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Restating Strict Liability and Nuisance

*Hon. Robert E. Keeton**

John Wade was a master of the craft of restating the law. The American Law Institute ("ALI") benefitted especially from his distinctive service during development of the Restatement (Second) of Torts. It is fitting that we use, as a vehicle for honoring his service, an inquiry into a segment of tort law that was first considered in the decades just after the Institute was founded and remains, even today, among the most difficult areas of law to restate. This segment of tort law concerns the general theory of strict liability and the extent that it applies to nuisance cases.

I.

To set the stage for this inquiry, let us imagine that we are participants in a third ALI effort to restate this segment of tort law. We are convened for a discussion, and perhaps a vote, in the year two-thousand-something-or-other. I would hesitate to predict the precise year, but hesitate not at all to predict this time will come during the lifetime of most of the younger readers of this Article.

Before us is a draft of the proposed blackletter of Restatement (Third) of Torts Section 822. Our hypothetical drafter appreciates the constructive purposes that ambiguity may serve in some contexts. But our drafter dislikes ambiguity in the statement of a legal test that must be used daily by lawyers and judges in contexts where clarity and precision have special value. These contexts include, for example, use of the legal test: (1) by lawyers when preparing to advise clients about their rights and about risks they may incur by a chosen course of conduct; (2) by judges when deciding whether a case will be allowed to go to a jury; and (3) by trial lawyers and trial judges when drafting instructions to a jury on mixed law-fact questions submitted to them.

Our hypothetical drafter presents to us options aimed at encouraging us to make immediately, rather than defer to other decision

* United States District Judge, District of Massachusetts.

makers at some later time, the hard choices that someone must make sooner or later. Making those choices wisely and immediately might be the first step toward resolving longstanding ambiguities in the way that many, perhaps most, writers (of judicial opinions as well as texts, articles, and comments) have stated the legal tests for deciding nuisance and strict liability cases.

Here is the proposed draft, commencing with the heading for Topic 2 of Chapter 40:

HYPOTHETICAL DRAFT

TOPIC 2. PRIVATE NUISANCE: ELEMENTS OF LIABILITY

§ 822. General Rule.

An actor is subject to liability for interference with the interest of another in private use and enjoyment of land if, but only if, the actor's conduct is a legal cause of the interference and the interference

(a) is intentional and unreasonable,

or

(b) is unintentional and unreasonable

or

(c) whether intentional or unintentional, is unreasonable in the sense that the interference is greater than the persons whose interests in use and enjoyment of land are interfered with can reasonably be required to bear without compensation. This part (c) applies even though the conduct causing the interference is reasonable in the sense that its social utility outweighs the harms and risks it causes.

In preparing this recommendation, our hypothetical drafter considered options at a number of different points along the way and prepared for our consideration another draft with sets of options. Here is the draft with sets of options.

HYPOTHETICAL DRAFT

§ 822 WITH SETS OF OPTIONS

§ 822. General Rule.

[Option 1] A person

[Option 2] An actor

is subject to liability for

[Option 1] invasion of

[Option 2] interference with

the interest of another in private use and enjoyment of land if, but only if, the [person's] [actor's] conduct is a legal cause of the [invasion] [interference] and the [invasion] [interference]

(a) is intentional and unreasonable,

or

- (b) is
 [Option 1] negligent or reckless,
 [Option 2] unintentional and unreasonable,

or

[Option 1]

- (c) is actionable under rules of liability for abnormally dangerous conduct.

[Option 2]

- (c) whether intentional or unintentional, is unreasonable in the sense that the [invasion] [interference] is greater than the persons whose interests in use and enjoyment of land are [invaded] [interfered with] can reasonably be required to bear without compensation. This part (c) applies even though the conduct causing the [invasion] [interference] is reasonable in the sense that its social utility outweighs the harms and risks it causes.

Set forth below, for comparison, are the texts of Section 822 of the original Restatement of Torts¹ and Restatement (Second) of Torts.²

Because of the reference in Section 822 of the original Restatement to "ultrahazardous conduct," Sections 519 and 520 of the first Restatement, regarding "ultrahazardous activities," are set forth below.³

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1. Restatement of Torts § 822 (1939) provides:

TOPIC 1. ELEMENTS OF LIABILITY

§ 822. GENERAL RULE.

The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if,

- (a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and
 (b) the invasion is substantial; and
 (c) the actor's conduct is a legal cause of the invasion; and
 (d) the invasion is either
 (i) intentional and unreasonable; or
 (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct.

2. Restatement (Second) of Torts § 822 (1979) provides:

TOPIC 2. PRIVATE NUISANCE: ELEMENTS OF LIABILITY

§ 822. General Rule.

