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Private Nuisance Law: A Window on Substantive Justice

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I. INTRODUCTION

MORE THAN ANY other tort action, the private nuisance action reveals the proper nature and full scope of tort law as an implementation of the classical principles of justice and their underlying moral norm of equal freedom.

The private wrong addressed by the private nuisance action is one of the few wrongs that it is feasible to prevent *ex ante*, and which often is prevented *ex ante* through the granting of an injunction, rather than being merely remedied *ex post* through monetary damages. As such, the private nuisance action clearly demonstrates the error of those, including many efficiency theorists, who describe tort law as merely setting prices, in the form of damages, for permitted invasions of others' interests, rather than, correctly, as the area of law that most fully addresses, articulates, and implements the basic principles of justice and right.

The equal freedom norm that underlies, connects, and co-ordinates these basic principles can be seen most clearly through an examination of the requirements for a successful private nuisance action. The nature of and relationship between the principles is illustrated most clearly through an examination of the remedies that are available for a successful nuisance action. The criteria for granting an injunction rather than limiting the plaintiff to a remedy in damages draw on the principle of distributive justice as well as the principle of interactive ('corrective') justice, in an integrated manner that some justice theorists have erroneously declared cannot coherently be done.¹

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¹ See, eg, EJ Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988)

Elaboration of these claims requires a substantial amount of preliminary ground clearing, since there is widespread confusion and misunderstanding regarding the principles of justice—especially the principle of interactive justice—and the nature and proper scope of the private nuisance action. In part II, I attempt to clear up the confusions and misunderstandings regarding the principles of justice. In part III, I attempt to clarify the nature and proper scope of the private nuisance action as a distinct (intentional) tort, which is explicitly grounded on the equal freedom norm. Finally, in part IV, I affirm the status of the private nuisance action as a strict liability tort by clarifying the criteria for the granting of an injunction, and I explain and justify those criteria as a co-ordinated implementation of the principles of distributive and interactive justice.

II. EQUAL FREEDOM, JUSTICE, AND RIGHTS

Over the ages, beginning with Aristotle, it has generally been assumed that the proper purpose of law is the implementation of justice: the creation and maintenance of the conditions necessary for the flourishing and fulfilment of each person in the community as a free and equal human being. One's freedom as a rational, human being has an internal aspect and an external aspect. The internal aspect, which law cannot and should not attempt to control, is a matter of personal virtue—one's shaping and living one's life by choosing and acting in accordance with the morally proper ends for a human being. The external aspect, which is the proper concern of justice and law, is one's practical exercise of one's freedom in the external world, which must be consistent with the equal external freedom of every other person.² As Immanuel Kant put it in his supreme principle of right: 'so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law'.³

The external exercise of equal freedom depends on sufficient access to the instrumental goods—material resources, political powers, and civil liberties—necessary for pursuing a meaningful human life ('positive freedom') and sufficient security against interferences by others with one's person and whatever instrumental goods one happens to possess ('negative freedom'). Distributive justice defines the scope of persons' positive freedom. Interactive justice, which traditionally but misleadingly has been referenced by using the Aristotelian terms 'corrective justice' or 'rectifi-

97 *Yale Law Journal* 949, 973–74, 979, 981, 984–85, 987–88, criticised in RW Wright, 'Substantive Corrective Justice' (1992) 77 *Iowa Law Review* 625, 632, 707–08.

² RW Wright, 'The Principles of Justice' (2000) 75 *Notre Dame Law Review* 1859, 1871–83.

³ I Kant, *The Metaphysics of Morals* (M Gregor tr and ed, Cambridge, Cambridge University Press, 1996) para 6:231.

catory justice', defines the scope of persons' negative freedom. Together, distributive justice and interactive justice seek to assure the attainment of the common good (the realisation, to the extent practicable, of each person's humanity) by providing each person with his or her equal or fair share of the social stock of instrumental goods (distributive justice) and by securing his or her person and existing stock of instrumental goods from interactions with others that are inconsistent with his or her right to equal external freedom (interactive justice).⁴

The term 'interactive justice' conveys the true nature and focus of Aristotelian 'corrective justice' and should be used instead of the latter term, which unfortunately nowadays is commonly interpreted literally and then dismissed, without investigation of Aristotle's actual philosophy. Read literally, the terms 'corrective justice' and 'rectificatory justice', which are the usual English translations of Aristotle's Greek terms, imply that this type of justice is only concerned with correcting or rectifying wrongs after they have occurred, and not with preventing them beforehand or with defining the nature of the wrong being corrected, or, as prominent scholars have erroneously assumed, that this type of justice is not distinct from but rather is merely a corollary of distributive justice—that corrective justice merely corrects deviations from the entitlements mandated by distributive justice.⁵

Neither of these assumptions is a correct interpretation of the use of these terms by Aristotle or others in the natural law/rights tradition. Aristotle clearly conceived of 'corrective justice' as being distinct and independent from distributive justice, with a different criterion of equality. He described the equality mandated by distributive justice as proportional or 'geometric': a person's just share of the resources of a society is determined by his or her relative ranking on some distributive criterion such as virtue, merit, or need. He explicitly distinguished this proportional equality from the absolute or 'arithmetic' equality demanded by 'corrective justice', which requires that, in 'transactions' (interactions) with others, the absolute equality and dignity of those others as human beings be respected regardless of their relative virtue, merit, or need. Furthermore, Aristotle discussed many of the factors that are relevant to just interactions, including intent, mistake, foreseeability, and consent.⁶

⁴ Wright, 'The Principles of Justice', above n 2, at 1883–87.

⁵ See, eg, J Rawls, *A Theory of Justice* (Cambridge MA, Harvard University Press, 1971) 10–11; R Dworkin, *Law's Empire* (Cambridge MA, Harvard University Press, 1986) 297–309; J Waldron, 'Criticizing the Economic Analysis of Law' (1990) 99 *Yale Law Journal* 1441, 1450–53 (reviewing JL Coleman, *Markets, Morals, and the Law* (Cambridge, Cambridge University Press, 1988)); J Gordley, 'Tort Law in the Aristotelian Tradition' in DG Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Oxford University Press, 1995) 131, 132–33, 135–36, 157.

⁶ See, eg, Aristotle, 'Nicomachean Ethics' (WD Ross and JO Urmson trs) in J Barnes (ed), *The Complete Works of Aristotle* (Princeton NJ, Princeton University Press, 1984) vol 2, at

Compensatory damages are the most common remedy in tort law and contract law. However, although this is sometimes forgotten by those who view tort law and contract law as merely setting prices for (allegedly efficient) non-consensual interactions, they are not the only remedy available in these areas of the law. Courts provide equitable, non-monetary relief much more often than is usually understood. For example, in tort law, a plaintiff may obtain repossession of property of which he or she has been wrongfully dispossessed, and, with sufficient advance notice of imminent or ongoing tortious injury, he or she may obtain an injunction to avert such injury.⁷

All of these remedies are part of the remedial component of interactive justice. They are all concerned with preventing and, if that should fail, to the extent possible rectifying unjust interactions—interactions that are inconsistent with and adversely affect others' equal external freedom. This is the purpose of tort law and contract law. It is also the purpose of criminal law.⁸ Tort law and contract law deal with 'private wrongs', unjust discrete injuries to the persons or property of specific individuals. Criminal law deals with 'public wrongs', unjust non-discrete injuries to the dignity and security of each member of society that result from (or are constituted by) criminals' acting in disregard of the society's norms of public peace and order, thereby declaring themselves to be outside the law ('outlaws').⁹

Properly understood and administered, punitive damages in tort law also compensate for discrete private injuries. When a person harms another through a deliberate disregard of the other's rights, then in addition to any non-dignitary harm that was inflicted on the victim, the victim has also suffered a discrete dignitary injury, which can be rectified through the imposition of private retribution in the form of punitive damages in tort law. These punitive damages, being private retribution for a discrete private dignitary injury, are distinct and separate from any criminal punishment that may be imposed for any non-discrete 'public wrong' that was caused to each member of the community as a result of the same conduct. This is how punitive damages once were understood in the United States¹⁰ and are now being limited (although still without recognition of

paras 1131a10–1132b21, 1135a16–1136b10, discussed in Wright, 'Substantive Corrective Justice', above n 1, at 691–702.

⁷ DB Dobbs, *The Law of Torts* (St Paul MN, West Publishing, 2000) 112–13, 153, 1047, 1338–39.

⁸ It is also the purpose of the law of restitution and many other areas of the law. See Wright, 'Substantive Corrective Justice', above n 1, at 708–10.

⁹ See RW Wright, 'Principled Adjudication: Tort Law and Beyond' (1999) 7 *Canterbury Law Review* 265, 291–92.

¹⁰ See TB Colby, 'Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs' (2003) 87 *Minnesota Law Review* 583, 613–36; AJ Sebok, 'What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today' (2003) 78 *Chicago-Kent Law Review* 163, 180–204. Unfortu-

the private rather than public nature of the wrong being remedied) by the United States Supreme Court.¹¹ It is how they generally continue to be understood in common law and civil law jurisdictions outside the United States—for example, as ‘aggravated damages’ in England, Australia, and New Zealand and as ‘satisfaction damages’ in a number of countries in continental Europe.¹²

III. PRIVATE NUISANCE AS A DISTINCT TORT

In order to understand the moral foundations of the private nuisance action, we first need to identify its proper content and contours as a distinct legal action. This turns out not to be a simple task. In the cases and the secondary literature, situations properly addressed under other tort actions are often treated as private nuisance actions, which has caused unnecessary complexity and confusion. In the following text, I focus primarily on the discussion of the private nuisance action in the *Restatements of Torts* and case law in the United States. However, I also refer to discussions in leading British Commonwealth texts,¹³ which indicate that an even greater failure to clarify and distinguish the private nuisance action as a distinct tort exists in the Commonwealth.

A. Distinguishing the Public Nuisance Action

The *First Restatement of Torts* emphasised the distinct natures of the private nuisance action and the public nuisance action and did not merge

nately, in the United States the private wrong conception of punitive damages in tort law generally has given way to a public wrong conception, which views such damages solely as a backstop to criminal law: see Colby at 584–613, 637–78; Wright, ‘Principled Adjudication’, above n 9, at 293.

¹¹ See *Philip Morris USA v Williams* 549 US 346 (2007); *State Farm Mutual Auto Insurance Co v Campbell* 538 US 408 (2003) 416–17, 422–23 (Kennedy J for Rehnquist CJ, Kennedy, Stevens, O’Connor, Souter and Breyer JJ).

¹² See JG Fleming, *The Law of Torts*, 9th edn (Sydney, Lawbook, 1998) 271–74; W van Gerven, J Lever and P Larouche, *Common Law of Europe Casebooks: Tort Law* (Oxford, Hart Publishing, 2000) para 8.1. As these sources note, distinct ‘exemplary’ damages are also awarded in Great Britain and the British Commonwealth in limited types of situations.

