

## MAKING SENSE OF NUISANCE IN SCOTS LAW

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### Introduction

Professor T.B. Smith wrote:<sup>2</sup> “If it were recognised that reparation for harm caused by the use of property was based upon the principle of culpa, then “nuisance” could appropriately be eliminated from the law of obligations (because the category would be unnecessary).”

The concern underlying Smith’s statement relates not only to the duplication of doctrines, but also by implication, to coherence.

This article draws on T.B. Smith’s observations. Initially it deals briefly with the duplication of doctrines. Then, the majority of the paper is devoted to the issue of coherence. In relation to coherence it may be said that the boundaries between circumstances amenable to resolution in nuisance and those subject to the law of negligence have not always been clearly drawn.

Until the relationship between nuisance and other aspects of the law of neighbourhood, principally negligence, are understood it will remain difficult to provide a prognosis for nuisance as a coherent doctrine of Scots law in the twenty first century. This paper proceeds on the premise that any such prognosis should be informed by an understanding of the processes that have brought nuisance to its current state.

### Is Nuisance Necessary In Delict?

When T.B. Smith wrote nuisance was thought not to be a doctrine based on culpa.<sup>3</sup> In 1985 the House of Lords ruled that liability in reparation for harm amounting to nuisance did indeed depend upon culpa.<sup>4</sup> Should nuisance now be eliminated from the law of obligations, since harm caused by the use of property is surely remediable under other fault based doctrines?

The simple answer is “no”. Nuisance has a specialised role in protecting occupiers of property from serious disturbance and substantial

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<sup>2</sup> *A Short Commentary on the Law of Scotland* (1962), p.642.

<sup>3</sup> See, e.g. DM Walker, *Delict* 2<sup>nd</sup> ed., (1981), p.643: “It is unnecessary to prove either intention to harm, or fault or lack of reasonable care.” In *Watt v Jamieson* 1954 SC 56, at 57 Lord President Cooper criticised the defender’s plea for its tendency to “confuse nuisance as a cause of action with culpa and the special aspect of culpa which is generally described as the rule in *Rylands v Fletcher*.” On nuisance presented in terms of strict liability see e.g. DM Walker, “Strict Liability in Scotland” 1954 *JR* 231; KWB Middleton, “Liability Without Fault” 1960 *JR* 72.

<sup>4</sup> *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17, 1985 SLT 214.

inconvenience.<sup>5</sup> This is a peculiar form of harm that is not protected by other regimes such as the law of negligence.<sup>6</sup> Of course the common law is not the only relevant means of regulation, but it can be seen as providing a residual level of protection when statutory regimes fail, for one reason or other.<sup>7</sup> Furthermore, the availability of interdict in nuisance fulfils a specialised role in providing a remedy against anticipated events or ending those that are continuing whereas reparation can only follow after the event.

While it is possible to provide a quick answer to the issue raised by TB Smith there remains scope for further discussion. Smith confessed that he found nuisance mystifying and considered that an element of property law had become confused with a claim in delict.<sup>8</sup> Of course, the elimination of nuisance from the law of obligations does not entail the elimination of nuisance from the common law altogether. Interdict in respect of disturbing or inconvenient uses of land could equally well be available as an operation of property law.<sup>9</sup> The earlier treatments of nuisance in Scots law do indeed place it in property rather than delict<sup>10</sup> and it has been argued that its location in the law remains a matter of difficulty.<sup>11</sup>

Following Smith's view, nuisance could be retained as an element of property law in which declarator and interdict are available in respect of activities carried out on land that cause serious disturbance or substantial inconvenience to the occupiers of neighbouring property. Culpa need not be proved for an award of interdict, but nuisance, that is a degree of disturbance or inconvenience that is more than the victim ought reasonably to tolerate,<sup>12</sup> must be established. What obstacles would then remain to the elimination of nuisance from the law of obligations?

First, how is the law to deal with the situation where quantifiable loss has arisen as a consequence of nuisance? A polluting activity may cause physical damage to property and persistent noise disturbance may have a detrimental effect on the health of the victim. Reparation has been awarded in such circumstances since a relatively early stage in the development of the

<sup>5</sup> *Watt v Jamieson* 1954 SC 56, at 58.

<sup>6</sup> Nowhere is this point better made than in D.B. Dobbs *The Law of Torts* vol.II (2001), at 1324: "[T]o find a nuisance is to say that the plaintiff can recover for loss of enjoyment, a kind of chronic emotional harm that might be viewed more cautiously without a finding of nuisance." In Scotland "harm" of this nature is also protected by the doctrine of *aemulationem vicini*, however the requirement to prove malice restricts the applicability of this doctrine.

<sup>7</sup> See C. Gearty, "The Place of Private Nuisance in a Modern Law of Torts" (1989) 48 *CLJ* 214 at 217.

<sup>8</sup> "Short Commentary" 531.

<sup>9</sup> N.R. Whitty, "Nuisance" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2001), para.17 identifies three possible roles for nuisance in modern Scots law: "Primo, the main role is as a doctrine of property law or neighbourhood protecting interests in the use and enjoyment of land or public places from present and future interference, the main remedies being interdict, declarator and (at least historically) decree *ad factum praestandum* for abatement."

<sup>10</sup> Hume, *Lectures* vol. III pp.214 – 216; Bell, *Principles* paras. 973 - 978.

<sup>11</sup> D. Visser & N. Whitty, *The Structure of the Law of Delict* in K Reid and R Zimmermann (eds.) *A History of Private Law in Scotland* (2000), vol.II 422 p.466.

<sup>12</sup> *Watt v Jamieson*, n.5 above.

doctrine.<sup>13</sup> Since *Watt v Jamieson* nuisance in Scots law has been defined so as to include material harm along with serious disturbance and substantial inconvenience.<sup>14</sup> While interdict is the appropriate device to prevent the continuation of a harmful activity it is a fundamental principle of the law that loss caused wrongfully should be repaired.

If reparation in nuisance was not available in respect of material harm consequent upon nuisance are there alternative doctrines that would allow this function to be performed? The alternative in some cases would be to litigate according to the law of negligence. However, the law of negligence cannot serve generally to provide reparation where merited in all cases where material harm to property is caused by the use of property.

To employ a tautology, the law of negligence concerns negligence. Unless the position sometimes contended for by English lawyers is adopted, that intention is a form of negligence,<sup>15</sup> then the law of negligence must be regarded as inapplicable in cases of intentional conduct. The classic nuisance action does not result from a failure to take care in circumstances where care is required, but from an activity deliberately conducted either in the belief that the consequences to neighbours would not amount to a legal wrong or in disregard of those consequences. Traditionally, delictual conduct has been presented as either intentional or negligent.<sup>16</sup> Scots law does not contemplate intention as a form of negligence. Accordingly, in Scotland, the law of negligence cannot serve generally to provide reparation in cases of material harm to property caused by the use of property.

Thus, a continuing role exists for the doctrine of nuisance in providing reparation in cases of material harm caused intentionally.<sup>17</sup> However, material harm caused negligently should perhaps, be recoverable only according to the law of negligence.<sup>18</sup>

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<sup>13</sup> The first action in which reparation was sought in respect of property harm arising from nuisance was *Skene v Maberleys* (1820) 2 Murr 352. Cases in which injury to health has formed an element of reparation in nuisance include *Chalmers v Dixon* (1876) 3 R 461 and *Shanlin v Collins* 1973 SLT (Sh Ct) 21.

<sup>14</sup> Discussed below, p.257.

<sup>15</sup> E.g. Gearty, n.7 above at 223: "The tort of negligence embraces, as logically it must, a tort of intention" and at 229: "We know that the tort of negligence includes intention".

<sup>16</sup> See Visser and Whitty, n.11 above.

<sup>17</sup> Whitty, n.9 above para.17: "*Secundo*, nuisance has also a role as a doctrine in the law of delict or reparation, applicable to situations where (as in the case of interdict) the defender's conduct is intentional in the sense that he knows that the harm is certain, or substantially certain, to result from his conduct."

<sup>18</sup> Whitty, n.9 above para.17: "*Tertio*, the third role is as a doctrine of the law of reparation applicable where the defender's conduct is unintentional or negligent. It is submitted that whereas the first two roles [nn.9 & 17 above] are consistent with principle, the third role is inconsistent with the fundamental general principle that there is no liability in delict without culpa. Here, nuisance usurps the role of the delict of negligence which is properly applicable to such cases to the exclusion of the test of reasonable tolerability (*plus quam tolerabile*) normally applied in nuisance cases." See further refs at n.102 below.

### Finding Coherence In Nuisance

This leads on to the concern implicit in TB Smith's statement, that nuisance and negligence have to some extent become confused. Modern evidence of this can be seen in the case law that follows *RHM Bakeries v Strathclyde Regional Council*.<sup>19</sup> Confusion between the two doctrines presents in acute form in the case of *The Globe v North of Scotland Water Authority*.<sup>20</sup>

The next aim of this paper is to explore the processes by which confusion has arisen. Such an examination has to be conducted in the Scottish context.<sup>21</sup> The relationship between private nuisance and negligence in the English law of torts is and historically has been, quite different.<sup>22</sup>

It has been argued elsewhere that nuisance in Scots law is best seen as an indigenous development albeit one that drew upon English as well as civilian influences.<sup>23</sup> Nuisance developed as a doctrine of Scots law over the latter half of the eighteenth century. It emerged into the nineteenth as a relatively limited aspect of a broader, developing, law of neighbourhood. By the end of that century nuisance retained its limited nature although the seeds of future confusion had by this time been sown.<sup>24</sup> Nuisance retained neither its limited nature nor relative coherence far into the twentieth century. It became confused with other doctrines and while criteria existed for some time to differentiate nuisance from negligence, by mid century such a distinction could no longer be drawn clearly. Nuisance broadened in scope, encroaching into territory previously held by other aspects of the law of neighbourhood. Cases that would once have been determined in negligence or indeed according to property law rules on support, came to be raised in nuisance.

### Scots Nuisance In The Nineteenth Century

During the nineteenth century reparation for property harm caused by the use of property was indeed based upon culpa.<sup>25</sup> Equally, reparation for personal

<sup>19</sup> See, e.g. *Argyll & Clyde Health Board v Strathclyde Regional Council* 1988 SCLR 120, 1988 SLT 381.

<sup>20</sup> 2000 SC 392; 2000 SLT 674; Sheriff Court proceedings reported *sub nom Cansco International plc v North of Scotland Water Authority* 1999 SCLR 494. For analysis see E. Reid, "Financial Loss and Negligent Nuisance" 2000 *SLT (News)* 151; GDL Cameron, "Muddy Pavements and Murky Law: Intentional and Unintentional Nuisance and the Recovery of Pure Economic Loss" 2001 *JR* 223.

<sup>21</sup> See GDL Cameron, "Scots and English Nuisance . . . Much the Same Thing?" (2005) 9 *Edin LR* 98 which concludes: "One point should be clear. When there are problems to be addressed in Scots nuisance they need to be considered in the Scottish context. The law of torts may prove of very limited assistance."

<sup>22</sup> On nuisance and negligence in the English jurisdiction see e.g. C. Gearty, n.7 above; M. Lee, "What is Private Nuisance" (2003) 119 *LQR* 298; JPS McLaren, "Revolution – Some Lessons from Social History" (1983) *OJLS* 155; JF Brenner, "Nuisance Law and the Industrial Revolution" 1973 *JLS* 403. RA Buckley, *The Law of Nuisance* 2<sup>nd</sup> ed. (1996), pp.18–22.

<sup>23</sup> GDL Cameron, n.21 above.

