1

Disturbances among neighbours: an introduction

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1.1 Introduction

The chapters of this volume describe how various legal systems deal with disturbances among neighbours. They pay particular attention to changes in the law and legal thinking since the mid-nineteenth century. This chapter discusses what general conclusions can be drawn, based on these studies.

My conclusion is that much of the doctrinal development in the nineteenth century described in these chapters had little to do with reaching new results in practice, results that would bring the law into line with the great economic and social changes of that century. The debate and reformulation of doctrine was addressed to a problem that can be simply stated. If fault is the general basis for liability in tort, then what should be the result if one person without negligence, and without the intent to hurt his neighbour, interferes with his neighbour's use of property? The continental jurists inherited that problem from earlier jurists. The English and Scots faced it when, for the first time, in the nineteenth century, they regarded fault as the general basis of liability in tort.

Urbanisation and industrialisation did put new strains on the problems of living in proximity. Legal systems responded by breaking with the past by created systems of land use regulation which vested great power in administrative authority. As we will see, however, the response was much the same throughout modern Europe.

If this interpretation is right, it rules out two others: that the differences among modern legal systems are the product either of different cultural proclivities or of different policy choices as to how to confront new problems such as industrialisation. That might be an encouraging conclusion, at least for those who regard law as a transnational rather than a national product. It is not the case that the law of different systems responds to differences in national culture and national policy. Rather, the problems are the same everywhere. If the solutions are different – and often they

are not – the reason is not a difference in culture or policy but that the problems are difficult and there is an understandable confusion as to how they might best be solved.

1.2 Disturbances among neighbours in private law: continental law

1.2.1 An historical baseline

If we are to understand the changes our authors describe, we need to know what the law was like before the nineteenth century. That gives us a baseline. If we find the law has changed, we can ask why. If we find it has not, we can rule out accounts which presume the law did change, and then try to explain the change by the industrialisation, urbanisation and changes in political and economic thought of the nineteenth century. If we find that the law did not change, but that jurists explained or discussed it in a different way or by applying different doctrines, we can then ask why that change occurred.

1.2.1.1 The problem in Roman law

Suppose someone harms another's property through his own fault, that is, by acting negligently or intentionally. Under Roman law, the owner could recover under the *lex Aquilia*. On the continent, liability for fault came to be recognised wherever Roman law was adopted. It was the law in the nineteenth century. It is the law today. In England, it became the law, but only when an action for negligence was recognised in the nineteenth century.

Suppose, however, someone interferes with another's use of his property. The aggrieved party could recover, not under the *lex Aquilia*, but for *iniuria*. His right to do so was dealt with in a few brief texts. Here are the most important:

> Aristo states in an opinion given to Cerellius Vitalis that he does not think that smoke can lawfully be discharged from a cheese shop onto the buildings above it, unless they are subject to a servitude to this effect, and this is admitted. He also holds that it is not permissible to discharge water or any other substance from the upper onto the lower property, as a man is only permitted to carry out operations on his own premises to this extent, that he discharge nothing onto those of another; and he adds that one can discharge smoke just as well as water. Thus, the owner of the upper property can bring an action against the owner of the lower, asserting that the latter does not have the right to act in this way.[1]

[1] D. 8.5.8.5.

> A doubt is raised by Pomponius in the 41st book of his *Readings*, as to whether a man can bring an action alleging that he has a right or that another has no right to create a moderate amount of smoke on his own premises, for example, smoke from a hearth. He says that the better opinion is that such an action cannot be brought, just as an action cannot be brought to maintain that one has a right to light a fire or sit or wash on one's own land.[2]
>
> If the owner of the lower premises creates smoke to fumigate those of his neighbour above, or if the owner of the upper premises throws or pours anything on to those below, Labeo says that the action for *iniuria* does not lie. I think this wrong, if it were done with the intention to offend.[3]

These texts deal with two situations: (1) the defendant caused the disturbance because he intended to offend his neighbour, and (2) the defendant disturbed his neighbour without such an intention.