¹³ See, eg, AM Dugdale et al (eds), *Clerk and Lindsell on Torts*, 19th edn (London, Sweet & Maxwell, 2006) (*Clerk and Lindsell on Torts*) ch 20; S Todd et al (eds), *The Law of Torts in New Zealand*, 2nd edn (Wellington, Brooker’s, 1997) (*The Law of Torts in NZ*) ch 9; P Giliker, ‘Relationships Between Neighbours: England and Wales 1850–2000’ in J Gordley (ed), *The Development of Liability Between Neighbours* (Cambridge, Cambridge University Press, 2010) 29; LN Klar, *Tort Law*, 4th edn (Toronto, Thomson, 2008) ch 18; M Lunney and K Oliphant, *Tort Law: Text and Materials*, 4th edn (Oxford, Oxford University Press, 2010) ch 12; NJ McBride and R Bagshaw, *Tort Law*, 3rd edn (Harlow, Pearson Education, 2008) ch 19; K Oliphant (ed), *The Law of Tort*, 2nd edn (London, LexisNexis Butterworths, 2007) (*The Law of Tort*) ch 22; RM Solomon et al, *Cases and Materials on the Law of Torts*, 7th edn (Toronto, Thomson, 2007) ch 24.

their treatment.¹⁴ The *Second Restatement of Torts*, although continuing to state that the two actions are 'quite different' and 'quite unrelated', unfortunately also inconsistently states that they are, with minor differences, subject to the same rules and merges their treatment.¹⁵ It then proceeds to state different rules for each with a disjointed and confusing elaboration of the rules governing private nuisance actions due to the merged treatment of the two actions.¹⁶

The required legal injury for the tort of private nuisance is a significant interference, through a non-trespassory invasion, with the plaintiff's use and enjoyment of an interest in land.¹⁷ A public nuisance is an unreasonable interference with the common interests or rights of the general public, such as the blocking of a highway or the maintenance of an illegal house of prostitution, which need not involve an interference with the use or enjoyment of an interest in land. It is a wrong to each and every member of the general public, which initially was always prosecuted as a criminal action and still is prosecuted, with respect to the interests of the general public, by the public prosecutor as a public wrong. However, an individual who suffers a discrete injury different in kind and not merely in degree from the injury suffered by the general public is granted standing to maintain a public nuisance action, in tort, for such discrete injury.¹⁸

Although the individual's public nuisance action is a private one encompassing only that individual and the defendant, seeking recourse only for the distinct wrong that the individual has suffered rather than also or instead for the shared non-discrete wrong to the general public, Nicholas McBride and Roderick Bagshaw deny that it is properly classified as a tort action or involves a civil wrong, since the duty that was breached was one owed to the general public rather than to the plaintiff.¹⁹ However, the public is not an independent organic entity but a collection of individuals. The duty owed to the public is a duty owed to each of its

¹⁴ *Restatement of the Law: Torts* (St Paul MN, American Law Institute, 1939) (*First Restatement*) ch 40 scope note and introductory note at 216–18. See also *The Law of Torts in NZ*, above n 13, at 519–20.

¹⁵ *Restatement of the Law, Second: Torts* (St Paul MN, American Law Institute, 1979) (*Second Restatement*) ch 40 introductory note at 84–85.

¹⁶ Compare *First Restatement*, above n 14, at § 822 with *Second Restatement*, above n 15, at §§ 821D, 821F, 822.

¹⁷ *Second Restatement*, above n 15, at §§ 821D, 821F; *First Restatement*, above n 14, at § 822.

¹⁸ *First Restatement*, above n 14, at ch 40 scope note and introductory note at 216–18; *Second Restatement*, above n 15, at §§ 821B, 821C, 826(a), 821F comment c; Dobbs, above n 7, at 1334–35; Klar, above n 13, at 715–16, 721–23; *The Law of Tort*, above n 13, at paras 22-69–22-70, 22-74–22-77; *The Law of Torts in NZ*, above n 13, at 519–21 (suggesting a plausible explanation for confusion of the two quite different actions); McBride and Bagshaw, above n 13, at 400–401; WP Keeton et al (eds), *Prosser and Keeton on Torts*, 5th edn (St Paul MN, West Publishing, 1984) 617–18, 643–52.

¹⁹ McBride and Bagshaw, above n 13, at 28, 791.

members, each of whom suffers a shared non-discrete wrong when there is a public nuisance. Although in earlier times any member of the public could initiate a criminal action on behalf of the general public to obtain redress for the non-discrete wrong suffered by him or her and everyone else, now generally only the public prosecutor, who is best situated to act on behalf of all the public, is authorised to do so. However, for any discrete injury suffered by an individual as a result of the breach of the 'public' duty, that individual is the only one with standing to seek redress.

B. Distinguishing the Negligence and Ultrahazardous Liability Actions

In both the United States and the British Commonwealth, the private nuisance action is often described as a field of tort liability, defined by the type of injury suffered regardless of the type of tortious conduct involved.²⁰ Section 822 of the American Law Institute's *Second Restatement of Torts* states:

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of [a significant non-trespassory] invasion of another's interest in the private use and enjoyment of land, and the invasion is either

- (a) intentional and unreasonable, or
- (b) unintentional and otherwise actionable under the rules governing liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.²¹

The inclusion of sub-section (b) is puzzling. If the injury suffered is already actionable through some other tort action, there would seem to be no benefit gained, but rather only unnecessary additional analysis and confusion generated, by making available a redundant private nuisance action that requires proof of all the same elements as in the other action, plus more. If, contrary to the 'otherwise actionable' language, the other action does not currently encompass the interest in the use and enjoyment of one's land, the issue should be squarely faced as to whether that interest should be protected against the type of conduct or activity addressed by the other action. If so, it should be included as one of the interests protected by that other action; if not, it should not be snuck in through the back door through the private nuisance action under sub-section (b). For

²⁰ See, eg, *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound)* [1967] AC 617 (PC) 639; *First Restatement*, above n 14, at ch 40 scope note and introductory note at 220–22; *Second Restatement*, above n 15, at § 822 comment a; Dobbs, above n 7, at 1321, 1324; Lunney and Oliphant, above n 13, at 653.

²¹ *Second Restatement*, above n 15, at § 822; see also at §§ 821D (non-trespassory invasion required), 821F (significant harm required, 'of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose').

example, although the negligence action applies most broadly to physical harms to person or property, in many jurisdictions it also applies to certain instances of pure emotional distress and pure economic loss.²² The policy issues involved in imposing liability for negligent interference with another's interest in the use and enjoyment of land should similarly be addressed through the doctrinal and analytical tools developed in the negligence action to address the proper breadth and scope of liability for harms caused by negligent conduct, rather than confusingly and redundantly (and perhaps inconsistently) in a private nuisance action.²³

The same reasoning applies to harms caused by ultrahazardous²⁴ conditions or activities, for which a distinct strict liability action, or group of actions, is available in almost every country, by statute or court decision.²⁵ The seminal source in the common law is Blackburn J's opinion for the Court of Exchequer Chamber in *Fletcher v Rylands*, in which he stated:

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.²⁶

Unfortunately, the opinions in the House of Lords on appeal, while claiming to accept and agree with Blackburn J's true rule, restated it as a seemingly very broadly applicable rule of absolute liability for the escape of anything that merely *might* (rather than being likely to) cause harm if it escaped,²⁷ or that actually causes harm as a result of any 'non-natural' use of the defendant's land.²⁸ Subsequent judicial decisions in the British Commonwealth, in an attempt to avoid such extremely broad liability, have interpreted *Rylands v Fletcher* liability increasingly narrowly (or have even completely eliminated it), on the ground that it supposedly redundantly addresses situations already addressed by the negligence or private nuisance action.²⁹ Focusing solely on Blackburn J's discussion of

²² See Dobbs, above n 7, at 258, 835–52, 1349–54, 1385–87; C van Dam, *European Tort Law* (Oxford, Oxford University Press, 2006) 146–49, 169–79.

²³ Keeton et al, above n 18, at 69–70; cf Dobbs, above n 7, at 1320. For discussion of cases treating negligent interferences with the use and enjoyment of land as negligence actions, see *The Law of Torts in NZ*, above n 13, at 542; Lunney and Oliphant, above n 13, at 660–61.

²⁴ 'Ultrahazardous' is the term used in the *First Restatement*, above n 14, at § 822. For reasons discussed in the text accompanying nn 34–41 below, the *First Restatement's* elaboration of liability for ultrahazardous conditions or activities is highly superior to the *Second Restatement's* elaboration of liability for abnormally dangerous conditions or activities.

²⁵ See, eg, van Dam, above n 22, at 353–67, 396–407.

²⁶ *Fletcher v Rylands* (1866) LR 1 Ex 265 (Exch Cham) 279. See also Giliker, above n 13, at 37.

²⁷ *Rylands v Fletcher* (1868) LR 3 HL 330 (HL) 340 (Lord Cranworth).

²⁸ *ibid*, at 339–40 (Lord Cairns).

²⁹ See, eg, *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1; *Cambridge Water Co v Eastern Counties Leathers plc* [1994] 2 AC 264 (HL) (*Cambridge Water*); *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR

nuisance cases, the British decisions ignore his discussion of, and reliance on, precedents involving trespassing cattle and dangerous animals when fashioning and elaborating his true rule.³⁰ As the following discussion explains, these precedents and the language of Blackburn's true rule point to a basis of strict liability that is distinct from the one underlying the sometimes overlapping private nuisance action.³¹

Although *Rylands v Fletcher* strict liability initially was rejected in the United States, due in large part to the mangling of Blackburn J's true rule by the House of Lords on appeal,³² the great majority of jurisdictions in the United States now accept it.³³ The basic principle embodied in Blackburn J's true rule was incorporated and clarified in sections 519 and 520 of the *First Restatement of Torts*:

§ 519. ... [O]ne who carries on an ultrahazardous activity is liable to another whose person, land, or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

520; *Tock v St John's Metropolitan Area Board* [1989] 2 SCR 1181; *Read v J Lyons & Co Ltd* [1947] AC 156 (HL); *Rickards v Lothian* [1913] AC 263 (PC). See also *Clerk and Lindsell on Torts*, above n 13, at ch 21; *The Law of Tort*, above n 13, at paras 23-2, 23-4-23-6, 23-8-23-10; Giliker, above n 13, at 37-38, 44; Klar, above n 13, at 620 n 9, 621-24, 626-27, 629-30; Lunney and Oliphant, above n 13, at 686-703; McBride and Bagshaw, above n 13, at 401, 754-69; *The Law of Torts in NZ*, above n 13, at ch 10. But see *A-G v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (New Zealand Court of Appeal) 354, in which Cook J noted that Blackburn J's judgment 'has hardly been taken seriously by modern English courts', which instead have focused on Lord Cairns' non-natural use requirement. McBride and Bagshaw, like other rights theorists who (incorrectly) believe that wrongs exist only when there was a duty to behave differently, treat *Rylands v Fletcher* liability as not being part of tort law since it is a strict liability rule, which holds the defendant liable despite the lack of breach of a duty to behave differently: McBride and Bagshaw, above n 13, at 25-27, 756-57. They inconsistently vacillate on whether strict liability for a harmful trespass to land in cases of necessity should be treated as part of tort law, and they employ a more capacious equal freedom conception of wrongs in order to treat strict liability for a private nuisance as part of tort law: at 366, 376-77.