<sup>24</sup> Particularly in *Chalmers v William Dixon Ltd* (1876) 3 R 461 discussed below, pp.250-252.

<sup>25</sup> *Callendar v Eddington* (1826) 4 Murr 108; *Douglas v Monteith* (1826) 4 Murr 130 explained in *McIntosh v Scott* (1859) 21 D 363 *per* Lord President McNeill at 368

injury caused by the use of property or dangerous states of property was also based upon culpa.<sup>26</sup> In such cases, culpa had to be averred and proved, but nuisance was not normally involved. Most nineteenth century reparation cases arising from the use of property are more accurately viewed in terms of negligence. Property harm in general was not considered in terms of nuisance.

It is contended that nuisance was a doctrine of relatively narrow application. It was invoked, classically, in the process of seeking interdict in respect of noxious trades. During the century there was a very small number of cases raised in which reparation was sought in respect of nuisance. In all of these cases physical harm to property was alleged as a consequence of either air or water pollution.<sup>27</sup>

In presenting this narrow view of the scope of nuisance during the nineteenth century it is necessary to take account of cases that have presented some difficulty in classification. *Cleghorn v Taylor*,<sup>28</sup> *Kerr v The Earl of Orkney*,<sup>29</sup> *Laurent v Lord Advocate*<sup>30</sup> and *Campbell v Kennedy*<sup>31</sup> have all been discussed at one time or another in the context of nuisance.<sup>32</sup> All these cases involved property damage to some extent albeit in *Kerr* the property harm

and in *Laurent v Lord Advocate* (1869) 7 M 607 per Lord President Inglis at 611; *Weston v Incorporation of Tailors of Potterrow* (1839) 1 D 218; *Thomson v Gray* (1842) 5 D 377; *Campbell v Kennedy* (1864) 3 M 121; *Lindsay v Thomson* (1866) 5 M 29; *Murdoch v Glasgow & South Western Railway Co* (1870) 8 M 768; *Pirie v Aberdeen Magistrates* (1871) 9 M 412; *Wilson v Waddell* (1876) 3 R 288; *Moffat v Park* (1877) 5 R 13; *Cameron v Fraser* (1881) 9 R 26; *Scott's Trustees v Moss* (1889) 17 R 32.

<sup>26</sup> *Gardner v Ferguson* 1795 (unreported) see discussion in H. MacQueen and W.D.H. Sellar, *Negligence* in K Reid & R Zimmermann, n.11 above vol.II, p.526 ff; *Innes v Edinburgh Magistrates* (1798) Mor 13189, 13967; *Black v Cadell* 9 Feb 1804 FC, (1804) Mor 13905, (1812) 5 Pat App 567; *Chapman v Parlane* (1825) 3 S 401; *Prentice v The Assets Co Ltd* (1889) 17 R 484; *Cormack v Wick & Pulneytown School Board* (1889) 16 R 812.

<sup>27</sup> The water pollution cases are: *Skene v Maberleys*; *Collins v Hamilton* (1837) 15 S 895; *Hamilton v Charles Tennant & Co* (1839) 1 D 502; *Ewen v Turnbull's Trustees* (1857) 19 D 513; *Armistead v Bowerman* (1888) 15 R 814. The air pollution cases are: *Arrott v Whyte* (1826) 4 Murr 149; *McCallum v Forth Iron Co* (1861) 23 D 729; *Cooper & Wood v North British Railway Co* (1863) 2 M 116; *Chalmers v William Dixon Ltd*. Damages were also sought in respect of a nuisance in *Blantyre (Lord) v Clyde Navigation Trustees* (1867) 5 M 508, (1871) 9 M (HL) 6. The defenders' operations had caused the accumulation of filth and sewage on the foreshore. The perceived harm to the pursuer was in terms of loss of access to the river channel rather than pollution. *Blantyre* is more instructive on statutory liability and interpretation than on the law of nuisance.

<sup>28</sup> (1856) 18 D 664.

<sup>29</sup> (1857) 20 D 298.

<sup>30</sup> (1869) 7 M 607.

<sup>31</sup> (1864) 3 M 121.

<sup>32</sup> See, e.g. K.W.B. Middleton, n.3 above. For a recent example See R. Zimmermann and P. Simpson, *Liability among neighbours* in K. Reid & R. Zimmermann, n.11 above vol.II, p.619. *Cleghorn*, which the authors interpret in terms of strict liability is seen in terms of nuisance on the strength of the following passage in Lord Cowan's opinion at 671: "They must use their property so as not to injure that of their neighbour, by any nuisance, or by what is tantamount to it, being within their premises."

had been made good by the defender and the pursuer sought reparation in respect of derivative financial losses which he could not prove.

In *Laurent* the pursuer argued that customers declined to patronise his restaurant because of the dust and dirt occasioned by the defender's activities. However, neither the report nor the discussion on the significance of *Laurent* in *Huber v Ross*<sup>33</sup> indicate that this action was pled or determined in nuisance. *Kerr* involved property harm through flooding consequent upon the collapse of a *novum opus*, a dam constructed by the defender. There is nothing in the report to suggest that the litigants or the bench considered this a case of nuisance. The invocation of nuisance in connection with flooding is a relatively recent development.<sup>34</sup> *Kerr* has caused difficulties because certain *obiter dicta* of Lord Justice Clerk Hope have been interpreted to support strict liability. This may have led some writers in the era when nuisance was associated with strict liability to conclude that *Kerr* as litigated, involved nuisance. It did not.<sup>35</sup>

The circumstances in *Cleghorn v Taylor* were quite unlike any action raised in nuisance during the nineteenth century. The defender was found liable in damages, apparently without proof of culpa, when a chimney, built for him

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<sup>33</sup> 1912 SC 898. See Lord Johnston at 916 and Lord President Dunedin at 907–909. See also discussion on *Laurent* in J.J. Gow “Is Culpa Amoral?” 1953 *JR* 17, pp.24–25.

<sup>34</sup> Flooding cases were pursued in nuisance, in some cases in addition to other grounds, in: *Gourock Rope Works v Greenock Corporation* 1966 SLT 125; *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*; *Plean Precast v NCB* 1986 SLT 78; *Argyll & Clyde Health Board v Strathclyde Regional Council* 1988 SCLR 120, 1988 SLT 381; *Logan v Wang (UK) Ltd* 1991 SLT 580; *GA Estates Ltd v Caviapen Trustees Ltd No 1* 1993 SLT 1037; *Dewar v Lothian* 1996 GWD 26-1538 OH; *Anderson v White* 2000 SLT 78; *Hand v North of Scotland Water Authority* 2002 SLT 798. Earlier cases were not pursued in nuisance. See *Fairly v Earl of Eglinton* (1744) Mor 12780; *Burgess v Brown* (1790) Hume 504; *Henderson & Thomson v Stewart* (1818) 5 S 868; *Graham v Loch* (1829) 5 Murr 74; *Samuel v Edinburgh & Glasgow Railway Co* (1849) 11 D 968, (1850) 13 D 312; *Macfarlane v Lewis* (1857) 19 D 1038; *Kerr v Earl of Orkney* (1857) 20 D 298; *Tennent v Earl of Glasgow* (1862) 1 M 133, (864) 2 M (HL) 22; *Potter v Hamilton & Strathaven Railway Co* (1864) 3 M 83; *Campbell v Bryson* (1864) 3 M 254; *Pirie & Sons v Aberdeen Magistrates* (1871) 9 M 412; *Moffat v Park* (1877) 5 R 13; *Roths (Countess of) v Kirkcaldy & Dysart Waterwork Commissioners* 1882 7 App Cas 694; *Filshill v Campbell* (1887) 14 R 592; *Kidston v Caledonian Railway Co* (1894) 31 SLR 564; 1894 1 SLT 576; *Clark v Glasgow Water Commissioners* (1896) 12 Sh Ct Rep 13; *Hanley v Edinburgh Magistrates* 1913 SC (HL) 27, 1913 1 SLT 420; *Caledonian Railway Co v Greenock Corporation* 1917 SC (HL) 56, [1917] AC 556; *St George's Cooperative Society v Glasgow Corporation* 1921 SC 872, 1921 SLT 178; *Brownlie & Son v Barrhead Magistrates* 1925 SC (HL) 41, 1925 SLT 373; *R Wylie Hill & Co Ltd v Glasgow Corporation* 1951 SLT (Notes) 3; *Greyhound Racing Trust Ltd v Edinburgh Corporation* 1952 SLT 35; *Tontine Hotel (Greenock) Ltd v Greenock Corporation* 1967 SLT 180. *Stirling v North of Scotland Hydro Electric Board* 1965 SLT 229, 1975 SLT 26 was raised *inter alia* on grounds of *opus manufactum*.

<sup>35</sup> *Kerr* has been much discussed. The present author's treatment is in “Strict Liability and the Rule in *Caledonian Railway Co v Greenock Corporation*” (2000) 5 *SLPQ* 356. Lord Hope's dictum is reproduced at 360.

by a contractor collapsed shortly after its erection destroying crockery in the pursuer's shop below.

Nowhere in the report is it suggested that *Cleghorn* was pled or determined in nuisance except that in Lord Cowan's opinion the maxim *sic utere tuo ut alienum non laedas* is quoted.<sup>36</sup> It is submitted that this single citation of a maxim normally associated with nuisance is not a sufficient reason to label *Cleghorn* as nuisance. No reference, either to this maxim or to the law of nuisance in general is made in any of the other opinions or in the pleadings as reported. Perhaps Lord Cowan viewed the maxim as being of general application in the law of neighbourhood. We might compare it with Guthrie-Smith's observation on negligence or culpa that: "every one must so govern his affairs and regulate his conduct, as not to be productive of injury to his neighbour".<sup>37</sup> The idea that one should not harm one's neighbour can be said to underpin the whole of delict. The *sic utere tuo* maxim may have occurred to Lord Cowan as a means of articulating this general idea and while it is normally associated with nuisance it is unusual, but not necessarily significant, to see it articulated in other types of property harm case.

*Cleghorn* could equally well be understood in terms of vicarious liability for the act of an independent contractor without the requirement to establish fault, perhaps inferring fault on the part of the contractor and calling upon the principal to answer for it.<sup>38</sup> In this analysis *Cleghorn* concerns vicarious liability and this seems a more plausible view than holding it as any sort of law, good or bad, in nuisance. Commenting on *Cleghorn* Lord Inglis regarded it as a case of implied negligence.<sup>39</sup>

A similarly weak foundation underlies any description of *Campbell v Kennedy* in terms of nuisance. On this occasion Lord Inglis, alone of the judges who delivered opinions, cited the maxim *sic utere tuo ut alienum non laedas*,<sup>40</sup> although his comments on the pursuer's case make it abundantly clear that the case was one of negligence: "[The pursuer's] summons is based on an averment of negligence, and, in so far as it was intended to embrace

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<sup>36</sup> At 671. The maxim may be translated: use your (property) so as not to harm (the property) of another.

<sup>37</sup> J. Guthrie Smith, *A Treatise on the Law of Reparation* (1864) quoted in H. MacQueen & W.D.H. Sellar, n.26 above p.534. See also the Lord Ordinary (McLaren) in *Armistead v Bowerman* (1888) 15 R 814 at 817: "The obligation of neighbourhood is expressed in the maxim *sic utere tuo* etc. I conceive that the obligation of neighbourhood required the defender to use a reasonable degree of care and trouble to avoid injurious pollution."

<sup>38</sup> *Per* Lord Neaves in *Campbell v Kennedy* (1864) 3 M 121 at 125: "The case of *Cleghorn* only settled this principle, that when a proprietor employs a tradesman to do something to his property, he is responsible to his neighbours for injury caused by the insufficiency of the work."

