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COMMENT

NUISANCE OR NEGLIGENCE: A STUDY IN THE TYRANNY OF LABELS

If it is possible to add further confusion to the chaos surrounding the concept of nuisance,¹ the Supreme Court of Errors of Connecticut has done so in a line of cases, the most recent example of which is *De Lahunta v. City of Waterbury*.²

On a rainy night plaintiff De Lahunta, driving south on the inner lane of a four-lane highway, struck a concrete "silent policeman" erected and maintained by the defendant City of Waterbury at a street intersection. The base of the stanchion was well illuminated and from its top an amber light flashed in the direction from which De Lahunta was coming. But instead of being located in the exact center of the highway, the stanchion had been erected near the center of the lane in which De Lahunta was driving. He sought recovery on the theory of nuisance. At the trial there was some evidence that he had been drinking at the time of the accident.³ From an adverse verdict and judgment, De Lahunta appealed on the ground that the trial court erred in charging the jury that contributory negligence was a defense. The Supreme Court of Errors agreed with this contention and reversed the judgment, holding that the nuisance did not arise out of negligence and that therefore contributory negligence was not relevant.

Despite the court's holding, the facts present what clearly amounts to negligence in planning and design on the part of the city.⁴ If this is true, the result of the court's position is that liability may well depend not upon the facts alleged

1. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" PROSSER, TORTS 549 (1941).

2. 59 A.2d 800 (Conn. 1948). See also *Beckwith v. Town of Stratford*, 129 Conn. 506, 29 A.2d 775 (1942); *Bacon v. Town of Rocky Hill*, 126 Conn. 402, 11 A.2d 399 (1940); *Hoffman v. City of Bristol*, 113 Conn. 386, 155 Atl. 499 (1931). See Mignone, *Nuisance and Negligence*, 11 CONN. B. J. 209 (1937).

3. Brief for Appellee, pp. 40, 41, *De Lahunta v. City of Waterbury*, 59 A.2d 800. (Conn. 1948).

4. Negligence can exist in planning and design as well as in the physical doing of an act. *Moran v. Pittsburgh-Des Moines Steel Co.*, 166 F.2d 908 (3rd Cir. 1948); *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865 (8th Cir. 1903); *McPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916); 2 RESTATEMENT, TORTS § 398

in the complaint but upon whether the plaintiff labels his tort action as one of "nuisance" or "negligence."⁵ Inconsistent results have often been reached when courts have wandered into the maze surrounding the concept of nuisance in deciding cases which could have been decided upon other general rules of torts applicable to injuries to person and chattels.⁶ The important problem to be considered is whether reference to nuisance concepts in such cases is necessary or even warranted.

Since the early period of the common law the word "nuisance" has encompassed two separate but often overlapping concepts, private and public nuisance.⁷ Private nuisance was always a tort related to "an unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with, it."⁸ Public nuisance, on the other hand, included any "act not warranted by law, or omission to discharge a legal duty, which inconveniences the public in the exercise of rights common to all. . . ."⁹ Since the plaintiff in the *De Lahunta* case is obviously not complaining of any interference with the use or enjoyment of his own land, the condition created by the city is a public

(1934). In Connecticut a municipality is made liable by statute for defects in the streets. CONN. GEN. STAT. § 2126 (1949).

It is interesting to note that the court in the *De Lahunta* case analyzed the facts as if it were attempting to find a failure to use due care, then proceeded to hold that the nuisance did not arise out of negligence. *De Lahunta v. City of Waterbury*, 59 A.2d 800, 804-05 (Conn. 1948).

5. "There has been forgetfulness at times that the forms of actions have been abolished. . . . Very often the sufferer is at liberty to give his complaint either one label or the other. It would be intolerable if the choice of a name were to condition liability." *McFarlane v. Niagara Falls*, 247 N. Y. 340, 345, 160 N. E. 391, 392 (1928).