³⁰ Dan Dobbs similarly focuses on the House of Lords' opinions in *Rylands v Fletcher* rather than Blackburn J's true rule and views *Rylands v Fletcher* as having 'anchored strict liability in the law of nuisance or competing land uses': above n 7, at 951, 954. He treats the strict liability actions for trespassing cattle, dangerous animals, abnormally dangerous activities, and private nuisances as distinct even though he assumes that they all are based on the same rationale: the fact that the defendant has engaged in an activity that is uncommon or inappropriate in the particular area or creates a non-reciprocal risk: at 941-59, 964-68.

³¹ See Klar, above n 13, at 621; R Bagshaw, 'Rylands Confined' (2004) 120 *Law Quarterly Review* 388; J Murphy, 'The Merits of *Rylands v Fletcher*' (2004) 24 *Oxford Journal of Legal Studies* 643; D Nolan, 'The Distinctiveness of *Rylands v Fletcher*' (2005) 121 *Law Quarterly Review* 421. Donal Nolan nevertheless agrees with abolition of *Rylands*-based strict liability: at 449.

³² See, eg, *Brown v Collins* 53 NH 442 (1873).

³³ See FV Harper, F James Jr and OS Gray, *The Law of Torts*, 2nd edn (Boston MA, Little, Brown & Co, 1986) vol 3, 193-95; Dobbs, above n 7, at 958-59; Keeton et al, above n 18, at 548-53.

§ 520. An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.³⁴

When these sections are read carefully and together, they state that there is strict liability for harms (to persons or property) caused by the ultrahazardous aspect of an ultrahazardous activity, wherever it may be located, and define an activity as ultrahazardous if the defendant should know that it is *likely* to cause *serious* injury to others *if* it should 'mis-carry' (escape from the defendant's control), no matter how much care the defendant exercises to prevent such miscarriage and no matter how unlikely such miscarriage may be, unless the activity is a 'common usage'. That is, the activity is ultrahazardous if the foreseeable risk of physical harm to others' person or property is qualitatively significant, given the high magnitude of both P₂ (the conditional probability of injury *if* there is a loss of control) and L (the seriousness of the likely injury), even if, due to a very low P₁ (the probability of escape or loss of control), the overall risk (P₁ × P₂ × L) is not quantitatively significant and thus not negligent. The 'common usage' exception is applied in an ad hoc, inconsistent manner in different States in the United States to prevent strict liability for some types of ultrahazardous activities, primarily the driving of automobiles³⁵ (which is subject to strict liability in many civil law jurisdictions³⁶). A more principled and consistently applied exception, which is often described as the defence of assumption of risk and would justify many of the English decisions holding that *Rylands v Fletcher* liability is inapplicable, applies to those plaintiffs who were seeking to benefit from the ultrahazardous activity as participants, spectators, employees, etc.³⁷

Setting aside the inconsistently applied 'common usage' exception, the *First Restatement's* criteria for an ultrahazardous activity generally support the instances of strict liability for such activities that have been recognised in the United States.³⁸ I would like to be able to state that the *First Restatement's* criteria are widely understood, taught, and accepted in the United States. However, this is not true. The *First Restatement's* elaboration and clarification of Blackburn J's true rule was replaced in the *Second Restatement* by a mélange of flawed factors, none of which is necessary or sufficient for identifying 'abnormally dangerous' conditions or activities.³⁹ Although the *Second Restatement's* formulation has been frequently

³⁴ *First Restatement*, above n 14, at §§ 519–20.

³⁵ See, eg, *Koos v Roth* 652 P 2d 1255 (Or 1982); *Second Restatement*, above n 15, at § 520 comment i.

³⁶ van Dam, above n 22, at 353–54, 359–70.

³⁷ Gordley, above n 5, at 156–57.

³⁸ K Kress, 'The Seriousness of Harm Thesis for Abnormally Dangerous Activities' in DG Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Oxford University Press, 1995) 277, 282–85.

³⁹ *Second Restatement*, above n 15, at §§ 519–20. Section 520 states:

and soundly criticised,⁴⁰ the criticism has not resulted in significant support for the *First Restatement's* formulation, which continues to be misunderstood and misstated even by its proponents.⁴¹

In any event, there is no good reason to go through the extra analysis required to establish a private nuisance action when, as in sub-section 822(b) of the *Second Restatement*, the private nuisance liability is piggybacked and dependent on satisfaction of the requirements for some other tort.⁴² Sub-section 822(b) of the *Second Restatement* (and its prior incarnation in the *First Restatement*) should be ignored, just as courts and academics in the United States⁴³ (but not in the British Commonwealth⁴⁴) have ignored—indeed, generally are unaware of—the *Second Restatement's* similar description of the trespass to land action as a field of tort liability that encompasses unintentional (negligent, reckless, or

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Item (a) refers to the overall risk ($P_1 \times P_2 \times L$), which is emphasised along with the equally non-explanatory criterion of non-reciprocal risk in Gordley, above n 5, at 153–55, or at least to $P_1 \times P_2$. Each of these mathematical products usually will be low rather than high due to a low P_1 . Item (c) is almost always true, for any condition or activity. Item (e) is almost never true. Item (f) may be appropriate for a negligence analysis but not a strict liability analysis.

⁴⁰ See, eg, *Koos v Roth* 652 P 2d 1255 (Or 1982); Dobbs, above n 7, at 952–54; Keeton et al, above n 18, at 554–56.

⁴¹ See, eg, Keeton et al, above n 18, at 555–56. In addition to its much better elaboration of the criteria for identifying an ultrahazardous activity, the *First Restatement* correctly insists, consistent with the cases and Blackburn J himself, that the harm for which recovery is sought must be caused by the ultrahazardous aspect of the defendant's activity, while the *Second Restatement* merely requires that the harm be caused by the activity per se. See *Second Restatement*, above n 15, at § 519; RW Wright, 'Causation in Tort Law' (1985) 73 *California Law Review* 1735, 1769–70.

⁴² See Dobbs, above n 7, at 1324–25.

⁴³ See, eg, *ibid*, at 95–102; Keeton et al, above n 18, at 69–70, 73.

⁴⁴ In England, the issue seems to relate to terminology rather than substance. The courts have made it clear that, while it may (or may not) still be proper to refer to a negligent but unintentional unpermitted contact with the person of the plaintiff as a 'trespass to person' but not as a 'battery' (which requires intent), a negligently caused contact will be actionable only if it results in actual harm to the plaintiff: *Lunney and Oliphant*, above n 13, at 43–51. Similarly, although actions for trespass to land apparently may be based on negligence as well as intent, there is an actual harm requirement only for negligent trespasses to land: *The Law of Torts in NZ*, above n 13, at 461; *Clerk and Lindsell on Torts*, above n 13, at para 19-06. Klar states that trespass actions in Canada, for trespass to person as well as property, can still be based on negligence as well as intent, with no actual harm requirement in either case: above n 13, at 32–34, 46, 56–58, 65, 91, 106, 115. Other Canadian authors agree with respect to trespass to persons, but treat the other trespass actions as requiring intent: see, eg, Solomon et al, above n 13, at 56–58, 61, 66, 111, 145.

ultrahazardous) as well as intentional invasions of another's interest in the exclusive possession of land, with, however, a physical harm requirement for unintentional invasions.⁴⁵

Elimination of sub-section 822(b) of the *Second Restatement* leaves sub-section 822(a), which provides liability for an *intentional* significant interference, through a non-trespassory invasion, with the plaintiff's interest in the use and enjoyment of land.⁴⁶ Private nuisance is a distinct tort only as a member of the common law's catalogue of discrete intentional torts, which are distinguished from one another primarily by the type of injury that must be intentionally caused. If the required intent does not exist, liability should depend on satisfaction of the requirements for some other recognised tort, such as negligence or ultrahazardous activity, rather than treating the situation as a private nuisance.⁴⁷

As with the other intentional torts, the intent required for a private nuisance action may be either the defendant's *purpose* to cause the required legal injury or his or her *knowledge* that it is occurring or is substantially certain to occur as a result of his or her conduct or activity.⁴⁸ The intent in the private nuisance action is almost always the second (knowledge rather than purpose) type.⁴⁹ The knowledge type of intent will almost always exist in repetitive or continuing nuisance situations, through either direct knowledge of the legal injury's almost certain occurrence or knowledge acquired as a result of complaints by the plaintiff. It may also exist, and if so will (or should) be sufficient to establish liability, in single occurrence situations.⁵⁰

Unfortunately, the *Second Restatement* further obscures the distinct nature of the private nuisance action as an intentional tort by adding 'and unreasonable' to 'intentional' in sub-section 822(a).⁵¹ 'Unreasonable' implies 'negligent', especially to anyone trained in the law. However, if 'unreasonable' in this context means 'negligent', the private nuisance action is a very odd and useless intentional tort: one that requires not only intent but also satisfaction of the requirements for a negligence action. Interpreting 'unreasonable' as 'negligent' is even odder given the structure of section 822. Since negligent invasions are already included in sub-section 822(b), why mention them again in sub-section 822(a) and, moreover, add an intention requirement? What plaintiff would ever want to rely upon

⁴⁵ *Second Restatement*, above n 15, at §§ 165, 821D comment d.

⁴⁶ See text accompanying n 21 above.

⁴⁷ *Copart Industries Inc v Consolidated Edison* 362 NE 2d 968 (NY 1977); Keeton et al, above n 18, at 69–70, 622–26, 652–54. Unfortunately, this does not seem to be the practice in the British Commonwealth. See text accompanying nn 77–83 below.

⁴⁸ *Second Restatement*, above n 15, at § 825.

⁴⁹ *ibid*, at § 825 comment d; *First Restatement*, above n 14, at ch 40 scope note and introductory note at 221–23, § 825 comment b; Keeton et al, above n 18, at 624–25.

⁵⁰ *Second Restatement*, above n 15, at § 825 comment d and illustrations 1 and 2.

⁵¹ See text accompanying n 21 above.

sub-section 822(a), which as so interpreted requires intent as well as negligence, rather than sub-section 822(b), which only requires negligence?

A reasonable assumption would be that the drafters of section 822 meant something other than 'negligent' and exhibited poor drafting skills by referring to an 'intentional and unreasonable' invasion. However, this assumption seems to be negated by the *Restatement's* primary definition of an 'unreasonable' invasion. Section 826 of the first and second *Restatements* states that whether an intentional invasion is unreasonable depends on whether the gravity of the harm outweighs the utility of the actor's conduct,⁵² which sounds very much like the definition of negligence in section 291 of the *Restatements*, which equates 'unreasonable' and 'negligent':

Where an act is one which a reasonable man would recognise as involving risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.⁵³

Indeed, the *Second Restatement* explicitly analogises the definition of 'unreasonable' in section 826 for a private nuisance to the definition of 'unreasonableness' and 'negligence' in section 291. It states that the two definitions are 'very similar' and differ merely in the fact that the risk (probability times seriousness) of harm is balanced against utility in the negligence action, while only the gravity (seriousness) of harm is balanced against utility in determining the reasonableness of an intentional private nuisance, since the intent in a private nuisance action is almost always the 'knowledge of a near certainty' type and the probability of harm is therefore close to one.⁵⁴

The implicit normative foundation is utilitarianism, or its modern elaboration, Kaldor-Hicks economic efficiency, which judge reasonableness in terms of aggregate utility or wealth maximisation, regardless of who is putting whom at risk for whose benefit. When discussing what is 'unreasonable' in the context of the private nuisance action, the *Second Restatement* states:

The question is not whether the plaintiff or the defendant would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. Consideration must be given not only to the interests of the person harmed but also for the interests of the actor and to the interests of the community as a whole. Determining unreasonableness is essentially a weighing process,

⁵² *First Restatement*, above n 14, at § 826; *Second Restatement*, above n 15, at § 826(a).