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an 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 controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

3. Restatement of Torts §§ 519, 520 provide:

§ 519. MISCARRIAGE OF ULTRAHAZARDOUS ACTIVITIES CAREFULLY CARRIED ON.

Except as stated in §§ 521-4, one 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

Because of the reference in Section 822 of the Restatement (Second), to "abnormally dangerous conditions or activities," Sections 519 and 520 of Restatement (Second) are set forth below.⁴

Before the influence of Restatement terminology, and to some extent even afterward, a common way of describing private nuisance was to call it an "*interference with*" a "protected interest [that] must not only be substantial but it must also be unreasonable."⁵ It was also common to refer to the protected interest in cases of "private nuisance" as an interest "in the use and enjoyment of land."⁶ Combining these phrases produces the definition of private nuisance as a *substantial and unreasonable interference with another's interest in the use and enjoyment of land*.

The ALI's development of Section 822 has refocused in three ways the definition of private nuisance that serves as the standard for determining whether a plaintiff has proved a claim under the rubric of private nuisance. For ease of reference, I will designate these aspects of the ALI's definition as "First," "Second," and "Third" of five propositions for your consideration.

that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

....

§ 520. DEFINITION OF ULTRAHAZARDOUS ACTIVITY.

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.

4. Restatement (Second) of Torts §§ 519, 520 provide:

§ 519. General Principle

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

....

§ 520. Abnormally Dangerous Activities

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.

5. See, for example, William. L. Prosser, *Handbook of the Law of Torts* 580 (West, 4th ed. 1971).

6. See, for example, *id.* at 591.

First. Both the original and the Restatement (Second) formulations of Section 822 attach the adjective “unreasonable” to the word “invasion” rather than the word “interference.” Does this preference for “invasion” connote something more closely analogous to intrusion in some physically detectable sense, and less conducive to the allowance of damages for mental and emotional harm, than “interference” would connote?

Second. Both the original formulation and the Restatement (Second) formulation of Section 822 do not use the word “unreasonable” in that part of the formulation regarding an “invasion” that is “negligent,” “reckless,” or actionable under rules regarding “ultrahazardous” or “abnormally dangerous” conduct, activity, or condition.

Third. The original Restatement, Section 822(b), states as a separate required element of the claim that the “invasion is substantial.” The Restatement (Second) treats substantiality not as a separate requirement but instead as a factor bearing on whether one or more of the remaining requirements is satisfied.

I will comment further on these three matters after introducing two more observations that I will designate “Fourth” and “Fifth” for ease of reference.

Fourth. The Restatement (Second) formulation of Section 822 uses “abnormally dangerous” rather than “ultrahazardous” in Section 822, as well as in Sections 519 and 520.

Fifth. In place of the original Restatement’s two-element definition of “ultrahazardous activity,” Restatement (Second) recites in Section 822 a list of “factors” to be considered in deciding, in one conclusive weighing, “whether an activity is abnormally dangerous.” Those factors include the following:

- (f) extent to which its [the activity’s] value to the community is outweighed by its dangerous attributes.

This new item (f), and associated comments explaining it, has an interesting background, part of which is stated next.

II.

As Reporter, Dean Prosser prepared Tentative Draft No. 16 (1970) for consideration at the ALI meeting in May of that year. In the discussions preceding Dean Prosser’s preparation of this draft,

Professor Fleming James had urged, with support from other advisers (including me), that the Restatement should explain that, quite apart from any liability for negligence or intentional tort, the law of nuisance has traditionally imposed liability for interference with another's interest in use and enjoyment of land if the interference is greater than the person whose interests in use and enjoyment of land are interfered with can reasonably be required to bear without compensation. This traditional liability applies even though the conduct causing the interference is reasonable in the sense that its social utility outweighs the harms and risks it causes. Professor James prepared a memorandum marshaling precedent in support of this position.⁷ He and others who participated in the 1970-71 discussions argued that this position was further supported by a case decided soon after Professor James placed his memorandum in circulation.⁸

This position was accepted by a majority vote at the May 1970 meeting.⁹ John Wade undertook the task of revision to conform with the Institute vote, and his revision was circulated among the advisers in early 1971.

I responded in a letter to John Wade on March 1, 1971:

The revised draft of the Restatement sections on Nuisance, of February 23rd, [1971] is greatly improved in my view. Regretfully I have to say that I am still less than enthusiastic about the draft. Basically my criticisms are leveled at the original Restatement. It was improved by the revisions Bill [Prosser] drafted, and has been further improved by your revisions, but I hope you will be persuaded to make still more changes. . . .¹⁰

A central point I was urging then, and still urge today, is that the way "unreasonable" is used in Section 822 of the original Restatement is curious and confusing at the least. If "unreasonable" is interpreted in one of its traditional ways, its use is not, in my view, well supported by precedent or on policy grounds.