6. Compare *McFarlane v. Niagara Falls*, 247 N. Y. 340, 160 N. E. 391 (1928), with *Beckwith v. Town of Stratford*, 129 Conn. 506, 29 A.2d 775 (1948). Compare *Dygert v. Schenk*, 23 Wend. 446 (N. Y. 1840), with *Smith v. Smith*, 2 Pick. 621 (Mass. 1824). Compare *Hoffman v. Bristol*, 113 Conn. 386, 155 Atl. 499 (1931), with *Johnson v. City of Alcoa*, 24 Tenn. App. 411, 145 S. W.2d 796 (1940). Compare *Albee v. Chappaqua Shoe Mfg. Co.*, 16 N. Y. S. 687 (1891), with *Fort Wayne Cooperage Co. v. Page*, 170 Ind. 585, 84 N. E. 145 (1908). Nor is the situation peculiar to the United States: Compare *Ware v. Garston Haulage Co., Ltd.*, [1944] 1 K. B. 30, with *Maitland v. Raisbeck & Hewitt, Ltd.*, [1944] 1 K. B. 689. And see Notes, 96 L. J. 225 (1946), 7 Mod. L. R. 155 (1944).

7. See Winfield, *Nuisance As a Tort*, 4 CAMB. L. J. 189 (1931), for a historical survey of nuisance.

8. *Id.* at 190; PROSSER, TORTS 573.

9. STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 105 (1890); PROSSER, TORTS 566.

nuisance, if it can properly be characterized as a nuisance at all. Public nuisance was and is a catch-all phrase for various petty crimes.¹⁰ It is well established that no private action accrues to an individual for infringement by a public nuisance upon his general rights as a member of the public.¹¹ However, it was held in 1536, that an action on the case would lie by one who could prove damage beyond or different from that suffered by the community as a whole.¹² Nor was it necessary that the public nuisance should have become a private one as to the plaintiff; the action would lie for injury to person or chattel completely unconnected with the use or enjoyment of the plaintiff's land.¹³

Nuisance is a term descriptive of a type of damage sustained, the invasion of a particular interest, and does not describe the type of conduct which leads to the damage or invasion.¹⁴ In determining whether a nuisance *exists*, the relevant inquiry is whether a certain condition has been created, not how it was created. Before negligence emerged as a separate tort, it is probable that an action on the case for damages resulting from a public nuisance could have been proved and decided merely upon a showing that defendant's act had created the condition and that plaintiff had suffered special injury. While it may have been necessary that defendant's conduct could be characterized as "wrongful," it seems safe to say that it was irrelevant

10. SALMOND, LAW OF TORTS 233 (8th ed. 1934); 2 RUSSELL, CRIMES AND MISDEMEANORS 1691 (8th ed. 1923).

11. Scheible v. Law, 65 Ind. 332 (1879); Bouquet v. Hackensack Water Co., 90 N. J. L. 203, 101 Atl. 379 (1916); PROSSER, TORTS 570; HARPER, TORTS § 179 (1933); SALMOND, LAW OF TORTS 293 (9th ed. 1936).

12. "If one makes a ditch across the highway, and I come riding in my way by night, and I and my horse are thrown into the ditch, so that I suffer great damage . . . in this case I shall have an action against him who made the ditch across the way, because I am more damaged by this than any other." Y. B. Mich. 27 Hen. VIII, pl. 10 (1536), also reported in 8 HOLDWORTH'S HISTORY OF ENGLISH LAW 424 (1926). See also Williams Case, Co. Rep. 72b, 77 Eng. Rep. 163 (1592); Fowler v. Sanders, Cro. Jac. 446, 79 Eng. Rep. 382 (1618); Benjamin v. Storr, L. R. 9 C. P. 400 (1874); cases cited note 11 *supra*.