1.2.1.2 The search for an explanation of the Roman texts

In the first situation, medieval and early modern jurists did not look for any further explanation. It was clear the defendant is liable because his purpose was to offend. The second situation was more difficult. Sometimes the defendant could not recover and sometimes he could. He could not recover when, for example, the defendant created a moderate amount of smoke from his own hearth. He could when, for example, he ran a cheese shop and disturbed his neighbours by smoking the cheese. The Romans did not explain the principle that distinguishes these two kinds of cases.

Distinguishing them proved to be difficult. Medieval and early modern jurists suggested three ways of doing so. Odofredus said that one cannot use one's land in a way that bothers others.[4] Blackstone eventually gave the same solution, although the Latin phrase was a bit different: *sic utere tuo ut neminem laedere* (use what is yours so as not to injure another).[5] That maxim has been repeated countless times by common law judges. As Professor Thier notes in his chapter on German law,[6] this argument has reappeared periodically in Germany. Critics claim it is meaningless.[7]

[2] D. 8.5.8.6. [3] D. 47.10.44.

[4] *Lectura super digesto veteri* to D. 8.5.8.5 (Lyon 1550) (*unusquisque debet facere in suo quod non officiat alieno*).

[5] W. Blackstone, *Commentaries on the Law of England* (Chicago, University of Chicago Press, 1979), vol. 2, p. 306.

[6] Below, p. 90.

[7] E.g., W. V. H. Rogers, *Winfield and Jolowicz on Tort*, 14th edn (London, Sweet and Maxwell, 1994), p. 404.

According to the chapter on English Law, the same objection has been made in England.[8] Everything that bothers another person is not actionable, and the maxim does not tell us which ones should be.

Later in the thirteenth century, Iacobus de Ravanis said that one cannot discharge anything onto another's property that disturbs the owner. He was picking up on Aristo's remark that one must 'discharge nothing onto [the premises] of another'. His solution was repeated by the great fourteenth century jurist Baldus de Ubaldis[9] and was popular among the Dutch and German jurists of the seventeenth and eighteenth centuries.[10] But it did not explain why the owner of the hearth was allowed to discharge smoke on his neighbour's property.

Still another explanation was given by Bartolus of Saxoferato, who may have been the greatest medieval jurist. Here is his commentary to D. 8.5.8.5:

> The owner of the lower premises cannot discharge smoke into the upper premises by the law of servitudes, and the owner of the upper premises cannot discharge water into the lower unless there is an agreement to the contrary, and for these interferences they can bring actions and the possessory interdicts [Roman actions available to one whose possession has been disturbed]. It may be objected that one is permitted to make a fire in his own premises, and one is not bound if the smoke ascends to those of another unless that happens with an intention to offend. D. 8.5.8.5.…
> I think the following is to be said: Sometimes the owner of the lower premises makes fire in the usual way for the ordering of his family, and then he may do it lawfully, and he is not liable if the smoke ascends unless he acts with an intention to offend. In the same way, if the owner of the upper premises lets water flow as is normal, for his water clock, he is not liable if some descends unless he acts with an intention to injure. But if the owner of the lower premises wants to make a shop or inn where he is continually making a fire and a great deal of smoke, he is not allowed to do so, as in this text (D. 8.5.8.5). In the same way, if the owner of the upper premises lets

[8] This has been criticised as lacking in accuracy: see Lord Wright in *Sedleigh-Denfield* v. *O'Callaghan* [1940] AC 880, p. 903.

[9] Baldus de Ubaldis, *Commentaria Corpus iuris civilis* to D. 8.5.8.5 (Venice, Iuntas, 1577).z

[10] E.g., Johann Brunnemann, *Commentarius in quinquaginta libros Pandectarum* (Genoa, Sumptibus fratrum Cramer, 1762)('in suo enim cuique facere licet, quatenus nihil in alienum immitit'); Dionisius Gothofredus, *Corpus iuris civilis … cum notis integris Dionysii Gothofredi, Antonii Anselmo, Simonis von Leuwen* (Antwerp, 1726) to D. 8.5.8.5 n. 37 ('immittere … vel … projicere non licet'); Johannes Voet, *Commentarius ad Pandectas* (The Hague, Petrus de Hondt, 1726) lib. VIII, tit. 5 ('cuius ire liceat in suo facere ea, quibus vicino nocet, si prosit sibi; observandum tamen, cuique in suo hactenus facere licere, quatenus nihil in alienum immittit').

