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AIR AND NOISE POLLUTION SURROUNDING AIRPORTS: EAST HAVEN V. EASTERN AIRLINES, INC.¹

By Michael B. Meyer²

In the last decade, commercial air travel has increased significantly, and turbo-prop and jet aircraft have become major commercial air vehicles.² These developments have caused marked increases in air and noise pollution in the vicinity of airports.³ The rights of nearby property holders to a quiet and clean environment have increasingly come into conflict with whatever rights the public has to relatively unrestricted air travel. In East Haven v. Eastern Airlines, Inc., the United States District Court for the District of Connecticut dealt with such a conflict, and ruled for the public’s right to relatively unrestricted air travel.⁴ The court’s opinion calls attention to the basic legal theories that have relevance to this nationwide environmental problem.⁵

Tweed-New Haven Airport, occupying land within the City of New Haven and the Town of East Haven, is owned and operated by the City of New Haven.⁶ It is served by two major commercial air carriers, Eastern and Allegheny, which employ turbo-prop and jet aircraft.⁷ Since the airport began in 1931 as a small turf runway handling only a few flights, it has expanded several times.⁸ Today it is a technologically advanced, metropolitan jet airport, with the paved runways of 4,100 and 5,600 feet.⁹ Flight operations are conducted in compliance with regulations promulgated by the Federal Aviation Administration (hereinafter the FAA).¹⁰

In 1967, the Town of East Haven and individual property holders therein sued the City of New Haven, Eastern and Allegheny Airlines, and the Administrator of the FAA, for legal and equitable relief.¹¹ All plaintiffs sought an injunction against continued operations at the airport as well as damages for reduced property values.¹² Individual property holders additionally
sought "emotional damages" as compensation for the annoyance and inconvenience caused by the airport operations. In January 1968, the court ruled upon all defendants' motions to dismiss. The suit against the Administrator of the FAA was dismissed for lack of in personam jurisdiction, for improper venue, and for failure to allege facts upon which relief might be granted. The other defendants' motions to dismiss, however, were denied. 16

In July 1971, after a non-jury trial, the court held: first, plaintiffs could not obtain an injunction on a nuisance or trespass theory against further operations at the airport; second, plaintiffs could not recover against the airlines for air and noise pollution on a partial compensable taking theory; third, plaintiffs could not recover against the operator of the airport (here, the City of New Haven) on a partial compensable taking theory for infrequent flights directly over property, for frequent flights not directly over property, or for adjacent ground operations, but plaintiffs could recover against the airport operator on a partial compensable taking theory for the effects of frequent flights directly over property; and fourth, individual property holders who had recovered on a partial compensable taking theory could not also recover for resultant "emotional damages" or mental suffering. 17

The court's decision is subject to three major criticisms. Most importantly, it does not recognize nuisance as the legal theory most applicable to complex controversies involving airports. In addition, it does not recognize trespass as an appropriate legal theory for dealing with invasions of property by either aircraft or physical agents (e.g., soot, gases, energy in the form of shock waves, vibrations, or noise). Finally, because of its exclusive reliance on a partial compensable taking theory as the basis of plaintiffs' recovery, and because of its employment of a strict definition of property rights, the court's decision limits the class of property holders who may recover; use of this theory also precludes injunctive relief, the most effective remedy in this regard, while allowing only for money damages, an inadequate remedy in view of the continuing nature of the problem.

This article will analyze each of the above three criticisms. Additionally, consideration will be given to the procedural issues that led to the dismissal of the suit against the Administrator of the FAA. Brief mention will also be made of salient provisions of the Federal Aviation Act of 1958 and the National Environmental Policy Act of 1969.
It is submitted that nuisance is the legal theory most relevant to complicated controversies involving airports and their attendant pollution. Extending tort liability to a wide range of conduct, nuisance may be of two kinds: private nuisance, which involves an unreasonable interference with a private party's enjoyment or use of his land, and is remedied through litigation by the affected party; and public nuisance, which involves a broad interference with a variety of public rights, and is remedied through litigation by governmental authorities.\(^{18}\)

A private nuisance may be shown to exist if: (1) an intentional or negligent unreasonable interference with plaintiff's interest in land occurs, or if conduct exists which is abnormal or out of place with respect to the prevailing use of the surrounding neighborhood; and (2) this invasion or abnormal land use substantially interferes with the plaintiff's use or enjoyment of his interest in land.\(^{19}\) Examples of invasions of interests in land that substantially interfere with the landholder's use and enjoyment thereof, include: odors,\(^{20}\) smoke or gas,\(^{21}\) noises,\(^{22}\) bright lights,\(^{23}\) and vibrations.\(^{24}\) Injunctive relief may lie where a private nuisance exists or is imminent.\(^{25}\) Money damages are also available.\(^{26}\)