Consider, for example, Section 822, subparagraph (a). It says an intentional invasion must be unreasonable to be actionable, but

7. Reproduced as Appendix A of Restatement (Second) of Torts: Tentative Draft No. 16 (1970).

8. *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164, 172 N.W.2d 647, 652 (1969) (refusing to balance the utility of the offending conduct against the gravity of the injury inflicted in a nuisance action for damages).

9. See Restatement (Second) of Torts: Tentative Draft No. 17, comment j (1971), and Dean Wade's explanatory comments on "The James-Keeton Proposals," *id.* at 31-32.

10. Letter from Robert Keeton to John Wade (March 1, 1971) (copy on file with the Author).

the requirement of unreasonableness is omitted from subparagraph (b). In this respect, the Restatement (Second) formulation carries forward the pattern of the original Restatement. This theme is also carried forward in revisions of Sections 826 and 827.

We may reasonably infer that drafters of the original Restatement thought they did not need to speak of unreasonableness in relation to unintended invasions because the concept of unreasonableness was inherent in the terms "negligent" and "reckless" and was not a requirement, as they saw it, if the invasion was otherwise "actionable under the rules governing liability for . . . ultrahazardous conduct."

One problem about this way of thinking is the failure to take account of the material difference between using the adjective "unreasonable" to modify "conduct" and using it to modify "interference with" or "invasion of" another's interests. Using the standard of *unreasonableness of conduct* in relation to a claim of negligence or recklessness is materially different from using the standard of *unreasonableness of the invasion* (or *interference*) in relation to a claim of nuisance. The drafters of the original Restatement seemed aware of this difference at some points in their comments but for some reason did not adhere to the distinction in drafting the blackletter and in many other parts of the comments.

I believe it to be the case that, with few exceptions apart from those opinions of the last fifty years that have cited and relied upon the Restatement, judicial opinions in nuisance cases have stated or assumed that no interference with use and enjoyment of land, intentional or unintentional, is actionable unless it is a "substantial" and "unreasonable" *interference* (or *invasion*). It is also clear, however, that an interference (or invasion) can be "unreasonable" in this nuisance sense even though social utility outweighs risk with the consequence that the conduct producing the interference is not "unreasonable" in the negligence sense.

Warren Seavey used to say, in defense of the first Restatement (during the development of which he was one of the advisers to the reporters), that you cannot have a nuisance founded on prudent, ultrahazardous conduct because by definition that conduct is not unreasonable. He therefore concluded that the Restatement departed from the precedents when it declared there could be a nuisance founded on prudent, ultrahazardous conduct.

It seems to me that Warren Seavey was right insofar as he was asserting that the precedents required unreasonableness to support

liability for private nuisance. But I nevertheless believe that the Restatement concept of a nuisance founded on ultrahazardous conduct is consistent with the precedents because the nuisance concept of unreasonableness is different from the negligence concept of unreasonableness, and unreasonable interference can be found to exist even though no unreasonable conduct could be proved because the conduct was prudent in the negligence sense. Indeed, if the original Restatement differed from precedents at this point, more likely it was in confining *strict* liability under nuisance theory to cases of ultrahazardous activity than in allowing to this modest extent a bit of strict liability under the rubric of nuisance.

Both the original and the Restatement (Second) versions of Sections 822, 826, and 827 may be read as implying that "unreasonableness" is not part of the test for liability applied by judges (or juries, if judges leave it to juries) to determine whether an *unintended* invasion (or interference) is a nuisance. I believe this implicit proposition is not supported by precedent, principle, or policy.

Since the Restatement (Second) version of Section 822 used "unintentional" and "unreasonable" as modifiers of "the invasion," one way (perhaps the least disruptive way) of correcting the flawed implication would have been to revise Section 822 subparagraph (b) to read as follows:

(b) Unintentional and unreasonable or otherwise actionable under the principles controlling liability for negligent, reckless or abnormally dangerous conduct.

In any event, whatever change a drafter might make in Section 822 in this respect should, of course, be carried into the text and comments in Sections 826 and 827, so as to indicate that "unreasonableness" applies to nuisance by unintended invasion (or interference) as well as nuisance by intended invasion (or interference).

Even better, perhaps, would have been a change of subparagraph (b) to read as follows:

(b) Unintentional and unreasonable.