> water flow beyond what is normal, he is not allowed to do so, as this text says.[11]

Thus, what mattered to Bartolus was the amount of smoke and the normal or abnormal character of the activity.

All three of these solutions not only endured but sometimes can be found side by side in the same author. Here is how the eighteenth-century French jurist Robert Pothier described the proprietor's rights:

> Being neighbours obligates each of the neighbours to use his property in such a way that it does not injure the other neighbour ….
>
> This rule must be understood in the sense that, whatever liberty each one has to do what seems good on his own land, he may do nothing that may result in something going on the land of his neighbour which is injurious. (Citing D.8.5.8.5)

Because of this same principle, one is not allowed to do anything on one's land that would send into a neighbouring house smoke that is too thick or too much of an interference, such as that which issues from a lime kiln or a furnace for burning the dregs of wine (citing D.8.5.8.5.).[12]

1.2.1.3 A further complication: the relationship to negligence

Nothing in the Roman texts suggested that in cases like the cheese shop, the defendant was liable because he was negligent in the sense that he neglected some precaution or should have located the cheese shop elsewhere. Fault or negligence (*culpa*) mattered only if he had caused physical harm to the plaintiff's property and the plaintiff sought to hold him liable under the *lex Aquilia*.

Confusion set in with the emergence of a unified conception of tort liability in the sixteenth century. During this period, as I have shown elsewhere, a group of jurists known as the 'late scholastics' tried to synthesise the rules of Roman law with the philosophical principles of their intellectual heroes, Aristotle and Thomas Aquinas. Aristotle had said that distributive justice entitles each citizen to a fair share of honour or wealth. Commutative justice preserves that share. If another involuntarily deprives one citizen of resources, commutative justice requires the person

[11] *Commentaria in Corpus iuris civilis* to D. 8.5.8.5 (Venice, Iuntas, 1615).

[12] R. Pothier, 'Traité du contrat de société App. 2, Du voisinage' 235, 241, in *Oeuvres de Pothier annotées et mises en correlation avec le Code civil et législation actuel*, 2nd edn by Bugnet (Paris, Marchal et Billard, 1861).

who did so to compensate the victim.[13] Aristotle and Aquinas thought this principle applied even in cases of wounding or striking another in which the defendant did not financially gain. Aquinas explained that he gained in the sense of fulfilling his will at another's expense. Aquinas, though not Aristotle, also said that a party who harmed another negligently but not intentionally must also make compensation. He had also made a choice: he chose to act imprudently or to neglect cultivating the virtue of prudence.

Consequently, the late scholastics explained that commutative justice was the principle underlying the Roman actions in what we would call delict or tort. The distinctions among them were mere matters of Roman positive law. As Aristotle said, whatever belonged to a person should be protected, be it his person, his property or his honour. The *lex Aquilia* protected a person's property and (according to medieval jurists) his person. The action for *iniuria* protected his 'honour'.

In many situations, the action of *iniuria* did protect honour, as, for example when the defendant beat the plaintiff's slave,[14] insulted him by composing or reciting a song,[15] denounced him in a petition to the emperor,[16] or assembled people at his house to raise a loud and offensive clamour.[17] Nevertheless, as we have seen, however, the action for *iniuria* not only protected a person's honour. Inter alia, it protected a person against smoke from another's cheese shop. The late scholastics and the northern natural lawyers neglected the case of the cheese shop and did not explain how it fitted with their general principle that one who harms another's property, person, or honour owes compensation.

That general formula resting liability on fault outlasted the Aristotelian ideas that had inspired it. Grotius, who borrowed heavily from the late scholastics, said in a famous passage:

> From … a fault, if damage is caused, an obligation arises by the law of nature, namely, that the damage be made good. … Damage … is when a man has less than what is his whether by mere nature or by some human act in addition such as ownership, agreement, or statute. Things which a man may regard as his by nature are life …, his limbs, fame, honour, and his own acts.[18]

[13] *Nicomachean Ethics* V.ii 1130[b] – 1131[a]. [14] D. 47.10.15.34. [15] D. 47.10.15.27.
[16] D. 47.10.15.29. [17] D. 47.10.15.2.
[18] H. Grotius, *De iure belli ac pacis libri tres*, B. J. A. de Kanter-van Hetting Tromp (ed.) (Leiden, Brill, 1939), II.xvii.21.