13. Leahan v. Cochran, 178 Mass. 566, 60 N. E. 382 (1901); Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911 (1891); Downes v. Silva, 57 R. I. 343, 190 Atl. 42 (1937); Y. B. Mich. 27 Hen. VIII, pl. 10 (1536), also reported in 8 HOLDWORTH'S HISTORY OF ENGLISH LAW 424 (1926); PROSSER, TORTS 570; 4 RESTATEMENT, TORTS, SCOPE AND INTRODUCTORY NOTE TO CHAPTER 40, 215-25, esp. 217-18 (1939).

14. 4 RESTATEMENT, TORTS, SCOPE AND INTRODUCTORY NOTE TO CHAPTER 40, 215-25, esp. 220-22 (1939); PROSSER, TORTS 553.

whether the wrongfulness consisted of negligent, ultra-hazardous, or intentional conduct.¹⁵ Contributory negligence, not yet being conceived, was, of course, equally irrelevant.

Complicating factors arose, however when negligence emerged as a separate tort.¹⁶ Unless negligence supplanted and replaced some of the other forms of action on the case, it is clear that either an action on the case for negligence or the older private action on the case for a public nuisance would sometimes lie for a single injury. Assuming that either action would lie, it might be argued that contributory negligence would be a defense to the former, but not to the latter.¹⁷ However, the case of *Butterfield v. Forrester*¹⁸ would seem conclusively to have negated such an argument. In that case, plaintiff was injured when he rode his horse into a barricade placed in the road by the defendant. In holding for defendant in an action termed "an action on the case for obstructing a highway," the court said, "One person being in fault will not dispense with another using ordinary care for himself."¹⁹ Not only did the case introduce the doctrine of contributory negligence into tort law, by coincidence it also involved the classic example of a

15. Under medieval concepts of tort liability a person acted at his peril and it was completely irrelevant whether the person inflicting the harm was at "fault." 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 446-82 (1926); Bohlen, *The Moral Duty to aid others as a Basis of Tort Liability*, 56 U. OF PA. L. REV. 217, 221 (1908); PROSSER, TORTS 19; Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908). *But cf.* HOLMES, THE COMMON LAW, Lecture III (1881). The development away from this early concept has been so gradual and unsteady that it is often impossible to say with any degree of exactitude what the state of the law was at a particular time. See PROSSER, TORTS 427; Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954 (1918). The older theory survived longer in possessory actions such as trespass and probably in private nuisance. 1 STREET, FOUNDATIONS OF LEGAL LIABILITIES, 19 (1906); PROSSER, TORTS 76-78. What the theoretical basis of liability was for either a public or a private nuisance during the period just prior to the emergence of negligence as a separate tort is difficult to ascertain. Possibly one of the reasons why some courts still refuse the defense of contributory negligence to an action phrased in terms of nuisance is the carrying over of the medieval concept of liability without fault (or of some intermediate mutation of that concept) into the present-day law.

16. No certain date can be set, as this legal phenomenon occurred gradually over the space of roughly one hundred years. However, for convenience the date is usually set as (circa) 1825. See Winfield, *The History of Negligence in the Law of Torts*, 42 L. Q. REV. 184, 195 (1926).

17. See note 15 *supra*.

18. 11 East 60, 103 Eng. Rep. 926 (1809).

19. *Id.* at 61, 103 Eng. Rep. at 927.

public nuisance—an obstruction in a highway.²⁰ Neither “nuisance” nor “negligence” was mentioned by the court, but, unless the choice of labels is to determine the result of an action, the *Butterfield* case stands for the proposition that contributory negligence is a defense to an action for damages resulting from a public nuisance brought about by negligent conduct. Anomalously, however, while the courts have generally accepted contributory negligence as a defense to an action for negligence, its application to an action phrased in terms of nuisance has been far from uniform.²¹