In light of the facts in *East Haven*, private nuisance would seem to have provided an appropriate theory for plaintiffs' relief. The *East Haven* court accepted testimony, from plaintiffs whom the court characterized as "truthful witnesses,"\(^{27}\) to the effect that the use and enjoyment of their respective landholdings had been disturbed for an extensive period of time by fumes, soot, noise, smoke, smells, vibrations, and bright lights at night.\(^{28}\) These physical annoyances had had such diverse harmful effects as breaking windows, dirtying house exteriors, shaking pictures off walls, loosening fuses in fuse boxes, loosening electrical connections, restricting the use of outdoor areas, causing fear of crashes (the evidence showed that there had been three aircraft crashes, of unspecified size and damages, in the area in recent years), and making conversation in homes difficult.\(^{29}\) Thus an invasion of plaintiffs' interest in land had occurred, and this invasion substantially interfered with their use and enjoyment in the land.\(^{30}\) Whether this invasion was intentional or negligent would not have been determinative of liability, as nuisance would allow recovery in either event.\(^{31}\)

Courts have held the private nuisance doctrine to be applicable
to such environmental irritants as dust and smoke. For example, in 1917, the Georgia Supreme Court held in *Tate v. Mull*\(^2\) that the great quantity of dust expelled from a cotton ginnery constituted a nuisance to an adjacent proprietor and thus justified the issuance of an injunction. In *Holman v. Athens Empire Laundry Company*,\(^3\) the same court two years later held that smoke alone could constitute a nuisance, if plaintiffs could show actual, tangible, and substantial injury to property, or palpable interference with the use or enjoyment of the land by people of ordinary sensitivities.

More recently, courts have specifically held that the very operation of an airport could constitute a nuisance.\(^4\) In *Anderson v. Souza*,\(^5\) the California Supreme Court in 1952 held that a small, private airport’s operations constituted a nuisance by reason of the erratic and low flying aircraft it brought to the area. It further held that an injunction was justified, if conditionally limited so as to allow renewed operation of the airport when the complained-of conditions were remedied. Dealing with a large, international airport in *City of Newark v. Eastern Airlines*,\(^6\) the United States District Court for the District of New Jersey stated in 1958 that aircraft operations could constitute a private nuisance and that an injunction might lie if the aircraft in question flew in such a manner as to invade the immediate reaches of any specific lands; however, the court, saying that this evidentiary burden had not been met by plaintiffs, refused to issue an injunction.

Although the above cases apply the private nuisance doctrine to problems that seem endemic to airports—noise, dust, fumes, smoke—they do not represent the majority view in the United States. More typical is the 1967 decision by the United States District Court for the Eastern District of New York in *American Airlines, Inc. v. Town of Hempstead*,\(^7\) wherein the court flatly rejected the applicability of the private nuisance doctrine. This case arose from Hempstead’s attempt to impose a noise control ordinance on aircraft operations at Kennedy Airport; it was held that the ordinance conflicted with flight patterns established by the FAA. It is ironic that most of the cases applying the private nuisance doctrine deal with the operations of small airports during the 1930’s, 40’s, and early 50’s. One might expect that the more distressing effects of a larger, public airport of the 1960’s or 70’s would provide enormously greater justification for the application of private nuisance.
The *East Haven* court, nevertheless, rejected the applicability of this doctrine as a basis of recovery. It found an overriding public interest in keeping the airport fully operative and in not restricting air travel. The court concluded that many more people would be adversely affected by closing a busy airport than by continuing the flights. The court in effect applied a balancing test in which the public interest in relatively unrestricted air travel was weighed against the private interest in a relatively undisturbed environment. With respect to any such balancing test, however, it is submitted that the *sum* of all private interests in undisturbed local environments, including those near airports, amounts to a public interest. And it is this public interest which should be weighed against the other public interest of relatively unrestricted air travel. Otherwise a species of tax or charge is unfairly imposed upon property holders adjacent to airports: they are required to bear the full costs of air transport in terms of their own inconvenience and diminished property values. These social costs would more properly be borne by the users of airport facilities. It should be noted that judicial acceptance of the suggested approach would be tantamount to recognition of private litigants as "private attorneys general," suing for the public interest on a *private* nuisance theory. Although the traditional meaning of private nuisance might thereby be modified, this fact should not deter a court from adopting the suggested approach in order to assure substantial justice.