<sup>39</sup> *ibid*, at 126: "With regard to that case (*Cleghorn*) I would observe, in the first place, that no such doctrine as that contended for by the pursuer (in *Campbell*) was required for its decision. The verdict found culpa proved, and any observations of the judges in regard to the liability of a proprietor when there was no culpa, were not necessary for the decision of the cause, and must be regarded as obiter." See also *McCull v Hoo* 1983 SLT (Sh Ct) 23 and W.M. Gordon, "Householders' Liabilities" (1982) 27 *JLSS* 253.

<sup>40</sup> At 126.

any other ground of action, it is plainly irrelevant.”<sup>41</sup> The source of complaint was a leaking water closet and the harm was flooding in a lower property. It was held that no liability could flow *ex dominio solo*. Again, flooding at the time was not regarded in terms of nuisance. The operative principle in such circumstances was fault or negligence. The circumstances and decision in *Campbell* do not differ in any significant way from the earlier case of *Weston v Tailors of Potterrow*<sup>42</sup> which was clearly a negligence case.

If we take the view that the scope of nuisance was more or less restricted to pollution, whether of air or water or in the forms of unusual noise, unnatural heat or vibration, reparation cases in nuisance would then only arise in respect of physical harm to person or property arising from such pollution.<sup>43</sup> The classification of any reparation case arising from different circumstances should not be designated as nuisance without some convincing argument being advanced. General understanding of nuisance has not been assisted by failure to appreciate the narrowness of its bounds during the nineteenth century.

### *Contemporary Texts*

It is true that nineteenth century texts on nuisance did not state the doctrine in the narrow terms contended for here. Both Bell, in “Principles” (first edition 1829) and Broun, writing in 1891,<sup>44</sup> presented nuisance in terms that arguably, were broader than merited by the operation of the doctrine in the courts.

Bell presented nuisance thus:

“The description of nuisance in Scotland is the same whether the public or individual be regarded. Whatever obstructs the public means of commerce and intercourse, whether in highways or navigable rivers; whatever is noxious or unsafe, or renders life intolerable to the public generally, or to the neighbourhood; whatever is intolerably offensive to individuals in their dwelling houses, or inconsistent with the comfort of life, whether by stench (as the boiling of whale blubber), by noise (as a smithy in an upper floor), or by indecency (as a brothel next door), is a nuisance.”<sup>45</sup>

In practice, nuisance in nineteenth century Scottish courts typically involved intolerably offensive operations detracting substantially from the comfortable enjoyment of property.<sup>46</sup> Potential or present dangers (especially in the form

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<sup>41</sup> *ibid.*, Rankine too viewed *Campbell* in terms of negligence. See J. Rankine, *The Law of Land Ownership in Scotland* 4<sup>th</sup> ed., (1909), p.372.

<sup>42</sup> (1839) 1 D 1218.

<sup>43</sup> This is borne out by the 19<sup>th</sup> century reparation cases explicitly pled and determined in nuisance. n.27 above.

<sup>44</sup> J.C.C. Broun, *The Law of Nuisance in Scotland*.

<sup>45</sup> “Principles” (1829), para.241; 10<sup>th</sup> (Guthrie) ed. (1899), para.974.

<sup>46</sup> “Thus narrowed in its application, the word nuisance, in the law of Scotland, corresponds rather with its popular than its technical signification in England, and is seldom applied to any other cases but those in which one party, by his direct operations or by his negligence, [in the sense of neglecting to abate a nuisance] occasions something offensive to the sight, smell or hearing of another.” *Per J*



of fire hazards) could also be interdicted as nuisances,<sup>47</sup> but as will be explained, the description without further qualification of dangers, or things unsafe, as nuisance is potentially misleading. Nuisance *contra bonos mores* or indecency also requires further discussion.

First, let us deal briefly with Bell's opening comments. The observation on the lack of distinction drawn between what in England at the time would have been termed private, common and public nuisance reflects accurately eighteenth century Scots case law and in particular those cases in which successful pleas for interdict were founded upon nuisance to the wider neighbourhood in combination with alleged invasions of the pursuer's enjoyment of his own property.<sup>48</sup>

The idea that obstructions to public means of commerce and intercourse should be characterised as nuisance seems never fully to have caught on.<sup>49</sup> It is true that this aspect of nuisance is preserved in Whitty's treatment,<sup>50</sup> but there are reasons for scepticism. For one thing, such obstructions could be dealt with in Scots law by invoking rules on encroachment on public right or *purpresture*.<sup>51</sup> There seems no need for Bell to have applied the label "nuisance" and relatively little justification from the case law. There have been very few obstruction cases brought in Scots law in nuisance.<sup>52</sup> Lord President Clyde in *Slater v McLennan* clearly regarded "public nuisance" as English terminology and seems almost to suggest what is probably true, that what had once gone by the name of *purpresture* might now be termed "nuisance" with no change in the law and no particularly good reason for the

Hill-Burton, *On the State of the Law as Regards the Abatement of Nuisances and the Protection of the Public Health, in Scotland, with Suggestions for Amendment*, (1840), p.1. Examples include: *Dowie v Oliphant* 11 Dec 1813 FC; *Trotter v Fairnie* (1830) 9 S 144, (1831) 5 W&S 649 (boiling of whale blubber); *Palmer v Macmillan* (1794) Mor 13188; *Kelt v Lindsay* 8 July 1814 FC; *Lauder v McLagan* 16 June 1815 FC; *Swinton v Peddie* (1837) 15 S 775, (1839) Macl & R 1018 (HL) (slaughtering of cattle in immediate vicinity of houses); *Raeburn v Kedslie* (1816) 1 Murr 1; *Johnston v Constable* (1841) 3 D 1263 (stream engines in tenements).

<sup>47</sup> E.g. *Carrubers Close Proprietors v Reoch* (1762) Mor 13175; *Wood v Sandeman* (1762) Mor 13175; *Lauder v Donaldson* 1788 (unreported) see Hume "Lectures" vol.III 215; *Vary v Thomson* 2 July 1805 FC, Mor "Public Police" App. No.4.

<sup>48</sup> See discussion in Cameron, n.21 above pp 101-102 on *Kinloch v Robertson* (1756) Mor 13163; *Carruber's Close Proprietors v Reoch*; *Wood v Sandeman*; and *Vary v Thomson*.

<sup>49</sup> Whitty, n.9 above para.163: "The basic principles of this branch of Scots law are not well developed."

<sup>50</sup> *Ibid.*, see paras.159 – 168.

<sup>51</sup> E.g. *Cockburn v Ramsay* (1497) Mor 13157; *Forbes v Ronaldson* (1783) Mor 13185; *Montrose Magistrates v Scott* (1761) Mor 13175; *Trotter v Hume* (1757) Mor 12798.

<sup>52</sup> *Donaldson v Pattison* (1834) 13 S 27 involved a dangerous obstruction on a pavement. *Adam v Moir* (1874) 2 R 143 involved an element of anticipated obstruction by a public urinal. There was an element of inconvenient overcrowding of the road by cattle in *Anderson v Aberdeen Agricultural Hall Co* (1879) 6 R 901. In Scotland collisions involving parked vehicles are resolved in negligence with no reference to nuisance. See e.g., *Scott v McIntosh* 1935 SC 199, 1935 SLT 171; *Isbister v J&T Smith* 1948 SLT (Notes) 8; *Campbell v Gillespie* 1996 SLT 503.

change in terminology.<sup>53</sup> Bell's inclusion of obstructions may have been prompted by statute rather than the common law.<sup>54</sup>

Broun's treatment of nuisance classifies it according to specific forms: pollution of air and water; unusual noise; unnatural heat or vibration. To these "typical" forms of nuisance he added a further two categories, nuisance *contra bonos mores* and dangerous nuisances.<sup>55</sup> Turning to nuisance *contra bonos mores* or indecency, to the extent that this was ever a form of nuisance in Scotland it was marginal. While it is true that in one relatively early case, *Scott v Cox*,<sup>56</sup> the drying of cow hides within sight of a public road was interdicted in nuisance as offensive to sight, the only other nuisance case that appears relevant is *Adam v Moir*<sup>57</sup> in which the pursuers objected to the erection outside their shop of a public urinal. The grounds of objection were that this would: interfere with public traffic; darken the pursuers' premises; prevent carts and carriages from drawing up to the doors of the shops; and would be "otherwise offensive to them and their customers." Apart from *Scott* there was only one further Scottish case upon which Bell and Broun founded. In footnote e) to paragraph 974 in Bell it is stated: "In *Paterson v Beattie*<sup>58</sup> it was held that a monument erected in a churchyard to the memory of persons convicted of sedition was not a nuisance." This is a misleading account of the case in which interdict was refused by the majority on the grounds that the proposed erection would not violate such property rights as the pursuers had. Lord Jeffrey listed four potential grounds upon which the pursuers could have advanced their arguments<sup>59</sup> and nuisance was among these, but it was perfectly clear that the arguments were founded upon other bases. The Court was not called upon to determine whether the monument would be a nuisance or not and did not do so.

Dangers also require careful consideration. Broun claimed:

"A person also occasions a dangerous nuisance where the condition of *opera manufacta* on his lands causes danger to the person or property of others; for example, a person occasions a dangerous nuisance if he builds a house close to his neighbour's march fence or to a public road and allows the

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<sup>53</sup> 1924 SC 854 at 858: "If any road user uses the road in such a way. . . as to interfere with other people's use of the road, he commits what in Scotland we recognise as an encroachment on public right (we used to call it *purpresture*) remediable by interdict, or by way of damages, at the instance of the road authority, or of any individual member of the public whose exercise of the public road has been interfered with. In England such interference is recognised as 'public nuisance' and the remedy is by indictment. The differences between our own law and that of England in this matter are differences of remedy, not of principle."

<sup>54</sup> The Turnpike Road Act 1831 1&2 Wm IV c43 s.96 provided for penalties for persons committing nuisances. Although the Act applied only to Scotland the wide ranging concept of nuisance employed belongs firmly to the law of England.

<sup>55</sup> Broun, n.44 above p.1.

<sup>56</sup> 5 July 1810 FC.

<sup>57</sup> (1874) 2 R 143.

<sup>58</sup> (1845) 7 D 561.

<sup>59</sup> *ibid.*, at 578. Readers who appreciate a little humour are directed to the opinion of Lord Mackenzie, at 568-571.

house to get into an unsafe condition, or if he makes a quarry in a similar position and neglects to fence it, or if he excavates his lands so close to the boundary line as to remove the natural support of his neighbour's land."<sup>60</sup>

This passage is an eccentric representation of Scots law as it stood at the time. The authorities cited in support of Broun's view were almost entirely English (criminal) public nuisance cases.<sup>61</sup> It may be noted that he founded neither upon *Cleghorn* nor *Kerr*. While the instances Broun gave would, in England, have attracted the label "nuisance," in Scotland all of these examples called for the invocation of other doctrines.

For example, while interdict against operations posing a fire risk gave rise to some relatively early nuisance cases in Scots law,<sup>62</sup> the extent to which dangerous states of property in general fell to be regarded as nuisances was strictly limited. There were a few interdict cases in which dangers were referred to as nuisances<sup>63</sup> and none in which reparation was sought. Reparation actions arising from dangerous buildings that fell down were litigated without reference to nuisance.<sup>64</sup> In general, dangers that materialised and caused harm were determined in negligence, not nuisance.<sup>65</sup> When injury was occasioned to persons falling into unfenced quarries or holes in general, again, no recourse was made to the doctrine of nuisance.<sup>66</sup> Broun's final example, deprivation of lateral support, confuses nuisance with property law rules. At the time Broun wrote, nuisance played no role in support cases.<sup>67</sup>

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<sup>60</sup> Broun, n.44 above p.75.