⁵³ *First Restatement*, above n 14, at § 291(1); *Second Restatement*, above n 15, at § 291.

⁵⁴ *Second Restatement*, above n 15, at § 822 comment k; see also *First Restatement*, above n 14, at § 828 comment b.

involving a comparative evaluation of conflicting interests in various situations according to objective legal standards.⁵⁵

An identical explanation of what makes conduct unreasonable appears in the *Second Restatement's* discussion of the negligence action:

Weighing interests. The judgment which is necessary to decide whether the risk so realized is unreasonable, is that which is necessary to determine whether the magnitude of the risk outweighs the value which the law attaches to the conduct which involves it. This requires ... that [the actor] give an impartial consideration to the harm likely to be done the interests of the other as compared with the advantages likely to accrue to his own interests, free from the natural tendency of the actor, as a party concerned, to prefer his own interests to those of others.⁵⁶

However, despite the obvious utilitarian influences, the authors of the first and second *Restatements* did not intend to adopt utilitarian or economic efficiency interpretations of reasonableness in either the negligence or private nuisance actions. They instead wanted to avoid the supposed danger that juries would find that a defendant's creation of any risk to others was unreasonable regardless of its contribution to the common good, understood in an equal freedom rather than aggregate utility sense. The best formulations they could come up with to counteract this supposed danger at the time the *First Restatement* was drafted adopted utilitarian language, but also contained significant qualifications and exceptions.⁵⁷ I have written extensively on this with respect to the negligence action, with detailed analysis of negligence cases in the United States and the United Kingdom.⁵⁸ Common sense, as well as analysis of the cases, clearly demonstrates the fallacy of a utilitarian or economic efficiency interpretation of reasonableness or negligence. Instead, in negligence cases different standards, consistent with interactive justice's equal freedom norm, apply in different types of situations depending on who is putting whom at risk for whose benefit. In the most common situation—defendants putting others at risk—no competent defence lawyer would argue that what the defend-

⁵⁵ *Second Restatement*, above n 15, at § 826 comment c; similarly *First Restatement*, above n 14, at § 826 comment b.

⁵⁶ *Second Restatement*, above n 15, at § 283 comment e; similarly *First Restatement*, above n 14, at § 283 comment c.

⁵⁷ RW Wright, 'Justice and Reasonable Care in Negligence Law' (2002) 47 *American Journal of Jurisprudence* 143, 146–58. Unfortunately, these qualifications have been eliminated by the reporters for the *Third Restatement*, who instead for the first time adopt, contrary to the cases and common sense, an explicit aggregate cost-benefit balancing interpretation of reasonableness and negligence and erroneously claim that such an interpretation is just as well as efficient. See *Restatement of the Law, Third: Torts: Liability for Physical and Emotional Harm* (St Paul MN, American Law Institute, 2010) § 3 comment e and reporters' note to comment d, criticised in Wright at 159–63, 170–94.

⁵⁸ RW Wright, 'Negligence in the Courts: Introduction and Commentary' (2002) 77 *Chicago-Kent Law Review* 425; RW Wright, 'Hand, Posner, and the Myth of the "Hand Formula"' (2003) 4 *Theoretical Inquiries in Law* 145.

ant did was reasonable because the defendant's expected gains outweighed the expected losses to those put at risk. That argument is much more likely to lead to a punitive damage award than a finding of reasonableness. Unless the person(s) put at risk by the defendant's conduct or activities are trespassers on the defendant's land, in which case the defendant's rights are paramount, the defendant's creation of significant foreseeable risks to others' persons or property is unreasonable unless the risks are necessary in order for those others to obtain, directly or indirectly, desired benefits that substantially outweigh the risks, are not too serious, and are risks about which they have been warned if it was feasible to do so.⁵⁹

The equal freedom, rights-respecting (rather than utilitarian efficiency) nature of the references to reasonableness in private nuisance doctrine is elaborated, albeit with considerable obfuscation, in the first and second *Restatements*. The gravity–utility balancing test in section 826 of each *Restatement* is a misleading charade, although one must wade through a number of other sections and comments before this becomes clear. The introductory note to the discussion of private nuisance in the *First Restatement* states: 'For the purpose of determining liability for damages for private nuisance, conduct may be regarded as unreasonable even though its utility is great and the amount of harm is relatively small.'⁶⁰ Both the first and second *Restatements* list three factors as important in determining the utility of the defendant's conduct:

- (a) the social value that the law attaches to the primary purpose of the conduct;
- (b) the suitability of the conduct to the character of the locality; and
- (c) the impracticability of preventing or avoiding the invasion.⁶¹

Social value depends on whether the 'general public good' is advanced. While the general public good may be advanced by purely private enterprises, 'activities that are customary and usual in the community have relatively greater social value than those that are not, and those that produce a direct public benefit have more than those carried on primarily for the benefit of the individual.'⁶² Moreover,

⁵⁹ Wright, 'Myth of the "Hand Formula"', above n 58, at 180–223.

⁶⁰ *First Restatement*, above n 14, at ch 40 scope note and introductory note at 223–24; similarly *Second Restatement*, above n 15, at § 822 comment d.

⁶¹ *Second Restatement*, above n 15, at § 828; similarly *First Restatement*, above n 14, at § 828.

⁶² *Second Restatement*, above n 15, at § 828 comment f; see also at § 828 comments e and g; *First Restatement*, above n 14, at § 828 comments d and e. If the defendant's conduct was malicious—done for the sole purpose of injuring the plaintiff's person or property—it is unreasonable 'as a matter of law': *Second Restatement*, above n 15, at § 829 and comment b; *The Law of Torts in NZ*, above n 13, at 559–60; McBride and Bagshaw, above n 13, at 382–83. No one even thinks of comparing the utility the defendant gains from his or her malicious conduct with the disutility suffered by the plaintiff.

It is only when the conduct has utility from the standpoint of all the factors that its merit is ever sufficient to outweigh the gravity of the harm it causes. If the conduct lacks utility from the standpoint of any one of the factors, the fact that it has utility from the standpoint of other factors is immaterial.⁶³

Thus, '[i]f the particular activity or inactivity is not suited to the character of the locality, the conduct generally lacks utility and the invasion it causes is generally unreasonable as a matter of law if the harm involved is at all serious.'⁶⁴ Moreover,

When a person knows that his conduct will interfere with another's use or enjoyment of land and it would be practicable for him to prevent or avoid part or all of the interference and still achieve his purpose, his conduct lacks utility if he fails to take the necessary measures to avoid it. It is only when an intentional invasion is practically unavoidable that one can be justified in causing it; and even then, he is not justified if the gravity of the harm is too great. An invasion is practically avoidable if the actor by some means can substantially reduce the harm without incurring prohibitive expense or hardship.⁶⁵

An invasion is deemed to be practically avoidable even if it would be less expensive or difficult for the plaintiff to take steps to avoid the harm, if those steps would impose a significant burden on the plaintiff.⁶⁶ This principle is given independent black letter treatment in sub-section 826(b) of the *Second Restatement*, as a definition of unreasonableness that is paired with, but distinct from, the gravity-utility definition in sub-section 826(a).⁶⁷

Even when the defendant's conduct has sufficient utility from the standpoint of all three of the listed factors, an intentional invasion is declared to be unreasonable, regardless of the utility of the defendant's conduct, 'if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation'.⁶⁸ How much harm should the other be required to bear? In the main comment on 'unreasonableness' of intentional invasions,⁶⁹ the answer is given in terms of

⁶³ *First Restatement*, above n 14, at § 828 comment b; see also *Second Restatement*, above n 15, at § 828 comment c.

⁶⁴ *Second Restatement*, above n 15, at § 828 comment g; see also at § 831; *First Restatement*, above n 14, at §§ 828 comment f, 831.

⁶⁵ *Second Restatement*, above n 15, at § 828 comment h; see also at § 830; *First Restatement*, above n 14, at §§ 828 comment g, 830.

⁶⁶ *Second Restatement*, above n 15, at § 827 comment i; *First Restatement*, above n 14, at § 827 comment g.

⁶⁷ *Second Restatement*, above n 15, at § 826(b). But see *Carpenter v The Double R Cattle Co* 701 P 2d 222 (Idaho 1985) (rejecting sub-section (b) by a 3-2 vote).

⁶⁸ *Second Restatement*, above n 15, at § 829A; see also at § 827 comment b. The same point is expressed differently at § 826 comment e: 'the legal utility of the activity may also be greatly reduced by the fact the actor is operating the factory and producing the noise and smoke without compensating his neighbors for the harm done to them'.

⁶⁹ *Second Restatement*, above n 15, at § 822 comment g; *First Restatement*, above n 14, at § 822 comment j.

the equal freedom based 'give and take, live and let live' principle that Bramwell B set forth in *Bamford v Turnley*,⁷⁰ which is also reflected in the definition of a significant harm or interference in section 821F of the *Second Restatement*: 'There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose.'⁷¹

In sum, 'unreasonable' refers to the impact on the plaintiff's use and enjoyment of his or her land, rather than to the defendant's conduct.⁷² 'Unreasonable' ends up having the same meaning as, and is used interchangeably and redundantly with, 'significant', which is interpreted objectively in accord with Bramwell B's 'give and take, live and let live' principle.⁷³ Even when 'unreasonable' is properly interpreted as applying to the evaluation of the plaintiff's injury rather than the defendant's conduct, its use is likely to mislead given its strong association with the negligence concept. It therefore is best to avoid any use of the word 'unreasonable' and instead to focus clearly on the nature of the legal injury that must be intentionally caused by the defendant: a significant

⁷⁰ *Bamford v Turnley* (1862) 3 B & S 66, 82-84; 122 ER 27, 33-34. Bramwell B's 'give and take, live and let live' principle, which is based on equal freedom, is inconsistently followed by a utilitarian argument. At 3 B & S 83-85; 122 ER 34 he states:

It seems to me that that principle may be deduced from the character of these cases, and is this, viz., that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. ... There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.

But later, he states (at 3 B & S 84-85; 122 ER 34):

The public consists of all the individuals in it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual he on the whole would be a gainer. But whenever this is the case,—whenever a thing is for the public benefit, properly understood,—the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain.

Lunney and Oliphant focus on the second paragraph above, which contains the utilitarian argument, rather than the usual citation to the morally and legally relevant first paragraph, which is based on the equal freedom principle: above n 13, at 645. Their discussions of negligence and private nuisance employ utilitarian conceptions of public benefit, the common good and reasonableness, rather than equal freedom conceptions: at 166, 172-75, 640-41, 644-46.

⁷¹ *Second Restatement*, above n 15, at § 821F; see also *First Restatement*, above n 14, at § 822 comment g (similar definition of a 'substantial invasion').