To be a private nuisance, an interference (whether intentional or unintentional) must be unreasonable. But standards of "unreasonableness" bearing on negligence, recklessness and abnormally dangerous conduct (or activity) applied in determining liability for harm to person or property are different from the stan-

dard of unreasonableness used in the law of nuisance, and it is confusing to refer to those standards even as analogies, worse still as if they were expressions of the same concept.

For example, a driver who speeds through a thirty miles per hour zone in a city is negligent because of the risk of injury to persons and property. That negligent conduct also may cause interference with use and enjoyment of properties in the area because the noise of the racing motor and squealing tires awakens sleepers. Some of those interferences are intentional because of the driver's knowledge, even while acting, that the interferences were occurring. But it might well be that the noise extended farther than the driver realized. Thus the driver's negligent conduct would have caused some unintended interferences. Are those interferences automatically classified as nuisances? I would think not. But Section 822 seems to say yes, unless one infers that the conduct must be negligent *in relation to* the nuisance type of interest and that it is not enough that the conduct is "otherwise actionable" because somebody was hurt.

It would have been better and more consistent with precedents to treat carelessness in causing unintended interference with use and enjoyment of land as just one of the factors weighed in determining whether the interference was unreasonable. But this way of thinking might reasonably be understood to be distinctly different from that implicit in both the original and the Restatement (Second) versions of Section 822.

More modest changes might reasonably be considered also in our hypothetical two-thousand-something discussion. The example of the negligent driver, discussed above, suggests that one who is guilty of actionable negligence causing physical harm may yet not be liable for an interference with use and enjoyment of land resulting from the same conduct.

A second example shows that one may be liable for an unintended interference that does not come within any of the three concepts of negligence, recklessness, and abnormally dangerous conduct. This second example is a hypothetical case, rather like *Jost*.¹¹ Suppose an accidental discharge of a fine mist of pollutants, when a new plant that was reasonably supposed to be pollution-proof goes into operation. Of course the continued operation of the plant, after

11. See note 8. In *Jost*, plaintiffs, alleging that the discharge of sulfur fumes from defendant's generating plant damaged their crops and soil, sought damages for injury to crops and loss of market value of their farm. 172 N.W.2d at 648-49.

the ineffectiveness of anti-pollutant devices is known, involves intended invasions. But the invasions occurring before the results became known may have produced substantial damage, and the damage may have occurred without negligence, recklessness, or abnormally dangerous conduct.

I believe (as I understand Professor James's memorandum to have argued) precedents support liability in such a case. Yet the blackletter of Section 822, even as revised, seems to me to say there would be no liability unless the judge or jury happened to come out this way in a discretionary application of the multi-factor evaluation—including the new (f) factor—taking account of this kind of circumstance as just one factor among others.

The example just given is also relevant, of course, to the central point of Fleming James's memorandum reproduced in Tentative Draft No. 16 and to the vote of the 1970 Annual Meeting.

I had a concern then, and still have it now, that some readers will read the blackletter as finally endorsed as easing back from the scope of strict liability approved in the 1970 vote. Unlike decisions of courts, Institute votes can be cast without explanation. Perhaps before the outcome of the 1970 vote was incorporated into a blackletter text acceptable to the membership at final approval, it had been toned down a bit from the phrasing of the 1970 motion because of the realization that when the majority voted for the motion, there was vigorous dissent.

III.

As the Institute's consideration of strict liability and nuisance progressed through the decades from the 1930s through the 1970s, the formulations of the legal tests for determining the scope of strict liability, both in general and under the rubric of nuisance in particular, pushed farther toward the use of multi-factor evaluative standards (and correspondingly less use of bright-line rules) than did either the corresponding sections of the first Restatement or the formulations appearing in other chapters of the Restatement (Second).

Can we identify the reasons?

Is the best explanation to be found in the inherent nature of the different subject matter of different chapters of the Restatement? In the common law the ALI was restating? Were developments intervening between completion of the initial Restatement and final ap-

proval of the Restatement (Second) more significant in these areas than in others?

Or is a better explanation found in the combination of a changing point of balance among contrasting perspectives of Institute members and the influence of John Wade's instincts and leadership in searching for a formulation that represented the closest thing to consensus that could be produced?

John Wade was ever searching more deeply and persistently for common ground. Did this instinct and his leadership bring the Institute to elect multi-factor evaluative standards as better reflecting the maturing sense of professionals of that time? Was it the Institute's sense that developments of the twentieth century pointed to a preference for multi-factor evaluative standards over bright-line rules?