Another means by which individuals may have redress is through the concept of public nuisance. Here, the state, representing its citizens, is plaintiff with respect to negligent or intentional invasions or abnormal land uses, any of which interferes with public rights. Such interference was revealed by the evidence in *East Haven*. However, although the elements of public nuisance were present, the State of Connecticut simply did not litigate. Nevertheless, as to future airport controversies, it should be noted that public nuisance may present a viable theory for relief.

**Trespass**

Trespass is another theory that should have been applied in *East Haven*. At early common law, there were two requirements for proving a cause of action in trespass to land: (1) the mere possession of land by a particular person, and (2) the unauthorized entry or invasion thereon by another. The defendant in a tres-
pass action was held strictly liable for all damages resulting from his trespass, not merely for those damages which were the reasonably foreseeable results of his acts. The defendant's liability existed so long as he had committed some voluntary act that led to the trespass; the trespass itself might have been neither intentional nor negligent but could still have been basis for the defendant's liability. This rule has been modified, however, throughout much of the United States today so that the acts must be either intentional or negligent or be the result of some extra-hazardous conduct.

Historically, the common law held that an estate extended upwards to infinity or "heaven." Modern courts, however, in an age of air travel and satellites, have understandably restricted this doctrine of infinite upper extent of estates in land. The United States Supreme Court in United States v. Causby in 1946 and in Griggs v. Allegheny County in 1962 concluded that a Congressional intent had been shown through various legislation to regard airspace above a certain altitude as being in the public domain so that private property rights were non-existent above this altitude. Under this concept, no trespasses could occur by the flight of aircraft above this altitude, no matter how harmful the impact on the land below. However, flights below this level might constitute the physical act necessary for a trespass, even though they might be on glide or flight paths approved by the Civil Aeronautics Authority.

The effects of Causby and Griggs have been far-reaching. Modifying early common law, the Restatement, Second, Torts, specifically takes the Causby rule into consideration by limiting trespass flights to those flights within the "immediate reaches of airspace next to the land." It should be noted, however, that Causby and the Restatement so further modify traditional trespass doctrine as to make it virtually synonymous with nuisance in cases involving repetitive direct overflights of aircraft. Again following Causby, the Restatement also limits trespass flights to those flights which interfere "substantially with the [plaintiff's] use and enjoyment of his land." This second restriction upon traditional trespass is unfortunate, since it imposes upon the plaintiff a considerably heavier burden than would have been imposed by earlier doctrine. It is to be emphasized, however, that these modifications apply only to aircraft overflights; they do not extend beyond this context.

Applying the Causby modifications to the common law rule,
courts have on occasion held aircraft overflights to be trespasses. The Arizona Supreme Court in *Brandes v. Mitterling* in 1948 stated:

> There is no definite yardstick that may be used in determining how low an airplane may fly over the property of others in landing or taking off; however, flying at low altitudes incident to landing and taking off may constitute trespass, as it may cause more than mere apprehension of injury.

The *Brandes* court, recognizing a trespass, upheld an injunction against flights of this character. However, the injunction was issued not because of the acknowledged trespass but primarily because of a proven nuisance. Four years later, in *Anderson v. Souza*, the California Supreme Court, quoting *Brandes* with approval on the issue of trespass, held that an injunction was justified. But here again the court also found that a nuisance existed which justified the injunction. Although *Brandes* and *Souza* do not reflect the majority rule on trespass in the United States today, they illustrate the potential for applying trespass law to aircraft operations, or at least to direct overflights, in the post-*Causby* era.

The reasoning behind the *East Haven* court's refusal to allow a remedy for trespass is suspect. Having found that some of the plaintiffs might recover for a partial taking, the court stated that a decision allowing recovery for trespass would lead to a "double recovery," i.e., two different recoveries for the same offensive overflights:

> Where there has been such an invasion in this case by a substantial number of overflights I have found the property owner to be entitled to recover from the City compensation for that taking. The taking includes the trespass. To allow recovery from the City of additional damages for the trespass would permit a double recovery for the same wrong. Where there has been no taking because there has been no significant invasion of plaintiff's property, it would seem to follow, at least as far as the City is concerned, that there has been no trespass on the property.

