s use and enjoyment of his real property or the knowledge or substantial certainty that such interference will result from the defendant’s activity.\textsuperscript{179} This would put an end to the confusing “hybrid action of nuisance and negligence”\textsuperscript{180} and would make clear that while in negligence the plaintiff must show that the defendant was under a duty of due care, no such duty need be established in nuisance.\textsuperscript{181} This would also, of course, move nuisance and trespass closer together, because nuisance would become, as trespass has long been, an exclusively intentional tort.

There is another difference, however, in the requisites of liability for nuisance and for trespass, aside from the underlying theory of fault. In nuisance, unlike trespass, actual harm must be shown.\textsuperscript{182} Indeed, the harm in nuisance must be unreasonable and substantial.\textsuperscript{183} On the other hand, at least nominal damages will be awarded in trespass for any unprivileged entry on or use of real property.\textsuperscript{184}

Various reasons have been advanced for allowing the trespass action without proof of actual damage: to prevent the acquisition of prescriptive

\textsuperscript{179} See Prosser \& Keeton, supra note 1, at 624 (terming it “highly desirable” that nuisance be limited to intentional interferences).

\textsuperscript{180} Winfield, The History of Negligence in the Law of Torts, 42 Law Q. Rev. 184, 197-98 (1926) (discussed and further explained in Nuisance as a Tort, supra note 10, at 198).

\textsuperscript{181} Nuisance as a Tort, supra note 10, at 198.

\textsuperscript{182} See id. at 203; cf. Keesling v. City of Seattle, 52 Wash. 2d 247, 324 P.2d 806 (1958) (technical trespass gives rise to nominal damages even if no actual harm was done).


It should be observed, however, that there is a trend toward requiring actual damage in trespass, as shown by a few limited groups of cases: those in which the plaintiff holds only a future interest in the land (see infra note 196 and accompanying text); those (under a “compromise,” and minority, view) in which there is no tangible, visible invasion (see supra notes 118-20 and accompanying text); and those (often treated as nuisance cases) in which the invasion is above or below the surface (see supra notes 65-83 and accompanying text).
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rights; to settle disputes regarding title to land; to vindicate property rights; and to prevent breaches of the peace. All of these grounds have been said to flow from the underlying idea that an owner of real property should have the right to prevent others from using the property without his consent. Once again, the requirement of harm in nuisance but not in trespass would seem to show the seriousness with which the common law regarded unauthorized physical invasions. Additionally, the requirement of harm may also show some continued life in the old notion that trespass involves a more direct injury than does nuisance. Thus, a 1979 case stated that "[i]f the intrusion is direct, then, under our present law, actual damages need not be shown ... ." It should be emphasized that while nuisance is usually said to require unreasonable harm (i.e., unreasonable interference with the plaintiff's use and enjoyment of his real property), this requirement relates purely to the extent of the damage, not to the defendant's conduct. It does not impose any requirement of unreasonable (i.e., negligent) conduct on the defendant's part. The damage is required to be unreasonable in light of all the factors weighed in the aforementioned balancing process that is employed in nuisance law, the balancing process that some authorities have now introduced into trespass analysis.

Another difference between what must be proven in actions of trespass and in actions of nuisance concerns the estate or interest owned by the plaintiff in the relevant real property. Because trespass involves an interference with possession, the plaintiff must show a possessor interest in the