<sup>61</sup> *R v Lister* 1875 26 LJ, MC 196; *Hepburn v Lordan* 1865 2 H&M 345, 34 LJ, Ch 293; *R v Muters* 1864 34 LJ, MC 22; *Arnold v Furness Railway Co* 1874 22 WR 613; The Scottish cases were *Vary v Thomson* 2 July 1805 FC, Mor "Public Police" App No 4; The other Scottish case founded upon is *Elgin Road Trustees v Innes* (1888) 14 R 48 and in this case any mention of the word "nuisance" is conspicuous by its absence!

<sup>62</sup> n.47 above.

<sup>63</sup> *Stevenson v Hawick Magistrates* (1871) 9 M 753; *Fleming v Hislop* (1882) 10 R 426, (1886) 13 R (HL) 43; *Ireland v Smith* (1895) 33 SLR 156, 3 SLT 180 (danger to health from dust from chickens); *Fergusson v Ferguson* (1900) 38 SLR 100; *Fergusson v Pollock* (1901) 3 F 1140.

<sup>64</sup> *Hay v Littlejohn* (1666) Mor 13974; *Caledonian Railway Co v Greenock Sacking Co* (1875) 2 R 671. Dangerous buildings in burghs fell under a statutory regime. An Act of Charles II anent Ruinous Houses in Royal Burghs APS 1663 c 12 empowered the Provost and Baillies to enforce repairs or to demolish dangerous buildings. Hill-Burton, n.46 above p.10 notes that this power was exercised during the nineteenth century by the Dean of Guild.

<sup>65</sup> *Sibbald v Lady Rosyth* (1685) Mor 13976; *Farquharson v Gillanders* (1698) 4 Brown's Supp 400; *Gordon v Grant* (1765) Mor 7356; *Mackintosh v Mackintosh* (1864) 2 M 1357; *Caledonian Railway Co v Greenock Sacking Co* (1875) 2 R 671; *Howie v Ailsa Shipbuilding Co Ltd* 1921 SC 1225; *Brierly v Midlothian CC* 1920 2 SLT 80, (1921) 1 SLT 192.

<sup>66</sup> See cases listed at n.26 above.

<sup>67</sup> See *Dunlop v Corbet & Macnair* 20 June 1809 FC; *Robertson v Hamilton's Trustees* (1825) 4 S 456; *Callendar v Eddington* (1826) 4 Murr 108; *Balds v Alloa Colliery Co* (1854) 16 D 870; *McIntosh v Scott* (1859) 21 D 363; *Bargeddie Coal Co v Wark* (1859) 3 Macq 467 (HL); *Taylor v Dunlop* (1872) 11 M 25; *Buchanan*

In short, a state of affairs that threatened a neighbour's property could be interdicted in nuisance. There are also cases in which states of affairs that threatened injury to persons could be interdicted in nuisance.<sup>68</sup> However, where the risk materialised and reparation was sought culpa had to be shown, no reference to nuisance was made, and the operative area of delict was negligence. Bell did not develop his point that what was unsafe was a nuisance and Broun's treatment of dangers simply did not represent the law of Scotland.

### *Nuisance and Culpa*

The need to classify nineteenth century cases as nuisance or negligence really only arises for the purposes of analysis, in the course of trying to make sense of what is generally acknowledged to be a difficult area of the law. Retrospective classification of reparation cases presents problems not least because actions are, of course, neither nuisance nor negligence actions, but actions for damages.

It is important to avoid classification of nuisance according to the different conceptions of a later period. As discussed above, there are difficulties in determining the exact scope of nuisance in the nineteenth century from the literature. Nevertheless there are indicators. First, the status as nuisance of cases brought in respect of anything other than pollution must be questionable bearing in mind that nuisance in the form of encroachment on public right is at best marginal and in the form of indecency is more or less non-existent. Second, the extent to which a case was pled or determined in nuisance will usually be clear from the report although there are cases that present particular difficulties. *Fleming v Gemmill*<sup>69</sup> is a good example of a case in which elements of nuisance and negligence cannot truly be separated.<sup>70</sup>

Third and critically, is the requirement of culpa. Nineteenth century nuisance cases did not require proof of culpa, any case in which such proof was required for liability was therefore not a case of nuisance. The converse is not true. It does not follow that where liability was established, apparently without culpa, that the case was one of nuisance.

Nuisance cases did not require proof of culpa, but this does not support the view sometimes proposed that liability in nuisance was strict. While it is true that liability in nuisance came to be seen as strict in time, this followed

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v *Andrew* (1873) 11 M (HL) 13; *Campbell's Trustees v Henderson* (1884) 11 R 520.

<sup>68</sup> n.63 above.

<sup>69</sup> 1908 SC 340, 15 SLT 691.

<sup>70</sup> This case involved water pollution, but there is no mention of nuisance in the pursuers' pleadings. The circumstances were remarkably similar to *Caledonian Railway Co v Baird & Co* (1876) 3 R 839 in which pollution had arisen from the misuse by tenants of the effluent system installed by the landlords. *Caledonian* was clearly raised and determined in nuisance and was founded upon in *Fleming*. In *Fleming* the ruling in damages against two of the defenders appears to have proceeded on the basis of nuisance, but the award of damages against the remaining defenders was made on grounds that, retrospectively at least, appear more like negligence.

as a result of later developments and did not really come to fruition until into the twentieth century.

Nuisance had its own special accommodation within delictual principles. It was determined in *Duke of Buccleuch v Cowan*<sup>71</sup> that specific proof of culpa was not required in an action based on nuisance. It must be noted that the remedy sought in *Duke of Buccleuch* was interdict, however it appears that the same view came to be taken in reparation cases.<sup>72</sup> No offence was given against the principle, *damnum injuria datum* since nuisance was viewed as a wrong in itself. As Lord Gillies put it directing the jury in *Arrott v Whyte*: “There is no doubt that a man can use his property in the way he thinks best; but it is equally true that he is not entitled to put a nuisance upon it.”<sup>73</sup> According to this analysis, where nuisance was established, an *ex lege* obligation had been breached, a delict had been committed, an unlawful act had taken place. The existence of a nuisance evidenced *injuria*. To require further proof of culpa would have been tautologous.<sup>74</sup>

A nuisance, after all, was more or less bound to cause discomfort or some other form of harm, otherwise it would not have been held as a nuisance. The view advanced here is supported by the test for nuisance as stated by Lord Chief Commissioner Adam in *Hart v Taylor*:

“In a question of nuisance, the first point is, whether the product of the work is noxious or unwholesome; but though it

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<sup>71</sup> (1866) 4 M 475. It was held that the pursuers did not have to put the word “wrongfully” in issue since the commission of a nuisance was itself a wrong.

<sup>72</sup> In *Skene v Maberlys* (1820) 2 Murr 352 there was no plea of culpa or wrongfulness, the action was defended on the argument that there was no nuisance. A jury verdict for the defenders was set aside and a new trial was allowed. In *Collins v Hamilton* (1837) 15 S 895 the pursuers did put wrongfulness in the issues. Lord Cockburn, directing the jury said at 902: The pursuer undertakes to prove loss by nuisance, and that it is wrongfully done. He must establish the three qualities of nuisance, damage and wrong.” The jury returned verdicts for the defenders on both issues. The pursuer had established neither nuisance nor loss. In *Hamilton v Charles Tennant & Co* (1839) 1 D 502 the report is concerned with a bill of exceptions and the competence of a question asked in cross examination. Neither culpa nor wrongfulness were in the issue. In *Ewen v Turnbull’s Trustees* (1857) 19 D 513 the issue proposed by the pursuer included the word wrongfully. The defenders were allowed to prove acquiescence in answer. In *Blantyre v Clyde Navigation Trustees* (1867) 5 M 508, (1871) 9 M (HL) 6 there is no concern with culpa or wrongfulness. The case turned on the interpretation of the Clyde Navigation Acts of 1758, 1840 & 1858. In *Cooper & Wood v North British Railway Co* (1863) 1 M 499, (1863) 2 M 116 the defenders’ plea, that wrongfully (meaning in this context . . . in excess of the powers in the Railways Clauses Consolidation (Scotland) Act 1845 s.16) should be put in issue was repelled. In *Armistead v Bowerman* (1888) 15 R 814 which involved water pollution the case was resolved for the pursuer at first instance on grounds of negligence. This was overturned on reclaiming in a bizarre judgment in which their lordships proceeded as if the laws of nuisance and negligence did not exist.

<sup>73</sup> (1826) 4 Murr 149, 158. Damages and interdict were awarded in this case. The action had been defended on grounds of acquiescence.

<sup>74</sup> *Duke of Buccleugh v Cowan* at 481: “The pursuers having withdrawn the additional issues, the Court approved of the other issues proposed by them, holding that “nuisance” being a species of legal wrong, it would be tautological to insert “wrongfully” in the issues.”

may not be absolutely noxious, still if it renders the enjoyment of life substantially uncomfortable, either in the pursuer's house or grounds, it is a nuisance."<sup>75</sup>

Lord Adam's test corroborates the view that nuisance was primarily concerned with pollution and must cast a shadow of dubiety over the marginal categories, obstruction or immorality, to which it can scarcely have applied.

This analysis of the relationship between nuisance and culpa was made possible by the narrowness of the scope of Scots nuisance and by what may be described as the objectified approach to nuisance that was taken at the time. The focus of inquiry was often upon whether a given activity or state of affairs was or was not a nuisance.<sup>76</sup> Notwithstanding the reservations stated above on his treatment of dangers, nuisances fell within a reasonably well defined taxonomy of recognisable types of invasion as noted by Broun. Accordingly, because courts could identify a nuisance, and because the commission of a nuisance was unlawful in the sense of being a wrong, nuisance was remediable without further proof of culpa. Property harm that did not arise from nuisance did, in the general case, require proof of culpa before liability in reparation could be established.

### Summary

Although there are some cases that present difficulty, it is generally possible to provide a broad classification of nineteenth century case law as falling under either nuisance or negligence. The important point is that care needs to be exercised in the process and there are cases whose classification as nuisance requires supporting arguments that are not always advanced. Retrospective labelling as nuisance of cases that were not, at the time they were determined, considered to be nuisance cases at all has not helped understanding of this doctrine.

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<sup>75</sup> (1827) 4 Murr. 307, at 313-314.

<sup>76</sup> E.g. "Buildings for the boiling of whale blubber are a nuisance" *Dowie v Olphant* 11 Dec 1813 FC; An outside toilet (euphemistically termed "house of office" in the report) is not a nuisance *Clark v Gordon* (1760) Mor 13172; An establishment on the ground floor of a tenement for boiling tripe was a nuisance *Farquhar v Watson* 19 Jan 1813 FC; A chimney that issued smoke seven feet from the pursuer's window was a nuisance *Laing v Muirhead* (1822) 2 S 73; "I know of no case where a hospital has been found to be a nuisance." *per* Lord President Boyle in *Mutter v Fife* (1849) 11 D 303; Bathwater used to irrigate fields was not a nuisance *Lady Willoughby d'Eresby's Trustees v Strathearn Hydropathic Establishment Co* (1873) 1 R 35; An elephant on the public highway was not *per se* a nuisance *Bennet v Bostock* (1897) 13 Sh Ct Rep 50. It is not that certain events or activities were necessarily nuisances as *Frame v Cameron* (1864) 3 M 290 demonstrates. In that case a steam engine in a residential setting was not proved to be injurious or disturbing. "[W]hether an elephant, or a traction engine, or anything else upon the highway is a nuisance is a question of fact, the answer to which must depend on the circumstances of each particular case." *Per* Sheriff Rutherford in *Bennet v Bostock* at 53. "[E]very case depends upon its own circumstances; and that is a nuisance which a jury of intelligent gentlemen think so in the circumstances of each case." *Per* Lord Gillies in *Arrott v Whyte* (1826) 4 Murr 149 at 158.