⁷² See, eg, *Morgan v High Penn Oil Co* 77 SE 2d 682 (NC 1953); *Jost v Dairyland Power Cooperative* 172 NW 2d 647 (Wis 1969); Dobbs, above n 7, at 1325-26; Keeton et al, above n 18, at 623, 625, 626-29.

⁷³ See, eg, *Estancias Dallas Corp v Schultz* 500 SW 2d 217 (Tex Ct Civ App 1973) (*Estancias Dallas*) 221; Keeton et al, above n 18, at 627-29.

interference, through a non-trespassory invasion, with the plaintiff's use and enjoyment of his or her land, with 'significant' being evaluated from the perspective of persons of ordinary sensibilities living in the locality.

This prescription applies as well in the British Commonwealth, in which discussions of the private nuisance action by courts and secondary sources generally state that there must be an 'unreasonable user', 'unreasonable invasion', or 'unreasonable interference' by the defendant with the plaintiff's use and enjoyment of his or her land.⁷⁴ Although, as in the United States, the Commonwealth courts often state that proof of negligence is not required for a private nuisance action, and that 'unreasonable invasion', 'unreasonable user', and 'unreasonable interference' do not refer to negligent conduct by the defendant but rather to the impact on the plaintiff assessed in terms of Bramwell B's 'live and let live' principle,⁷⁵ references to 'fault' as well as unreasonable conduct by the defendant still occur and create confusion.⁷⁶

Further confusion has been generated in the British Commonwealth by the failure to recognise intentional conduct, usually in the sense of knowing rather than purposeful causation of the required legal injury, as the typical and, preferably, only type of conduct giving rise to liability for a private nuisance.⁷⁷ There is no clear specification of the type of conduct or activity that must exist in the absence of conduct that is the basis for some other recognised tort, such as negligence or *Rylands v Fletcher* strict liability. This seems to be due in part to the severe restriction or even elimination of *Rylands v Fletcher* strict liability. Cases in which liability could and should have been imposed under a proper interpretation of Blackburn J's true rule have instead been allowed as private nuisance

⁷⁴ See, eg, McBride and Bagshaw, above n 13, at 367, 374; Lunney and Oliphant, above n 13, at 644; Solomon et al, above n 13, at 796.

⁷⁵ See, eg, *The Wagon Mound* [1967] AC 617 (PC) 639; *Cambridge Water* [1994] 2 AC 264 (HL); *The Law of Tort*, above n 13, at paras 22-17, 22-34; *The Law of Torts in NZ*, above n 13, at 532-34, 538, 540, 556-59; Giliker, above n 13, at 33-34; Klar, above n 13, at 726-30; Lunney and Oliphant, above n 13, at 653-56; McBride and Bagshaw, above n 13, at 374-81; Solomon et al, above n 13, at 795-800.

⁷⁶ See, eg, Giliker, above n 13, at 38-46; Lunney and Oliphant, above n 13, at 653-56; *The Law of Torts in NZ*, above n 13, at 538-40, each of which, in order to explain private nuisance liability, treat mere foreseeability of a significant interference with the plaintiff's use and enjoyment of an interest in land as faulty and/or unreasonable.

⁷⁷ Although appearing to discuss private nuisance as an intentional tort, Klar apparently construes 'deliberate conduct' as referring merely to the conduct itself, not to its consequences (which is the proper focus for the intent requirement in any intentional tort), and criticises Canadian decisions denying nuisance liability when the defendants did not know that their conduct would have an adverse impact on their neighbour: see Klar, above n 13, at 726, 733. The cases discussed by Klar and others (eg, *The Law of Torts in NZ*, above n 13, at 532, 539-40; Giliker, above n 13, at 39-43) that employ the *Sedleigh-Denfield* distinction between conditions created by the defendant and pre-existing conditions not created by the defendant and use negligence analysis with respect to the latter would be resolved much more simply and consistently, without the need for any such distinction, if private nuisance were always treated as an intentional tort, so that *Sedleigh-Denfield* type of situations could only be litigated as negligence actions.

actions in the absence of intentional or negligent conduct and with little or no articulation of the grounds for or limits on such strict liability.⁷⁸ In *Cambridge Water Co v Eastern Counties Leather plc*, the House of Lords stated that there must be foreseeability of the significant interference with the plaintiff's use and enjoyment of an interest in land, and it noted that actual knowledge of such interference will always exist when the remedy sought is an injunction against future interference, but it did not elaborate on the degree of foreseeability, or any other criterion, that is required in the absence of negligence when damages are sought for a past interference.⁷⁹ Mere foreseeability surely is insufficient, especially given the extremely low threshold set for foreseeability in *Bolton v Stone*⁸⁰ and *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound)*,⁸¹ which held that a risk is foreseeable even if it is 'remote', 'infinitesimal', 'insubstantial', 'very rare', or 'improbable', rather than 'fantastic'.⁸² Contrary to the holding of the House in *Cambridge Water*, the risk of the underground flow of pollution to the plaintiff's borehole in that case likely had the minimal level of foreseeability required in *Bolton v Stone* and *The Wagon Mound*, although (supporting the rejection of liability for a private nuisance) the defendant did not have the knowledge of a near certainty required for a finding of intent.⁸³

C. Distinguishing the Trespass to Land Action

Although the private nuisance action is usually defined in contrast to the trespass to land action, as a 'non-trespassory' tort,⁸⁴ the two actions are closely related and thus sometimes confused. Both actions, properly construed, require (or should require) an intentional interference with the plaintiff's legally recognised interest in land as a result of a physical invasion of something onto the land.⁸⁵ However, they protect different aspects of the plaintiff's interest in land. The trespass to land action protects a plaintiff's interest in the *possession and occupancy* of the land, regardless of whether there is any physical, economic, or emotional harm or interference with the plaintiff's use and enjoyment of the land, while the private

⁷⁸ See *The Law of Torts in NZ*, above n 13, at 532; Klar, above n 13, at 734–36.

⁷⁹ *Cambridge Water* [1994] 2 AC 264 (HL). See also McBride and Bagshaw, above n 13, at 374–82; Clerk and Lindsell on Torts, above n 13, at paras 20-35–20-38.

⁸⁰ *Bolton v Stone* [1951] AC 850 (HL).

⁸¹ *The Wagon Mound* [1967] AC 617 (PC).

⁸² See RW Wright, 'The Grounds and Extent of Legal Responsibility' (2003) 40 *San Diego Law Review* 1425, 1515–17.

⁸³ The *Second Restatement* presciently employs a hypothetical with facts essentially the same as those in the *Cambridge Water* case to illustrate the importance of this distinction: *Second Restatement*, above n 15, at § 825 illustration 3.

⁸⁴ See, eg, *The Law of Tort*, above n 13, at para 22-8; text accompanying n 21 above.

⁸⁵ See text accompanying nn 96–108 below.

nuisance action protects a plaintiff's interest in the *use and enjoyment* of the land, but only if there has been a significant interference from the perspective of a person with ordinary sensitivities in the locale.⁸⁶

The traditional common law distinction between trespass and nuisance, which has its roots in the old forms of action and turns on whether the interference was 'direct' or 'indirect', bears little or no relation to the basic issue of whether there has been an actionable interference with possession or occupancy or an actionable interference with use and enjoyment. Yet, despite its unclear and unsettled meaning and lack of a principled basis, the distinction between 'direct' and 'indirect' interferences still has some support, at least in the doctrine, in the British Commonwealth.⁸⁷ It has generally been rejected in the United States and replaced by a distinction between tangible and intangible physical invasions.⁸⁸ Although the distinction between tangible and intangible physical invasions blurs at the microscopic level, there are significantly different impacts on a person's autonomy and equal freedom at the macroscopic level. Tangible physical invasions, by animate or inanimate entities, are more likely than intangible physical invasions to cause or be a significant interference with a person's occupancy, control, and use of his or her land. Moreover, it generally is much easier to avoid purposely or knowingly causing such invasions, while many intangible physical invasions—by, for example, odours, fumes, smoke, dust, or sounds—are extremely difficult if not impossible to avoid knowingly causing as a result of normal and basic everyday activities. Thus, everyone's equal freedom is promoted by making intentional tan-

⁸⁶ See, eg, Dobbs, above n 7, at 95–96, 104–107, 1321–23; Keeton et al, above n 18, at 70–71, 622–23.

⁸⁷ See, eg, McBride and Bagshaw, above n 13, at 368, suggesting that 'the most important factor in drawing the distinction [between direct and indirect interference] seems to be the defendant's degree of control over the thing which caused the interference', but acknowledging that 'difficulties arise' in trying to fit this interpretation with the cases. *The Law of Tort*, above n 13, at para 22–16 states that the distinction turns on whether the 'the defendant's act from the beginning is unlawful' or is 'initially lawful, but leads thereafter to an invasion of the claimant's rights'. The purported distinction is highly questionable, since both trespass and private nuisance liability exist only when the invasion of the claimant's interest in land is desired, known, or at least foreseeable at the time of the act, which makes the act 'unlawful' from the beginning. Any attempted distinction along these lines would lack a principled foundation and be subject to numerous counter-examples. Klar, above n 13, at 724 fn 65 rejects the distinction between direct and indirect interferences as applied to the private nuisance action. He states that the Canadian courts still sometimes refer to the distinction, albeit inconsistently, to distinguish the trespass and negligence actions, but argues that '[a]s a matter of contemporary policy, there are no reasons why courts should continue to distinguish between direct and indirect injuries': at 31; see also at 29–31, 47–48. Other texts pay little or no attention to the purported distinction between direct and indirect interferences. See, eg, *The Law of Torts in NZ*, above n 13, at 460–61, 521–22; Solomon et al, above n 13, at 156–59, 795.

⁸⁸ *First Restatement*, above n 14, at ch 40 scope note and introductory note at 224–25; *Second Restatement*, above n 15, at § 821D and comment e; Dobbs, above n 7, at 95–96, 104–07, 1321–23; Keeton et al, above n 18, at 70–71, 622–23.

gible invasions generally actionable,⁸⁹ while making intentional (known but not purposeful) intangible invasions actionable only if they constitute a significant interference with the plaintiff's use and enjoyment of his or her land, as judged from the perspective of a person with ordinary sensitivities in the particular community.

The *First Restatement* clearly distinguished these two torts, while noting that a plaintiff in a trespass action can recover not only for the interference with his or her possessory rights caused by the tangible invasion but also for any incidental interference with his or her use and enjoyment of the land.⁹⁰ The *Second Restatement*, while still stating that a private nuisance is 'a nontrespassory invasion of another's interest in the private use and enjoyment of land', blurs the distinction between the two actions by allowing recovery for significant interferences with the use and enjoyment of land caused by a tangible, trespassory invasion through overlapping trespass and private nuisance actions.⁹¹

A few courts in the United States have gone in the other direction by allowing claims involving intangible invasions to be brought as a trespass action. For example, in *Martin v Reynolds Metals Co*⁹² the Supreme Court of Oregon stated that modern scientific knowledge, which has revealed the molecular and atomic structure of the physical world and the equivalence of matter and energy, has undermined the traditional distinction between tangible and intangible invasions. Relying on *Martin*, the Supreme Court of Washington held, in *Bradley v American Smelting and Refining Co*,⁹³ that airborne microscopic particles or substances that do not dissipate, but rather accumulate on the plaintiff's land, can constitute a trespass as well as a private nuisance. However, neither Court would allow the trespass action unless there was a substantial interference with the plaintiff's possessory interest or substantial damage, respectively, thereby reintroducing under the guise of the trespass action the more restrictive requirement for a private nuisance action.⁹⁴ In each case, what actually constituted a private nuisance was allowed to be brought as a nominal trespass action

⁸⁹ The equal freedom principle can also explain the somewhat different rules applied to tangible physical invasions by tree roots or branches and overflying aircraft, which are practically unavoidable and allowed unless they significantly interfere with the plaintiff's occupancy, possession, or use of the land, regardless of whether the applicable action is described as a trespass action or a private nuisance action.