185. See Keeton & Jones, supra note 25, at 256-57. See generally T. STREET, supra note 8, at 25.
186. See Keeton & Jones, supra note 25, at 257.
187. See supra notes 25-26 and accompanying text.
188. See Note, Torts — Remedy for Trespass Where No Injury is Shown, 39 Ky. L.J. 99, 102 (1950) (implied damages are granted in trespass on theory that every direct entry results in some material injury). See generally Keeton, Trespass, supra note 4, at 464-65. See also D. DOBBS, REMEDIES 332-35 (1973) (stating that indirect physical entries, such as by percolating waters, are often treated as possible nuisances but not trespasses, perhaps because of the lack of direct application of force).
189. Borland v. Sanders Lead Co., 369 So. 2d 523, 529 (Ala. 1979) (stating that while the direct/indirect analysis is no longer used by that court to distinguish trespass from nuisance, it is used to determine the elements necessary for trespass; if the intrusion is direct, no actual harm need be shown, but if it is indirect, substantial harm must be established. "Indirect intrusion" thus seems to lead in Alabama to the equivalent of nuisance liability, though it may be called "trespass.").
190. See Annotation, Cement Plant, supra note 110, at 1004, 1007 (noting that the fact that an enterprise is well equipped and operated efficiently does not prevent nuisance liability if it nonetheless unreasonably interferes with other persons).
191. See supra notes 137-48 and accompanying text.
192. See supra notes 92-103 and accompanying text.
real property. A mere easement or license will not suffice. The holder of a future possessory estate, such as a landlord owning a reversionary interest, may recover for harm to his estate, but his action is derived from the old writ of trespass on the case and he must, contrary to the usual rule of trespass actions, show actual harm to his interest. In private nuisance, the rules are somewhat more lenient toward the plaintiff, because the plaintiff need only establish interference with use and enjoyment of real property, not with possession thereof. Accordingly, the plaintiff need not show that he holds a possessory interest in the land, and an easement or right-of-way will suffice. Yet even here, some property right must be shown, and a mere lodger or licensee cannot recover. In public nuisance, the rules are still more liberal in favor of the plaintiff since only an interference with life, not necessarily with property rights, need be shown.

193. See Brenner v. Haley, 185 Cal. App. 2d 183, 8 Cal. Rptr. 224 (1960) (one holding under illegal lease may maintain trespass); Southern Ry. v. Horine, 121 Ga. 386, 49 S.E. 285 (1904); Nickerson v. Thacher, 146 Mass. 609, 16 N.E. 581 (1888); Frisbee v. Town of Marshall, 122 N.C. 760, 30 S.E. 21 (1898); Langdon v. Templeton, 66 Vt. 173, 28 A. 866 (1894) (adverse possessor may maintain trespass); cf. Zimmerman v. Shreeve, 59 Md. 357, 361 (1881) (trespass harms possessory rights; thus, the plaintiff must show actual or constructive possession at time of invasion). If the plaintiff has possession but lacks valid legal title, defendant may not use that lack of legal title as a defense unless defendant is able to show a superior right in himself. Thus, defendant may not assert the superior right of a third party unless he can connect himself with that right. See Kirk v. Cassady, 217 Ky. 87, 288 S.W. 1045 (1926).


197. See Hancock v. Moriarity, 215 Ga. 274, 110 S.E.2d 403 (1959) (right to use alley); Webber v. Wright, 124 Me. 190, 26 A. 737 (1924) (right to passage, light and air); Herman v. Roberts, 119 N.Y. 37, 23 N.E. 442 (1889) (right of way). An adverse possessor may maintain private nuisance. Brink v. Moeschl Edwards Corrugating Co., 142 Ky. 88, 133 S.W. 1147 (1911). A tenant may maintain such an action and recover for the harm to his term. Bowden v. Edison Elec. Illuminating Co., 29 Misc. 171, 60 N.Y.S. 835 (Sup. Ct. 1899). However, a tenant may not recover for harm to the reversion. Klassen v. Central Kansas Coop. Creamery Ass'n, 160 Kan. 697, 163 P.2d 601 (1946). With the holder of the reversionary interest, the rule is the reverse: the tenant may recover for permanent harm to the property, but not for harm merely to the present use or enjoyment. See McConnell v. Cambridge R.R., 151 Mass. 159, 23 N.E. 841 (1890); Miller v. Edison Elec. Illuminating Co., 184 N.Y. 17, 76 N.E. 734 (1906); Gotwals v. City of Wessington Springs, 60 S.D. 428, 244 N.W. 649 (1932).


be established. In any nuisance case, however, the plaintiff does have to show actual harm, and in private nuisance it must be harm to the plaintiff's rights and privileges in real property.

A final difference between trespass and nuisance may be observed in many of the cases dealing with alleged governmental "takeings" of property, particularly when the taking is alleged to have occurred through airplane flights over the land or other above-surface or sub-surface disturbance. In the case of overflights, for instance, the majority view is that a taking is shown only if an invasion of the airspace directly above the plaintiff's property is established. The taking in effect must be predicated on a "trespass" in the old sense of an unauthorized entry to the space that a landowner owns, which is the space extending up to the heavens and down to the center of the earth. However, flights near the plaintiff's property may, even if they do not pass directly over that property, certainly constitute a nuisance, and there is a minority view, taken in Oregon and Washington, that allows a claim of taking to be based on an underlying nuisance, whether or not any technical trespass has occurred.