It is apparent that the key to the problem of the availability of the defense of contributory negligence in actions for injuries to person or chattels arising out of nuisance should be the determination of the type of conduct bringing the nuisance about, *i.e.*, whether the nuisance was caused by negligence or by some other type of tortious conduct. In *McFarlane v. Niagara Falls*,²² Chief Judge Cardozo used this analysis in deciding a case arising out of injury resulting from a defectively constructed sidewalk. He made it clear that contributory negligence is a defense if the conduct out of which the nuisance arose is actionable only because it is negligent.²³ But some conduct, he said, is “wrongful” whether or not it can be characterized as negligent.²⁴ Judge Cardozo did not define the word “wrongful” but if he meant conduct usually described as ultra-hazardous his analysis would be doctrinally sound.²⁵ Strict liability (*i.e.*, liability without proof of negli-

20. See *McFarlane v. Niagara Falls*, 247 N. Y. 340, 348, 160 N. E. 391, 393 (1928); Note, 29 ILL. L. REV. 372, 373 (1934); PROSSER, TORTS 568-69.

21. Compare *McFarlane v. Niagara Falls*, 247 N. Y. 340, 160 N. E. 391 (1928), with *Beckwith v. Town of Stratford*, 129 Conn. 506, 29 A. 2d 775 (1948). Compare *Dygert v. Schenk*, 23 Wend. 446 (N. Y. 1840), with *Smith v. Smith*, 2 Pick. 621 (Mass. 1824). Compare *Johnson v. City of Alcoa*, 24 Tenn. App. 411, 145 S. W.2d 796 (1940), with *Albee v. Chappaqua Shoe Mfg. Co.*, 16 N. Y. S. 687 (1891). Authorities maintaining that contributory negligence is not a defense to an action for nuisance are SHEARMAN AND REDFIELD, NEGLIGENCE § 157 (6th ed. 1913); JOYCE, NUISANCES § 45 (1906); Winfield, *Nuisance as a Tort*, 4 CUMB. L. J. 189 (1931). *Contra*: PROSSER, TORTS 597; Notes, 29 ILL. L. REV. 372 (1935), 23 CALIF. L. REV. 427 (1935), 35 MICH. L. REV. 684 (1937).

22. 247 N. Y. 340, 160 N. E. 391 (1928).

23. *Id.* at 344, 160 N. E. at 392.

24. *Id.* at 343, 160 N. E. at 391.

25. It is also possible that by “wrongful” Judge Cardozo may have meant “conduct in violation of a statute,” which might result in a finding of negligence *per se* without any inquiry as to whether negligence in fact existed. See Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933). However, by interpret-

gence) attaches to ultra-hazardous conduct if engaged in without a license,²⁶ and contributory negligence is not a defense.²⁷ Judge Cardozo termed a nuisance resulting from this type of conduct an "absolute nuisance," and although intimating that contributory negligence might not constitute a defense to an action for damages resulting from the existence of such a nuisance, he specifically reserved the question.²⁸

In *Hoffman v. Bristol*²⁹ the Connecticut court decided the question left open by Judge Cardozo, holding that contributory negligence is not a defense to an action for damages resulting from an "absolute nuisance." If the term "absolute nuisance" had been defined by that court to mean one arising from ultra-hazardous or intentional conduct this reasoning cannot be criticized.³⁰

The *Hoffman* case, however, sowed the seeds of an unusual definition of "absolute nuisance" which resulted in the court's holding in the *De Lahunta* case that when conditions which are subsequently found to constitute a nuisance are *intentionally* created, the nuisance is "not one arising out of negligence," *i.e.*, is an absolute one. "Intentionally" was defined as having the novel meaning "not that a wrong or

ing "wrongful" to mean "ultra-hazardous conduct," the analysis is the same as that used in the RESTATEMENT OF TORTS, *i.e.*, the fundamental bases of tort liability are three types of conduct: intentional, negligent, and ultra-hazardous. 1 RESTATEMENT, TORTS § 6 (1934). Dean Prosser also uses this analysis. PROSSER, TORTS 34, 35.