The court had previously stated that only frequent and direct overflights would satisfy the requirements for a *taking*. However, it does not necessarily follow that merely because there have not been the frequent and direct overflights needed for a *taking* there could not then have been a *trespass*. This reasoning
is further flawed because not all plaintiffs had recovered for a taking in the first place and because some of those not so recovering had made out cases in trespass. Those who had established a trespass and who were denied recovery for a taking would thus fall outside the court's "double recovery" argument. The sole recovery for these plaintiffs would have been for trespass. No convincing reason was given in explanation of why the court approached the problem as it did. It is at least as logical to inquire first whether there has been a trespass, and then secondly whether there has been a taking. This approach would seem especially logical in view of the court's theory that repetitive trespass may amount to a taking. Further, as injunctive relief lies in the event of trespass, but not in the event of partial compensable taking, it is unfortunate that the existence of trespass, which permits injunctive relief preferable to plaintiffs, depend upon the absence of a taking, which entails only money damages.

The above discussion has dealt only with trespass resulting from the physical intrusions of the aircraft *per se*. However, in addition to aircraft overflights, plaintiffs testified that the operations of the aircraft caused soot, gases, fumes and noise to invade their respective properties. As mentioned above, the resulting physical damages included: dirtying of house exteriors, breaking of windows, shaking of pictures from walls, and loosening of fuses and other electrical connections. More personal damages included: fear of crashes, restrictions on use of outdoor areas, and rendering difficult conversations in homes. The common law of trespass to land extends liability to defendants who directly cause physical objects, such as rocks or trees, to fall upon the plaintiff's land. It would not seem unreasonable then to regard physical particles (soot), molecules (gases and fumes), or energy (noise, vibrations, shock waves) as having the same capacity as rocks and trees to effect a trespass. Although in the past, courts were reluctant to find a trespass where the physical agent was invisible, courts in more recent years have found gas, dust, gases and particulates, and sparks to be physical entities sufficient to produce a trespass. The physical agents referred to by plaintiffs in *East Haven* were shown to have been set in motion by the airline defendants, and to have caused harmful impact on plaintiff's property. This would seem to compel the conclusion, contrary to that of the court, that liability in trespass had indeed been established against the airline-defendants.
Partial Compensable Taking

The *East Haven* court regarded a partial compensable taking theory as the only basis for plaintiffs' recovery. The traditional theory allows for recovery where the government, in an exercise of its eminent domain powers, has acted in such a way as to partially take plaintiff's land; the most common example is the taking of an easement. From a plaintiff's viewpoint, however, the theory suffers from two limitations: (1) strict definitions of property rights, and (2) limited forms of relief. The *East Haven* court adopted the view that frequent, direct overflights were needed to establish a partial taking.\(^7\) In doing so the court adhered to the older, majority view in the United States. The United States Supreme Court in *Causby* held that the United States had imposed a servitude on the land of plaintiffs therein by allowing a federal agency (the military) to fly frequently and directly over plaintiff's land in such a manner as to damage his poultry business.\(^7\) As indicated above, the *Causby* court stated that flights that were above a minimum altitude prescribed as safe by the (then) Civil Aeronautics Authority were flights in the public domain.\(^7\) Flights below this minimum level were expressly held not to reach the public domain, even if they were on flight paths approved by the Civil Aeronautics Authority.\(^7\) Therefore, the court held, flights directly over private land, so low and frequent to have been a direct and immediate interference with the use and enjoyment of the land, constituted an appropriation of that land.\(^7\)

The United States Supreme Court in *Griggs v. Allegheny County* in 1962 applied the *Causby* standards to a county owned and operated airport.\(^7\) The *Griggs* court held that if the location of defendant's airport and the rules of the Civil Aeronautics Authority required aircraft to fly regularly over plaintiff's property, and if the resultant noise, vibrations, and danger forced the plaintiff to move to another location, then an air easement (i.e. a partial taking) occurred and plaintiff, under the Fourteenth Amendment, was entitled to compensation. The *Causby* and *Griggs* requirement of regular and frequent direct overflights has remained essentially unmodified as the majority view in the United States.\(^7\)

A reasonable basis for a variation upon this standard was implied, however, by the United States District Court for the Western District of Michigan in 1956 in *United States v. Certain*
This case held that if a source of noise and disturbance (here, a highway) was sufficient to destroy the current use of the adjacent property, there occurred thereby a compensable taking; this taking would occur despite the fact that the source of the disturbance was beside, not above, the land. Air or noise pollution originating from a highway or other adjacent activity would ordinarily come from a horizontal direction. An extension of this holding to situations of aircraft by-flights (diagonal to plaintiff’s property) and general airport operations (horizontal thereto) would be logical.