At the same time, contemporary accounts of the scope of nuisance need some care in their treatment. Broun's first four categories of pollution of air and water, unusual noise and unnatural heat appear to encapsulate the core of nuisance as it operated at the time. Obstructions in public highways and nuisance *contra bonos mores* can be regarded at best as marginal. It is very important to recognise that while dangers could be interdicted in nuisance, property harm or personal injury resultant upon the realisation of a danger required proof of culpa and thus belonged in the law of negligence rather than nuisance.

Liability in nuisance was not strict. The absence of any requirement to show culpa is explained by the status of nuisance as a wrong. So long as the objectified view of nuisance was taken, that a nuisance was something that courts could identify, this rationalisation of nuisance was perfectly coherent and did not offend against the general principle of no liability without fault.

### **The Early To Mid Twentieth Century: Nuisance and Non-Natural User**

A number of factors, taken together, played a role in changing nuisance from the relatively coherent doctrine of the nineteenth century to the comparatively difficult one of the twentieth.

First, conceptions of nuisance changed over the period at the end of the nineteenth and beginning of the twentieth centuries. The objectified view, in which nuisance was seen as a "thing" came to be replaced, gradually, with descriptions of nuisance in terms of the interest invaded. This change can be witnessed when the treatments of nuisance in the 1912 and 1930 editions of Green's Encyclopaedia are compared.<sup>77</sup> The point is of some significance, because while "a nuisance" was something that fell within certain recognised categories of event, an interference with rights incidental to land ownership was a potentially broader conception. It might include interferences that did not possess the characteristics of "a nuisance" in the old sense. Without generally accepted rules to define which interferences were actionable in nuisance and which were not, it is not difficult to see that this conceptual change could facilitate the erosion of what boundaries nuisance possessed and in turn the capture by nuisance of circumstances that belonged properly to other doctrines.

Moreover, nuisance came to be associated with the doctrine of non-natural user through a process that also brought within the potential ambit of nuisance liability for *opera manufacta* and created dangers. The case of *Chalmers v Dixon*<sup>78</sup> is at the root of this development and represents a true confusion of doctrines.

In *Chalmers* damages were sought in respect of harm to crops and the health of the inhabitants of a farm. The source of harm was a smouldering bin on neighbouring land for which the defenders were responsible. The defenders were held liable without proof of specific culpa.

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<sup>77</sup> *Green's Encyclopaedia of the Law of Scotland* (1912) Vol.viii, pp.563-593; (1930) Vol.x, pp.340-387.

<sup>78</sup> (1876) 3 R 461.

Now, a smoking pit bing that polluted the air of neighbouring property to the extent that health was affected and crops were destroyed was a nuisance by any reckoning. Since nuisance was a wrong it would have been tautologous to require further proof of culpa.

However, the circumstances did not allow for disposal in this fashion. This was unlike other nuisance cases. This was not a case in which a factory chimney belched forth smoke. The pit waste was not smoking when the bing was constructed. Inevitably the defenders sought to focus attention on the issue of how combustion had occurred. They had not deliberately created a nuisance. The issue then ought to be whether they had exercised sufficient care to prevent combustion from occurring. In other words were the defenders culpable? In *Chalmers* nuisance and negligence came together.

It can be seen how it would have benefited the defenders to have had the case treated as one of negligence. This would have required the pursuers to aver and prove specific culpa. On the other hand since smoke pollution was the source of harm, the action was raised in nuisance and in nuisance courts would not require pursuers to prove culpa. Had this case involved anticipated harm that had not materialised then, as an easily combustible and presently dangerous *opus manufactum*, the bing could have been interdicted in nuisance in exactly the way that occurred in the later case of *Fleming v Hislop*.<sup>79</sup> Since the danger had materialised and the harm had been done the Court found itself considering the case along negligence lines and resolved the issue in a way that must have seemed ingenious at the time.

The requirement to prove culpa was circumvented by distinguishing *Mackintosh v Mackintosh*<sup>80</sup> in which property harm was caused by fire spreading from neighbouring land on the basis that the source of the fire in *Mackintosh*, muirburn, was a natural operation on land whereas the construction of the bing amounted to a non-natural use of land. This concept was taken explicitly from the English case of *Rylands v Fletcher*.<sup>81</sup> The view that specific culpa need not be proved in respect of a dangerous *opus manufactum* came from *Kerr v The Earl of Orkney*.<sup>82</sup> Through the application of *Kerr* and *Rylands* it was held that the pursuer was entitled to recover damages, without specific proof of culpa, in respect of a dangerous *opus* that represented a non-natural use of land.<sup>83</sup>

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<sup>79</sup> (1882) 10 R 426, (1886) 13 R (HL) 43. See also *Inglis v Shotts Iron Co* (1881) 8 R 1006, (1882) 9 R (HL) 78.

<sup>80</sup> (1864) 2 M 1357.

<sup>81</sup> (1868) LR 3 HL 330.

<sup>82</sup> (1857) 20 D 298.

<sup>83</sup> See Lord Justice Clerk Moncreiff at 464. The rule in *Rylands v Fletcher* has not, in Scotland, invariably been understood to signify liability without culpa. Bell, *Principles*, para.970: "In the class of cases which falls under what English lawyers call the principle of *Fletcher v Rylands*, negligence is still the ground of liability. The only difference is that in such cases the proprietor is doing something upon his property which is in its nature dangerous and not necessary (or usual?) in the ordinary management of the particular kind of property, and he is therefore bound to observe a higher degree of diligence to prevent injury to his neighbour." In *Watt v Jamieson* 1954 SC 56, 57 Lord President Cooper referred to *Rylands* as involving a "special aspect of culpa". Of course, there are other cases in which



Although *Chalmers* was determined in 1876 the consequences of the reasoning employed did not materialise until much later. As a consequence of *Chalmers* and *Rylands* nuisance, bereft of the limited taxonomy associated with the objectified view, came in time to be associated with non-natural use of land, with *opera manufacta* and with created dangers.

There appears to have been some ambivalence about the relationship between nuisance and non-natural user. It was not always clear whether they were different aspects of the same doctrine or entirely separable. Thus, in 1930, what had been the “Nuisance” chapter in earlier editions of Green’s Encyclopaedia became “Nuisance and Non-Natural use of Property”.

The author of the 1930 entry, Mitchell, attempted to rationalise liability for the infringement of natural rights incidental to land ownership in general. He was careful to differentiate damage resulting from the illegal use of property, which he designated “nuisance proper” from damage resulting from extraordinary and non-natural use of property. By illegal Mitchell did not of course mean criminal, but unlawful in the sense established in *Duke of Buccleuch v Cowan*. According to Mitchell’s analysis, in “nuisance proper” the concern of courts should have been with the illegality of the conduct and the issue of negligence need not have been raised. The relevant question was whether the defender had done something which he or she ought not, rather than whether they had exhibited less care than they ought. Mitchell took the view that where damages were sought in respect of extraordinary and non-natural uses of property, negligence could be imputed, much as it was in *Chalmers*. This meant that for physical harm arising from non-natural use of property, liability was strict in the limited sense that there was no requirement to prove specific culpa. Liability in nuisance “proper” was not strict, but arose from the unlawful nature of the defender’s conduct. Liability for acts that were neither wrongful in themselves, *i.e.* not “nuisance proper”, nor extraordinary or non-natural could only be found upon proof of culpa.<sup>84</sup>

This, it is submitted, is a sound analysis given: the currency of authority in which liability for non-natural user was “strict”; the *Duke of Buccleuch v Cowan* accommodation of nuisance within delictual principle; and clear authority that liability in reparation for ordinary uses of land that did not amount to nuisance depended upon the establishment of culpa. Mitchell sought to preserve the integrity of nuisance as it had operated during the previous century. That he was not successful in so doing may be attributed a number of inter-related factors: weaknesses in the distinction between natural and non-natural user;<sup>85</sup> the fact that the key authority on non-natural user in

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*Rylands* liability is regarded as absolute. See, *e.g.* *Giblin v Lanarkshire CC* 1927 SLT 563.

<sup>84</sup> Mitchell, “*Nuisance and Non-Natural Use of Property*” n.77 above, para.692.

<sup>85</sup> The point is well explained by W Stallybrass, (1928) *Torts* 7th ed. quoted in F. McManus, “Liability for *Opera Manufacta* in Scots Law”, 1998 *JR* 282 at 287: “Such a distinction has little in principle to recommend it. What is the natural use of land? Is it natural to build a house on it, or to light a fire? Almost all use of land involves some alteration of its natural condition, and it seems impossible to say how far this alienation may go before the use of the land becomes non-natural or extraordinary, so as to bring the rule in *Rylands v Fletcher* into operation. Moreover, if there is one kind of use more natural than another it is the keeping of

Scots law, *Chalmers v Dixon*, appeared as an authority on nuisance; and the demise of the idea of “nuisance” falling within the limitations of an accepted taxonomy.

By the time Mitchell wrote a tendency had already been demonstrated in the courts to equate nuisance with non-natural user. In *Blair v Springfield Stores*<sup>86</sup> damages were awarded in an action raised in nuisance by a shopkeeper in respect of loss of stock and discomfort and annoyance. The harm was caused by the escape of weevils from the defender’s grain store. Sheriff Welsh held that the knowing storage of grain infested by weevils was an exceptional and unusual act and founding upon *Kerr v Earl of Orkney*, *Chalmers v Dixon* and *Rylands v Fletcher* described the law in the following terms:

“[T]he storage thereof, though quite a lawful act in itself, becomes an exceptional and unusual act, and is such an act as the owners of the store must know, or ought to know, may cause injury to neighbouring proprietors. The storage of such a consignment creates a hazard which did not exist before, and, if damage is done by the escape of weevils from the consignment, then in my view, the persons under whose administration the consignment is stored are responsible, however careful they may have been, to neighbouring proprietors who may have suffered damage.”<sup>87</sup>

Non-natural user cases had the potential to bring within the ambit of nuisance property harm actions that were not restricted according to the nature of the source of harm. Thus, any harmful use of property designated “non-natural” could now be viewed as nuisance, and not just those involving pollution.

It is worth reiterating the point that it is perfectly clear that, notwithstanding Broun and Bell’s inclusion of dangers or things unsafe within their treatments of nuisance, and the fact that dangers could be interdicted in nuisance, during the nineteenth century reparation for dangers that materialised did not proceed in nuisance. This changed in the early twentieth century.

In 1896 alternative issues of fault and nuisance were allowed in *Hay v Waldegrave Leslie*<sup>88</sup> in which the pursuer claimed his horse had bolted in fright at the sight of a traction engine blowing off steam on the road. He sought reparation in respect of injury to himself, his dogcart and the horse. The locomotive was alleged to be a nuisance in terms of the Locomotives Act 1861 s. 13. This statutory provision featured once again in 1924 in *Slater v A & J McLellan*.<sup>89</sup> A householder, whose home and garden had been damaged by burning embers from a cargo of cork that had ignited while being towed by a steam lorry, sought damages. The pursuer had attempted to

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cattle; yet cattle-trespass is a typical instance of the application of this rule of strict responsibility, and it is indeed the historical source of the general principle.”