The formula was repeated by many seventeenth- and eighteenth-century jurists, including Robert Pothier, although Pothier did not enumerate the rights that constituted damage. The drafters of the French Civil Code, who were greatly influenced by Pothier, replicated it in Arts. 1382–3. Versions of it, with various modifications, passed into virtually all modern civil codes. But the French Code included no provision dealing with interferences among neighbours like that of the cheese shop, even though they had been mentioned by Pothier, albeit only in an appendix to his *Traité du contrat de société*.[19] Other codes, such as the Dutch Code of 1838, did contain a provision mentioning disturbances among neighbours but never explained how that provision related to the general formula.

So, in addition to the ancient problem of how to limit actions for disturbing neighbours, continental jurists faced another problem as well, one which had been long neglected. They had to explain how the general formula which provided for liability based on fault was related to protecting neighbours against disturbances. Much of the development of modern law can be understood as a thrashing out of that problem.

1.2.2 The development of modern law

1.2.2.1 German law

In Germany, much confusion was avoided because the Germans did not simply model their Code on the French or on the work of the seventeenth- and eighteenth-century authors. While the French Code came into force in 1804, the German Code did so in 1900, and only after a revival of academic interest in the Roman texts. Consequently, their Code included not only a general provision governing liability for fault (§ 823(1)), which the Germans modelled on the *lex Aquilia*, but also special provisions governing disturbances among neighbours which they modelled on the action for *iniuria*. Because disturbances among neighbours were governed by these special provisions, there was no effort to apply the general formula to them, and consequently, no confusion about how it might apply.

The German jurists knew that, under Roman law, one could recover for *iniuria* if one interfered with a neighbour's use of land simply in order to disturb him. This rule was eventually adopted in a generalised form in § 226 of the German Civil Code which provides that 'The use of a right is not permitted when it can only have the purpose of causing harm to another.'

[19] Below, p. 68.

The German jurists also knew that one might be liable in Roman law even if the purpose of interfering with one's neighbour was not to disturb him. They gave considerable thought to when, in this second case, one should or should not be liable. The classic discussion was by Rudolph von Ihering. He pointed out that property rights would be worthless if a property owner either could disturb his neighbour at will or could not disturb him at all. An owner who could disturb his neighbours at will could make their land valueless by some pestilential use of his own. An owner who could not disturb them at all could not cook or use heat if they objected to the odours or the smoke. Ihering concluded that the owner's rights must depend on the degree of interference and the normal use of land.[20] As the German report observes, a similar solution was adopted by German courts in the nineteenth century. It passed into § 906 of the German Civil Code which reads (as amended in 1960):

> The owner of land may not prohibit the discharge upon it of gas, steam, odours, smoke, soot, heat, noise, vibrations, and any similar interferences from the operations conducted on other land insofar as the use of his own property is not impaired or not substantially impaired. …
> The same applies insofar as a substantial impairment is caused by a use of other land that is normal for the area and cannot be reasonably prevented by measures which are commercially feasible for activities of this type. If the owner must suffer some interference on this account, then he can require an appropriate compensation in money from the person using the other land when the interference prevents a use of his own land or its product that is unreasonable in degree.

Taken together, these provisions govern interferences among neighbours in much the same way as Roman law as interpreted by Bartolus. Courts give relief in two types of cases: against one who deliberately bothers his neighbours (§ 226), and sometimes against one who disturbs them even without fault as in the Roman case of the cheese shop (§ 906). In the second case, § 906 limits recovery for a disturbance in the same way German courts did in the nineteenth century, French courts have done since the nineteenth century, and Roman law did according to Bartolus. What matters is whether the disturbance is abnormal in kind or in degree for the locality.

[20] R. von Ihering, 'Zur Lehre von den Beschränkungen den Grundeigenthümers im Interesse der Nachbarn', (1863) 6 *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 81, at 94–6.