⁹⁰ *First Restatement*, above n 14, at ch 40 scope note and introductory note at 215, 224–25, § 822 comment c.

⁹¹ *Second Restatement*, above n 15, at § 821D. The same situation seems to exist in England and Wales: see Giliker, above n 13, at 31 (stating that private nuisances may involve tangible as well as intangible invasions).

⁹² *Martin v Reynolds Metals Co* 342 P 2d 790 (Or 1959) (*Martin*).

⁹³ *Bradley v American Smelting and Refining Co* 709 P 2d 782 (Wash 1985).

⁹⁴ For other examples, see Dobbs, above n 7, at 1322 n 19; Keeton et al, above n 18, at 71 n 38.

to enable the plaintiff to take advantage of the longer limitation period for trespass actions.⁹⁵

As with the trespass action, the significant interference with the plaintiff's interest in the use and enjoyment of land that is required for a private nuisance action must result from an (intentionally caused) physical invasion of some entity (for a nuisance, an intangible entity) across the borders of the plaintiff's land. Otherwise a property owner would be able to acquire easements for unobstructed views or the flow of (light, radio, television, telephone, internet, etc) waves across others' property without the consent of the owners of the other property and without paying for the easements.⁹⁶ An often cited case is *Fontainebleau Hotel Corp v Forty-Five Twenty-Five Inc*,⁹⁷ in which the Eden Roc Hotel unsuccessfully sought to hold the adjoining Fontainebleau Hotel liable for a private nuisance for building an addition to its hotel that 'cast a shadow on' (blocked the direct transmission of sunlight to) the Eden Roc Hotel's swimming pool. The Supreme Court of Florida summarily dismissed the suit, noting that, in the absence of contract or statute, a property owner does not have a presumptive or implied right to the free flow of light and air across adjoining land.⁹⁸ The same result, on the same grounds, was reached by

⁹⁵ See Keeton et al, above n 18, at 71–72.

⁹⁶ *Second Restatement*, above n 15, at § 821D; see Dobbs, above n 7, at 1330–33. But see Klar, above n 13, at 726 n 73 (discussing an apparently unique Canadian case that found the blocking of a view to be a nuisance). For similar reasons, the argument that the plaintiff moved to the nuisance generally is not recognised as a valid defence. Allowing such a defence would permit a defendant to acquire property rights in another's land—an easement or servitude for purposes of dumping noises, smells, fumes, etc onto the plaintiff's land—without the consent of the plaintiff or any prior owner of the land and without paying for the property right, even if the plaintiff or the prior owners had previously been unable to prevent the dumping because it had not caused a significant interference with their actual use and enjoyment of the land (most commonly, because the land previously was undeveloped and vacant): Dobbs, above n 7, at 1328; Klar, above n 13, at 727. A defence based on the plaintiff's having moved to the nuisance is equitable, and has been allowed, when (1) the plaintiff moved to the nuisance solely for the purpose of obtaining money by suing the defendant, or (2) the plaintiff moved into an area that is generally dedicated to uses such as the defendant's and is not, due to general social and economic forces, shifting away from such uses to ones more compatible with the plaintiff's use. In most instances of the second type a defence of plaintiff's having moved to the nuisance will not be necessary, since the effects of the defendant's activity on the plaintiff's use and enjoyment of his or her land would not be considered significant by a person of ordinary sensitivity in the locality: Dobbs, above n 7, at 1327–28; Klar, above n 13, at 729.

⁹⁷ *Fontainebleau Hotel Corp v Forty-Five Twenty-Five Inc* 114 So 2d 357 (Fla Ct App 1959), certiorari denied 117 So 2d 842 (Fla 1960).

⁹⁸ In *Prah v Maretti* 321 NW 2d 182 (Wis 1982), decided during the glory days of the environmental movement, the Court (over a vigorous dissent), supposedly applying the *Second Restatement's* definition of a private nuisance, but ignoring its 'non-trespassory invasion' requirement, reversed a summary judgment for the defendant and remanded to allow the plaintiff to try to prove that the defendant's building of a house that allegedly interfered with solar collectors on the plaintiff's house on an adjacent lot in a new sub-division constituted an 'unreasonable' interference. On remand, the defendant's house was moved at the plaintiff's expense. However, it was not a good location for solar energy. The plaintiff's solar collectors did not work and were abandoned.

the Supreme Court of Illinois and the German *Bundesgerichtshof* in cases in which the plaintiffs sought to hold the owners of buildings liable for interfering, by the mere presence of the building, with the transmission of television and radio signals.⁹⁹

Interference with the transmission of television signals by the construction of a building was also at issue in *Hunter v Canary Wharf Ltd*,¹⁰⁰ in which the House of Lords reached the same result as the *Bundesgerichtshof* and the Supreme Court of Illinois on very similar grounds. Lord Goff noted that 'for an action in private nuisance to lie in respect of interference with the plaintiff's enjoyment of his land, it will generally arise from something emanating from the defendant's land' (which thus physically invades the plaintiff's land),¹⁰¹ and Lord Lloyd agreed.¹⁰² Although Lord Goff and Lord Hoffmann relied on a person's right to build whatever he wants on his land,¹⁰³ this right is not absolute. As Lord Goff noted, a private nuisance action should be available if the defendant's building does not merely, by its presence, *block the flow* of light or other waves *across the defendant's land*, but rather *projects or reflects onto the plaintiff's land* light, noise, electromagnetic waves, or other intangible entities that significantly interfere with the plaintiffs' use and enjoyment of their property.¹⁰⁴ Unfortunately, explicit reliance on the physical invasion requirement seems to have been impeded in England by the anachronistic 'ancient lights' doctrine, codified in the Prescription Act of 1832, which, as Lord Hoffman noted,¹⁰⁵ created an anomalous conclusive presumption of a prescriptive negative easement for continuation of the flow of air and light across the defendant's land after a certain period of years. While the 'ancient lights' doctrine may have made sense as an implementation of an equal-freedom based principle of mutual necessity and advantage at a time when there were minimal means of indoor illumination or ventilation, it no longer has such a justification. It should be understood and (perhaps) preserved only as a statutorily created 'acquired right', interference with which is treated similarly to expressly granted easements for light, air and view across others' property.

Other commonly discussed cases that might be thought to be inconsis-

⁹⁹ *The People ex rel Hoogasian v Sears, Roebuck & Co* 287 NE 2d 677 (Ill 1972); *Bundesgerichtshof* [German Federal Court of Justice], V ZR 166/82, 21 October 1983 reported in (1984) 88 BGHZ 344.

¹⁰⁰ *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL) (*Hunter*).

¹⁰¹ *ibid*, at 685 (Lord Goff). See McBride and Bagshaw, above n 13, at 371.

¹⁰² *Hunter* [1997] AC 655 (HL) 700 (Lord Lloyd).

¹⁰³ *ibid*, at 685 (Lord Goff), 709 (Lord Hoffmann).

¹⁰⁴ *ibid*, at 684-87 (Lord Goff), citing and discussing *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch 436 (Ch); *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525 (High Court of New Zealand); *Nor-Video Services Ltd v Ontario Hydro* (1978) 84 DLR (3d) 221 (Ontario High Court of Justice) 231 (Robins J). See also *ibid*, at 708-09 (Lord Hoffmann).

¹⁰⁵ *Hunter* [1997] AC 655 (HL) 709 (Lord Hoffmann).

ent with the physical invasion requirement, such as cases involving angst over nearby houses of prostitution or blockage of access to land,¹⁰⁶ would be better handled under more relevant actions (eg, as private actions for discrete harm caused by a public nuisance, or as negligence actions) rather than as private nuisance actions.

As with requirements in other torts that are sometimes ignored or relaxed to allow recovery for malicious causation of the legal injury that is addressed by those torts, the physical invasion requirement that exists for both trespass and private nuisance should be and generally is set aside (at least in North America) if the defendant acted with the sole purpose of causing the relevant legal injury—for example, if the defendant maintained a ‘spite fence’, a junk heap, or an atrociously painted house on his or her property for the sole purpose of interfering with the plaintiff’s use and enjoyment of his or her property.¹⁰⁷ A better approach would be to recognise a generally applicable tort of deliberate, maliciously caused injury.¹⁰⁸

IV. PRIVATE NUISANCE AS A STRICT LIABILITY TORT

If, as argued above, the private nuisance action is a distinct tort only as an intentional tort, its usual classification as a strict liability tort would be improper from the viewpoint of those who define strict liability as liability in the absence of intentional or negligent causation of the injury at issue.¹⁰⁹ Under the more common definition of strict liability as liability in the absence of unreasonable¹¹⁰ or faulty conduct (in the objective sense of conduct or activities in which people should not engage given a particular understanding of the common good), the strict liability nature of the private nuisance action is questionable only if it gives rise to liability solely in situations in which such conduct is deemed unreasonable or faulty (in the sense indicated above). Since it is generally agreed that

¹⁰⁶ See *The Law of Torts in NZ*, above n 13, at 530–31; McBride and Bagshaw, above n 13, at 371–74, 384.

¹⁰⁷ Dobbs, above n 7, at 1331; Klar, above n 13, at 730. Cf *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468 (KB), in which the Court held the defendant liable, despite the extra-sensitive nature of the plaintiff’s silver foxes, when the defendant maliciously fired shots on his own property (the noise from which invaded the plaintiff’s property) for the sole purpose of adversely affecting the plaintiff’s foxes. English jurisprudence on this issue was thrown partially off track by the House of Lords’ decision in *Bradford Corp v Pickles* [1895] AC 587 (HL), which held that the defendant was not liable for obstructing the flow of groundwater to the plaintiff’s land even if he had acted solely for the purpose of extorting money from the plaintiff. See McBride and Bagshaw, above n 13, at 382–83.

¹⁰⁸ See, eg, *Second Restatement*, above n 15, at § 870; *Bürgerliches Gesetzbuch* (German Civil Code) § 226; JW Neyers, ‘Explaining the Inexplicable? Four Manifestations of Abuse of Rights in English Law’, ch 11 of this book.

¹⁰⁹ See, eg, Keeton et al, above n 18, at 554.

¹¹⁰ See, eg, Klar, above n 13, at 619.

negligent conduct, which clearly is faulty, is not required for a private nuisance action, the issue turns on whether intentional causation of the legally cognisable injury is always faulty, at least in the context of the private nuisance action. A clear example of liability for intentional conduct that is not faulty is the liability that exists, for actual damages only, for intentional trespasses to property when there is a valid defence of private necessity.¹¹¹ If we focus specifically on the private nuisance action, the issue narrows to the question of whether imminent or continuing private nuisances are always enjoined, as well as being subject to payment of damages.