<sup>86</sup> (1911) 27 Sh Ct Rep 178.

<sup>87</sup> *ibid.*, at 181.

<sup>88</sup> (1896) 4 SLT 124.

<sup>89</sup> 1924 SC 854.

establish fault although there was some difficulty in proving the source of the fire. Lord President Clyde stated:

“[T]his motor and its load of cork dust constituted, as they went along the public road, a manifest source of danger. One of the categories of nuisance is that which is known as a dangerous nuisance...There is, I think, no doubt in these circumstances that the damage of which the pursuer complains was the result of a nuisance – a dangerous nuisance – which was created by the defenders on the public road opposite his house. It is not necessary for him in order to establish his right to damages to appeal to the doctrine of *Rylands v Fletcher*, nor indeed to the law of negligence. His remedy is under the law of nuisance.”<sup>90</sup>

In *Slater* damages were awarded in respect of a dangerous nuisance irrespective of negligence. While there is some authority during this period to show the award of damages on the sole basis of *Rylands*,<sup>91</sup> the concepts of the dangerous nuisance and non-natural user were brought together in *Giblin v Lanarkshire County Council*.<sup>92</sup> The pursuer sought reparation in respect of his mother who had died following a gas leak. Alternative issues of fault and nuisance were allowed. Lord Moncrieff expressed the law in the following terms:

“One who brings a dangerous agent on his land or keeps there anything likely to do damage if it escapes, must keep it at his peril. If there be escape of the dangerous agent and damage ensues, the defenders...are liable as for a legal wrong irrespective of negligence. Under the issue of fault the Court has regard only to the origin of the event; under an issue of nuisance the Court has regard only to the fact of the event as having interfered with a natural right of property irrespective of the origin of any such interference. In supporting a claim founded on nuisance it is accordingly not necessary to put negligence in issue.”<sup>93</sup>

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<sup>90</sup> *ibid.*, at 859. Earlier cases involving sparks from locomotives had been resolved in negligence rather than nuisance. See *Murdoch v Glasgow & South Western Railway Co* 1870 8 M 768; *Port Glasgow & Newark Sailcloth Co v Caledonian Railway Co* (1892) 19 R 608, (1893) 20 R (HL) 35. In 1950 liability in such circumstances was once more resolved in negligence. *Balfour v The Railway Executive* 1950 SLT (Notes) 43.

<sup>91</sup> *Gemmill's Trustees v Alexander Cross & Sons Ltd* (1906) 14 SLT 576. *Rylands* was distinguished in *Marshall v Moncrieffe* 1912 2 SLT 306 and discussed in *Reynolds v Lanarkshire Tramways Co* (1908) 16 SLT 230. In *Durham v Hood* (1871) 9 M 474 *Rylands* had been founded upon by the complainer seeking to interdict blasting operations in a mine. The relevance of *Rylands* to the judgment is not clear, but the extraordinary nature of the charge used did weigh with the Court. In *Clark v Glasgow Water Commissioners* (1896) 12 Sh Ct Rep 13 the pursuers founded upon *Rylands, Kerr & Chalmers* in an unsuccessful argument that they need not prove fault.

<sup>92</sup> 1927 SLT 563.

<sup>93</sup> *ibid.*

The practical effect of this view does not differ from the *Duke of Buccleuch* position in which nuisance is a wrong. The difference is that the view in *Giblin* is founded squarely on *Rylands* and not only that, but on an interpretation of *Rylands* in terms of absolute liability whereas in Scotland the tendency had been to see *Rylands* as a case of inferred negligence.<sup>94</sup>

Rather than the threefold classification favoured by Mitchell, a two fold classification appears to have been in development whereby non-natural use of land and nuisance were placed together. Where land use was not extraordinary or non-natural of course, culpa still required to be proved, so a great deal turned on whether courts viewed a given activity as natural or not. This is seen in cases involving escapes of gas subsequent to *Giblin*. In 1934 in *Miller v Robert Addie & Son* it was determined that:

“the laying of gas pipes by a landlord for the supply of gas to dwelling houses owned by him was a natural and not a non-natural use of his property, and, accordingly, that ownership of an ordinary service pipe for the conveyance of gas to a tenant’s house was insufficient, *per se*, and without proof of negligence, to render the landlord liable for injury resulting to the occupants of the house through an escape of gas from the pipe.”<sup>95</sup>

A further unsuccessful attempt to argue that a gas supply was a non-natural use of land falling within the principle of *Rylands* was made in 1948 in *McLauchlan v Craig*.<sup>96</sup>

The emergent two fold classification between nuisance and non-natural user on one hand and negligence on the other could not prove satisfactory in the long run, because the distinction between natural and non-natural user was not easily drawn. So long as the belief that it could be drawn persisted,

<sup>94</sup> See n.83 above. The view of *Rylands* taken in *Giblin* followed *Midwood & Co Ltd v Manchester Corporation* [1905] 2 KB 597; and *Charing Cross Electricity Supply Co Ltd v Hydraulic Power Co* [1914] 3 KB 772. Lord Moncreiff at 564 quoted Collins MR in the latter case as follows: “It is not having water in the pipes which is the legal wrong, it is not even subjecting water in pipes to the very high pressure necessary for the defendant’s undertaking that is the legal wrong, it is letting the water escape.” This view of allowing the escape as a wrong *per se* may be contrasted with the interpretation of *Rylands* found in Bell, *Principles* para.970 and may be compared with the Scottish view of nuisance as something in itself wrongful. Per Sheriff Donald in *Spiers v Newton-on-Ayr Gas Co Ltd* (1940) 56 Sh Ct Rep 226, 234: “The doctrine of things dangerous in themselves finds its chief expression in the celebrated English case of *Rylands v Fletcher* and there is a noticeable tendency in distinguished writers, not only south of the Border, to overlook Lord Justice-Clerk Moncreiff’s opinion. . . in *Chalmers v Dixon* that negligence is still the fundamental ground of liability, although it may be inferred from various circumstances.” See also W.A. Elliott, “What is Culpa?” 1954 *JR* 6 pp 22-26.

<sup>95</sup> 1934 SC 150, 1934 SLT 160. The quote is taken from the rubric. This rubric was cited with approval by Lord Russell in *McLauchlan v Craig* 1948 SC 599, 1948 SLT 483 at 489.

<sup>96</sup> *ibid.* In *McLauchlan* Lord President Cooper launched a scathing attack on *Rylands* at 490-491. See also *Spiers v Newton-on-Ayr Gas Co Ltd* n.94 above. The natural/ non-natural user distinction was also considered in *Gordon v Huntly Lodge Estates Co Ltd* (1946) 56 Sh Ct Rep 112.

criteria existed to differentiate nuisance from negligence. Ordinary uses of land gave rise to liability in negligence, extraordinary or non-natural uses of land gave rise to liability in nuisance. When non-natural user fell out of favour it took with it the basis for the distinction, and after this occurs we see further expansion in the scope of nuisance into circumstances once litigated in negligence.<sup>97</sup>

As a final point it may be added that non-natural user and reparation for dangerous nuisances served to distort perceptions of Scots nuisance. In the interests of coherent development it is perhaps unfortunate that during the early to mid twentieth century there was not one single reported case in which reparation was sought in nuisance in respect of pollution after *Fleming v Gemmill* in 1908.<sup>98</sup> The rationalisation effected between nuisance and delictual principle in *Duke of Buccleuch v Cowan* was given little or no opportunity to develop and become generally accepted. Instead, focus shifted from pollution to dangerous land uses. The idea of nuisance as a wrong *per se* appears more or less forgotten, and the notion of liability irrespective of fault gained ground.

### **Watt v Jamieson**

In the 1950's what may be thought of as a conscious attempt to clarify Scots nuisance was taken by Lord President Cooper sitting in *Watt v Jamieson*,<sup>99</sup> in the Outer House.

*Watt* was a reparation action for an intentionally conducted activity. Damages were sought in respect of physical harm to the upper floors in a tenement, namely: damp in interior walls; discolouration and disintegration of stonework; crumbling of brickwork and plaster; and dry rot caused by the fact that the defender had installed a gas water heater in the lower flat connecting it to the flue in the gable. The emissions contained water vapour impregnated with sulphuric acid. The installation of the heater was a deliberate act done apparently with no regard to the consequences.

Lord Cooper ended the association between nuisance and non-natural user by the fashion in which he disposed of the defender's proposition that: "an action for nuisance will not lie in Scotland where the type of user complained of involves only a normal, natural and familiar use of the property." This argument brought the issue to a critical point, had it found favour with the

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<sup>97</sup> See p.258 below.

<sup>98</sup> Indeed, in comparison with the nineteenth century there were relatively few interdict actions raised in nuisance during the same period. Research has revealed only 12 such reported cases during the period 1900 to 1950: *Wilson v Gibb* (1902) 10 SLT 293; *Harvie v Robertson* (1903) 5F 338, 10 SLT 581; *Midlothian v Pumpherson Oil Co Ltd* (1903) 6 F 387, 11 SLT 557; *Richmond (Duke of) v Lossiemouth Burgh* (1904) 12 SLT 116; *Allison v Stevenson* (1908) 24 Sh Ct Rep 214; *Rennie v North British Railway Co* (1910) 26 Sh Ct Rep 100; *McEwen v Steedman & McAlister* 1912 SC 156, 1913 SC 761, 1913 1 SLT 298; *Maguire v Charles McNeil Ltd* 1922 SC 174, 1922 SLT 193; *Simpson v Millar* (1923) 39 Sh Ct Rep 182; *Buchan v Stephen's Representatives* 1946 SC 39, 1946 SLT 82; *Ben Nevis Distillery (Fort William) Ltd v North British Aluminium Co Ltd* 1948 SC 592, 1948 SLT 450; *Gavin v Ayrshire CC* 1950 SC 197, 1950 SLT 146.

<sup>99</sup> 1954 SC 56.

Court, the doctrine of non-natural user could have occluded nuisance altogether. Lord Cooper rejected the defender's contention. The focus of concern in nuisance was to be not on the nature or reasonableness of the defender's use of land, but on the tolerability of the defender's conduct as seen from the victim's point of view.

Thus, Lord Cooper imposed upon the law of nuisance the *plus quam tolerabile* requirement. This measures the gravity of the harm and taking all the facts and circumstances into account may be used to determine whether or not nuisance is established. Is the disturbance to which the pursuer is subjected more than he or she ought reasonably to tolerate?

Lord Cooper defined nuisance in the following terms:

“[I]f any person so uses his property as to occasion serious disturbance or substantial inconvenience to his neighbour or material damage to his neighbour's property, it is in the general case irrelevant to plead merely that he was making a normal and familiar use of his own property. The balance in all such cases has to be held between the freedom of a proprietor to use his property as he pleases and the duty on a proprietor not to inflict material loss or inconvenience on adjoining proprietors or adjoining property.”<sup>100</sup>

The express inclusion of material damage along with serious disturbance and substantial inconvenience as forms of harm actionable in nuisance follows from the harm alleged in *Watt* and indicates that physical harm could be an incidental effect of nuisance, as indeed it was in the nineteenth century nuisance cases in which damages were sought. To this extent, Cooper's definition may be seen as a timely update to that provided one hundred and twenty seven years earlier by Lord Chief Commissioner Adam.<sup>101</sup>

Unfortunately there was an unforeseen effect. Although there was now criteria to establish the existence of nuisance in the form of the *plus quam tolerabile* test, there was nothing really to differentiate circumstances amenable to resolution in nuisance and negligence respectively. The argument has been put that the *plus quam tolerabile* test is inapplicable in cases of unintentional harm, but this argument was not advanced until long after *Watt*.<sup>102</sup> *Watt* was a case of intentional harm, but Lord Cooper said nothing to suggest that nuisance should be restricted to such cases. Neither did he re-establish explicitly the idea of nuisance as a wrong in itself.