1.2.2.2 French law

Articles 1382–3 of the French Civil Code contained the general formula imposing liability on those who cause harm through fault. No provisions like the Roman rules of *iniuria* governed disturbances among neighbours. Yet, French courts avoided the confusion of how this formula might apply to such disturbances by, in effect, creating new actions for which the Code did not provide. As the chapter on French law points out, they gave relief when the defendant acted in order to disturb the plaintiff, and when, as French courts put it, the interference went beyond those normal among neighbours.[21] Although the terminology was not uniform, French commentators usually described the first case as an 'abuse of right' (*abus du droit*) and the second as an interference among neighbours (*trouble de voisinage*), although the latter expression was sometimes used to encompass cases of 'abuse of right'.

In the second case, to quote the chapter on French law, 'he is liable if the disturbance exceeds that which is "normal" among neighbouring properties'.[22] What is normal is judged by the character of the locality. The defendant is liable if the interference is normal in kind but abnormal in degree so that the defendant is causing more of a disturbance than others engaged in the same activity. He is liable whether or not he is at fault for causing the interference. For example, if his factory emits fluorine gas he is liable even if there is no measure he should have taken to prevent the emission. In such a case, however, a court may allow him to continue his operations but require him to pay damages for the harm they cause.[23]

Thus, the French resolved the problems they inherited by, in effect, recognising an action the Romans would have given for *iniuria* alongside the general formula of Arts. 1382–3. As in Roman law, this action lies in two types of cases: when one deliberately bothers one's neighbours and when one disturbs them even without fault as in the Roman case of the cheese shop. In the second case, the French cleared up the ancient question of when one can recover – of what makes smoke from a cheese shop different from smoke from a hearth – in much the same manner as Bartolus: it all depends on whether the disturbance is abnormal in kind or in degree for the locality. In short, in France as in Germany, it is hard to see much difference between the law governing disturbances among neighbours and the Roman law as interpreted by Bartolus.

[21] Below, pp. 70–71. [22] Ibid. [23] Ibid.

1.2.2.3 Dutch law

The Dutch Code of 1838 also contained a general formula like that of Arts. 1382–3. Indeed, as the chapter on Dutch law points out, Art. 1401 of the 1838 Code was a translation of Art. 1382, although it specified that the defendant's conduct must be 'unlawful' since merely to mention 'fault' was thought to be too vague.[24] In the new Dutch Code of 1992, the old Art. 1401 has been replaced by Art. 6:162 but without a change of substance.

The old Dutch Code also provided in Art. 625 'that an owner may not use his property in such a way that he causes nuisances to the rights of others'. What this provision meant was unclear. Had the Dutch courts wished, they could have construed it to mean that a neighbour could bring an action for a disturbance without having to bring his case within the general formula of Art. 1401. French courts had allowed such an action even though their Code did not contain a text like Art. 625, which spoke of nuisances.

As the chapter on Dutch law notes, 'The Supreme Court at first seemed to sanction the fact that plaintiffs based [their action] on art 625 CC, but later on it made clear that the relations between neighbours were governed by the law of torts', that is, by Art. 1401.[25] Consequently, a neighbour had to be at 'fault' and act 'unlawfully' to be liable. This approach has been taken by Art. 5:37 of the Dutch Civil Code of 1992. It provides that the owner of land is not allowed to cause nuisance to his neighbour that amounts to negligence within the meaning of Art. 6:162. It mentions specific examples of nuisances: noise, disgusting smells, smoke, and deprivation of air, light and support. But it does not clarify the question that remained unresolved under the old Dutch Code: what does it mean to say that one is liable for causing such disturbances only if one is at fault and acted unlawfully?

The closest the Dutch courts have come to answering this question is to lay down a list of factors that judges should take into account in order to decide whether a certain type of behaviour was unlawful or not.[26] To quote the chapter on Dutch law:

> The list of factors … was the following: 1) the chance that others would not pay attention, 2) the chance that as a result damage would ensue, 3)

[24] Below, p. 108.
[25] Below, p. 110, citing, as the first instance in which this earlier tendency was rejected, HR 14 May 1886, W. 5288, along with subsequent decisions reaffirming this position.
[26] Below, pp. 114–15.