26. Thus in *Clifford v. Dam*, 81 N. Y. 52 (1880), plaintiff fell into a coal hole which defendant had constructed in the street. The court held that defendant was strictly liable because he had failed to plead a license from the city. If defendant had established the issuance of a license, the court went on to say by way of dictum, he would have been liable only on a showing of negligence.

27. *Muller v. McKeeseon*, 73 N. Y. 195 (1878). On the other hand voluntary assumption of risk is a defense to liability based on ultra-hazardous conduct. *Worth v. Dunn*, 93 Conn. 51, 113 Atl. 467 (1922); *Thompson v. Petrozzello*, 5 N. J. Misc. 645, 137 Atl. 835 (Sup. Ct. 1927); *Rylands v. Fletcher*, L. R. 3 H. L. 330 (1868); PROSSER, TORTS 463-64; HARPER, TORTS § 164. In *McFarlane v. Niagara Falls*, 247 N. Y. 340, 160 N. E. 391 (1928), Chief Judge Cardozo, after noting that a nuisance existed in *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (1809), said: "Very likely the breadth of its pronouncement calls for revision and restriction. . . . In nuisance of that order, the fault that bars recovery is fault so extreme as to be equivalent to invitation of injury or, at least, indifference to consequences."

28. *McFarlane v. Niagara Falls*, 247 N. Y. 340, 350, 160 N. E. 391, 393 (1928).

29. 113 Conn. 386, 155 Atl. 499 (1931).

30. See note 25 *supra*.

the existence of a nuisance was intended, but that the creator of [it] intended to bring about the conditions which are in fact found to be a nuisance."³¹ The result of the court's test is to give to the concept of negligence a double meaning; it will signify one thing when the action is called "negligence" and something else when the label "nuisance" is attached to the action. For "intent" in the sense of "volition" does not draw the boundary line between negligent and intentional conduct in the general law of torts. Conduct is often negligent and at the same time volitional; in fact, negligent misfeasances occupy the greater part of the negligence field.³² Under the court's test, however, strict liability will attach to any volitional act the result of which can be tagged with the label "nuisance," and neither negligence nor contributory negligence will be relevant except where the conduct is non-volitional. Neither the *McFarlane* case nor the accepted principles of tort law compel or countenance such a result.

It may nevertheless be insisted that the court in the *De Lahunta* case reached the right result for the wrong reason, *i.e.*, that the city was engaged in "ultra-hazardous" conduct to which strict liability attached, and therefore that even though negligence existed in fact, its existence was irrelevant to liability.³³ But it has been generally held that

31. *De Lahunta v. City of Waterbury*, 59 A.2d 800, 802 (Conn. 1948). The definition in these terms was first phrased in *Beckwith v. Town of Stratford*, 129 Conn. 506, 511, 29 A.2d 775, 777 (1942).

32. Negligence may consist of either a voluntary physical act (misfeasance) or a failure to act (nonfeasance). 2 RESTATEMENT, TORTS § 284. Intent in the law of torts today means that the actor acts for the purpose of causing an invasion of another's interest or knows that the invasion is resulting or is substantially certain to result from his conduct. It is not enough that the act itself is intentionally (volitionally) done. 1 *Id.* § 13 comment d. ". . . the mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent . . . but it is not classed as an intentional wrong." PROSSER, TORTS 42. See also *Louisville and S. I. T. Co. v. Jennings*, 73 Ind. App. 69, 75, 123 N. E. 835, 837-8 (1919); *Pickett v. Waldorf System*, 241 Mass. 569, 136 N. E. 64, 65 (1922); *Payne v. Vance*, 103 Ohio St. 59, 133 N. E. 85, 89 (1921); *Goff v. Emde*, 132 Ohio App. 216, 167 N. E. 699, 700 (1928).