Nuisance cases were not culpa cases, and the idea that had originated with non-natural user cases, that liability in nuisance was strict persisted. While there had been some broadening in scope in the period before *Watt* so that reparation for dangerous operations could competently be sought in nuisance, the period following *Watt* saw further expansion. Since material harm to property now fell within the definition of nuisance, since material harm would more or less always be *plus quam tolerabile*, since culpa,

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<sup>100</sup> *ibid.*, 58.

<sup>101</sup> Above, pp.248-249.

<sup>102</sup> Not until Whitty's treatment of nuisance in the *Stair Memorial Encyclopaedia* in 1998. See Whitty, n.9 above paras.17, 77, 89, 104, 105, 106 in (2001) Reissue.

apparently, did not have to be proved and moreover since nuisance was now unencumbered by any perception that it necessarily involved extraordinary or non-natural land uses, it is perhaps unsurprising that actions that would once have been raised in negligence came to be founded upon nuisance.

### Modern Developments

Following *Watt* the next major judicial development of Scots nuisance came in 1985 in *RHM Bakeries v Strathclyde Regional Council*. In the intervening years between these two cases there was no effective check on the scope of nuisance and by the time of *RHM* nuisance had become more broadly associated with property harm arising from the use of property. Not only were reparation claims brought in nuisance in circumstances that would once have given rise to actions founded in negligence, particularly flooding from burst pipes or other operations on water not involving pollution,<sup>103</sup> but nuisance had also been invoked in cases arising from deprivation of support.<sup>104</sup> This represents a significant increase in the scope of nuisance and an encroachment upon territory previously held by other doctrines.

Scots nuisance in the modern context is by no means limited to pollution, in fact the majority of reported reparation cases since 1951 concern property damage through flooding. In this period there is only one reported reparation case involving noise,<sup>105</sup> two involving property harm caused by vibration<sup>106</sup> and three where the nature of harm was water pollution.<sup>107</sup> One further reparation case raised, *inter alia* in nuisance involved a rather personal form of pollution.<sup>108</sup> A further change in the operation of the nuisance doctrine is the increase in reparation cases relative to interdict actions. In the period 1976 to 2000 reparation cases outnumbered interdict cases fourteen to seven.

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<sup>103</sup> See n.34 above.

<sup>104</sup> n.67 above cites nineteenth century support cases. Twentieth century support cases raised in negligence were: *Hill's Trustees v Edinburgh Magistrates* 1912 1 SLT 448; *McCormick v Fife Coal Co Ltd* 1931 SC 9, 1930 SLT 747; *Angus v NCB* 1955 SC 175, 1955 SLT 245; *Thomson v St Cuthbert's Cooperative Association Ltd* 1958 SC 380, 1959 SLT 54; *Kerr v McGreavy* 1970 SLT (Sh Ct) 7; *Doran v Smith* 1971 SLT (Sh Ct) 46; *G.U.S. Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC (HL) 157, 1982 SLT 533. Support cases raised in nuisance, in some cases with alternative pleadings in negligence were: *Duncan's Hotel (Glasgow) Ltd v J&A Ferguson Ltd* 1974 SC 191; *McNab v McDevitt* 1971 SLT (Notes) 41 (in this case there were elements of noise, vibration and dust from machinery); *Lord Advocate v Reo Stakis Organisation Ltd* 1980 SC 203, 1981 SC 104, 1984 SLT 140 (structural damage caused by vibrations from defenders' piling operations); *Borders RC v Roxburgh DC* 1989 SLT 837; *Kennedy v Glenbelle* 1996 SC 95, 1996 SLT 1186, 1996 SCLR 411.

<sup>105</sup> *Shanlin v Collins* 1973 SLT (Sh Ct) 21.

<sup>106</sup> *Lord Advocate v Reo Stakis Organisation Ltd* 1980 SC 203, 1981 SC 104, 1984 SLT 140; *Steel-Maitland v British Airways Board* 1981 SLT 110. This case involved an additional allegation of air pollution in the form of droplets of aviation fuel from airliners.

<sup>107</sup> *Noble's Trustees v Economic Forestry (Scotland) Ltd* 1988 SLT 662; *Mull Shellfish Ltd v Golden Sea Produce Ltd* 1992 SLT 703; *British Waterways Board v Moore & Mulheron* 1998 GWD 11-569 (Sh Ct).

<sup>108</sup> The averments in *Gray v Dunlop* 1954 SLT (Sh Ct) 75 involved the pouring from a window of a pot of urine over an eleven year old boy.

The interdict cases reported since 1951 show little or no change in the operation of nuisance since the nineteenth century. Interdict was sought in respect of: noise or anticipated noise in six cases<sup>109</sup>; water pollution in three cases;<sup>110</sup> air pollution or smells in four cases;<sup>111</sup> and against blasting operations causing property harm in one case.<sup>112</sup> In *Rae v Musselburgh Town Council*<sup>113</sup> declarator and specific implement were sought to abate flooding containing sewage.

The diminution in the numbers of traditional interdict actions can probably be accounted for by the existence of statutory regimes. Historically, the introduction of Public Health legislation in the mid nineteenth century and the development of planning regimes have reduced the importance of the common law remedy. The abatement of nuisance under current statutory regimes<sup>114</sup> may be effected by local authorities or the Scottish Environmental Protection Agency. Accordingly the need for common law actions is not what it once was.

Regarding reparation actions, while the scope of nuisance has broadened to include harm caused by dangerous operations, by flooding and by deprivation of support, it is notable that it has not broadened further. Scots law has never reached the position where property harm in general caused by operations on property is regarded as nuisance.

### **Culpa**

In *RHM Bakeries* it was determined that liability for reparation in nuisance under the common law was not strict, but depended upon culpa. However, as Lord President Hope said of *RHM* in the 1996 case of *Kennedy v Glenbelle*:

“But the analysis of the authorities in that case did not go into the difficult question as to what types of delictual conduct on the part of the defender, amounting to culpa or fault on his part, are actionable on the ground of nuisance and what types are actionable by reference to the ordinary principles of negligence.”<sup>115</sup>

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<sup>109</sup> *Fergusson v McCulloch* 1953 SLT (Sh Ct) 113 (noise and vibration from sawmill); *Skilbeck v Beveridge* 959 SC 313, 1959 SLT 342; *Central Motors (St Andrews) Ltd v St Andrews Magistrates* 1961 SLT 290 (noise and obstruction); *Murdoch v Airdrie Dean of Guild Court* 1967 SLT (Sh Ct) 4; *Webster v Lord Advocate* 1984 SLT 13, 1985 SLT 361; *Cumnock & Doon Valley DC v Dance Energy Associates Ltd* 1992 GWD 25-1441 (Sh Ct).

<sup>110</sup> *Elderslie Estates v Gryfe Tannery Ltd* 1959 SLT (Notes) 71; *McColl v Strathclyde Regional Council* 1983 SC 225, 1983 SLT 616 (in this case interdict was sought, unsuccessfully, in respect of fluoridation of the domestic water supply); *Hugh Blackwood (Farms) Ltd v Motherwell DC* 1988 GWD 30-1290.

<sup>111</sup> *Hands v Perthshire CC* (1959) 75 Sh Ct Rep 173; *Forth Yacht Marina Ltd v Forth Road Bridge Joint Board* 1984 SLT 177 (the petitioners complained of property damage to boats and marina caused by abrasive materials falling from the bridge above during maintenance work); *Barr & Stroud Ltd v West of Scotland Water Authority* 1996 GWD 36-21236 (OH).

<sup>112</sup> *Banks v Fife Redstone Quarry Co Ltd* 1954 SLT (Notes) 77.

<sup>113</sup> 1973 SC 291, 1974 SLT 29.

<sup>114</sup> E.g. under the Environmental Protection Act 1990.

<sup>115</sup> 1996 SCLR 414D.



The defenders' plea in *Kennedy*, that an action for damages in nuisance could not succeed without proof of negligence, provided the Court with the opportunity to deal with this unfinished business. Lord Hope proceeded by differentiating between nuisance and negligence as follows:

“A claim for damages for nuisance is a delictual claim, as it does not depend for its existence on any contract. It arises where there is an invasion of the pursuer's interest in land to an extent which exceeds what is reasonably tolerable. The *plus quam tolerabile* test is peculiar to the liability in damages for nuisance. Where that test is satisfied and culpa is established, the requirements for the delictual liability are fulfilled. Liability in damages for negligence, on the other hand, depends on a failure to take reasonable care where there is a foreseeable risk of injury. That is another species of delictual liability, the basis for which also depends upon culpa.”<sup>116</sup>

So nuisance is established by measuring the gravity of the harm through the *plus quam toilerabile* requirement introduced in *Watt* and affirmed in *Kennedy*. No liability in damages arises unless culpa also can be shown, but culpa is not synonymous with negligence, negligence is a species of culpa separate from nuisance. Lord Hope continued by discussing delictual liability in general:

“The essential requirement is that fault or culpa must be established. *That may be done by demonstrating negligence, in which case the ordinary principles of the law of negligence will provide an equivalent remedy.* Or it may be done by demonstrating that the defender was at fault in some other respect. This may be because his action was malicious, or because it was deliberate in the knowledge that his action would result in harm to the other party, or because it was reckless as he had no regard to the question whether his action, if it was of a kind likely to cause harm to the other party, would have that result. Or it may be – and this is perhaps just another example of recklessness – because the defender has indulged in conduct which gives rise to a special risk of abnormal damage, from which fault is implied if damage results from that conduct . . . in each case personal responsibility rests upon the defender because he has conducted himself in a respect which is recognised as inferring culpa by our law. So what is required is a deliberate act or negligence or some other conduct from which culpa or fault may be inferred.”<sup>117</sup>

In averring “a deliberate act, done in the knowledge that harm would be the likely result” the pursuer's case in nuisance was held relevant. This formula has been followed successfully in subsequent cases.<sup>118</sup> It appears from

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<sup>116</sup> *ibid.*, 414F-G.

<sup>117</sup> *ibid.*, 416D, italics added.

<sup>118</sup> *Anderson v White* 2000 SLT 37; *Powrie Castle Properties v Dundee CC* 2001 SCLR (Sh Ct) (Notes) 146. There are also subsequent nuisance cases in which pleadings were directed at an alleged failure to take care. See *The Globe*

*Kennedy* that harm arising from intentional conduct in the sense of a deliberate act is actionable in nuisance whereas unintentionally caused harm is actionable in negligence. The issue raised by Whitty, concerning the applicability of the *plus quam tolerabile* test in cases of unintentional harm<sup>119</sup> is resolved. The *plus quam tolerabile* requirement applies in every case of nuisance as Lord Cooper surely intended it to, because, following *Kennedy*, nuisance is not a relevant head of claim for negligently caused harm.

The sense in which liability in nuisance is described as *intentional* requires further comment. It appears clear that it is not meant that the act complained of was intended to harm the victim. In the model of culpa applied in *Kennedy* any such action would more accurately be described as malicious. According to this model an act is intentional in the sense that it is deliberately conducted in the knowledge that harm to the pursuer will be the consequence. It is necessary to explain the model of culpa applied by the Court.