The criterion for a taking should be the effect or impact upon the plaintiff’s land, not the direction from which the taking was effected. Following this logic, the Oregon Supreme Court in *Thornburg v. Port of Portland* in 1962 held that aircraft by-flights could constitute a taking; the objectionable flights could be over nearby land, as long as there could be shown substantial interference with the plaintiff’s use or enjoyment of his own land. This decision looked to the effect of the disturbance, under a “substantial interference” test, and did not concern itself with the older requirement that the disturbance’s origin be directly overhead. Taking an even more liberal approach, the Washington Supreme Court, in *Martin v. Port of Seattle*, in 1965 further reduced the requirements for a taking by awarding damages not only in the absence of direct overflights, but also in the absence of a showing of substantial interference with the use of the plaintiff’s land. If, however, no substantial interference were shown, the damages were to be limited to whatever decrease in the land’s market value could be attributed to the indirect overflights.

Under the partial compensable taking theory injunctive relief is usually not available. A taking is considered to be a species of legalized trespass by the government. As an exercise of the government’s right of eminent domain, it is, with respect to another party’s land, an irreversible assertion of an easement or other right for the benefit of the public. Monetary compensation is the normal relief for such a taking. If injunctions are granted, they are granted only as a matter of judicial grace, and not as a matter of right. Generally, injunctive relief will not be applied against the government, unless, in addition to irreparable injury to the plaintiffs and inadequate remedies at law, the government’s action is shown to be abusive of its discretion, fraudulent, or in
some other manner grossly improper. In the ordinary aircraft overflight case, however, where money compensation is usually available and where such factors as fraud, gross impropriety or abuse of discretion do not exist, injunctions cannot be obtained. Since plaintiffs in such litigation will normally desire injunctive relief, in the form of cessation or abatement, more than they will desire money damages, the partial compensable taking theory offers them little promise.

**Additional Considerations**

*Procedural Matters: Dismissal of the Suit Against the Administrator of the FAA.*

Proceedings against the (national) Administrator of the FAA were dismissed on the grounds of improper venue, lack of *in personam* jurisdiction, and failure to allege facts upon which relief might be granted.\(^87\)

To overcome such venue problems in the future, it may be argued that the following federal venue statute (28 U.S.C. §1391(e)) applies:

> A Civil Action in which *each* defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority or any agency, of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. . . . \(^88\) (Emphasis added).

Thus with respect to the Tweed-New Haven Airport, a separate suit (brought in either Connecticut or the District of Columbia) in which the Administrator of the FAA would have been the *sole* defendant, would have satisfied venue requirements.\(^89\) Moreover, had §1391(e) been used as the basis for venue, the general provisions of §1391 would have allowed for interstate service of process, thus enabling the court to gain *in personam* jurisdiction over the Administrator.\(^90\) The *East Haven* court stated that had there not also been a problem with respect to plaintiff's failure to state a claim upon which relief might be granted, the court would have ordered a severance, in order to allow the provisions of §1391(e) to operate against the Administrator so as to deny his motion to dismiss the complaint.\(^91\)
As to the failure to state a claim, plaintiffs had sought relief in the nature of mandamus in order to compel the Administrator to order the other defendants to desist from pollution activities. The Federal Aviation Act of 1958 permits one who seeks enforcement of existing regulations or laws to file a written complaint with the Administrator; an unfavorable administrative decision on this complaint may be appealed to the United States Court of Appeals for the District of Columbia Circuit. However, the only sanction that a United States District Court may impose upon the Administrator is to compel him to rule upon a written complaint that had been received but not yet acted upon. The court in East Haven did not make a finding as to whether such a written complaint had been presented to the Administrator, but merely noted that much had been said on both sides of this issue. As to future controversies, however, litigants should be sure to submit administrative complaints to the Administrator in order to establish a basis for any subsequent legal action against him.


The FAA, by reason of its legislative mandate, must issue administrative regulations concerning such matters as the control over air commerce, navigable airspace, and air traffic control. More specific regulatory controls involve take-off and landing glide paths, required aircraft equipment, and noise levels. The Federal Aviation Act itself does not specifically require the Board or the Administrator to consider environmental factors in making or enforcing agency regulations. However, the National Environmental Policy Act of 1969 creates an affirmative duty in all U.S. public officials to administer all laws and regulations in such a way as to further the continuing policies of environmental protection and improvement. Future plaintiffs may base administrative complaints to the Administrator of the FAA on the failure of the FAA to conform with these policies.