33. Where carrying on of ultra-hazardous activity is the basis of liability ". . . negligence, in the ordinary sense, is not the ground of liability. . . ." *Muller v. McKeelson*, 73 N. Y. 195 (1878). ". . . one who carries on an ultra-hazardous activity is liable . . . although the utmost care is exercised to prevent the harm." 3 RESTATEMENT, TORTS § 519 (1938). This seems to be the theory used by the English courts in deciding a number of cases involving injuries suffered from ob-

the placing of an obstruction in the street under a valid license is not actionable unless negligence is shown.³⁴ It is clear that a city acting within the scope of its statutory power should be in no worse position than its licensee.³⁵ Neither should be liable unless some phase of the conduct can be characterized as negligent.³⁶ Certainly the city's conduct was not intentional in the accepted tort sense. While such activity could be considered to have the attributes of ultra-hazardous conduct in the absence of any right to obstruct the highway, a municipality has such a right.³⁷ It follows that negligence is the only sound basis of liability, and that contributory negligence should be a defense. Nothing is gained by use of the term "nuisance." Reasoning which reaches an opposite result is clearly untenable.

It has been pointed out above that the basic source of confusion in the negligence-nuisance area lies in the fact that the common law background has often blinded courts to the realization that negligence by any other name should still have the same consequences. But there is an additional source of confusion arising from a failure to differentiate

structions placed in the streets by private individuals. *Ware v. Garston Haulage Co., Ltd.*, [1944] 1 K. B. 30; *Maitland v. Raisbeck & Hewitt, Ltd.*, [1944] 1 K. B. 689; *Wing v. London General Omnibus Co.*, [1909] 2 K. B. 652; See Notes, 96 L. J. 225 (1946), 7 Mod. L. Rev. 155 (1944).

34. *Houston v. Town of Waverly*, 225 Ala. 98, 142 So. 80 (1932); *McKenna v. Andreassi*, 292 Mass. 213, 197 N. E. 879 (1935); *Aristos v. Detroit & Canada Tunnel Co.*, 258 Mich. 579, 242 N. W. 757 (1932); *Kelly v. Doody*, 116 N. Y. 575, 22 N. E. 1084 (1889); *Clifford v. Dam*, 81 N. Y. 52 (1880). When that which would otherwise constitute a nuisance is specifically authorized by statute, it loses its character as a nuisance. HARPER, TORTS § 189.

35. In England it seems to be clear that negligence must be shown when an action is brought against a municipality for obstructions in the street, nuisance being irrelevant. *Fisher v. Ruislip-Northwood Urban District Council*, [1945] 1 K. B. 584; *Jelley v. Ilford Borough Council*, [1941] 2 All E. R. 468; Note, 96 L. J. 127, 142 (1946).

36. 3 RESTATEMENT, TORTS § 521, which states that strict liability "does not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee," would seem to apply with equal force to a municipality.

37. Municipalities are subdivisions of the state with delegated powers and functions. Among these are the regulations of traffic, safety, etc., which include erection and maintenance of traffic lights, safety zone markers, etc. *City of Valparaiso v. Spaeth*, 166 Ind. 14, 76 N. E. 514 (1905); *Lacey v. Oskaloosa*, 143 Iowa 704, 121 N. W. 542 (1909); *Brand v. Multnomah County*, 38 Ore. 79, 60 Pac. 390 (1900). Strict liability is applied only to conduct considered to be ultra-hazardous; the existence of intent and negligence is irrelevant. To hold the city strictly liable in damage cases involving these governmental functions would, in effect, make it an insurer. See notes 35 and 36 *supra*.

between the doctrines applicable to the different present-day remedies for nuisance. In an action to enjoin a nuisance, the type of conduct which created the nuisance is as irrelevant today as it was at early common law; the sole inquiry is whether a nuisance exists. The same is true as to a criminal prosecution for public nuisance, except to the extent that *mens rea* may be a requisite of the crime. And *mens rea* involves conceptions of intent materially different from the concept of intent in tort law.³⁸

The need for a complete analysis and re-evaluation of the concept of nuisance is apparent. Enough has been said to demonstrate that to attach the label of nuisance to the remedy of damages for injuries to person or chattels is to invite confusion. The *De Lahunta* case is a striking example.³⁹ Such cases can and should be decided by the general rules