An observer might be more likely to sense a trend of this kind in the areas of strict liability and nuisance than in other areas of tort law, or law generally. The clashing interests and policy perceptions in these areas were perhaps more likely to lead one to shy away from too many hard edges and, even at the sacrifice to some degree of efficiency and predictability, to seek the ends of justice by allowing judicial decision makers, and in some instances juries as well, the greater degree of discretion that is inherent in using evaluative standards to determine liability.

IV.

The principal section on nuisance, as it emerged from all the consultation and debate of the 1970s, reflects a judgment of the Institute consistent with John Wade's recommendation for a multi-factor evaluative standard. Perhaps it is a correct observation also that judicial decisions of the latter half of the twentieth century have moved farther than had decisions of earlier vintage toward reliance on evaluative standards in areas where policy arguments founded on highly-valued interests can be invoked by each set of opposing advocates.

In the earlier stages of this clash over the nature of the legal test for liability, evaluative standards tended usually to have the effect of supporting somewhat broader liability than did bright-line rules. At that time, this influence on outcomes could be expected from conferring more discretion upon both trial judges and juries. It is less clear that conferring greater discretion tends today to have the effect

of expanding tort liability. Neither juries nor trial judges are as predictably inclined to favor liability. One consequence is that the perspective of partisans on the use of evaluative standards in legal doctrine is less predictable today.

In addition to partisan interests at stake in the choice between hard-edged rules and multi-factor evaluative standards is a public interest. Underlying the common law system, in which precedent is binding on decision makers (except in rare and generally defined circumstances), is the premise that justice should be administered in an evenhanded way, to produce like outcomes in like cases. The dilemma that constantly faces lawmakers in choosing the form of legal tests for liability is where to strike the balance among competing interests and policy arguments. For a balance must be struck between, on the one hand, allowing decision makers in individual cases discretion to take into account every circumstance that appeals to one's sense of justice, and, on the other hand, prescribing bright-line rules that assure evenhanded and predictable decision making.

One speculation suggested by these observations is that the wisest choice about how and where to strike the balance on this issue of lawmaking style is not necessarily the same for all generations in the ongoing development of law. Perhaps the sense of the American Law Institute, in that period of accelerated change toward expanded tort liability that was ongoing from the late 1950s into the 1970s, was that the Institute, in relying to somewhat greater extent on multi-factor evaluative tests in its Restatement of the law of torts, was faithful to the law as it was then developing.

V.

I return, finally, to the theme with which I began.

John Wade was instinctively the scholar and teacher. He was gracious, always ready to listen and learn, to probe more deeply both the subject matter under inquiry and the perspectives of others who appeared to differ with his own view of that matter, and to explain what he had come to understand. In personal qualities as well as scholarly instinct, he was an energetic but always gentle and constructive participant in probing for deeper understanding.

My most sustained contacts with John Wade occurred in that extraordinary assortment of torts enthusiasts (lawyers, judges, and professors) who were the advisers to the reporter for the Restatement (Second) of Torts. Dean Prosser's skill as a sprightly writer and his passion for comprehensive research enabled him, as reporter, to place

before us, as a point of beginning for every successive chapter of our work, a draft that made significant improvements on the first Restatement. These drafts were orderly and readable distillations of the generalizations and the more precise rules he had derived from the common law materials on tort law—already massive in the decades when this group was doing its work. The advisers were meeting with the reporter at least twice a year. Of course, there were strongly-held differences among us.

John Wade, distinctively, was the most persistent among the group in searching for common ground that would enable us to reach recommendations acceptable not only to Bill Prosser as reporter but also, in due course, to the council and the Institute.

At a stage when pressures for prompt completion were building, Bill Prosser's health led him to consider resignation. It was the consensus of the advisers (apart from John Wade, though we freely expressed our views in his presence) that John Wade should lead our efforts to assure Bill Prosser our full support and assistance and try to persuade him to continue as reporter, or at least, if the director and council approved, as chief reporter with assistance. When those efforts failed, John Wade was the consensus choice (not only among advisers but more significantly among officers of the Institute as well) for reporter to complete the project. Thus it was that John Wade became reporter for the chapters on strict liability and nuisance, among others then unfinished.

The assignment was an especially difficult one. The reasons were rooted in the subject matter and in problems left unresolved in the first Restatement of Torts. Both among advisers and among Institute membership generally, differences over the unresolved issues were significant and vigorously voiced.

Both professionally and personally, all of us who served with John Wade in the many professional activities to which he devoted his energies and talents have greatly benefitted and have been deeply moved by knowing him and his work. As one of that large group, I will continue to remember fondly the personal associations.

I salute John Wade's distinctive contributions to the legal profession.

We miss him, personally, and those of us who participate in the two-thousand-something-or-other Institute debates among torts enthusiasts will miss his professional presence.