205. See Nestle v. City of Santa Monica, 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972) (jet aircraft flights to and from municipal airport held not to support the plaintiffs' inverse condemnation claim, but possible nuisance claim recognized).


Trespass and nuisance, then, have in some respects been moved closer together by court opinions of recent decades. First, there is authority, chiefly in Oregon, which introduces a balancing test into trespass analysis, such as has always been present in private nuisance. Yet here the balancing is performed to determine the scope of exclusive possession rather than the extent of the possessor's interest in use and enjoyment. Second, there is authority, mainly in Washington state, imposing a requirement of actual harm, such as is always present in nuisance cases, in those trespass cases that display no tangible entry. Third, subject to the above-mentioned two modifications, there is authority in Oregon, Washington, and other jurisdictions allowing trespass liability to be found when there is no tangible or visible entry, even though nuisance liability is normally also a possibility in such situations. Fourth, there is a trend toward treating private nuisance as an exclusively intentional tort (though this is probably still a minority view), just as trespass has long been.

However, there remain a number of differences between trespass and private nuisance. First, the great weight of authority still requires a tangible, visible entry for trespass liability, while this is never essential to nuisance. Second, most authorities still allow nuisance to be based on intent or negligence or, when an abnormally dangerous activity is present, strict liability, even though it is true that the label "nuisance" in the negligence or strict liability cases may add nothing but confusion to the picture. Trespass, on the other hand, must be based on intent. Third, when intent is the basis of nuisance, it is a different intent from that needed for trespass. In nuisance, the relevant intent is to disturb the plaintiff's use and enjoyment of his real property. In trespass, it is the intent to go upon or use the plaintiff's real property, thus interfering with his right of exclusive possession. Fourth, trespass liability can be established only if the plaintiff shows a possessory interest in the real property involved. In nuisance, however, any property rights will suffice. Further, when a disturbance occurs above or below the surface, trespass liability is now usually considered inappropriate, at least unless the disturbance was within the "immediate reaches" of the surface; nuisance is the appropriate action. Fifth, actual harm is necessary to nuisance liability, but it is generally unneeded in trespass. Finally, all of the above-mentioned differences mirror the underlying distinction that trespass involves interference with possession while nuisance involves interference with use and enjoyment.

In light of the continuing differences between the torts, it is submitted that they will continue to have separate identities and that both are needed in order to address all situations of unjustified interferences with property. Some of the limitations imposed in the past, such as the distinction between

tangible and intangible invasions, now often appear irrelevant and difficult to draw and will likely disappear in time. The overlap of nuisance with negligence and strict liability presents unnecessary duplication, plus confusion as to applicable defenses, and thus nuisance is likely to become, like trespass, an exclusively intentional tort — perhaps covered in Torts courses along with trespass, battery, etc., rather than separately as in the past. Yet the overlap between trespass and nuisance appears inevitable since interference with possession and interference with use and enjoyment will themselves inevitably often overlap. With the dissolving of the aforementioned old barriers, the overlap is likely to increase. In cases within this borderland, "the action may be maintained upon either basis as the plaintiff elects or both ... "

Typically, trespass is going upon another's property without authorization, and nuisance is using one's own property to the disturbance of one's neighbor. Yet the breadth of nuisance is such that it may exist whether or not one goes onto another's property — and thus the overlap. A review of the cases does not find the oft-sought "simple and satisfying answer" to the question of distinguishing the torts of trespass and nuisance but does show that they have coexisted for centuries and are likely to do so for centuries more.


209. See Fairlawn Cemetery Ass'n v. First Presbyterian Church, 496 P.2d 1185, 1187 (Okla. 1972).

210. See Fairview Farms, Inc. v. Reynolds Metals Co., 176 F. Supp. 178, 184 (D. Or. 1959) (finding that a review of the Oregon cases did not give such an answer to the problem of distinguishing trespass and nuisance).