Courts in some jurisdictions in the United States have held that any plaintiff subjected to a continuing or imminent private nuisance is automatically entitled to an injunction, as well as damages for any legally cognisable injury that has already been incurred. However, most courts have treated the issuance of an injunction as being a distinct equitable issue, which should be resolved through a 'balancing of the equities' involved in the case.¹¹² Contrary to the attempts of the drafters of the *Second Restatement*¹¹³ and similarly minded academics to interpret 'balancing of the equities' in a utilitarian or aggregate cost-benefit sense, in this context as in others equity generally has been viewed in its Aristotelian sense¹¹⁴ as what is just, and equitable principles are invoked (at times through distinct courts of equity) to attain such justice when it would not be obtained by the mere award of damages.

Although, as far as I am aware, no court in the United States has explicitly articulated all of the following criteria, an analysis of the cases makes it fairly clear that, in most jurisdictions, an injunction will be granted to halt an ongoing or imminent significant interference with the plaintiff's use and enjoyment of his or her property unless all of the following conditions are satisfied:

1. there is an important public benefit from the defendant's activity rather than a merely private benefit to the defendant;¹¹⁵

¹¹¹ See, eg, *Vincent v Lake Erie Transportation Co* 124 NW 221 (Minn 1910). Robert Keeton insists on describing such conduct, as well as private nuisances in which the plaintiff is limited to a damages remedy, as being faulty, not in terms of the conduct per se, but conditionally if one engages in such conduct without paying compensation for the intentionally caused injury: RE Keeton, 'Conditional Fault in the Law of Torts' (1959) 72 *Harvard Law Review* 401; Keeton et al, above n 18, at 554, 635-36, 629-30.

¹¹² See, eg, *Estancias Dallas* 500 SW 2d 217 (Tex Ct Civ App 1973).

¹¹³ In its own discussion of the criteria for granting an injunction, the *Second Restatement*, above n 15, at § 941 states: 'The relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, is one of the factors to be considered in determining the appropriateness of an injunction against tort'. See also at § 826 comment f.

¹¹⁴ Wright, 'Substantive Corrective Justice', above n 1, at 686-87.

¹¹⁵ See, eg, *Estancias Dallas* 500 SW 2d 217 (Tex Ct Civ App 1973); see also text accompanying nn 124-27 below.

2. granting the injunction would result in a loss of or substantial reduction in the public benefit because it is not technologically or economically feasible for the defendant to avoid causing the significant interference with the plaintiff's use and enjoyment of his or her property;¹¹⁶
3. the continuation of the nuisance would not constitute a significant threat to the plaintiff's life or health;¹¹⁷
4. the public benefit substantially outweighs the burden on the plaintiff;¹¹⁸ and
5. the plaintiff is fully compensated.¹¹⁹

The most frequently cited and discussed case on this question in the United States is *Boomer v Atlantic Cement Co.*¹²⁰ Prior to *Boomer*, the rule in the State of New York had been that, once a continuing nuisance was established, the plaintiff was automatically entitled to an injunction to prevent its continuance, even if the impact on the defendant of granting the injunction greatly outweighed the impact of the nuisance on the plaintiff. *Boomer* was a widely noted departure from this rule, which is frequently described as having made the granting of the injunction turn on a utilitarian cost-benefit analysis. However, although some language in the New York Court of Appeals' opinion might seem to support this interpretation, the reality is different.

The Court claimed to focus solely on the rights and interests of the plaintiffs and the defendant, to the exclusion of the rights and interests of the public.¹²¹ It stated that '[t]he ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction'.¹²² The defendant had invested more than \$45 million in its new facility, while the aggregate diminution in value of the plaintiffs' land was found by the trial Court to be only \$185 000.¹²³

However, this was not the basis for the trial Court's or the Court of Appeals' refusal to grant an injunction against continuation of the nuisance. The trial Court emphasised the major public benefits to the local economy and schools in terms of jobs, taxes, and other indirect benefits.¹²⁴ In a footnote, the Court of Appeals referred indirectly to the public benefits, instancing not only the defendant's investment in excess of \$45 million, but also the fact that over 300 jobs had been created

¹¹⁶ See text accompanying nn 128–31 below.

¹¹⁷ See text accompanying and following n 126 below.

¹¹⁸ See text accompanying nn 122–25 below.

¹¹⁹ See below n 132 and accompanying text.

¹²⁰ *Boomer v Atlantic Cement Co* 257 NE 2d 870 (NY 1970) (*Boomer*).

¹²¹ *ibid*, at 871.

¹²² *ibid*, at 872.

¹²³ *ibid*, at 873.

¹²⁴ *Boomer v Atlantic Cement Co* 287 NYS 2d 112 (NY Sup Ct 1967) 114 (Herzberg JJ).

directly through employment at the plant.¹²⁵ If the activity causing the nuisance (which reduced the value of the plaintiffs' properties by 50 to 60 per cent) had been of purely private benefit to the defendant without any major benefits to the public, surely an injunction would have been granted.

Why, then, did the Court of Appeals frame the issue as one involving only the private interests of the plaintiffs and the defendant, to the exclusion of the interests of the public in general? The answer seems to be that the plaintiffs raised the issue of the newly energised public concern over the non-discrete risks to the general public due to air pollution in general and particulate emissions from concrete plants in particular, an issue that was being vigorously debated at the time in the State and federal legislatures, leading to the enactment of the initial federal Clean Air Act in the same year, 1970. The Court of Appeals noted that courts are not institutionally competent to resolve the scientifically and geographically complex issues related to the general risks to the public created by air pollution, and there apparently were no allegations of significant imminent health risks to the plaintiffs in particular.¹²⁶ If the plaintiffs had alleged and proven significant concrete adverse health effects, a different result no doubt would have been reached.

In order to justify not taking into account the non-discrete yet substantial health risks to the public in general posed by the defendant's activity, the Court of Appeals thought it needed to appear to be framing the issue as one not involving the interests of the public, which disenabled it from relying straightforwardly on the real reason for the denial of the injunction: the major benefits to the public that were relied upon by the trial Court, which the majority referenced only incompletely, indirectly, and discreetly in a footnote. Continuing the charade, the dissenting opinion took the majority to task for authorising the forced sale to the defendant of a permanent easement for dumping pollution on the plaintiffs' lands for the defendant's private purpose, rather than any public purpose or use, contrary to the takings clauses in the State and federal constitutions.¹²⁷

Consistently with the criteria for not granting an injunction that I listed above, the New York Court of Appeals in *Boomer* also noted that the defendant was employing the best currently available pollution control equipment, so that requiring any further reduction in the pollution would require the defendant to close down (thereby eliminating the public

¹²⁵ *Boomer* 257 NE 2d 870 (NY 1970) 873 n * (Bergan J for Fuld CJ, Bergan, Burke and Scileppi JJ); see also Dobbs, above n 7, at 1339, referring to the social value of the defendant's activity in *Boomer* as the explanation for the Court of Appeals' refusal to grant an injunction, and citing other similar cases in which substantial public benefits in terms of jobs and tax revenues were relied upon to justify refusal of an injunction.

¹²⁶ *Boomer* 257 NE 2d 870 (NY 1970) 871 (Bergan J for Fuld CJ, Bergan, Burke and Scileppi JJ).

¹²⁷ *ibid*, at 876 (Jasen J).

benefits).¹²⁸ If it had thought that further reduction in the pollution were possible without eliminating or substantially reducing the desired public benefits, it seems likely from the overall thrust of the opinion that such reduction would have been ordered.

In *Renken v Harvey Aluminum Co*,¹²⁹ the plaintiffs each suffered less than \$10 000 in damage to their fruit orchards and crops as a result of periodic emissions of particulates and gases, including fluorides, from the defendant's aluminium reduction plant, which during non-windy conditions caused a smoky cloud of such emissions to cover the plaintiffs' lands and orchards. The plant was constructed at a cost in excess of \$40 million, employed 550 persons who lived in the area, had a gross annual payroll of \$3.5 million, and produced aluminium for industrial and national defence purposes. The Court ordered the defendant to install available hoods and electrostatic precipitators within one year to reduce the fluoride emissions to 'inconsequential' amounts, or else be enjoined from continuing operations, although it might cost over \$2 million to install such devices:

While the cost of the installations of these additional controls will be a substantial sum, the fact remains that effective controls must be exercised over the escape of these noxious fumes. Such expenditures would not be so great as to substantially deprive defendant of the use of its property. While we are not dealing with the public as such, we must recognise that air pollution is one of the great problems now facing the American public. If necessary, the cost of installing adequate controls must be passed on to the ultimate consumer. The heavy cost of corrective devices is no reason why plaintiffs should stand by and suffer substantial damage.¹³⁰

The *Renken* Court stated that the defendant could avoid the injunction only if it

show[ed] that the use of its property, which caused the injury, was unavoidable or that it could not be prevented except by the expenditure of such vast sums of money as would substantially deprive it of the use of its property. This seems to be the general rule.¹³¹

Finally, as the *Boomer* Court held, the denial of an injunction is conditioned on the plaintiff's being fully compensated for the reduced value of its land. Since an injunction will (or should) not be granted if continuation of the nuisance would result in the plaintiff's suffering any significant

¹²⁸ *Boomer* 257 NE 2d 870 (NY 1970) 873 (Bergan J for Fuld CJ, Bergan, Burke and Scileppi JJ).

¹²⁹ *Renken v Harvey Aluminum Co* 226 F Supp 169 (D Or 1963) (*Renken*).

¹³⁰ *ibid*, at 172 (Kilkenny J).

¹³¹ *ibid*, at 174 (citation omitted) (Kilkenny J). See also Keeton et al, above n 18, at 630-31 (noting the likelihood of an injunction if 'there was a feasible way, economically and scientifically, to avoid a substantial amount of the harm without material impairment to the benefits').

adverse health effects, such compensation should ensure that the plaintiff is no worse off physically or economically. To make sure that this occurred in *Boomer* itself, the Court remanded with instructions to the trial Court to reconsider its prior determination of the reduced values of the plaintiffs' properties.¹³²

Courts in the British Commonwealth also may refuse to enjoin a continuing or imminent private nuisance, but this apparently occurs less often than in the United States, with Canadian courts being more willing than English courts to do so.¹³³ Courts and academics frequently cite the criteria stated in *Shelfer v City of London Electric Lighting Co*,¹³⁴ according to which an injunction to prevent an imminent or continuing nuisance will be granted unless the injury to the plaintiff's legal rights is small, capable of being estimated in money, and can be adequately compensated by a small money payment, and it would be oppressive to the defendant to grant an injunction.¹³⁵ Note that the last factor comes into play only if all of the other factors are satisfied. An apparently rare exception¹³⁶ occurred in *Miller v Jackson*,¹³⁷ in which Lord Denning MR—a dedicated utilitarian who (alone on this point) would have refused to hold the defendant cricket club liable even for damages—and Cumming-Bruce LJ relied upon the social value to the community of the long-standing cricket club as well as the fact that the plaintiffs had come to the nuisance to refuse an injunction, despite a fairly serious diminution of the plaintiffs' use and enjoyment of their property, including a significant risk of personal injury from the cricket balls frequently landing on and damaging their property.¹³⁸

Although the *Shelfer* criteria do not mention public benefit, the effects on the general public of granting an injunction can be and are taken into account in appropriate cases by British Commonwealth courts, more so in some countries than others, and more often when fashioning injunctive

¹³² *Boomer* 257 NE 2d 870 (NY 1970) 873–75 (Bergan J for Fuld CJ, Bergan, Burke and Scileppi JJ). Since property valuations usually are based on objective market value, at times there may be a substantial undervaluation of the plaintiff's interest, especially for properties with significant non-pecuniary value, such as a long-occupied home or family farm. There was one such property in the *Boomer* case, and the trial Court on remand, noting the Court of Appeals' emphasis on providing 'full compensation', took into account more subjective standards: a 'special' market value rule based on inflated prices paid by the defendant for other properties in the neighbourhood, and a 'contract price' theory reflecting the amount that a private corporation would have to pay where it needs such a servitude to continue in operation as against a seller who is unwilling to sell his or her land. See *Kinley v Atlantic Cement Co* 349 NYS 2d 199 (NY Sup Ct App Div 1973) 202 (Herlihy P).