38. The court's definition of "intent" in the *De Lahunta* case, while completely untenable from a tort point of view (see note 32 *supra*), would have been entirely adequate to describe the intent necessary to support a criminal action for public nuisance. For definitions of *mens rea*, see *Screws v. United States*, 325 U. S. 91, 96 (1945); *Ellis v. United States*, 206 U. S. 246, 257; HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 138-68, esp. 148-49 (1947). Whether the Connecticut doctrine, as exemplified by the *De Lahunta* case, had its origin in confusion with criminal law concepts is, of course, conjectural. But the possibility is obvious.

39. *Beckwith v. Town of Stratford*, 129 Conn. 506, 29 A.2d 775 (1942), is, perhaps, an even more striking example. For an example of the doctrinal gymnastics through which its conception of nuisance has put the Connecticut court, see *Hill v. Way*, 117 Conn. 358, 168 Atl. 1 (1933), *overruled* by *Beckwith v. Town of Stratford*, *supra*.

Two possible factors may have influenced the Connecticut court in the development of this doctrine. First, it may share in the increasing dissatisfaction with the doctrine of contributory negligence. Lowndes, *Contributory Negligence*, 22 GEO. L. J. 674 (1934); Mole and Wilson, *A Study of Comparative Negligence*, 17 CORN. L. Q. 333, 604 (1932); Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476 (1936); PROSSER, *TORTS* 403. Second, many municipal activities have been regarded in Connecticut as governmental functions to which tort immunity attaches. An exception to this immunity, however, is nuisance. This has resulted in the Connecticut court's (and other courts in the same situation) attempting to separate negligence and nuisance. The attempt has created nothing but confusion as the separation cannot be made. Certainly if the court is trying to avoid the outmoded governmental immunity doctrine and the hardships of contributory negligence a clear holding to that effect would be more desirable than retreat behind an unsound theory. The attempt to escape from the governmental immunity doctrine, while applicable to some of the previous cases in this line (*e.g.*, *Hoffman v. Bristol*, note 2 *supra*) has no relevance to the *De Lahunta* case as a Connecticut statute provides for recovery against the municipality for defects in the streets, CONN. GEN. STAT. § 2126 (1949).

of torts applicable to injuries to person and chattels, without any reference whatever to nuisance concepts.⁴⁰

40. While this note has been concerned primarily with injuries to person and chattels resulting from public nuisances, it would seem that the conclusions apply equally to actions for injuries to person and chattels caused by a private nuisance. In neither case is it doctrinally unsound to talk in terms of nuisance if the courts could avoid being confused by its use and would not use it as a catch-word to avoid a difficult problem. Courts have strained and warped the concept of private nuisance, originally only an interference with the use and enjoyment of land, to give members of the owner's family a remedy for personal injuries. *Hosmer v. Republic Iron and Steel Co.* 179 Ala. 415, 60 So. 801 (1913); *Ft. Worth & R. G. R. Co. v. Glen*, 97 Tex. 586, 80 S. W. 992 (1904). The simple solution would be to recognize the fact that an independent tort action for invasion of an individual's right in the physical integrity of his person exists over and above the private nuisance. See PROSSER, TORTS 577; 4 RESTATEMENT, TORTS, SCOPE AND INTRODUCTORY NOTE TO CHAPTER 40, 215-25, esp. 219-20. This solution would seem to apply equally well whether the action is brought by the owner of land or by a member of his household or family. Compare *Exner v. Sherman Power Construction Co.*, 54 F.2d 510 (1931), with *French v. Center Creek Powder Mfg. Co.*, 173 Mo. App. 220, 158 S. W. 723 (1913). Compare *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio St. 560, 54 N. E. 528 (1899), with *Kerbough v. Caldwell*, 151 Fed. 194 (3rd Cir. 1907).