Conclusion

East Haven v. Eastern Airlines, Inc. is representative of the majority view in the United States today in its refusal to apply nuisance or trespass to airport pollution, and in its allowance of only limited damages under partial compensable taking. However, if the continuing problem of serious airport pollution is to
be resolved without legislation, courts in future controversies will have to apply, in a more imaginative and vigorous manner, the established common law theories. Courts may consider as a nuisance the air and noise pollution attendant to running a modern airport. They may also apply trespass to instances of objectionable overflights or to instances of pollution from noise, energy, soot, or gases. When nuisance or trespass is found to exist, courts may find that injunctive relief is justified. Additionally, courts may hold that overflights constitute a partial compensable taking, whether or not they occur directly overhead, and that full damages should be awarded in compensation therefor. In this regard, the Thornburg and Martin decisions, by not requiring direct overflights for a partial taking, signal a more liberal judicial trend.

Procedural difficulties, such as encountered by plaintiffs in East Haven in the dismissal of the suit against the Administrator of the FAA, can be avoided by a prior administrative complaint and a subsequent separate suit under 28 U.S.C. §1391(e). Substantively, apart from the above common law theories, the Federal Aviation Act of 1958 may provide a basis for relief when it is interpreted in light of the broad mandates of the National Environmental Policy Act of 1969.

These relevant statutes aside, however, the common law can provide substantial relief. Airport pollution continues, not for the want of legal theories for damages or abatement, but for the want of judicial willingness to apply such historic theories to jet-age problems.

Footnotes

East Haven at 29–36.

Id.

Id. at 17.

Id. at 20–21. The main concern of the instant case involves Allegheny Airlines' turbo-prop aircraft (operated currently), Eastern Airlines' turbo-prop aircraft (operated until recently), and Eastern Airlines' jet aircraft (operated currently).

Id. at 19–20.

The airport is in the process of further expansion at present. These expansions, and other improvements in the airport's facilities, were partially funded by Federal grants to the City of New Haven pursuant to the National Airport Plan, 49 U.S.C. §1102, under the Federal Airport Act, 49 U.S.C. §1101 et seq. This statute has been superseded by the Airport and Airway Development Act of 1970, Public Law 91–258, 84 Stat. 219.


East Haven at 17–18.

Id. at 17.

Id. at 17–18.


Id. at 509–513.

Id. at 513–516.

East Haven at 29–36. In a simultaneous suit in the Connecticut state courts, the Town of East Haven won a decision against the City of New Haven, entitling the Town to an injunction against further airport expansion, against the wishes of the Town, into the Town of East Haven. The case was decided primarily on points of administrative law. It held that the City of New Haven had not complied with the state statute governing the taking of land by eminent domain by the state. It precluded further expansion, either in the form of physical occupation of more land, or in the form of maintenance of more extensive "clear zones" over property located in East Haven. Town of East Haven v. City of New Haven, 159 Conn. 453, 271 A. 2d 110 (1970); Conn. Gen. Stat. Ann. §15–79.

W. L. Prosser, Handbook of Torts, §§87–88 (4th Ed.) (hereinafter cited as Prosser). Such litigation for public nuisance by the state is usually a criminal action, with public nuisance being an indictable criminal offense.

Taylor v. City of Cincinnati, 143 Ohio St. 426, 55 N.E. 2d 724, 155 ALR 44 (1924); Prosser, §88; Restatement, Torts, §822; Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997 (1966).


Sam Warren & Son Stone Co. v. Gruesser, 397 Ky. 98, 209 S.W. 2d 817 (1948).

Hamilton Corp. v. Julian, 130 Md. 597, 101 A. 558, 7 ALR 746 (1917); Prosser, §91.

Oklahoma City v. Eylar, 177 Okla. 616, 61 P. 2d 649 (1936); Prosser, §91.

East Haven at 21, n. 4.

Id. at 21-26.

Id.

Taylor v. Cincinnati, supra note 19. Additionally, it might be argued that private nuisance in airport cases exists in yet a third form, i.e. the airport’s use of its land may be an abnormal use with respect to the prevalingly residential use of the surrounding neighborhood. Such an argument, however, would not seem too likely to succeed, particularly in urban areas where such airports may be deemed an area necessity.

Tate v. Mull., 147 Ga. 195, 93 S.E. 212 (1917); 3 ALR 313; 24 ALR 2d 194.

Holman v. Athens Empire Laundry Co., 149 Ga. 345, 100 S.E. 207 (1919); 6 ALR 1575.