¹³³ Solomon et al, above n 13, at 822–23.

¹³⁴ *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 (CA) (*Shelfer*).

¹³⁵ *The Law of Torts in NZ*, above n 13, at 570; Klar, above n 13, at 743; Solomon et al, above n 13, at 821–23.

¹³⁶ *The Law of Torts in NZ*, above n 13, at 570.

¹³⁷ *Miller v Jackson* [1977] QB 966 (CA).

¹³⁸ Solomon et al, above n 13, at 823–27.

remedies rather than as a basis for refusing an injunction.¹³⁹ As is indicated by the *Shelfer* criteria, an injunction is likely to be granted, despite a significant public benefit from the defendant's activity, if there would be significant uncompensated harm to the plaintiffs, or if it is possible to reduce the impact on the plaintiffs' use and enjoyment of their land without significantly impairing the public benefit.¹⁴⁰

The criteria for refusing to enjoin a private nuisance are inconsistent in many respects with the principles of utilitarianism and economic efficiency. Most notably, for the defendant to avoid an injunction despite a significant adverse impact on the plaintiffs' use and enjoyment of their land, the criteria require that the continuation of the nuisance be necessary for the realisation of some important public benefit, understood in the sense that it enhances the equal freedom of the members of the community, rather than some merely private benefit to the defendant or third parties. The utilitarians and efficiency theorists have no such conception of public benefit, or indeed of any distinction between public and private. For them, the public good is simply the sum of all individuals' utility or wealth, and all that matters is the sum, not how it is distributed among the members of the community. The sole test of the 'public good' is whether, in the aggregate, the nuisance increases the defendant's (and other benefited persons') private utility or wealth more than it decreases the plaintiff's (and other adversely affected persons') private utility or wealth.

The efficiency theorists state that the decision whether or not to grant an injunction should turn on whether or not the situation is one involving low or high transaction costs. If transactions costs are low, the injunction should be granted in order to force the defendant to bargain with those who are being or will be affected by the nuisance, which will better ensure that the affected parties' actual subjective valuations are taken into account and that, as a result, there will be an efficient outcome. However, if transactions costs are high, courts should not employ an injunction to force the defendant into the market, since the transaction costs may prevent an efficient result from being reached. Instead, the court should either make its own determination of the efficient outcome and impose liability for damages only if continuation of the defendant's activity would be inefficient (if not, it would be deemed reasonable and not to be a nuisance, contrary to the law as discussed in part III above) or hold the defendant strictly liable for the adverse impacts on the plaintiffs (whether or not those impacts would be deemed significant under the 'live and let live' rule, again contrary to the law as discussed in part III above) and

¹³⁹ *The Law of Torts in NZ*, above n 13, at 570–72; Solomon et al, above n 13, at 822–23; Klar, above n 13, at 743–44; *The Law of Tort*, above n 13, at paras 22–94–22–95.

¹⁴⁰ See, eg, 340909 *Ontario Ltd v Huron Steel Products (Windsor) Ltd* (1990) 73 OR 2d 641 (Ontario High Court of Justice), discussed in Solomon et al, above n 13, at 796–800.

have the defendant decide whether it would be worthwhile to continue his or her activity.¹⁴¹

Transaction costs are assumed to vary depending on the number of adversely affected parties. If there are many, transaction costs are likely to be high, not only due to the sheer number of parties but also due to the increased risk of strategic bargaining as each adversely affected party tries to obtain as much as he or she can of the defendant's expected gain. If there are only a few adversely affected parties, transaction costs may be low enough to enable bargaining to an efficient result. However, even if there are only a few adversely affected parties, or even only one, transaction costs often will still be high due to strategic bargaining, since in the private nuisance context each adversely affected party is in a 'bilateral monopoly' situation with respect to the defendant, who is not able to avoid having to make a deal with the adversely affected party by instead making a deal with someone else (as would be the case with, eg, a supplier of parts for a machine).¹⁴² It thus seems that under a utilitarian or economic efficiency approach, injunctions should rarely, if ever, be granted, contrary to the actual practice.

In any event, the courts do not base decisions on granting an injunction on whether the situation involves low or high transaction costs. Injunctions are often granted in situations involving a high number of adversely affected parties¹⁴³ and refused in situations involving only a few adversely affected parties, as was the case in *Boomer*. Not only were there only a few adversely affected parties in *Boomer*, the bargaining range presumably was huge. To justify an investment of over \$45 million, the defendant must have expected a very high flow of income, while the trial court's initial assessment of the aggregate reduced value of the plaintiffs' land was only \$185,000. As the New York Court of Appeals noted, '[t]he parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant'.¹⁴⁴

The criteria actually employed by the courts in deciding whether to grant an injunction to prevent or halt a private nuisance are consistent with the principles of justice. As the judges in *Boomer* stated, refusing to grant an injunction and instead allowing the defendant to continue to maintain the nuisance in effect is to authorise a forced sale to the defendant, at a price set by the court, of an easement on the plaintiff's lands for the continued invasion of the intangible entities generated by the defend-

¹⁴¹ See, eg, RA Posner, *Economic Analysis of Law*, 8th edn (Boston, Wolters Kluwer, 2011) 86–88.

¹⁴² *ibid.*, at 89.

¹⁴³ See, eg, *Morgan v High Penn Oil Co* 77 SE 2d 682 (NC 1953); *Estancias Dallas* 500 SW 2d 217 (Text Ct Civ App 1973).

¹⁴⁴ *Boomer* 257 NE 2d 870 (NY 1970) 873 (Bergan J for Fuld CJ, Bergan, Burke and Scileppi JJ).

ant's activity.¹⁴⁵ In the absence of a proper justification, such a forced sale would be a denial of the plaintiff's equal external freedom and thus a violation of interactive justice. The justification begins, consistent with the criteria employed by the courts, with the fact that the continuation of the defendant's activity is necessary to obtain an important public benefit that enhances the equal freedom of every member of the community. This fact brings into play the principle of distributive justice. All property is held subject to the requirements of distributive justice, and is subject to being redistributed to promote the equal external freedom of all in accordance with that principle.¹⁴⁶

However, in the private nuisance context, as with takings in general, the distributive justice claim is not that the person whose property is being taken has more than his or her just share of the resources needed to pursue a meaningful life, or, even if this is the case, that he or she is the only person who has more than a just share. Rather, the distributive justice claim is that the person's property is needed to accomplish some distributive objective—either redistribution of goods to those who have too little, or increasing the total amount of goods in society so that everyone's distributive share can be increased. But this satisfies only the 'output' side of the distributive justice claim, not the 'input' side. Rather than the distributive justice objective being implemented, as in the case of proper taxation, by assessing all those who have too much (the input side) and distributing the proceeds to all those who have too little (the output side), or assessing all equally who are initially distributively equal and will benefit equally from the project, the person whose property is being taken would be singled out, with no justification, to shoulder involuntarily the costs involved in achieving the distributive objective.

To have a complete, properly implemented distributive justice claim, none of the costs of the redistribution, which is intended to benefit the entire community, should fall solely on the plaintiff, who simply happens to own the property that is needed to achieve the distributive objective, but instead they should be borne by the entire community. This is a principle of justice that is firmly embedded in the jurisprudence of the United States.¹⁴⁷ Thus, the criteria for allowing a taking, by not granting

¹⁴⁵ *ibid.*, at 875.

¹⁴⁶ See J Finnis, *Natural Law and Natural Rights* (Oxford, Oxford University Press, 1980) 169–73; R Nozick, *Anarchy, State, and Utopia* (New York, Basic Books, 1974) 174–82.

¹⁴⁷ See, eg, *First English Evangelical Lutheran Church of Glendale v County of Los Angeles* 482 US 304 (1987) 318–19 (Rehnquist CJ for Rehnquist CJ, Brennan, White, Marshall, Powell and Scalia JJ): 'It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"' (quoting *Armstrong v United States* 364 US 40 (1960) 49). Dobbs, above n 7, at 1329 n 25 cites *Armory Park Neighborhood Association v Episcopal Community Services in Arizona* 712 P 2d 914 (Ariz 1985), in which the defendant's actions in serving free meals to indigents had significant adverse effects on the plaintiffs' use and enjoyment of their lands;

an injunction, include a requirement that there be no significant adverse health effect on the plaintiff (which mere payment of money cannot prevent or undo) and that the plaintiff receive full compensation for his or her economic losses. When there is a taking by the government, the required just compensation will be paid by the government and shifted, through taxation or other means, to the members of the community. When the taking occurs through the failure to grant an injunction in a private nuisance action, the required just compensation will be paid as damages by the defendant, whose earnings will be reduced, which will result in lesser tax revenues and perhaps jobs and other benefits being generated for the surrounding community.

The last point explains why, in takings cases, including private nuisance cases in which an injunction is not granted because doing so would eliminate or substantially reduce an important public benefit being generated by the activity, the plaintiff is limited to full compensation through a forced sale, rather than being allowed to seek as much as possible of the gain generated by the taking. While, to avoid an interactive justice violation, the plaintiff must receive full compensation for the taking of his or her property, to allow the plaintiff to take advantage of the bilateral monopoly situation to attempt to obtain more than full compensation would lower and perhaps eliminate the public benefit that is being pursued as a matter of distributive justice, by increasing the government's costs when the government is acquiring the property or by lowering the defendant's gain in a private nuisance action. When no distributive justice objective is being pursued, there is no reason or justification for intruding on an interactively just bargaining situation.

V. CONCLUSION

This analysis of the private nuisance action confirms, once more, what has been shown by my analyses of other major areas and doctrines of tort law. Tort law, which has been held up by efficiency theorists as the prime example of the supposed efficiency basis of the law, is instead based on and implements the principles of justice. More than any other action, the private nuisance action, with its use of injunctions as well as damages and its reliance on the principle of distributive justice as well as interactive justice, demonstrates the full scope of tort law as an elaboration and implementation of the principles of justice and right.

the Court stated that the law does not allow 'the costs of a charitable enterprise to be visited in their entirety upon the residents of a single neighborhood. The problems of dealing with the unemployed, the homeless and the mentally ill are also matters of community or governmental responsibility.'