Lord Hope founded upon the treatment of culpa presented in Whitty.<sup>120</sup> Whitty had derived this model from the American Second Restatement of the Law of Torts.<sup>121</sup> In order to understand this model it is necessary to see culpa in terms of a continuum.<sup>122</sup> At one end of the continuum is malice where the delinquent sets out to harm the victim. Moving down the continuum intentional conduct is a deliberately conducted activity where harm to the victim is a virtual certainty. As the likelihood of harm lessens to highly probable, but less than substantially certain, conduct is described as reckless. Where an activity gives rise to a mere risk of harm then conduct is negligent where the risk materialises as a consequence of failure to exercise the requisite degree of care.

Because culpa is seen as operating on a continuum it can be seen that there is no clear demarcation between liability for intentional and unintentional harm. These two forms meet somewhere under the cloak of recklessness. The difference may be explained by the distinction between an act that bears a foreseeable risk of harm if conducted without sufficient care and one that will most likely cause harm irrespective of care taken.

Lord Hope found support for this view of fault in Scots authority. The following dicta are quoted in his opinion in *Kennedy*.

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*(Aberdeen) Ltd v North of Scotland Water Authority* 2000 SC 392, 2000 SLT 392, 2000 SLT 674, sheriff court proceedings reported *sub nom Cansco International plc v North of Scotland Water Authority* 1999 SCLR 494. For analysis of this case see n.20 above.

<sup>119</sup> See n.102 above.

<sup>120</sup> Whitty, n.9 above (1988) paras.2087, 2089. See paras.87, 89 in (2001) Reissue.

<sup>121</sup> American Law Institute 1979.

<sup>122</sup> Whitty "Nuisance" 2001 para.89. cf J.J. Gow, n.33 above p.20: "[C]ulpa is much more comprehensive [than legal negligence], capable of containing at one end legal negligence of the most technical nature and at the other end, what, to the uninformed, appears to be strict or absolute liability. In brief *damnum plus culpa* does not mean that in Scots law of reparation there is no liability without legal negligence, or there is no liability without fault; it does mean that there is no liability without legal fault and legal fault there may be even where the most censorious could find not even carelessness."

“If a man puts upon his land a new combination of materials, which he knows, or ought to know, are of a dangerous nature, then either due care will prevent injury, in which case he is liable if injury occurs for not taking that due care, or else no precautions will prevent injury, in which case he is liable for his original act in placing the materials upon the ground.”<sup>123</sup>

“If the necessary or natural result of the blasting was to cause structural damage to the pursuers’ property, although there was no want of care or skill in the conduct of the operations, then the defenders were not, in my judgment, entitled to carry on the operations at all, because no man is entitled to cause an explosion in his property, the necessary or natural result of which is to blow down or injure his neighbour’s house. On the other hand, if injury to the pursuers’ buildings was not a necessary or natural result of the blasting, but injury in fact resulted, the inference is that the operation was negligently or unskilfully conducted.”<sup>124</sup>

“A landowner will be liable to his neighbour if he carries out operations on his land which will or are likely to cause damage to his neighbour’s land however much care is exercised. Similarly will a landowner be liable in respect of carrying out operations, either at his own hand or at the hand of the contractor, if it is necessary to take steps in the carrying out of those operations to prevent damage to a neighbour, and he, the landlord, does not take or instruct those steps. In the former case the landowner’s culpa lies in the actual carrying out of his operations in the knowledge, actual or implied of their likely consequences. In the latter case culpa lies in not taking steps to avoid consequences which he should have foreseen would be likely to flow from one method of carrying out the operation.”<sup>125</sup>

It is submitted that it was Lord Hope’s intention to designate nuisance as the appropriate doctrine where property harm results from deliberate acts which will or are likely to cause harm irrespective of care exercised and to allocate to the law of negligence harm attributable to a failure to exercise care where such care would have prevented that harm.<sup>126</sup> Regarding the form of culpa relevant to nuisance, Lord Hope appears to have located this towards the

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<sup>123</sup> Per Lord Justice-Clerk Moncreiff in *Chalmers v Dixon*, n.78 above at 464 quoted in *Kennedy* at 415C.

<sup>124</sup> Per the Lord Ordinary (Low) in *Edinburgh Railway Access & Property Co v John Ritchie & Co*, (1903) 5 F 299 at 302 quoted in *Kennedy* 415D.

<sup>125</sup> Per Lord Jauncey in *Nobles Trustees v Economic Forestry (Scotland) Ltd* 1988 SLT 662 at 664A-B quoted in *Kennedy* 415 F-G.

<sup>126</sup> The decision in *British Waterways Board v Moore & Mulheron Contracts Ltd* 1998 GWD 11-569 (Sh Ct) is contrary to the argument pursued in this paper. Reparation was awarded in respect of a dangerous nuisance, diesel oil stored in tanks near a canal which, having been tampered with, leaked into the water. Culpa consisted in the situation of the tank, insufficient protection and the defenders’ awareness of the risk of tampering. Sheriff Morrison considered that the pursuers could have succeeded in negligence as well.

reckless rather than the malicious end of the intentional part of the continuum. It also appears from the dicta cited above that there is no need to inquire into the state of mind of the defender to determine his or her knowledge. Just as negligence is concerned with what the reasonable person in the defender's position ought to have foreseen when directing his mind to the likely consequences of his conduct, so too in this form of intentional liability, courts will impute constructive knowledge.

There is of course scope to argue that a defender did not and could not have known that a particular consequence would transpire. We do not yet have case law on this point. When the issue does emerge, as doubtless it will given time, Scots courts should avoid the English solution of imposing a requirement of *reasonable foreseeability* as happened in *Cambridge Water Co v Eastern Counties Leather*,<sup>127</sup> simply because this terminology belongs properly to negligence and its use in the context of Scots nuisance will serve only to confuse the doctrines once more.

In the context of damages claims at least, nuisance can now be seen as a nominate delict of intention. Otherwise, if negligence is a relevant form of culpa, there is no effective check on the scope of nuisance. While it is arguable that the ramifications of the view of culpa taken in *Kennedy* extend beyond nuisance and inform delictual theory in a more general sense there is no need to pursue this point here. For present purposes it can be said that nuisance, like other intentional delicts, has its own peculiar rules for liability in damages. While the view taken of intention here may not meet with universal approval it is surely less controversial than the presumption of malice found in defamation in which malice is inferred from the defamatory nature of the offending statement.<sup>128</sup> Similarly we know, from *Reid v Mitchell*<sup>129</sup> that a directed intention to cause harm is not required to found liability in damages for assault.

It may be that intention as described here would not appeal to lawyers in the English jurisdiction.<sup>130</sup> It may, however find parallels in other jurisdictions. For example in their text on the (South African) Law of Delict, Neethling, Potgieter and Visser describe three forms of intention, two of which appear relevant in the present analysis.

“Indirect intent . . . is present where a wrongdoer directly intends one consequence of his conduct but at the same time has knowledge that another consequence will unavoidably or inevitably occur. The causing of the second consequence is accompanied by direct intent.”<sup>131</sup>

This is similar to *Kennedy* style intention inasmuch as the defender is liable in delict for the second undesired consequence as well as for the first, desired consequence. However, in the example given in the text, the direct intent of the actor is to shoot a man and the indirect consequence is the damage to the

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<sup>127</sup> [1994] 2 AC 264, [1994] 1 All ER 53.

<sup>128</sup> See K.McK. Norrie, *Defamation and Related Actions in Scots Law* (1995), discussion p.7.

<sup>129</sup> (1885) 12 R 1129.

<sup>130</sup> See e.g. P. Cane, “Mens Rea in Tort Law” (2000) 20 *OJLS* 533.

<sup>131</sup> J. Neethling, J.M. Potgieter, P.J. Visser, *Law of Delict* (2001), p.123.

window through which he shoots. The direct intent in nuisance, to carry out some operation on property for one's own benefit is not *per se* wrongful, but only becomes so because of the invasion of a neighbour's rights.

The next form of intention in South Africa, *dolus eventualis*, appears closer to the *Kennedy* formulation.

“*Dolus eventualis* . . . is present where the wrongdoer, while not desiring a particular result, foresees the possibility that he may cause the result and reconciles himself to this fact; that is, he nevertheless performs the act which brings about the consequence in question.”<sup>132</sup>

It is submitted that classically, nuisance actions are of this type. The defender carries out an activity, either regardless of neighbours' interests or in the belief that the degree of interference will not amount to a wrong. The difference between intention in *Kennedy* and *dolus eventualis* is that in the latter, knowledge of the harmful consequence must be subjective and actual. In Scotland it appears that knowledge can be treated objectively. The South African authors consider that objective knowledge belongs properly to recklessness which they equate with gross negligence.

Of course in *Kennedy*, the Court applied an American and not a South African model. The present point in considering South African law is to demonstrate that the concept of intention need not necessarily be restricted to desired results. A further parallel may be drawn with the German law concept *Rechtswidrigkeit*, meaning unlawfulness in the sense of a violation of a person's legal interests without lawful excuse. Of this concept Markensius writes:

“The traditional school of thought on the matter, which still enjoys much support with the courts, takes the view that the element of unlawfulness is automatically satisfied whenever one of the interests or rights enumerated in paragraph 823 BGB<sup>133</sup> has been violated . . . Unlawfulness, in other words, depends on the harmful result.”<sup>134</sup>

While *Rechtswidrigkeit* is a concept of broader application, it can be seen that liability in nuisance is precisely of this order. The law of nuisance stipulates comfortable enjoyment of property, free from serious disturbance and substantial inconvenience as a legally protected interest. The invasion of this interest through deliberate conduct was described by Mitchell as “illegal,” equally we might describe it as unlawful. The concept of *rechtswidrigkeit* accords harmoniously with the *Duke of Buccleuch v Cowan* view in which nuisance is seen as a wrong *per se*.

*Rechtswidrigkeit* accords equally well with the modern position. Nuisance normally consists of acts that would be perfectly lawful were it not for the

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<sup>132</sup> *ibid.* 124.

<sup>133</sup> 823 BGB states: “A person who wilfully or negligently injures the life, body, health, freedom, property, or other right of another contrary to law is bound to compensate him for any damage arising therefrom.”

<sup>134</sup> B.S. Markensius, *The German law of Obligations*, 3<sup>rd</sup> ed., (1997) vol.II, p.68.

fact that a neighbour has suffered an infringement of his or her right. Unlawfulness is judged by results, given the circumstances is the harm more than reasonably tolerable? If so, nuisance is established and the requirements of culpa necessary for liability in reparation can be satisfied providing it can be established that the harm arose from a deliberate act or course of conduct undertaken in circumstances where the defender ought to have known that the harm would occur.

### **Conclusion**

*Kennedy* does much to restore nuisance not only to general coherence, but also preserves to a large extent the theoretical integrity of the doctrine as it operated prior to the confusions that arose during the early 20<sup>th</sup> century. Given the developments in the scope of nuisance and the fact that damages actions appear to have become the norm rather than the exception, the attainment of coherence must be regarded as a considerable achievement.

The nature of the achievement is in the limitation of nuisance. At one time nuisance was limited by the idea that courts could determine what was and what was not, a nuisance. Later, limitation appeared in the form of the distinction between ordinary and extraordinary or non-natural land uses. Now the limitation is to be found in the difference between intentional and unintentionally caused harm albeit intention is to be understood in a specific form which may or may not be peculiar in Scots law to liability in nuisance.

The practical implications in court are that pleadings must be directed, not at any failure to take care, but at the objectionable act itself. There will be cases in which the knowledge of the defender may be easily presumed and one day no doubt, there will be a case in which the defender's knowledge presents much difficulty. Where the culpability of the defender is alleged in terms of a failure to take care the action should be raised not in nuisance, but in negligence.