4. Annotation, Airport of Flight of Aircraft as a Nuisance, 140 ALR 1362.

Anderson v. Souza, 38 Cal. 2d 825, 243 P. 2d 497 (1952). Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817, 99 ALR 158 (1934), held a municipal airport to be a nuisance due to the dust created by its operation, and upheld the issuance of an injunction against the continued spreading of dust in excessive or unreasonable quantities over adjoining residential properties. Vanderslice v. Shawn, 26 Del. Ch. 225, 27 A. 2d 87 (1942), held that flights in the vicinity of an airport, under 100 feet in altitude, over plaintiffs’ land and houses constituted a nuisance, and enjoined further flights of this kind. Swetland v. Curtis Airports Corp., 55 F. 2d 201 (6th Cir., 1932), held that a private airport was entirely enjoineable due to the dust created and due to low overflights, and enjoined all aircraft operations by the defendant at the airport’s present location. (Swetland v. Curtis Airports Corp. was criticized as “inapplicable to modern problems” in American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226, 231 (E.D.N.Y., 1967),
aff'd. 398 F. 2d 369 (2d Cir., 1968), cert. den. 393 U.S. 1017 (1969).) Brandes v. Mitterling, 67 Ariz. 349, 196 P. 2d 464 (1948), held that the resultant noise and dust concomitant with aircraft operations at a small, private airport constituted a nuisance, and that the plaintiffs were entitled to an injunction.


39 East Haven at 30.

40 Id.

41 Id.

42 Id. at 21–26.

43 Prosser, §13; Restatement, 2d, Torts, §157–166. Restatement, 2d, Torts, §158 provides as follows:

“One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
(a) enters land in the possession of the other, or causes a thing or third person to do so, or
(b) remains on the land, or
(c) fails to remove from the land a thing which he is under a duty to remove.”

In trespass, the plaintiff was not required to possess title to the land trespassed upon; it was sufficient that the plaintiff merely be in possession. Leach v. Woods, 31 Mass. (14 Pick.) 461 (1883); Nickerson v. Thacher, 146 Mass. 609, 16 N.E. 581 (1888).

44 Wyant v. Crouse, 127 Mich. 158, 86 N.W. 527 (1901). Forest City Cotton Co. v. Miller, 218 N.C. 294, 10 S.E. 2d 806 (1940), held that no actual damages had to be shown; if none were shown the plaintiff was still entitled to recover nominal damages.


46 Loe v. Lenhardt, 227 Ore. 242, 362 P. 2d 312 (1961); Young v. Darter, 363 P. 2d 829 (Okla., 1961); Restatement, 2d, Torts, §166.

47 Coke on Littleton, 4a.


(1) Except as stated in Subsection (2), a trespass may be committed on, beneath, or above the surface of the earth;

(2) Flight by aircraft in the airspace above the land of another is a trespass if, but only if,

(a) it enters into the immediate reaches of the airspace next to the land; and

(b) it interferes substantially with the other's use and enjoyment of his land.

See also comment on subsection (2), subcomments (g)-(m), Restatement, 2d, Torts, §159. United States v. Causby, supra note 48, at 264.

Overhanging telephone and power lines have been held to constitute a trespass: McKenzie v. Pacific Gas and Electric Co., 200 Cal. App. 2d 731, 19 Cal. Rptr. 628 (1962); Butler v. Frontier Tel. Co., 186 N.Y. 486, 79 N.E. 716 (1906). Bullets passing over land have been held to constitute a trespass: Munro v. Williams, 94 Conn. 377, 109 A. 129 (1920); Whittaker v. Strangvick, 100 Minn. 386, 111 N.W. 295 (1907).


East Haven at 34–35.

Id. at 35.

Id. at 30–34.

Id. at 32–33.

Id. at 21–26.

Id.


Newsom v. Anderson, supra note 45.

PROSSER, §13.


Hall v. Deweld Mica Corp., 244 N.C. 182, 93 S.E. 2d 56 (1956).


Id.

Id. at 30–34.

United States v. Causby, supra note 48.
AIRPORTS AND POLLUTION

76 Id. at 260–261, 266. The Air Commerce Act of 1926, 49 U.S.C. §171 et seq., as amended by the Civil Aeronautics Act of 1938, 49 U.S.C. §401 et seq. (currently amended to 49 U.S.C. §1301 et seq.), were used by the court in determining Congressional intent as to what was in the public domain.

77 United States v. Causby, supra note 48, at 263–264.

78 Id. at 261–262, 264–267.

79 Griggs v. Allegheny County, supra note 49.


80 United States v. Certain Parcels of Land in Kent County, Michigan, 252 F. Supp. 319 (W.D. Mich., 1956). A dissent in Batten v. United States, supra note 78, by Murrah, C. J., pointed out the extremely arbitrary nature of the requirement that the offending flights be directly over plaintiff's property in order to effect a taking.


83 United States v. Causby, supra note 48; Griggs v. Allegheny County, supra note 49; 30 CJS Eminent Domain §401.


88 28 U.S.C. §1391(e). For explanation of the clause, "except as otherwise provided by law," see notes (2) and (3) to 28 U.S.C.A. §1391. Where Congress in another statute has dealt with a particular venue problem, the broader language of this section will not control, even though literally applicable. Such a particular venue statute does not exist in this case.


92 Id. at 512.

95 Id. at §1486(a).
99 Id. at §1303.
100 Id. at §§91, 93, 95, 97, 99 (take-off and landing glide paths); §§21, 23, 25, 27, 33, 35 (required aircraft equipment); §36 (noise levels). Authority for the issuance of these regulations is specifically given in Federal Aviation Act of 1958, 49 U.S.C. §§1341, 1343, 1346, 1348-1350, 1353-1354, 1421-1430.
102 Id. at §1303.
103 42 U.S.C. §§4331(a), 4332(1).
104 Id. at §4332; Donovan, The Federal Government and Environmental Control: Administrative Reform on the Executive Level, 1 ENVIRONMENTAL AFFAIRS 299 (1971).

Case law interpreting the mandates of the NEPA is still scarce. State Committee to Stop Sanguine v. Laird, 317 F. Supp. 664 (W. D. Wis., 1970), held, while dismissing plaintiffs’ complaint, that sufficient facts had not been alleged to state a claim upon which relief might be granted. Plaintiffs were attempting to block the operation and maintenance of a Defense Department radio communication system in Wisconsin. The court held that plaintiffs would have to allege that the “world wide and long range character of environmental problems” were being ignored or not recognized by the defendants in their (defendants’) proposed course of action, or that appropriate support was not being lent to programs “designed to maximize international cooperation.” These criteria the court chose to apply are taken from 28 U.S.C. §4332(E), one of the NEPA’s provisions, which is only one of a series of apparently independent responsibilities enumerated in that section. As other responsibilities also are enumerated, as for example §4332(A) and (B), quoted above, it would seem harsh to require an allegation, and subsequent proof, of the criteria of §4332(E), which would seem to be much harder to prove. It would seem that an allegation of a violation of any one or more of the responsibilities enumerated in §4332 would suffice to state a cause of action; it does not seem logical that it be necessary to allege a violation of any one specific responsibility.

Other cases have accepted much less sweeping allegations as being sufficient. State of Delaware v. Pennsylvania New York Central Transportation Co., 323 F. Supp. 487 (D. Del., 1971), held that plaintiffs’ allegations, that the granting of a permit to defendants to construct a
dike and fill in a portion of a river would have adverse effects on the ecology of the area, that it would block a navigable stream, that it would obstruct alleged public rights in easements, and that it would land unusable for presently planned projects, were sufficient to state a cause of action. Environmental Defense Fund, Inc. v. Corps of Engineers of United States Army, 324 F. Supp. 878 (D. D.C., 1971), held, while granting a preliminary injunction against defendants, that plaintiffs' allegations of damage to the ecosystem and contamination to the water supply resulting from defendants' further construction of a canal showed a strong possibility of irreparable damage. The allegations stated a cause of action, defendants' motion to dismiss was denied, and the preliminary injunction was warranted pending further proceedings. Wilderness Society v. Hickel, 325 F. Supp. 422 (D. D.C., 1970), granted a preliminary injunction to plaintiffs against defendants' further construction of a trans-Alaska pipeline; sufficient allegations were made to show the possibility of irreparable damage. Zabel v. Tabb, 430 F.2d 199 (5th Cir., 1970), held, reversing summary judgment for plaintiffs below that the Army would refuse to issue a permit to dredge and fill in navigable waters on environmental grounds even though no navigation, flood control or power production loss was at issue. See also Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M. D. Pa., 1970); Ely v. Velde, 321 F. Supp. 1088 (E. D. Va., 1971); Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alaska, 1971); National Helium Corp. v. Morton, 326 F. Supp. 151 (D. Kan., 1971).

It would seem that plaintiffs in East Haven could satisfy the more liberal requirements for stating a cause of action found in Pennsylvania New York Central, Environmental Defense Fund, Wilderness Society, and Zabel, in a suit against the Administrator of the FAA to force compliance with the NEPA. Allegations of substantial adverse environmental effects of the airports, supported by the evidence admitted in East Haven, would seem to be sufficient to state a cause of action.

106 Id. at §§4321, 4331, 4332. The Department of Transportation Act, 49 U.S.C. §1651 et seq., included the FAA under the overall responsibility of the Department of Transportation (49 U.S.C. §1652(e)(1)). The statement of Congressional purpose of that act stated (49 U.S.C. §1651(b)(2)):

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites."