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PRIVATE AND PUBLIC NECESSITY AND THE VIOLATION OF PROPERTY RIGHTS

JOHN ALAN COHAN*

I. INTRODUCTION.....	653
II. VIOLATION OF PROPERTY RIGHTS BASED ON PRIVATE NECESSITY	655
A. TRESPASS TO PREVENT SERIOUS HARM TO ONESELF, ONE’S LAND, THIRD PARTIES, OR ONE’S CHATTELS	655
B. TRESPASS TO RECOVER LIVESTOCK	667
C. TRESPASS TO AVOID AN OBSTRUCTION ON PUBLIC HIGHWAYS.....	668
D. REMOVING, DISMANTLING OR DESTROYING OBSTRUCTIONS TO NAVIGATION	670
E. TRESPASS—UNINTENTIONAL AND NON-NEGLIGENT ENTRY ONTO ANOTHER’S LAND	673
F. AVIATION EMERGENCY LANDING CASES	675
G. ACTS DIVERTING A DANGER FROM THE ACTOR TO A THIRD PARTY	682
III. VIOLATION OF PROPERTY RIGHTS BASED ON PUBLIC NECESSITY	690
A. INTRODUCTION	690
B. ISSUE OF COMPENSATION	691
C. MILITARY NECESSITY IN SEIZING OR DESTROYING PROPERTY IN TIME OF WAR.	694

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D. PUBLIC NECESSITY IN DESTROYING PROPERTY BY CIVIL AUTHORITIES OR PRIVATE PARTIES	718
1. <i>Fire Cases</i>	719
2. <i>Cases Involving Floods, Infectious Disease, and a Mad Dog</i>	724
3. <i>Cases Involving Destruction or Harm to Property by Police in Apprehending Criminal Suspects</i>	728
IV. CONCLUSION.....	732

I. INTRODUCTION

This article examines situations in which the common law doctrine of necessity justifies violating property rights in order to avert a greater danger or produce a greater good. There are two broad areas in this topic—private necessity and public necessity. Private necessity involves the actions of private individuals who destroy, use or consume the property of others, without permission or over their objections.¹ Private necessity involves the need to protect the actor’s own property, that of a third party, or to protect life and limb of the actor or others.² The hallmark of private necessity is that the action is done for the purpose of preserving only the interest of the actor or some third party, rather than the public at large.³

Public necessity pertains to action taken by public authorities or private individuals to avert a public calamity.⁴ The action consists in destroying or appropriating another’s property.⁵ The classic example of public necessity is the destruction of private property to prevent the spread of fire⁶ or disease,⁷ and hence to avert an injury to the public at large. Public necessity is in operation where the police trespass on or damage private property in order to apprehend a criminal suspect or gain access to the site of an emergency.⁸ The principle behind public necessity is that the law regards the welfare of the public as superior to the interests of individuals and, when there is a conflict between them, the latter must give way.⁹

Glanville Williams expressed the necessity doctrine in the following way: “[S]ome acts that would otherwise be wrong are rendered rightful by a

1. BLACK’S LAW DICTIONARY 1059 (8th ed. 2004) (defining private necessity); *see also* Vincent v. Lake Erie Transportation Company, 124 N.W. 221 (Minn. 1910) (discussed in Part II.A *infra*).

2. RESTATEMENT SECOND OF TORTS § 197 (1965) (Private Necessity).

3. *Id.*

4. BLACK’S LAW DICTIONARY 1059 (8th ed. 2004) (defining public necessity); *see also* Surocco v. Geary, 3 Cal. 69 (Cal. 1853) (discussed in Part III.D *infra*).

5. RESTATEMENT (SECOND) OF TORTS § 204 (Entry to Arrest for Criminal Offense) RESTATEMENT (SECOND) OF TORTS § 196 (Public Necessity).

6. *See, e.g.*, Surocco, 3 Cal. at 71; Conwell v. Emrie, 2 Ind. 35, 35 (1850); Field v. City of Des Moines, 39 Ia. 575, 575 (1874); Hale v. Lawrence, 21 N.J. L. 714, 714 (N.J. 1848); Keller v. City of Corpus Christi, 50 Tex. 614, 614 (1879). *See generally* Joseph H. Beale, Note, *Justification for Injury*, 41 HARV. L. REV. 553 (1928).

7. Seavy v. Preble, 64 Me. 120 (1874).

8. *See, e.g.*, United States v. Schoon, 971 F.2d 193, 196 (9th Cir. 1991) (stating that necessity is “a utilitarian defense” based on “maximizing social welfare . . . where the social benefits of the crime outweigh the social costs of failing to commit the crime”); *see also* David L. Shapiro, *The Case of the Speluncan Explorers: A Fiftieth Anniversary Symposium*, 112 HARV. L. REV. 1834, 1914 (1999) (“Like all of the lesser-evil justifications, necessity is openly utilitarian.”).

9. *See* City of Durham v. Eno Cotton Mills, 54 S.E. 453, 464 (1906).

good purpose, or by the necessity of choosing the lesser of two evils.”¹⁰ Williams offers this example:

Suppose that a dike threatens to give way, and the actor is faced with the choice of either making a breach in the dike, which he knows will result in one or two people being drowned, or doing nothing, in which case he knows that the dike will burst at another point involving a whole town in sudden destruction. In such a situation, where there is an unhappy choice between the destruction of one life and the destruction of many, utilitarian philosophy would certainly justify the actor in preferring the lesser evil.¹¹

Another commentator observed:

[T]hese [justified] acts are ones, as regard which, upon balancing all considerations of public policy, it seems desirable that they should be encouraged and commended even though in each case some individual may be injured or the result may be otherwise not wholly to be desired.¹²

The necessity doctrine “represents a concession to human weakness in cases of extreme pressure, where the accused breaks the law rather than submitting to the probability of greater harm if he does not break the law.”¹³ English and American courts have long recognized necessity as a common law principle, even in the absence of statutory law on the subject.¹⁴ Today many states have enacted varying forms of a statutory necessity defense.¹⁵

With the necessity defense there will always be a prima facie violation of the law. For purposes of this article, the violation will consist of trespass, conversion or other kinds of infringement of property rights. Under the necessity doctrine, there is a weighing of interests: the act of invasion of another’s property is justified under the necessity doctrine only if done to protect or advance some private or public interest of a value greater than, or at least equal to, that of the interest invaded. The policy rationale is that

10. GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 198 (Alfred A. Knopf, Inc. 1957).

11. *Id.* at 190-200.

12. JUSTIN MILLER, *HANDBOOK OF CRIMINAL LAW* 189 (West Publishing Co. 1934).

13. A. J. Ashworth, *Reason, Logic and Criminal Liability*, 91 L. Q. REV. 102, 106 (1975).

14. Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 291-96 (1974).

15. *See, e.g.*, ALASKA STAT. § 11.81.320 (LexisNexis 2002); ARK. CODE ANN. § 5-2-604 (West 2004); COLO. REV. STAT. ANN. § 18-1-702 (West 2003); DEL. CODE ANN. tit. 11, § 463 (2001); HAW. REV. STAT. § 703-302 (LexisNexis 2003); KY. REV. STAT. ANN. § 503.030 (LexisNexis 2003); MO. ANN. STAT. § 563.026 (West 2004); N.J. STAT. ANN. § 2C:3-2 (West 2004); N.Y. PENAL LAW § 35.05 (McKinney 2004); TEX. PENAL CODE § 9.22 (Vernon 2004); WIS. STAT. ANN. § 939.47 (West 2003).

society as a whole has no interest in the invasion of property rights unless the good which is intended to result is greater than, or at least equal to, the harm that it is likely to cause.

A major issue associated with both private and public necessity is whether compensation is owed to the aggrieved party whose property is damaged, appropriated or destroyed. In cases involving both private and public necessity, there is no liability for the technical tort, be it trespass or conversion. However, in cases of private necessity, for the most part actors are considered to have an “incomplete” or “partial” privilege so that the aggrieved party is entitled to compensation for the damage done. With regard to public necessity, the general rule is that no compensation is owed, but there are numerous exceptions.

This article first examines private necessity, and a variety of situations in which actors have trespassed on land or committed acts of conversion in necessitous circumstances are considered. Among other things, situations involving the loss of control of automobiles, the special situation of aviation emergency landings, and acts in diverting harm from the actor to a third party are discussed. The larger part of the article focuses on public necessity, especially cases involving trespass or conversion on the part of the military in time of war. Then the focus turns to other instances of the invasion of property rights based on public necessity, including emergencies such as preventing a fire from spreading, preventing the spread of disease, and actions by the police in apprehending criminal suspects. The issue of whether aggrieved parties are legally entitled to compensation will be considered throughout the article.

II. VIOLATION OF PROPERTY RIGHTS BASED ON PRIVATE NECESSITY

A. TRESPASS TO PREVENT SERIOUS HARM TO ONESELF, ONE’S LAND, THIRD PARTIES, OR ONE’S CHATTELS

There is a general sense in the doctrine of necessity that one has the qualified privilege to intentionally trespass onto the land of another in order to prevent serious harm to oneself, to one’s own land, to one’s chattels, or to the person, land, or chattels of another. However, compensation must ordinarily be paid for any harm done in the process.

No one would have any qualms about justifying the action of the proverbial backpacker who, in the stress of weather and being lost in the wilderness, comes upon an unoccupied cabin, enters it, and partakes of

foodstuff and shelter.¹⁶ It seems intuitive, as well, that the backpacker should be required to compensate the occupant for the food so consumed. All the more so, if the backpacker was reckless in getting stranded or in failing to take provisions that would probably be associated with a backpacking venture. This principle is set forth in section 197 of the *Restatement (Second) of Torts* (Private Necessity):

(1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to:

(a) the actor, or his land or chattels, or

(b) the other or a third person, or the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action.

(2) Where the entry is for the benefit of the actor or a third person, he is subject to liability for any harm done in the exercise of the privilege stated in Subsection (1) to any legally protected interest of the possessor in the land or connected with it, except where the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor.¹⁷

The Comment to this section states that when necessary to prevent serious harm, a person is privileged “to break and enter or to destroy a fence or other enclosure and indeed a building, including a dwelling.”¹⁸ However, “more may be required to justify [entering a dwelling] than . . . entry upon other premises”¹⁹ and this is “a fact to be taken into account in determining the reasonableness of the defendant’s action[s].”²⁰ Thus, one might be justified in breaking into someone’s barn under a set of circumstances that would fail to justify breaking into the dwelling. The Comment also states: “[I]t may be reasonable for the actor to break through a fence in order to rescue his dog who is drowning in the plaintiff’s pond, where it would not be reasonable for him to break into the plaintiff’s dwelling in order to release the same dog from temporary confinement.”²¹

16. See Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFFAIRS 93, 97 (1978) (discussing the connection between the right to life and human well-being).

17. RESTATEMENT (SECOND) TORTS § 197 (1965).

18. *Id.* cmt. g.

19. *Id.* cmt. h.

20. *Id.*

21. *Id.*

What if, in the backpacker case, the cabin reasonably appears unoccupied but in fact is actually occupied? What if the occupant objects to the intrusion? Does the backpacker have a right, based in necessity, to use reasonable force to gain entry and to take food from the cabin, over the objection of the occupant? The *Restatement* addresses this concern as follows: “[T]he privilege . . . carries with it the subsidiary privilege to use reasonable force to the person of the possessor or any third person.”²² However, “[d]irect authority is lacking as to the subsidiary privilege to use force against the person, or to break or enter an enclosure or a building. . . [but that] to render the privilege of entry effective the subsidiary privilege is obviously necessary.”²³ In an emergency one might well use force against an objecting possessor, and worry about the consequences later. For instance, if my dog is drowning in a neighbor’s pool, I would likely run down the side of my neighbor’s house towards the backyard, and then jump over the fence to save my dog. If, as it happens, my neighbor blocks my passage (perhaps the neighbor is unaware of the nature of the emergency and there is no time to explain), I will likely use reasonable force to push past the occupant, and explain later. If I were charged with trespass and assault and battery, the *Restatement* view would justify the action based on the necessity doctrine. I would, however, be liable to pay for damages associated with the trespass, such as costs to replace or repair a broken fence, or damages to my neighbor’s flowerbed. It would also seem consistent with the *Restatement* position to impose liability for any damages associated with the assault, such as medical costs.

In *Rossi v. Del Duca*,²⁴ the plaintiff, a child, was walking home from school, when a large dog chased her down the street.²⁵ In order to protect herself from harm, she cut across a field to the rear of the defendant’s house in an effort to escape from the dog chasing her and to get home.²⁶ However, another dog, owned by the defendant, proceeded to attack and injured her.²⁷ The girl sued for damages under a Massachusetts law that imposed strict liability on the owner or keeper of any dog that does damage to the body or property of any person.²⁸ The statute made an exception for instances where a person at the time such damage was sustained, committed a

22. *Id.* cmt. g.

23. *Id.* Reporter’s notes to § 197 cmt. g.

24. 81 N.E.2d 591 (Mass. 1962).

25. *Rossi*, 81 N.E.2d at 592.

26. *Id.*

27. *Id.*

28. *Id.* at 593 (internal citation omitted).

trespass.²⁹ The evidence clearly showed that the plaintiff was trespassing on defendant's property when the dog attacked her.³⁰ However, the court, citing section 197 of *Restatement (Second) of Torts*, held that the plaintiff had a privilege to enter the land because it reasonably appeared to be necessary to prevent serious harm from occurring to her.³¹ "This privilege not only relieves the intruder from liability for technical trespass but it also destroys the possessor's immunity from liability in resisting the intrusion."³² Thus, the court noted that this privilege to enter the land means that the possessor of the land is under a duty to permit that person to come onto and remain there, and is not privileged to block the actor from proceeding with the necessitous conduct.³³

In *Depue v. Flatau*,³⁴ the plaintiff was invited into the defendant's house, and while there, he was taken suddenly ill and fell to the floor.³⁵ He requested permission to remain overnight, but defendants refused.³⁶ The defendants assisted him from their house to the cutter.³⁷ Plaintiff could not hold the reins to guide his team, and one of the defendants threw the reins over his shoulders, and started the team upon the road.³⁸

The plaintiff, who nearly froze to death, sued for damages. The court noted that the plaintiff was in the defendants' house by invitation.³⁹ He was temporarily their guest.⁴⁰ The court issued a ruling noting the

comprehensive principle that whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 593-94. The court quoted the *Restatement (Second) of Torts*, § 197, comment k (Tent. draft no. 2, 1958), on this point:

The important difference between the status of one who is a trespasser on land and one who is on the land pursuant to an incomplete privilege is that the latter is entitled to be on the land and therefore the possessor of the land is under a duty to permit him to come and remain there and hence is not privileged to resist.

Id.

33. The drafters of the *Restatement (Second) of Torts* take the view that the possessor of land or chattel has no right to use reasonable force to defend his exclusive possession, in cases of necessity. *RESTATEMENT (SECOND) OF TORTS* § 263, cmt. b (1965).

34. 111 N.W. 1 (Minn. 1907).

35. *Depue*, 111 N.W. at 1.

36. *Id.* at 2.

37. *Id.*

38. *Id.*

39. *Id.* at 3.

40. *Id.*

person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself.⁴¹

The defendants thus violated a legal duty towards their guest when they turned him out of their house in a winter night and left him to his fate.⁴²

Illustration 4 to section 197 of *Restatement (Second) of Torts*, echoes the *Depue* case:

On a very cold winter night A, visiting at B's dwelling, is overcome by an attack of illness which leaves him helpless and unable to take care of himself. A is privileged without liability to remain in B's house until arrangements can be made to take him to a place where he will not be exposed to danger from the weather.⁴³

In *Currie v. Silvernale*,⁴⁴ the defendant made unauthorized entry upon plaintiff's land, claiming necessity in an emergency to save his own property.⁴⁵ The plaintiff sued for trespass and for injunctive relief to prevent further trespasses.⁴⁶ The defendant claimed that he entered the plaintiff's land so as to block the formation of a channel that would have prevented water from flowing into defendant's millpond, and would have thus

41. *Id.* at 2.

42. *Id.* at 3. Of similar import, see *Texas Midland R. R. Co. v. Geraldton*, 117 S.W. 1004, 1007-08 (Tex. 1909), in which the court held that the inconvenience in keeping a railway station open was not sufficient to justify turning out into a storm, far from any shelter, a woman who had missed her train and was waiting out the storm in the waiting room until the next train left the following morning.

According to Bohlen:

It is clear that a railway company may not eject even a "hobo," stealing a ride on its through express, while the train is going at fifty miles an hour, although this involves a toleration of his presence on the train until it reaches the next stop; and a captain of a vessel is not privileged to make a stowaway, discovered in mid-ocean, walk the plank, although he would be privileged to force him to leave the vessel by the same plank if it were a gangway to a dock.

Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307, 311 n.7 (1926).

Of similar import, see *Bradshaw v. Frazier*, 85 N.W. 752 (Ia. 1901), in which the court held that a judgment of eviction to oust a holdover tenant "could not be lawfully executed if a member of the tenant's family was so ill that his removal would endanger his life." Bohlen, *supra* note 42, at 311. This is subject, however, to the proviso that his continued presence is not likely to cause the occupiers of other premises in the building to acquiring a contagious disease. *Id.*

A similar holding occurred in *Tucker v. Burt*, 115 N.W. 722 (Mich. 1908), in which a janitor who was entitled to occupy an apartment during his employment, was discharged. *Id.* It was held that a member of his family, who was ill with a contagious disease and whose removal was dangerous, could be removed if the interest of the occupiers of the other premises in their bodily security outweighed the janitor's family member's interests. *Id.*

43. RESTATEMENT (SECOND) OF TORTS § 197, illus. 4 (1965).

44. 171 N.W. 782 (Minn. 1919).

45. *Currie*, 171 N.W. at 784.

46. *Id.*

destroyed the usefulness of defendant's dam.⁴⁷ The defendant constructed an embankment on plaintiff's land with rocks and dirt so as to prevent overflow from forming new channels.⁴⁸ It was the defendant's purpose to maintain the natural spillway so that the efficiency of defendant's dam would not become impaired.⁴⁹

The court noted that an unauthorized entry upon the lands of another to save private property may be justified in an emergency.⁵⁰ The court said that it may well be that the "unexpected opening of a new channel" was such an emergency that threatened the destruction of the defendant's water power, and that this could justify entering plaintiff's property to preserve the water flow.⁵¹ This entry not only saved the defendant's water flow, but also averted the erosion to plaintiff's property, and thus was beneficial to both parties.⁵² However, the facts of the case indicated that following the initial trespass, the defendant made repeated entries onto plaintiff's land to make repairs.⁵³ The court concluded that these repeated entries must be regarded as trespass or a wrongful invasion of plaintiff's premises, but that the appropriate remedy would be nominal damages and an injunction forbidding further trespasses.⁵⁴

*Vincent v. Lake Erie Transportation Co.*⁵⁵ is a classic tort case decided in 1910 by the Minnesota Supreme Court. The case was somewhat of a *cause celebre* in its day and generated critical comments in several law review articles.⁵⁶ The facts of the case are as follows: A ship's captain kept his vessel, the steamship *Reynolds*, moored to a dock after its cargo had been offloaded rather than risk losing the ship in a very severe storm.⁵⁷ The storm developed during the unloading process, and by the time the unloading was completed, winds were at fifty miles per hour.⁵⁸ The storm continued to increase in intensity as the night went on.⁵⁹ The captain tried to get a tug to tow the ship from the dock, but no tug could be obtained

47. *Id.* at 783.

48. *Id.*

49. *Id.*

50. *Id.* at 784.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. 124 N.W. 221 (Minn. 1910).

56. *E.g.*, Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 157 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 546 (1972); George P. Fletcher, *The Search for Synthesis in Tort Theory*, 2 L. & PHIL. 63, 65 (1983).

57. *Vincent*, 124 N.W. at 221.

58. *Id.*

59. *Id.*

because of the storm.⁶⁰ Those in charge of the vessel were therefore confronted with the following choice of evils: either keep the vessel moored fast to the dock with the obvious certainty of injuring the dock, or permit the boat to drift away into a tempest in circumstances that would in all probability render the boat unmanageable.⁶¹ The captain opted to keep the lines fastened to the dock, and “as soon as one parted or chafed it was replaced, sometimes with a larger one.”⁶² The winds and waves struck the *Reynolds* with such force “that she was constantly being lifted and thrown against the dock,” causing damage that the jury found in the amount of \$500.⁶³

The Minnesota Supreme Court held the master was justified in keeping his ship tied to the dock during the storm.⁶⁴ The court commented that it would have been highly imprudent for the captain to attempt to leave the dock or to have permitted his vessel to drift away from it.⁶⁵ The court added that while “the situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control,”

those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.⁶⁶

The court also stated:

Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such a person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.⁶⁷

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 222.

65. *Id.* at 221.

66. *Id.* at 222.

67. *Id.*

Finally, the court concluded:

This is not a case where life or property was menaced by any object or thing belonging to the plaintiff, the destruction of which became necessary to prevent the threatened disaster, nor is it a case where, because of the act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiff's property for the purpose of preserving its own more valuable property. . . .⁶⁸

The court cited with approval *Ploof v. Putnam*,⁶⁹ in which a Vermont court held the owner of a dock liable for damages to a shipowner for unmooring a vessel that had sought refuge in a storm, thereby casting it back into the storm.⁷⁰ The plaintiff in *Ploof* was sailing with his family in his sloop upon Lake Champlain, and was overtaken by a violent tempest which threatened to swamp his boat.⁷¹ The plaintiff was faced with the following choice of evils: either to trespass by mooring the boat to a private dock owned by the defendant, without permission, and thereby prevent destruction of his boat and of the lives of its occupants; or to remain upon the lake in the midst of the storm. The plaintiff decided to trespass on the private dock, and secured it with mooring.⁷² However, the defendant's employee promptly unmoored the vessel, which was cast upon the opposite shore by the tempest, with the result that "the sloop and its contents were thereby destroyed, and the plaintiff and his wife and children [were] cast into the lake and upon the shore, receiving injuries."⁷³ The complaint charged the defendant alternatively with trespass and negligence.⁷⁴ The plaintiff argued that it was the duty of the defendant to allow the plaintiff to moor his sloop to the dock and to permit it to remain so moored during the continuance of the storm.⁷⁵ The court held for the plaintiff, finding the defendant responsible for damages because his employee unmoored the vessel, permitting it to drift upon the shore, with resultant injuries to it.⁷⁶

The *Vincent* court commented that in the *Ploof* case, if "the vessel had been permitted to remain, and the dock had suffered an injury, we believe

68. *Id.*

69. 71 A. 188 (Vt. 1908).

70. *Ploof*, 71 A. at 188-89.

71. *Id.* at 188.

72. *Id.*

73. *Id.* at 189.

74. *Id.*

75. *Id.*

76. *Id.* at 190.

the shipowner would have been held liable for the injury done.”⁷⁷ The *Vincent* case holds for the idea that a shipowner can unilaterally appropriate a dock in necessitous circumstances, provided he pays for its damages. In other words, there is a “qualified” necessity in that the action, while justified under the necessity doctrine, nonetheless entails paying compensation for damages occasioned by the trespass.⁷⁸

The *Vincent* court tried to distinguish the facts of its case from injuries to a dock caused by an act of God, which would not result in liability for damages.⁷⁹ The court concluded:

[H]ad the ship entered the harbor, and while there had become disabled and been thrown against the plaintiffs’ dock, the plaintiffs could not have recovered. Again, if while attempting to hold fast to the dock the lines had parted, without any negligence, and the vessel carried against some other boat or dock in the harbor, there would be no liability upon her owner.⁸⁰

While the storm, in itself, was an act of God, the damage to the dock was not. That is, the *Vincent* court seemed to focus on the fact that the cables attached from the boat to the dock had given way, and that the master of the ship reattached new cables to keep the boat from being cast adrift. The opinion seems to rest on the fact that the master reattached the ship, using stronger cables, after the initial mooring got dislodged during the storm. This reconfiguring the moorings with the stronger cables dissociated the incident from being an act of God. The master had the right to renew his cables, but in doing so he was required to compensate the dock owner for the damages.⁸¹

The *Vincent* case suggests that if the ship had not completed discharging her cargo, so that her license to use the dock had still been in effect, or if the captain had not reattached the vessel to the dock with fresh cables after her moorings broke, the case might be decided as one of an act of God, and no liability would have been imposed.

The dissenting judge in *Vincent* declared:

[I]f the boat was lawfully in position at the time the storm broke, and the master could not, in the exercise of due care, have left that position without subjecting his vessel to the hazards of the storm, then the damage to the dock, caused by the pounding of the boat,

77. *Id.* at 222.

78. *See id.* (explaining that damages from necessity can be compensated).

79. *Id.*

80. *Id.*

81. *Id.*

was the result of an inevitable accident. If the master was in the exercise of due care, he was not at fault. The reasoning of the opinion admits that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would be no liability.⁸²

The dissent seems to make sense. The majority noted that, often enough, if property is damaged in consequence of an act of God, one who benefits from that damage or destruction is not legally obligated to pay compensation.⁸³ It seems to be a superficial distinction to say that had the captain's cables held fast, the consequential damage would have been an unavoidable accident due to an act of God, whereas by retying the vessel with stronger cables, the ensuing damage was not an act of God and therefore liability attaches.

The dissent also analyzed the case in terms of contract law. He emphasized that the defendant was "lawfully in position" at the dock, and that "one who constructs a dock to the navigable line of waters and enters into contractual relations with the owner of a vessel to moor at the same, takes the risk of damage to his dock by a boat caught there by a storm" if the damage "could not have been avoided in the exercise of due care."⁸⁴

One commentator of the *Vincent* case, Robert Keeton, suggests that a basis for liability in the case hinges on the moral sense of the community.⁸⁵ According to Keeton, the case was one of "conditional privilege," under which one could "use the property of another in circumstances of private necessity" if one "compensate[d] for any harm done."⁸⁶ Another view is that *Vincent* is an example of an appropriate application of "strict liability," one that "reduce[s] the administrative costs of decision" by relieving the court of the necessity to use cost-benefit analysis, leaving that analysis "in private hands where it belongs."⁸⁷

Yet another commentator opines that the decision creates "a noncategory tort, grounded in social mores, which requires compensation from a party that used its temporal power to protect its interests, with substantial certainty of injury to another, in a situation about which the parties had not engaged in prior bargaining."⁸⁸ One final view is that *Vincent* "is not an

82. *Id.* (Lewis, J., dissenting).

83. *Id.*

84. *Id.* (Lewis, J., dissenting).

85. Robert Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 428 (1959).

86. *Id.*

87. Epstein, *supra* note 56, at 188.

88. MARSHALL S. SHAPO, *PRINCIPLES OF TORT LAW* 235 (Thomson West 2003).

instance of the exercise of a privilege at all.”⁸⁹ Rather, “[i]t is simply a case of intentionally damaging the property of another in the civil sense of ‘intention,’ that is, of engaging in conduct that one knows, with substantial certainty, will lead to that result.”⁹⁰ This would be “[a]t the very least, . . . negligent or reckless behavior” and the commentator concludes that it is not at all surprising that the defendant must pay compensation.⁹¹

The principle of the *Vincent* case is embodied in section 197 of the *Restatement Second of Torts*, illustration 2:

A moors his boat to B’s wharf and there discharges its cargo, whereupon it is his duty to vacate the wharf. A violent storm then arises, and A, to prevent his boat from being washed ashore and wrecked, strengthens and renews the cables by which his boat is lashed to B’s wharf. The force of the storm causes the boat to damage the wharf. A is privileged to keep his boat at B’s wharf, but . . . he is subject to liability for the harm thereby caused to the wharf.⁹²

A modern case from England involved trespass with respect to jettison of oil during a storm at sea, justified by the necessity doctrine. The case, *Esso Petroleum Co. v. Southport Corp.*,⁹³ involved a claim in trespass, nuisance and negligence, for damages incurred to clean up plaintiff’s property after a tanker in difficulty discharged oil to prevent “breaking her back,”⁹⁴ which would have endangered the ship, her cargo, and the lives of the crew.⁹⁵

While at sea, a problem suddenly developed in the operations of the vessel’s steering mechanism.⁹⁶ The weather at the time made it impossible to drop anchor, and it appeared reasonably clear that any effort to turn the ship around was more dangerous than to continue on course towards the coast.⁹⁷ The master recognized there was danger in proceeding into what was a narrow channel with defective steering gear, but he considered that the lesser of the two evils was to attempt to get away from the storm and into sheltered water, rather than put back to sea.⁹⁸ He was concerned that

89. George Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975, 1002 (1999).

90. *Id.*

91. *Id.* at 1002-03.

92. RESTATEMENT (SECOND) OF TORTS § 197, illus. 2 (1965).

93. [1956] A.C. 218 (H.L.).

94. *Id.* at 220.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

the lives of people on board could be jeopardized if he turned the ship around and proceeded back out to sea. The master began to discharge the oil tanks in order to lighten the ship, and over four hundred tons of oil were released.⁹⁹ The ship became stranded.¹⁰⁰ The oil deposited on the plaintiff's foreshore, and extended for about seven and one-half miles.¹⁰¹ The people on board, however, were safe and the ship eventually was towed.

The plaintiff argued that there was trespass from the bare fact that oil was discharged onto the plaintiff's property. In addition, the plaintiff alleged negligent navigation resulting in the jettison of oil and stranding of the ship. The master explained that the stranding was due to a defect in the steering, and was not due to negligence. Principally, the defendant argued on the defense of necessity—that in discharging the oil, the master “was doing no more than was reasonably necessary for the safety of the crew and of the ship and cargo.”¹⁰²

The trial judge stated that “[t]he safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary on another's property.”¹⁰³ The judge found that there was no negligence in the action taken in response to the sudden defect in the steering mechanism.¹⁰⁴ Accepting the trial judge's finding that there was no negligence, the House of Lords affirmed the lower court's conclusion that there was no liability on the part of the tanker's owners.¹⁰⁵

With respect to the defense of necessity, the court stated:

I am not prepared to hold without further consideration that a man is entitled to damage the property of another without compensating him merely because the infliction of such damage is necessary in order to save his own property. I doubt whether the court in such circumstances can be asked to evaluate the relation of the damage done to the property saved, by inquiring, for example, whether it is permissible to do £5,000 worth of damage to a third party in order to save property worth £10,000. In the ordinary case of jettison the property which is sacrificed is the property of a person who is

99. *Id.* at 220-21.

100. *Id.* at 221.

101. *Southport Corp. v. Esso Petroleum Co.*, (1953) 3 W.L.R. 773 (Q.B.).

102. *Id.*

103. *Id.* at 779.

104. *Id.*

105. *Esso Petroleum Co. v. Southport Corp.*, [1956] A.C. 218 (H.L.) (appeal taken from Eng. C.A.).

interested in the venture, and an equitable adjustment is made by the application of general average. The same considerations may not apply to the property of a third party who has no stake in the venture which is being saved.¹⁰⁶

The court noted, however, that the imminent danger was not only to the ship, but that the lives of the crew were endangered as well.¹⁰⁷

The House of Lords noted that in the necessity doctrine, if the exigent circumstances are occasioned by the actor's negligence, the defense would not be available.¹⁰⁸ However, the evidence was inconclusive as to what caused the defect in the steering gear.¹⁰⁹ The court held that there was no negligence proven on the part of the master with respect to any defect in his ship, and that based on the necessity doctrine in the context of saving lives there would be no liability for the damages to plaintiff's property caused by the jettison of oil from the tanker.¹¹⁰ The case stands thus for the proposition that property may be destroyed when necessary to save human life, and that no compensation is payable if the person who destroys the property has not been at fault in creating the life-threatening danger.

B. TRESPASS TO RECOVER LIVESTOCK

As noted in Section 197 of the *Restatement (Second) of Torts*, the necessity doctrine may justify trespass onto another's property in order to prevent serious harm to livestock (i.e., chattel) that have wandered there.¹¹¹ In addition, sections 100-106 of the *Restatement (Second) of Torts*, set forth principles by which one is entitled to use force against another for the sole purpose of recovering chattel.¹¹²

*Arlowski v. Foglio*¹¹³ dealt with this issue. The plaintiffs and defendant owned farms that were contiguous to each other.¹¹⁴ Some of the fencing for which plaintiffs were responsible was inadequate.¹¹⁵ Several of defendant's cattle roamed onto plaintiffs' land.¹¹⁶ The plaintiffs, husband and wife, took possession of the cattle and locked them in their barn.¹¹⁷ The

106. Southport, [1953] 3 W.L.R. at 778.

107. *Id.* at 779.

108. [1956] A.C. at 228.

109. *Id.* at 229.

110. *Id.* at 232.

111. RESTATEMENT (SECOND) OF TORTS, § 197 (1965).

112. RESTATEMENT (SECOND) OF TORTS, §§ 100-106 (1965).

113. 135 A. 397 (Conn. 1926).

114. *Arlowski*, 135 A. at 398.

115. *Id.*

116. *Id.*

117. *Id.*

defendant came over and demanded the return of his cattle.¹¹⁸ This request was refused, and the husband threatened to kill him unless he departed.¹¹⁹ Later, the defendant returned to again try and retrieve his cattle because he feared the cattle would be hungry and thirsty.¹²⁰ He had tried to get the help of local selectmen, but no one was available to come to his aid.¹²¹ He carried a pistol because he wanted to defend himself, if necessary, against a vicious dog kept by the plaintiffs.¹²² Indeed, he was attacked by the dog and shot the dog, wounding but not killing it.¹²³ Then, the plaintiffs set upon to severely beat the defendant; the defendant in turn fought back and ended up injuring the wife.¹²⁴ Later, selectmen retrieved the cows and returned them to the defendant.¹²⁵ Both parties ended up suing each other for assault and battery.¹²⁶

According to Section 197 of the *Restatement (Second) of Torts*, the defendant would not be liable for any harm done in the exercise of the privilege to enter given the plaintiff's negligence in bringing about the situation that necessitated the entry. The court held that the plaintiffs were not in lawful possession of the livestock since the livestock's incursion onto the land, was caused by their defective division fence.¹²⁷ Also, the court found that the defendant's entry to retrieve his livestock, which the plaintiffs had wrongfully retained, was lawful.¹²⁸ It was proper for the defendant to take such precautions to known dangers involved in such entry as a reasonable person would deem proper, including a gun to protect himself against the vicious dog.¹²⁹ The defendant was awarded damages on his cross-complaint.¹³⁰

C. TRESPASS TO AVOID AN OBSTRUCTION ON PUBLIC HIGHWAYS

There are numerous instances of trivial entry on another's property due to obstructions on public roads. For example, on many country roads where there are no sidewalks, it is frequently necessary to walk across the edge of

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 398-99.

125. *Id.* at 399.

126. *Id.*

127. *Id.* at 400.

128. *Id.*

129. *Id.*

130. *Id.*

someone's lawn to avoid oncoming traffic or to avoid a puddle, and such intrusions are considered justifiable trespass.¹³¹ Or, if a public highway is obstructed, one may go around the obstruction, trespassing on private land for that purpose. According to Section 195 of the *Restatement (Second) of Torts*, if a flood or fallen tree renders a road impassable, one is "privileged . . . to enter . . . upon neighboring land in possession of another."¹³² In such cases the actor is liable to pay for any harm his entry might cause.

The *Restatement* view appears to have had its progeny in the 1851 case, *Campbell v. Race*,¹³³ in which the defendant was sued for trespass to plaintiff's property. The defendant argued that he had a right of way based in necessity, because the public highway adjacent to plaintiff's property was impassable due to snowdrifts.¹³⁴ The defendant went over the adjoining fields of the plaintiff, doing no unnecessary damage, and then returned to the highway at the point where it was passable.¹³⁵

The plaintiff argued that the necessity doctrine is limited, in cases of trespass, to situations of "inevitable necessity or accident," neither of which existed in this case.¹³⁶ The judge disagreed, and stated what he considered was a well-settled rule:

If a traveller in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the travelled paths, so that he cannot reach his destination, without passing upon adjacent lands, he is certainly under a necessity so to do. . . . Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public way. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. . . . Such a temporary and unavoidable use of private property, must be regarded as one of those incidental burdens to which all property in a civilized community is subject. . . . It is a maxim of the common law, that where public convenience and necessity come in conflict with private right, the latter must yield to the former.¹³⁷

131. Christie, *supra* note 89 at 997 n. 25.

132. RESTATEMENT (SECOND) OF TORTS § 195(1) (1965).

133. 61 Mass. 408 (1851).

134. *Campbell*, 61 Mass. at 408.

135. *Id.*

136. *Id.* at 410.

137. *Id.* at 411-12.

The court also noted that, had another way been available to proceed beyond the obstruction without trespassing on plaintiff's land, the defendant should have selected that alternative.¹³⁸

D. REMOVING, DISMANTLING OR DESTROYING OBSTRUCTIONS TO NAVIGATION

In some instances, property owners engage in the destruction of property in order to preserve their right of passage through navigable waters. For example, *McKeesport Sawmill Co. v. Pennsylvania Co.*¹³⁹ was an action for damages for the destruction of a coal barge.¹⁴⁰ The barge had slipped its moorings and was carried downstream where it got stuck in a great chunk of slush ice and obstructed a bridge owned by the defendant railroad.¹⁴¹ The barge remained stuck there for several days, and the owner did nothing to rescue it or get it out of the way.¹⁴² The defendants dislodged the barge, finding it necessary as a last resort to break up the barge in order to effect its removal.¹⁴³ The defendants' workers cut the barge to pieces only after other means had been tried and failed in efforts to remove it.¹⁴⁴

The plaintiff introduced evidence that impressed the jury with the idea that the barge could have been saved by first breaking up the ice with a steamboat, and then attaching a line to pull the barge away.¹⁴⁵ The judge instructed the jury that the defendants should be held to a standard in which they did as little injury as possible to the barge, and that, if they did not, the defendants would be liable.¹⁴⁶ The jury found for the plaintiff.¹⁴⁷

In reversing and ordering a new trial, the court of appeals noted that in exercising the right to remove an obstruction in navigable waters, the exigencies are such that one need not be held to the standard of ordinary care; one needs to simply avoid gross negligence or recklessness.¹⁴⁸ The action in removing the obstruction must be assessed in light of the exigencies of

138. *Id.* at 413.

139. 122 F. 184 (W.D. Pa. 1903).

140. *McKeesport*, 122 F. at 185.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 186.

147. *Id.* at 187.

148. *Id.* at 186.

the situation.¹⁴⁹ One does not have to try and save the obstructing property, “but simply not to recklessly or unnecessarily injure or destroy it.”¹⁵⁰

The court noted that the barge

was a derelect, brought down upon them by the high water, and whether it got loose through the neglect of the owner to properly moor it or not is not material. It was astray, without a master, and thereby became a floating nuisance, which they were entitled to ward off or get out of the way as best they could.¹⁵¹

The court added:

[W]hile they could not wantonly or unnecessarily destroy it, they were not required to save it for an unknown owner, or have particular regard to interests, which he himself took no pains to assert. To hold, therefore, that care should have been taken to do the least possible injury in the removal of the barge, was going farther than was warranted. The defendants were authorized to take such steps as were reasonably necessary to free themselves from the danger, which is quite different.¹⁵²

In addition, the court noted that the defendants had urged the plaintiff to remove the obstruction, but nothing happened, so that the defendants had no reasonable legal alternative but to take action on their own.¹⁵³

Thus, the general rule is that if one’s approach in navigable waters is obstructed, by accident or otherwise, one has the right to remove the obstruction in a manner that is consistent with the exigencies of the case, taking care not to act in a grossly negligent or wanton manner in removing it.¹⁵⁴ Of course, one must first pursue a reasonable legal alternative, such as getting the owner of the obstruction to take appropriate action, assuming that the danger posed by the obstruction is not imminent.¹⁵⁵

In *Philiber v. Matson*,¹⁵⁶ the same standard of conduct in extricating an obstruction was discussed. The plaintiff’s raft, while floating down a navigable highway, got stuck.¹⁵⁷ The defendant, coming upon the scene in another raft, tried to avoid colliding with plaintiffs’ raft and got thrown to

149. *Id.*

150. *Id.* at 187.

151. *Id.* at 186.

152. *Id.*

153. *Id.* at 185-86.

154. *Id.* at 187.

155. *See, e.g., id.* at 186-87.

156. 14 Pa. 306, 1850 WL 5885 (1850).

157. *Philiber*, 14 Pa. 306, 1850 WL 5885, at *1.

one side and stuck on the shore.¹⁵⁸ Then a third raft came down and jammed between the two.¹⁵⁹ At that point, there was danger that other rafts would become entangled because the stream was crowded with rafts.¹⁶⁰ The defendant thereupon cut away so much of the plaintiffs' raft as would enable him to get his own raft loose.¹⁶¹ The court held that this was an emergency situation and that the defendant had a right to extricate his raft in the only way he could—to cut it loose—provided he did no more than was necessary to free his raft.¹⁶² “If, on the other hand, it was not necessary to cut plaintiffs' raft for that purpose, but the act was wanton and uncalled for, or more injury was done than the circumstances required,” the defendant would be liable for damages.¹⁶³

In *Forster v. Juniata Bridge Co.*,¹⁶⁴ the court considered a situation involving a span of bridge that had become dislodged in a storm and obstructed property of the defendant.¹⁶⁵ In March 1846, a span of a bridge was swept away by a flood in Harrisburg, Pennsylvania, and lodged on the end of an island owned by the defendant.¹⁶⁶ The portion of the bridge caused damage to the defendant's property.¹⁶⁷ It diverted a stream, caused soil to be washed away, destroyed crops, and interfered with livestock pastures.¹⁶⁸ The defendant asked the president of the bridge company to remove the span of bridge that had lodged on his property, but the company failed to take action.¹⁶⁹ After several months, the defendant hired help to dismantle and remove the obstruction and piled it up near his barn.¹⁷⁰ He used some of the timber dismantled from the bridge to erect other buildings.¹⁷¹

The court concluded that no one was at fault for the initial obstruction of the span of bridge because it was an unavoidable accident.¹⁷² Thus, the bridge company would not be liable for damages to the owner of the land where the span of bridge came to rest. The court found that the plaintiff

158. *Id.*

159. *Id.* at *2.

160. *Id.* at *1.

161. *Id.* at *2.

162. *Id.*

163. *Id.* at *1.

164. 16 Pa. 393, 1851 WL 5794 (1851).

165. *Forster*, 16 Pa. 393, 1851 WL 5794, at *1.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at *2.

171. *Id.*

172. *Id.* at *6.

would have been justified in entering the land of the defendant without asking permission, in order to remove the span of bridge.¹⁷³ The refusal of the company to remove it did not divest them of the property or bar them from reclaiming it; that is, the span of bridge remained the property of the plaintiff while lodged on defendant's property.¹⁷⁴

The court found that the defendant was justified in dismantling and removing the obstruction, but that he was liable for damages to the extent that he appropriated the wooden assemblage for his own use.¹⁷⁵ The court also concluded that the defendant was not entitled to compensation for costs incurred in dismantling the bridge and removing it.¹⁷⁶

E. TRESPASS—UNINTENTIONAL AND NON-NEGLIGENT ENTRY ONTO ANOTHER'S LAND

There are numerous situations that can arise, predicated on a kind of necessity, where through circumstances beyond one's control, one ends up on another's property and causes damage. Section 166 of the *Restatement (Second) of Torts*, is entitled: *Non-liability for Accidental Intrusion*. This section provides that an unintentional and non-negligent entry on land of another by one not engaged in an abnormally dangerous activity does not subject the actor to liability to the possessor even though the entry causes harm to the possessor.¹⁷⁷ However, there is a fine line between action deemed intentional, and that deemed unintentional.

For instance, suppose a motorist suffers a heart attack, immediately loses consciousness, and his car runs onto plaintiff's land, causing damages. *First City National Bank of Houston v. Japhet*¹⁷⁸ dealt with just such a situation. The driver suffered a heart attack, lost consciousness, and died; his car in turn ran into plaintiff's land and caused damage to a tree and a wall.¹⁷⁹ The driver's estate argued that "the occurrence was the result of an act of God or an unavoidable accident."¹⁸⁰

The court referred to illustration 2 under Section 166 of the *Restatement (Second) of Torts*:

A, while driving his automobile along the street in the exercise of due care, is suddenly overcome by a paralytic stroke, which he had

173. *Id.* at *3.

174. *Id.* at *6.

175. *Id.*

176. *Id.*

177. RESTATEMENT (SECOND) OF TORTS § 166 (1965).

178. 390 S.W.2d 70 (Tex. Civ. App. 1965).

179. *Japhnet*, 390 S.W.2d at 71.

180. *Id.*

no reason to anticipate. He loses control of the automobile and falls across the steering wheel thereby turning the car so that it runs upon and damages B's lawn. A is not liable to B.¹⁸¹

There was no liability because the intrusion was unintentional and non-negligent.¹⁸² The actor was not legally at fault for losing control of the automobile and destroying the property of another.¹⁸³

Ruiz v. Forman,¹⁸⁴ a 1974 Texas case, involved the intentional rather than unintentional action of a driver. A driver swerved to avoid an oncoming vehicle and ended causing property damage to plaintiff's land.¹⁸⁵ In an action for damages to the plaintiff's property, the defendant testified that he "consciously and intentionally turned his wheels to the right to avoid hitting the truck," and thereby his car entered upon the plaintiff's land and caused damages.¹⁸⁶ The court commented that, given the parties' stipulation to the facts, this case would come within the ambit of Section 197 of the *Restatement (Second) of Torts*, as a privileged entry onto the property of another.¹⁸⁷ However, the defendant would be liable for damages because it was an intentional invasion.¹⁸⁸ The entry was intentional in the sense that the defendant intended the act which resulted in the trespass, and that in turn caused the trespass.¹⁸⁹

Most states would not impose liability in situations of accidental loss of control of a vehicle in the absence of a showing of negligence.¹⁹⁰ For example, in *Phillips v. Pickwick Stages*,¹⁹¹ a driver was proceeding down a street when he observed that a parade was in progress and the area, which the driver was approaching, was closed to traffic.¹⁹² A number of people

181. *Id.* at 73 (quoting RESTATEMENT (SECOND) OF TORTS § 166 illus. 2 (1965)). The full text of section 166 ("Accidental Entries on Land") reads:

Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in the possession of another, or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest.

RESTATEMENT (SECOND) OF TORTS § 166 (1965).

182. *Japhnet*, 390 S.W.2d at 74.

183. *Id.*

184. 514 S.W.2d 817 (Tex. Civ. App. 1974).

185. *Ruiz*, 514 S.W.2d at 817.

186. *Id.*

187. *Id.*

188. *Id.* at 814.

189. *Id.* at 818.

190. See Christie, *supra* note 89, at 993.

191. 85 Cal. App. 571 (1927).

192. *Phillips*, 85 Cal. App. at 572.

were gathered in the street ahead.¹⁹³ The driver was traveling at about ten miles per hour.¹⁹⁴ He tried to stop, but the foot pedal, which operated the brakes, suddenly broke.¹⁹⁵ The driver then started to turn into a lamppost in an effort to crash and halt the vehicle, but before reaching it a child stepped out into the street in front his vehicle.¹⁹⁶ At that point the driver had the choice of either hitting the child or turning his vehicle away from the child, in which case he would be headed toward the crowd.¹⁹⁷ He tried to stop the car by use of the emergency brake, but it was inadequate to bring the car to a stop.¹⁹⁸ He veered away from the child and into the crowd.¹⁹⁹ Fortunately, no one was killed, but three people sustained injuries and sued for damages.²⁰⁰

This case recognizes the general principle that that if a driver, in the course of an emergency, acts as a reasonable person would in choosing to injure the plaintiff in order to avoid a child, there is no liability for plaintiff's injuries.²⁰¹ However, the jury found that the defendant negligently failed to sound his horn as he approached the crowd of people who had their backs facing the defendant's approach, and that he was further negligent in that he should have known or discovered the defect in the foot pedal.²⁰²

F. AVIATION EMERGENCY LANDING CASES

Some cases involve emergency landings of airplanes in order to save the lives of passengers and crews, which in turn destroy private property.²⁰³ In such instances it appears that the issue of damages depends strictly on whether negligence can be shown.²⁰⁴

In the early years of aviation, and well into the 1950s, aviation was regarded as an ultra-hazardous activity, requiring the imposition of strict liability for any damage or injury caused in the course of flying.²⁰⁵ The

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 572-73.

197. *Id.* at 573.

198. *Id.*

199. *Id.*

200. *Id.*

201. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 24 (5th ed. 1984).

202. *Philips*, 85 Cal. App. at 574.

203. See text accompanying notes 207-229.

204. See *id.*

205. See Jeffrey M. Jakubiiak, Note, *Maintaining Air Safety at Less Cost: A Plan for Replacing FAA Safety Regulations With Strict Liability*, 6 CORNELL J.L. & PUB. POL'Y 421, 428 (1997).

rationale was that even the best constructed and maintained aircraft was incapable of complete control so that flying created a risk that the plane, even though carefully constructed, maintained and operated, may crash and injure people and structures on the ground.

As aviation became a common mode of transportation, and as technical strides in the navigation of aircraft developed, the courts stopped looking upon aviation as an ultra-hazardous activity. Cases in several states, for example, California,²⁰⁶ New York²⁰⁷ and Washington,²⁰⁸ have indicated that aviation is no longer considered an ultra-hazardous activity, so that owners and operators of aircraft are not strictly liable for ground damage that is not occasioned by their fault. Today, airplanes will occasionally crash mysteriously, but these often are experimental aircraft built and handled by the owners.²⁰⁹ The operation of experimental aircraft continues to be regarded as an ultra-hazardous activity and, therefore, can result in strict liability for damages.²¹⁰

Section 197 of the *Restatement (Second) of Torts* states that an intentional entry into the land of another is privileged if it reasonably appears necessary to prevent serious harm to the actor or a third person, and that “[w]here the entry is for the benefit of the actor or a third person, he is subject to liability for any harm done in the exercise of the privilege. . . to any legally protected interest of the possessor in the land or connected with it.”²¹¹ On this view, if the pilot’s landing of the aircraft is “intentional,” albeit in an emergency situation, there should be liability for damages irrespective of negligence. Illustration 3 of that section provides an example of a forced landing in which it is stipulated that the pilot was not negligent:

206. See *S. California Edison Co. v. Coleman*, 310 P.2d 504, 505 (Cal. App. 1957) (“There is no California case which holds that a pilot is liable for collision damage independent of negligence”); *Boyd v. White*, 276 P.2d 92, 98 (Cal. Dist. Ct. App. 1954) (identifying as the general rule in California that “the owner (or operator) of an airship is only liable for injury inflicted upon another when such damage is caused by a defect in the plane or its negligent operation”).

207. See *Wood v. United Airlines, Inc.*, 32 Misc. 2d 955, 958 (N.Y. Sup. Ct. 1961) (rejecting strict liability in the context of operating an airplane, and applying the rule that “to constitute an actionable trespass there must be an intent to do the very act which results in the immediate damage”).

208. See *Crosby v. Cox Aircraft Co. of Washington*, 746 P.2d 1198, 1202 (Wash. 1987) (“[O]wners and operators of flying aircraft are liable for ground damage caused by such aircraft only upon a showing of negligence.”).

209. See, e.g., Mary Bender, *Pilot Hurt When Experimental Aircraft Crashes in High Desert*, THE PRESS ENTERPRISE (Riverside, California), Mar. 18, 2007, at B6; David R. Anderson, *Pilot’s Son Suspects Engine Failure*, THE OREGONIAN, July 18, 2006, at A6; J.C. Laxon & Amy Allyn Swann, *Trenton Plane Crash Kills Pilot, Injures Student*, THE AUGUSTA CHRONICLE, Feb. 17, 2006 at B7; *Architect Killed in Crash of Experimental Aircraft He Designed*, ASSOCIATED PRESS, Nov. 12, 2005; *Pine Island Plane Crash Kills Two*, ASSOCIATED PRESS, Apr. 29, 2005.

210. See Jakubiiak, *supra* note 205, at 428.

211. RESTATEMENT (SECOND) OF TORTS § 197(2) (1965).

A, an aviator, while carefully and skillfully operating his airplane makes a forced landing on B's field in the reasonable belief that it is necessary to do so for the protection of himself and his plane. A is not liable for his mere entry, but. . . is subject to liability for any harm thereby caused to B or to B's buildings, crops or other belongings.²¹²

Thus, under the Restatement view, while there is a privilege to make a forced landing, liability for damages is imposed irrespective of negligence, where the entry is intentional.²¹³

Boyd v. White,²¹⁴ a California case, seems to depart from the Restatement view because, under the Restatement illustration, the aviator is required to pay compensation for damages, irrespective of negligence. In *Boyd*, shortly after takeoff, the motor of an aircraft started to sputter, and the pilot began to lose altitude.²¹⁵ The pilot attempted to turn back to the airport but realized he could not make it.²¹⁶ He then observed a schoolyard and a baseball field and decided to make a forced landing there.²¹⁷ He circled the field, losing altitude all the while, and did not reach the field.²¹⁸ Instead, he crashed into plaintiff's house, causing damages, but no loss of life.²¹⁹ The pilot had leased the plane, and the plaintiff sued both the pilot and the plane's owner.²²⁰

The court expressed the general rule that, properly handled by a competent pilot exercising reasonable care, an airplane is not an inherently dangerous instrument, so that the owner or the operator of an airplane is only liable for injury inflicted upon another when such damage is caused by a defect in the plane or its negligent operation.²²¹ Thus, the court held that the defendant would be liable by ordinary negligence principles, so that the landowner would need to prove negligence in the operation or maintenance of the aircraft in order to win damages.

Other cases concerning ground damage have focused on whether the conduct of the pilot was volitional or involuntary in landing the aircraft. For example, in a New York case, *Wood v. United Air Lines Inc.*,²²² two

212. *Id.* § 197 illus. 3.

213. *Id.*

214. 276 P.2d 92 (Cal. Dist. Ct. App. 1954).

215. *Boyd*, 276 P.2d at 95.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 99-100.

222. 32 Misc. 2d 955 (N.Y. Sup. Ct. 1961).

airplanes collided in midair and one of them fell onto an apartment building and exploded, causing personal injuries and property damages. Various plaintiffs sued for damages under the theory of trespass.²²³ The plaintiffs argued strict liability for trespass and for consequent damages, “irrespective of the absence of any negligence or of any intent to invade the rights of those on the ground.”²²⁴ The court held that aviation is no longer considered an ultra-hazardous activity.²²⁵ Further, the court rejected the theory of trespass, emphasizing that an essential element of a trespass is the intention to do the very act that amounts to or produces the unlawful invasion.²²⁶ There was no evidence that the airplane was in any way under the pilot’s control when it plunged into the ground.²²⁷ The collision which led to the crash did not even occur during the course of an attempt to land.²²⁸ The court held there was no liability because the intrusion was unintentional in that the pilots no longer were in control of the aircraft, and non-negligent.²²⁹ The court apparently did not consider, for purposes of its ruling, the question of whether the midair collision was a product of negligence.

In a similar, earlier case, *Southern California Edison Co. v. Coleman*,²³⁰ a California court held there was no basis for holding an aircraft owner strictly liable for damage occurring to a utility company’s lines when the plane struck its electric line.²³¹ The aircraft owners claimed that there was no trespass because an unavoidable downdraft caused the airplane to drop to the level of the wires.²³² The contact with the wires was unintentional and not the result of negligence.²³³

The approach taken by the courts in the abovementioned cases is tied to the principle, stated in Section 166 of the *Restatement (Second) of Torts*, that an unintentional and non-negligent entry on land of another by one not engaged in an abnormally dangerous activity does not subject the actor to liability to the possessor even though the entry causes harm to the

223. *Wood*, 32 Misc. 2d at 956.

224. *Id.* at 957.

225. *Id.* at 960.

226. *Id.* at 950.

227. *Id.*

228. *Id.*

229. *Id.*

230. 310 P.2d 504 (Cal. 1957).

231. *Coleman*, 310 P.2d at 505.

232. *Id.* at 504.

233. *See id.* (stating that trial court impliedly found the defendants had not been negligent).

possessor.²³⁴ In sum, these rulings are in opposition to rulings from an earlier period when aviation was considered an ultra-hazardous activity.²³⁵

Following the *Wood* decision, the American Law Institute adopted section 520A of the *Restatement (Second) of Torts* (Ground Damage From Aircraft), which imposes strict liability in such cases:

If physical harm to land or to persons or chattels on the ground is caused by the ascent, descent or flight of aircraft, or by the dropping or falling of an object from the aircraft,

(a) the operator of the aircraft is subject to liability for the harm, even though he has exercised the utmost care to prevent it, and

(b) the owner of the aircraft is subject to similar liability if he has authorized or permitted the operation.²³⁶

Comment b of that section states:

Under the rule set forth in this Section, any flight by aircraft, together with ascent to or descent from the flight, is an activity of such a character that both the operator of the aircraft and its owner if he has consented to or permitted the operation are subject to strict liability for physical harm to land, or to persons or chattels on the ground.²³⁷

Comment c of that section takes the view that

while the safety record [of aviation] is greatly improved it still cannot be said that the danger of ground damage has been so eliminated or reduced that the ordinary rules of negligence law should be applied. Although there will be relatively few cases in which an airplane falls upon a house, for example, the gravity of the harm resulting when a few tons of flaming gasoline descend upon a dwelling is still a factor to be taken into account. Together with this is the obvious fact that those on the ground have no place to hide from falling aircraft and are helpless to select any locality for their residence or business in which they will not be exposed to

234. RESTATEMENT (SECOND) OF TORTS § 166 (1965).

235. *See, e.g.,* Rochester Gas & Elec. Corp. v. Dunlop, 266 N.Y.S. 469 (N.Y. 1933) (finding a pilot strictly liable for damage caused when the airplane he was piloting crashed into a utility tower); Hahn v. United States Airlines, Inc., 127 F. Supp. 950 (E.D. N.Y. 1954) (holding an airline strictly liable for the damage caused on the ground by an airline crash in a residential area); Margosian v. U.S. Airlines, Inc., 127 F. Supp. 464 (E.D. N.Y. 1955) (holding an airline strictly liable for damage caused on the ground when one of its airplanes crashed in a residential area).

236. RESTATEMENT (SECOND) OF TORTS § 520A (1965).

237. *Id.* § 520A cmt. 6.

the risk, however minimized it may be. Aviation flights differ in this respect from other kinds of traffic and transportation.²³⁸

It should be noted that Section 520A pertains solely to ground damage, and leaves the ordinary rules of negligence to determine liability for harm to passengers or others participating in aviation.²³⁹ Several states have statutes that impose strict liability for ground damage.²⁴⁰

The principle set forth in Section 520A has apparently not prevailed in more recent cases, and to an extent it has been discredited. Some think it was a “historical mistake.”²⁴¹ Since 1976, when Section 520A was promulgated, the American Law Institute has in some measure retreated from the idea of strict liability for ground damage by aircraft. In the *Tentative Draft of Restatement (Third) of Torts*, in a section called “A special note on aviation ground damage,” the committee states that in light of the dramatic decline in the airplane crash rate since Section 520A was adopted, and given that airplane crashes are generally a result of negligence, “the strict-liability issue is no longer one that has major practical significance (and similarly explains why there are so few modern cases considering the issue). In these circumstances, the issue is left open in this Restatement.”²⁴²

A 1995 case apparently ignored the principle set forth in Section 520A, and ruled along the same lines as in the *Wood* and *Coleman* cases mentioned above. *In re Air Crash Disaster at Cove Neck*,²⁴³ involved a Columbian passenger airplane that had exhausted its fuel supply while circling La Guardia Airport waiting for clearance to land. The plane crashed into a residential backyard in Long Island’s populated North Shore, causing damages to non-passengers on the ground.²⁴⁴ The plaintiffs in this case did not sustain physical injuries.²⁴⁵ The residents sued for property damages and emotional distress as a result of witnessing the aftermath of the crash in their yard, on the theory that the defendant committed intentional trespass.²⁴⁶

238. *Id.* § 520A cmt. c.

239. *Id.* § 520A cmt. e.

240. *E.g.*, DEL. CODE ANN. tit. 2, § 305 (2007); HAW. REV. STAT. ANN. § 263-5 (2007); MINN. STAT. ANN. § 360.012 (2007); N.J. REV. STAT. § 6:2-7 (2007); S.C. CODE ANN. § 55-3-60 (2007); VT. STAT. ANN. tit. 5 § 479 (2007).

241. *E.g.*, Nicolas P. Terry, *Collapsing Torts*, 25 CONN. L. REV. 717, 742 (1993).

242. RESTATEMENT (THIRD) OF TORTS § 20 cmt. k (2001).

243. 885 F. Supp. 434 (E.D. N.Y. 1995).

244. *Cove Neck*, 885 F. Supp. at 437.

245. *Id.*

246. *Id.*

The court held that the facts do not support intentional trespass because when the plane ran out of fuel, it became impossible for the pilots to control the aircraft and it unfortunately and accidentally crashed into the plaintiffs' yard.²⁴⁷ The court noted that intentional trespass is the "intentional and unlawful invasion of another's land," and that the intent requirement means that the tortfeasor "need only intend the act which amounts to or produces the unlawful invasion, and the intrusion must be . . . the immediate or inevitable consequence of what . . . he does so negligently as to amount to willfulness."²⁴⁸

In similar vein, in a case from Washington State, *Crosby v. Cox Aircraft Company*,²⁴⁹ a property owner brought action against the owner and operator of an aircraft, seeking to recover for ground damage inflicted by the crash landing of the aircraft.²⁵⁰ The highest court of that state held that the owner and operator would be liable for ground damage only upon a showing of negligence, and that strict liability did not apply.²⁵¹ In this case, the pilot was flying near Seattle and the engine ran out of fuel in mid-flight.²⁵² There may have been something wrong with the fuel system.²⁵³ The pilot was forced to crash-land the plane, and damaged the plaintiff's garage.²⁵⁴ Of course, running out of fuel likely is negligence, but the plaintiff sought to impose strict liability. A new trial was ordered in which the plaintiff attempted to prove negligence.²⁵⁵ It is not clear from this case whether the landing was considered intentional or unintentional. It would seem that there was an element of intentionality in that the pilot was able to steer the plane even though the engine was not operating since there was no more fuel.

The *Crosby* case had a vigorous dissent that argued Section 520A of the *Restatement* ought to be applicable, and that the majority had misinterpreted the provision.²⁵⁶ The dissent argued that the burden of loss should be placed on the "person who voluntarily chose to fly that airplane, for his own purpose and benefit" and not on the "wholly innocent, non-active, non-benefited, but damaged person."²⁵⁷ The dissent suggested that

247. *Id.* at 440-41.

248. *Id.* at 440 (quoting *Phillips v. Sun Oil Co.*, 121 N.E.2d 249, 250 (1954)).

249. 746 P.2d 1198 (Wash. 1987).

250. *Crosby*, 746 P.2d at 1198.

251. *Id.* at 1202.

252. *Id.* at 1198.

253. *Id.* at 1198-99.

254. *Id.* at 1198.

255. *Id.* at 1202.

256. *Id.* at 1203 (Brachtenbach, J., dissenting).

257. *Id.*

strong public policy seems to favor strict liability for damage occurring on the ground.²⁵⁸ For example, there is an unequal distribution of the benefits and risks of aviation between those in the air and those on the ground. Without strict liability, there is an onerous and expensive burden of proof required by the plaintiff in an aviation accident case (although to some extent the National Transportation Safety Board,²⁵⁹ which investigates every civil aviation accident in the United States, and provides information that significantly eases the plaintiff's burden in case preparation). Moreover, the owners of aircraft have the ability to spread the financial risks with insurance.²⁶⁰ Finally, a high degree of harm usually results, despite the exercise of due care, when an airplane crashes.

G. ACTS DIVERTING A DANGER FROM THE ACTOR TO A THIRD PARTY

Some private necessity cases involve emergencies in which one party diverts a threat, such as flood waters, to save his own property, and in doing so causes damage or destruction to the property of others. For example, in *Whalley v. Lancashire & Yorkshire Ry., Co.*,²⁶¹ the defendant railroad cut gaps in an embankment to protect its railroad tracks from the accumulation of water after an unprecedented rainfall.²⁶² The action taken by the railroad company diverted the position at which the water would accumulate.²⁶³ As a result of this action, the water was diverted, causing flooding of plaintiff's land and destruction of crops.²⁶⁴

The plaintiff sued for damages.²⁶⁵ The court concluded that "in order to get rid of the misfortune which had happened to [the defendants] . . . which . . . would not have injured the plaintiff, they did something which brought an injury upon the plaintiff [and] [u]nder [these] circumstances . . . the defendants are liable."²⁶⁶ The court found that, under the necessity doctrine, the evil to be averted (damage to the defendant's railroad tracks) did not outweigh the evil that resulted (damage to the plaintiff's land). That is, a greater good did not result.²⁶⁷ According to the court, the harm to the

258. *Id.*

259. The National Transportation Safety Board is an independent agency. 49 U.S.C. § 111 (2007).

260. *Crosby*, 746 P.2d at 1203-04.

261. 13 Q.B.D. 131 (A.C. 1884).

262. *Whalley*, 13 Q.B.D. at 131.

263. *Id.*

264. *Id.*

265. *Id.* at 132.

266. *Id.* at 138.

267. *Id.* at 133.

plaintiff, as it turned out, was *greater* than the harm averted by the defendant's action, in terms of the amount of damages.²⁶⁸

The result was better *for the defendant*, but resulted in damages to the plaintiff that would not otherwise have occurred.²⁶⁹ According to the court, even if the damage to the railroad tracks had been much more extensive than that which resulted to plaintiff's land by diverting the waters—the necessity doctrine does not justify harming another's property in order to protect one's own under the facts of this case.²⁷⁰

The court alluded to an exception in situations that involve an imminent "common enemy" such as a fire that is approaching and presents a common threat to the community.²⁷¹ In a "common enemy" situation, the actor seeks to avert an imminent harm which poses a threat to a number of individuals in common. The following is an example of a common enemy situation: If an extraordinary flood is seen to be coming upon a community, and someone builds barriers to prevent the flood from encroaching upon his land, the danger might thereby affect neighboring lands instead. The danger in this example is a "common enemy" that equally threatens innocent parties, and in seeking a means to avert the harm to oneself, the danger will devolve on someone else.²⁷² Each party has an equal opportunity of taking such measures are necessary to protect oneself, even though that may result in injuring one's neighbor.²⁷³

In *Whalley*, the danger had already "hit" the defendant's embankment; it was not a threat to the plaintiff's property. There was no "common enemy" which the defendant sought to protect against. Rather, the defendants diverted the accumulation of water that had already begun to affect the railroad tracks, to the plaintiff.²⁷⁴

The *Whalley* case is embodied in illustration 5 of Section 197 of the *Restatement*:

An unprecedented rainfall causes such a quantity of water to accumulate against one of the sides of the A Railroad Company's embankment as to endanger the embankment. A is not privileged to cut trenches and to cause the water to flow onto B's land if the probable harm to B's land is in excess of or even equal to the probable harm to A by the threatened loss of the embankment. A

268. *Id.*

269. *Id.*

270. *Id.* at 134.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 137-38.

is privileged to flood B's land if the probable harm to B's land is less than the probable harm to A from the loss of its embankment, but . . . A is subject to liability to B for any harm thereby caused to his land.²⁷⁵

According to Comment c of Section 197, in determining reasonableness of the actor's conduct

the probable advantage to the actor to be expected from the entry must be weighed against the probable detriment to the possessor of the land or other persons properly upon it. Thus, the actor's entry to avoid death or serious bodily harm would be unreasonable if it would involve a more serious or even an equal risk of harm to the possessor of the land or other lawful occupants. Likewise, where the entry is for the purpose of protecting the actor's land or chattels, not only would any serious risk of harm to the person of the possessor or other lawful occupants make the entry unreasonable, but so would a disproportionate, or even an equal, risk of harm to the land or chattels of the possessor or chattel of third persons lawfully on the land.²⁷⁶

As mentioned, in *Whalley* the court found that the harm to the plaintiff's land was in excess of the harm that would have accrued to the defendant's railroad tracks.²⁷⁷

Another situation involves deflecting a danger from one party to another with respect to personal property rather than real property. Section 263 of the *Restatement (Second) of Torts* (Privilege Created by Private Necessity), is based on Section 197.²⁷⁸ Section 263 provides a privilege to destroy the personal property of others in necessitous circumstances:

One is privileged to commit an act which would otherwise be a trespass to the chattel of another or a conversion of it, if it or is reasonably believed to be reasonable and necessary to protect the person or property of the actor, the other or a third person from serious harm . . .²⁷⁹

The Comment to this section indicates that the act of destroying another's personal property to save one's own property must not only be

275. RESTATEMENT (SECOND) OF TORTS § 197 cmt. 4, illus. 5 (1965).

276. *Id.* § 197 cmt. c.

277. *Whalley*, 13 Q.B.D. at 138.

278. *See* RESTATEMENT (SECOND) OF TORTS § 263 cmt. b ("The statement in this Subsection is analogous in part to the privilege to enter land in the possession of another for the protection of person or property as stated in § 197.").

279. RESTATEMENT (SECOND) OF TORTS § 263 (1965).

necessary but also reasonable. This is required so that “one whose chattel of small value is threatened with serious harm or even with complete destruction *may not* be privileged to destroy a far more valuable chattel of another in order to protect it.”²⁸⁰

In *Latta v. New Orleans & N.W. Ry.*,²⁸¹ two boxcars loaded with cotton caught fire, possibly from a spark from a passing locomotive engine, or possibly from a worker’s pipe or cigarette that may have caused smoldering and then the fire.²⁸² At any rate, the defendant was not at fault for causing the boxcars to catch fire. Because the boxcars were adjacent to the depot, and the depot was in peril of catching fire, about seven or eight people, including employees of the defendant, pushed the burning boxcars about twenty-five feet down the track and let one of the cars come to rest near a storage bin which held wooden staves owned by the plaintiff. The burning car in turn set fire to the wooden staves.²⁸³

The plaintiff sued for damages. The defendant invoked the necessity doctrine. He argued that the burning cars imminently threatened the destruction of the defendant’s depot, that there was an impulse which led to the removal of the burning cars to the place where they destroyed the property of plaintiff, and that this effort to push the burning cars away from the depot “may be regarded as natural in some sense.”²⁸⁴

The Supreme Court of Louisiana held that the defendant had no right to sacrifice plaintiff’s property in order to save its own, and was liable for damages.²⁸⁵ It stated that the removal of the burning cars to save defendant’s property from catching fire was “hardly that kind of a natural impulse which impels one to brush a wasp from one’s face or to get rid of a

280. *Id.* § 263, cmt. d (emphasis added).

281. 59 So. 250 (La. 1912).

282. *Latta*, 59 So. at 251.

283. *Id.* at 252.

284. *Id.* at 254.

285. *Id.* at 255.

dangerous squib;²⁸⁶ it belongs rather to that class of sordid impulses which may and should be restrained.”²⁸⁷

The defendant further argued that the law of necessity recognizes a right of an individual to destroy the property of another in order to save his own, where it is impracticable to save both parties' property, and that it would be proper to consider whether the actor averted a greater evil by sacrificing property of lesser value than his own property, which was saved.²⁸⁸ The saving of the depot, being of greater value than the wooden staves of the plaintiff, was therefore justified.²⁸⁹ The court dismissed this argument as an idea that “would lead to great injustice.”²⁹⁰ Thus, this case is much the same in its analysis and result as the *Whalley* case. *Latta* apparently is at odds with Section 263 of the *Restatement*—had the *Restatement* view been followed, the relative values of the property sacrificed and the property saved would have been a consideration.

*Swan-Finch Oil Corp. v. Warner-Quinlin Co*²⁹¹ presented another situation involving diverting a danger from one party to another. The defendant owned a wooden barge that contained 6000 barrels of crude fuel oil and was moored to a dock, also owned by the defendant, in Staten Island Sound.²⁹² Lightning struck the barge and ignited the oil.²⁹³ The fire rapidly spread through the barge, and the fire department was summoned.²⁹⁴ Meanwhile, about ten men under the charge of the dock superintendent prepared to fight the fire on their own.²⁹⁵ They cast the barge adrift by cutting the hawsers which tied it to the dock.²⁹⁶ They pushed the barge, which was still on fire, out into the stream, and, as a result, the other boats

286. A squib is a “serpent,” firecracker or other incendiary device containing gunpowder that has a fuse which, when ignited, will burn down into the device until it explodes. OXFORD ENGLISH DICTIONARY, 414 (2d ed. 1989). The court's reference to a “dangerous squib” no doubt had in mind the 1773 English Case, *Scott v. Shepherd*. The defendant Shepherd threw a squib into a crowded marketplace. 2 Black. at 892. Two other persons hurled the squib away from themselves before it ultimately exploded in the plaintiff's face. 2 Black. at 892-93. The issue before the court was whether Shepherd, the initial thrower of the squib, or the intermediate throwers, would be liable for damages to the plaintiff. 2 Black. at 893.

There are two reports of *Scott v. Shepherd*: one by Blackstone, who was one of the four judges in the case, 2 W. Black. 892, 96 Eng. Rep. 525 (K.B. 1773), the other by Wilson, a private reporter, at 2 Wils. 403, 95 Eng. Rep. 1124 (1773).

287. *Latta*, 59 So. at 254.

288. *Id.*

289. *Id.*

290. *Id.* at 254.

291. 167 A. 211, 212 (N.J. 1933).

292. *Swan-Finch Oil Corp.*, 167 A. at 211.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

moored at the dock were saved.²⁹⁷ A passing tug boat immediately pushed the blazing barge across the stream to an island some 800 feet distant from the dock.²⁹⁸ Later, a New York City fire boat arrived on the scene, and made unsuccessful efforts to quench the fire.²⁹⁹ Several hours later, the barge, was still burning, was carried away from the island by the tide.³⁰⁰ The city fireboat pursued it and made every effort to keep the fire from spreading to other boats and property.³⁰¹ The fireboat managed to push the barge onto the beach of another island, but after a half an hour it again floated away.³⁰² Finally, the barge collided into the docks owned by the plaintiffs, and blazing oil escaped from the hull and set fire to the plaintiffs' property, causing extensive damage.³⁰³

The plaintiffs sued for damages caused by the burning barge.³⁰⁴ The defendant argued that the necessity of the situation justified the casting adrift of the barge. The court disagreed:

The defendant's act in casting adrift this burning cargo of oil, in order to save its own property from destruction, was a violation of a legal duty owing to the plaintiffs and others whose property was thus put in jeopardy. While it cannot be said that it was intended by the casting adrift of this barge to set on fire the property of the plaintiffs or any one else, nevertheless it is clear that the intent of the defendant was to save its own property, irrespective of any danger or consequence to the property of others. The law cannot allow one deliberately to cast upon another any dangerous instrumentality, even in self-defense, without being answerable for the natural consequences which follow.

....

[T]he act complained of cannot be excused because of the emergency or the necessity. Nor can it be excused on the ground that an act of God was the immediate cause of the catastrophe. It makes no difference, it seems to me, what the primary cause of the fire was. The act of casting the boat adrift was dissociated from

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at 212-13.

302. *Id.* at 212.

303. *Id.*

304. *Id.*

the act of God. It was a new and different act, creating a new hazard.³⁰⁵

The court held that there was proximate cause in connection with the damage to plaintiffs' property.³⁰⁶ The damage was foreseeable and not as remote in circumstances as to relieve the actor from liability.³⁰⁷

Perhaps the case hinged principally on the court's finding that the defendant was negligent in using a wooden barge for the transportation of inflammable fuel oil in such a large quantity, and in mooring the barge on the dock in close proximity to other shipping, without greater fire protection. The court's reasoning was that the defendant created an unreasonable risk in the first instance by using a wooden barge to carry inflammable fuel oil, and that regardless of how the fire got started, it was reckless to have permitted the oil to be transported on that barge.³⁰⁸

The decision also suggests that the defendant failed to make a reasonable choice of evils in casting out the barge in that the action was taken "irrespective of any danger or consequence to the property of others."³⁰⁹ The court apparently failed to consider that the action may, in fact, have been reasonably calculated to avert a greater danger because a number of vessels at the dock would otherwise have caught fire, perhaps creating a greater quantum of damage than the plaintiff ended up incurring. The record is silent as to the amount of damage sustained by the plaintiff, and the value of the boats on the dock that were saved.³¹⁰ Apparently the court deemed irrelevant the question of whether the damages that accrued were greater, or less, than the damages averted by the defendant's action.³¹¹

Thus, the court held that the action in casting adrift the barge was wrong because it was foreseeable that such action would cause damage to someone else's property, and that the necessity doctrine simply could be used to shield oneself from liability (except in a "common enemy" case) where the choice of evils consists of the actor's property versus another's property.³¹²

305. *Id.*

306. *Id.* "[T]here was no intervening, culpable, and efficient agency which broke the chain of causation, no negligence by any other actor in the premises, no elements except natural and casual ones such as wind and tide which intervened between the starting of the wrongful act and its conclusion."

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

The fire was caused by an act of God—lightning.³¹³ Had the defendant kept the barge moored where it was, the resulting, and surely inevitable, spread of the fire to the other boats and the dock, would not have imposed any liability. It would probably have been considered an unavoidable accident caused by an act of God. In contrast, property owners in such a situation might well recover based on negligence in that the barge should have had a steel hull, and that flammable oil should not be transported in a wooden vessel.

In *Protectus Alpha Nav. Co. v. North Pacific Grain Growers*,³¹⁴ a vessel owner sued a terminal at which the ship had docked, alleging that defendant's employees had acted negligently in casting the burning ship away from the dock while successful firefighting efforts were underway at the dock.³¹⁵ The defendant ordered the ship cast off in defiance of the fire chief's orders.³¹⁶ The fire was on the verge of being extinguished.³¹⁷ The vessel's engines were inoperable, and once the vessel was cast adrift, the firefighters were delayed by several hours in their plan of shooting high expansion foam into the engine room to stop the fire, at which point the engine room exploded and the fire spread rapidly to the ship's superstructure.³¹⁸ One person was killed in the explosion.³¹⁹

Defendant argued, among other things, that the danger of explosion made it reasonable and prudent for employees to cast off the ship, and that the conduct was justified by necessity.³²⁰ On the issue of necessity, the court held that the danger of explosion was not sufficiently imminent to justify defendant's conduct (in that the fire was small and confined to the engine room), and that defendant's conduct was not reasonable under the circumstances.³²¹ The court found the defendant liable for the destruction of the ship and awarded compensatory and punitive damages.³²²

313. *Id.* at 211.

314. 585 F.Supp. 1062 (D. Ore. 1984), *aff'd*, 767 F.2d 1379 (9th Cir. 1985).

315. *Protectus*, 585 F. Supp. at 1064.

316. *Id.* at 1065.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 1066.

322. *Id.* at 1068-69.

III. VIOLATION OF PROPERTY RIGHTS BASED ON PUBLIC NECESSITY

A. INTRODUCTION

Public necessity contemplates a situation where there is an imminent public calamity, and in order to avert this danger it is necessary to destroy or damage property. In the numerous cases that have considered the question of public necessity, it appears that “[w]here the danger affects the entire community, or so many people that the public interest is involved, that interest serves as a complete justification to the defendant who acts to avert the peril to all.”³²³ This means that “one has a complete privilege to destroy, damage, or use real or personal property if the actor reasonably believes it to be necessary to avert an imminent public disaster.”³²⁴ The danger to be averted in cases of public necessity may pertain to property only, or it may be a danger to property as well as to life and limb.

Section 196 of the *Restatement (Second) of Torts* (Public Necessity), states: “One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster.”³²⁵ This privilege is to protect the public from “an impending public disaster such as a conflagration, flood, earthquake, or pestilence.”³²⁶ Section 196 is supplemented by Section 262 (Privilege Created by Public Necessity), which pertains to trespass to chattel rather than to land: “One is privileged to commit an act which would otherwise be a trespass to chattel or a conversion if the act is or is reasonably believed to be necessary for the purpose of avoiding a public disaster.”³²⁷

The comments to Section 196, dealing with the privilege to enter land in the possession of another, are applicable also to Section 262.³²⁸ Comment b of Section 262 states that the privilege in this section “is applicable where one intermeddles with chattels in the possession of another in a reasonable effort to protect against a public enemy, or to prevent or mitigate the effect of conflagration, flood, earthquake, or pestilence.”³²⁹

323. W. PAGE KEETON ET AL., *supra* note 201, at § 24.

324. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 196 & 262).

325. RESTATEMENT (SECOND) OF TORTS § 196 (1965).

326. *Id.* cmt. a.

327. *Id.* § 262.

328. *Id.* cmt. a.

329. *Id.* cmt. b.

There is no litmus test as to what constitutes “public” as opposed to “private” necessity. The distinction is chiefly of importance on the question of compensation for damages, discussed below. Public necessity is “[w]here the danger affects the entire community, or so many people that the public interest is involved.”³³⁰ “The number of persons who must be endangered in order to create a public necessity has not been determined by the courts.”³³¹

The concept of public necessity pertains not so much as to who the agent is, but the purpose of the act, for the privilege applies to private individuals as well as public officials.³³² If the public authorities have taken control of the situation, it would ordinarily be unreasonable for a private individual to attempt to exercise the privilege on his own initiative. It may happen, however, that, in the absence of a public official competent to deal with the situation, or when the appropriate official unreasonably refuses to act, action by a private individual to avert a public disaster would be reasonable.³³³

Two broad areas of public necessity will be considered. One pertains to military operations in time of war. The second area involves emergencies such as fire, pestilence, police activities in apprehending criminal suspects, and other exigencies in which government officials or private individuals take action to avert a public danger. But, first, it is necessary to consider the issue of compensation in situations of public necessity.

B. ISSUE OF COMPENSATION

The question of compensation for the destruction or appropriation of property in situations of public necessity is complex. The majority view is that there is no duty to pay compensation to the owner of any property when the action is taken based on public necessity.³³⁴ There are, however, numerous exceptions.

330. See W. PAGE KEETON ET AL., *supra* note 201, at § 24.

331. *Id.*

332. RESTATEMENT (SECOND) OF TORTS § 262 cmt. b. (1965).

333. *Id.* § 196 cmt. e.

334. See *id.* § 262 cmt. d (“Since the privilege stated in this Section arises only because of public necessity, the actor is not liable for the harm caused by its proper exercise.”); see also *Surocco v. Geary*, 3 Cal. 70, 74 (1853) (holding that the government was not liable for the costs of destroying buildings to prevent the spread of a fire); *Seavey v. Preble*, 64 Me. 120-22 (1874) (holding that the government was not liable for the costs of destroying wallpaper in the homes of smallpox victims); *Putnam v. Payne*, 13 Johns. 312, 312 (N.Y. Sup. Ct. 1816) (holding that the government was not liable for the costs of destroying mad dogs). Government destruction of property also does not give rise to any constitutional claim for compensation against state governments under the Fourteenth Amendment. See *Miller v. Schoene*, 276 U.S. 272, 280 (1928) (holding that Virginia did not have to compensate owners of cedar trees destroyed to save apple

There are three broad areas on the question of compensation in situations of public necessity. The first area involves the seizure or destruction of property by the military. There are two types of military activity for purposes of evaluating the right of compensation: If the loss is occasioned by combat activity, or to impede the advance of a hostile army (*e.g.*, breaking up of roads or burning of bridges), or to destroy food or liquor supplies that the enemy might utilize, there is generally no right of compensation for the aggrieved party.³³⁵ On the other hand, if the military appropriates property for its subsequent use (*e.g.*, taking vessels to transport military supplies, or seizing buildings to use as storehouses of war material or to house soldiers), courts are inclined to award compensation for the loss.³³⁶ In the latter situations, the courts generally find there is a “qualified privilege” for the military to appropriate the property based on necessity, but a corresponding duty for the government to compensate the owner. Compensation in such situations is not based on the Takings Clause of the Fifth Amendment, but on the theory of *implied promise* on the part of the government to pay a reasonable compensation for the property taken or destroyed.³³⁷

Second, if the property that is damaged or seized itself had become dangerous and was likely to have been destroyed anyway, the aggrieved party is not entitled to compensation.³³⁸ Cases of this sort might involve a fire or other danger in which the property destroyed “had temporarily become dangerous itself and was likely to have been destroyed anyway.”³³⁹

A third area involves police activity—*e.g.*, firing tear gas into a building in order to flush out criminal suspects, in turn causing damage to the property.³⁴⁰ There is generally no right of compensation so long as the police acted reasonably, but there are some exceptions.³⁴¹

In situations of public necessity where there is no legal obligation to pay compensation for the destruction of property, there is an exception if the entry and the action taken were unreasonable under the

trees because “preferment of [the public] interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of police power which affects property”). All of the cases just mentioned are discussed in Part III.D. *infra*.

335. See discussion in Section C *infra*.

336. *Id.*

337. *Id.*

338. *Id.*

339. W. PAGE KEETON, ET AL., *supra* note 201, at § 24.

340. See discussion in Section D *infra*.

341. See, *e.g.*, *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38 (Minn. 1991) (holding that doctrine of public necessity did not insulate municipality to pay just compensation to homeowner who suffered property damages after police fired tear gas into his home).

circumstances.³⁴² The exception also applies if the actor failed to use reasonable care to avoid doing unnecessary harm to persons or things, “although the exigencies of the occasion must be taken into account in judging his conduct.”³⁴³ Many believe that there is or should be a moral obligation for public authorities to provide compensation to an aggrieved party whose property has been destroyed by public necessity. Section 196 of the *Restatement (Second) of Torts* expresses this view:

Although the moral obligation to compensate the person whose property has been damaged or destroyed for the public good is obviously very great, and is of the kind which should be recognized by the law, the rules as to governmental immunity from suit have stood in the past as a barrier to any effective legal remedy. After major public disasters compensation often has been paid under special legislation enacted for the purpose, and in several jurisdictions general statutes provide for such compensation.³⁴⁴

Some jurisdictions have enacted statutes which provide for compensation in certain situations “where property is destroyed on grounds of public necessity.”³⁴⁵ For instance, in *Mayor of New York v. Lord*,³⁴⁶ the court discussed a municipal ordinance in New York passed in 1806, which directed the mayor to compensate property owners whose property was destroyed at the mayor’s direction to prevent the spread of fire.³⁴⁷ The basis for such compensation is that the government has a moral obligation, albeit not a legal one, to provide compensation in certain instances when private property is destroyed due to public necessity.³⁴⁸

In some situations where the destruction or property occurs pursuant to government authority, plaintiffs have successfully argued that the Takings

342. RESTATEMENT (SECOND) OF TORTS § 196 cmt. e (1965).

343. *Id.* cmt. e.

344. *Id.* cmt. h.

345. *See* Christie, *supra* note 89, at 996. In addition, numerous states have statutorily authorized reimbursement programs for damage to property of innocent residents caused by the police engaged in apprehending suspects. *See, e.g.*, CAL. GOV’T CODE § 29631 (“The Legislature hereby declares that it serves a public purpose, and is of benefit to the state and to every county and city in the state, to indemnify those innocent residents of the State of California whose property has been injured or destroyed as a result of the acts specified in Section 29632.”).

The legislative body of a county or of a city may establish a program which provides for the reimbursement of any innocent resident . . . whose property is or has been . . . injured or destroyed as the consequences of: (a) An act of a peace officer in the detection of crime or the apprehension or arrest of any person for any public offense; or (b) An act of a person in resisting or avoiding arrest.

Id. § 29632.

346. 17 Wend. (N.Y.) 285 (1837).

347. *Lord*, 17 Wend. at 285.

348. *Id.*

Clause of the Fifth Amendment, in the case of the federal government, or the comparable provisions applicable to the states under the 14th Amendment, require compensation. The Takings Clause was “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”³⁴⁹ Where plaintiffs have won awards of compensation, under one theory or another, usually property was taken or destroyed, but the property was not a part of the threatened danger and was not itself likely to be harmed or destroyed.

C. MILITARY NECESSITY IN SEIZING OR DESTROYING PROPERTY IN TIME OF WAR

Generally, the destruction of private property caused by military operations during war is not subject to compensation under the Takings Clause of the Fifth Amendment.³⁵⁰ Examples of losses occasioned by government troops in the operations of war include destroying bridges to prevent the enemy from crossing them, destroying storehouses to prevent their being of use to the enemy, seizing and destroying other types of private property so as to prevent it from falling into the hands of enemies, taking other measures for the safety and efficiency of troops, and other necessary and unavoidable destruction of property from the ravages of war.³⁵¹

In *United States v. Caltex, Inc.*,³⁵² the Supreme Court held that the wartime destruction of private property by the Army to prevent its imminent capture and use by an advancing enemy did not entitle the owner to compensation under the Fifth Amendment.³⁵³ The case involved orders to demolish the facilities of an oil company terminal in the Philippines in December, 1941, at a time when Japanese troops were invading Manila.³⁵⁴ The demolition rendered the facilities useless by the enemy, and the enemy was thus deprived of a valuable logistic weapon.³⁵⁵ The issue before the Court was whether the Government must compensate the owner of the property for its destruction.³⁵⁶ The sole objective of the Army was to

349. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). For a general discussion of the purposes of the Just Compensation Clause, see Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV L. REV. 1165, 1165 (1967).

350. See discussion *infra*.

351. *Id.*

352. 344 U.S. 149 (1952).

353. *Caltex*, 344 U.S. at 156.

354. *Id.* at 150-51.

355. *Id.* at 151.

356. *Id.* at 152.

destroy property of strategic value to prevent the enemy from using it to wage war more successfully.³⁵⁷

The Court found, by a seven-to-two vote, that “the common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.”³⁵⁸ Justices Douglas and Black dissented, stating that while there is no doubt that the military has authority to select certain property for destruction to prevent the enemy from using it, the Fifth Amendment requires compensation for the taking.³⁵⁹ “Whenever the Government determines that one person’s property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss.”³⁶⁰ This view seems to be supported by Vattel, who in his *Law of Nations*, discussed damages sustained by individuals in war.³⁶¹ He noted Grotius indicated a split of opinion on this question.³⁶² According to Vattel, there are two kinds of damages to be distinguished.³⁶³ The state is not required to indemnify those who suffer damages done by inevitable necessity, the havoc done by the artillery in engagements and other calamities arising from action in the field.³⁶⁴ In these cases

the public finances would be soon exhausted. Every one must contribute his share in due proportion, which would be impracticable. Besides, these indemnifications would be liable to a thousand abuses, and there would be no end of the particulars; it is therefore to be supposed that no such thing was ever meant by those who formed a society.³⁶⁵

On the other hand, Vattel appears to agree with the dissenting opinion in *Caltex* that, with respect to military action by the state

done voluntarily and by precaution, as when a field, a house, or garden, belonging to a private person, is made use of for building the rampart of a town, or some other piece of fortification; when

357. *Id.* at 153.

358. *Id.* at 154.

359. *Id.* at 156 (Douglas, J., dissenting).

360. *Id.*

361. M.D. VATTEL, *THE LAW OF NATIONS*, Book III, ch. 15, § 232 (Simeon Butler, Northampton, Mass. 1820).

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

his standing corn, or his store houses are destroyed to prevent their being of use to the enemy. Such damages are to be made good to the owner, who should bear only his quota.³⁶⁶

Perhaps the case mainly hinged on the distinction between “destruction” and “use.” Because the claimant’s property was demolished in order to prevent capture by the enemy, rather than appropriated for subsequent use, the Court refused to grant compensation.³⁶⁷ Perhaps this is a nonsensical distinction—that between destroying property of strategic value and taking property for subsequent use by the military. In either instance, the owner has been deprived of property.

The *Caltex* case distinguished *Mitchell v. Harmony*,³⁶⁸ in which the Supreme Court considered the necessity doctrine in connection with the appropriation of property for subsequent use in a military campaign.³⁶⁹ The question in *Mitchell* was under what circumstances private property may be taken from the owner by a military officer in a time of war.³⁷⁰ More specifically, the question was whether a military officer might take private property simply to insure the success of any military enterprise that a commanding officer may deem advisable to undertake against the enemy.³⁷¹

The case involved the seizure of mules, wagons and goods of an American merchant who was headed to Mexico just before the war commenced between the United States and Mexico.³⁷² The merchant was forced to accompany American troops against his will, together with his goods, which eventually were disposed of in Mexico by order of the commander of the American forces.³⁷³

The commander sought to justify the seizure, in part, to prevent the property from falling into the hands of the enemy.³⁷⁴ In addition, he sought to justify the seizure based on the assertion that it would ensure the success of the expedition upon which the commander was embarking.³⁷⁵ At trial, the jury did not find that a danger or necessity existed, and ruled in favor of the claimant.³⁷⁶

366. *Id.*

367. *United States v. Caltex*, 344 U.S. 149, 156 (1952).

368. 54 U.S. (13 How.) 115 (1851).

369. *Mitchell*, 54 U.S. at 133.

370. *Id.* at 134.

371. *Id.*

372. *Id.* at 129.

373. *Id.* at 130.

374. *Id.* at 132.

375. *Id.*

376. *Id.* at 133.

On review, the Supreme Court stated that the necessity doctrine allows for property to be seized for public use “in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise.”³⁷⁷ The Court found, “the property was seized not to defend [the troops’] position, nor to place the troops in a safer one, nor to anticipate the attack of an approaching enemy, but to insure the success of a distant and hazardous expedition some time” in the future.³⁷⁸

In regard to the powers of a military commander, the Court stated:

But it must be remembered that the question here, is not as to the discretion he may exercise in his military operations or in relation to those who are under his command. His distance from home, and the duties in which he is engaged, cannot enlarge his power over the property of a citizen, nor give to him, in that respect, any authority which he would not, under similar circumstances, possess at home. And where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own.

There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.³⁷⁹

The Court concluded that there was no public necessity in the taking of the private property under the circumstances of the Mexican campaign, and

377. *Id.*

378. *Id.* at 135.

379. *Id.* at 134.

that the owner should be compensated.³⁸⁰ The Court pointed out that the standard for determining if a necessity exists is one of reasonableness:

In deciding upon this necessity . . . the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good.³⁸¹

The *Mitchell* Court made reference to a 1774 English case, *Mostyn v. Fabrigas*.³⁸² Lord Mansfield, in writing the decision in *Mostyn*, referred to an unpublished case against Captain Gambier of the British Navy who, following orders, “pulled down the houses of some sutlers on the coast of Nova Scotia who were supplying sailors with . . . liquor.”³⁸³ Lord Mansfield found that the action was done “with a good intention . . . for the health of the sailors was affected” by frequenting the houses where liquor was offered.³⁸⁴ The Supreme Court, in commenting on Captain Gambier’s action, concluded that the action was “evidently a laudable one” in that it performed a public service in the protection of the morals of the sailors.³⁸⁵ However, one of the sutlers whose house had been destroyed sued Captain Gambier in England, and a thousand pounds damages were awarded against the Captain.³⁸⁶ The Supreme Court, in noting this result with approval,

380. *Id.* at 137.

381. *Id.* at 135.

382. *Id.*

383. *Id.* at 135-36.

384. *Mostyn v. Fabrigas*, 1 Cowp. 161, 180 (1774).

385. *Mitchell*, 54 U.S. at 136

386. *See Mostyn*, 1 Cowp. at 181.

stated that Captain Gambier's action "was an invasion of the rights of private property, and without the authority of law."³⁸⁷

President Grant, eighty years before the *Caltex* decision, vetoed a bill of Congress that originated in the Senate Committee on Claims, which authorized compensation for a house and its contents that had been ordered destroyed by the commanding officer of the Union forces "in defense of the city of Paducah, Kentucky, in March, 1864."³⁸⁸ The city was under siege by the Confederates.³⁸⁹ Federal troops retreated to Fort Anderson for protection.³⁹⁰ Confederate sharpshooters seized possession of the claimant's house, which was about one hundred and fifty yards from the fort, and fired on the fort late into the night, but Union fire managed to drive them away from the house.³⁹¹ Anticipating that the Confederate forces would appear with reinforcements in the morning to continue their assault, the Union officer in command gave orders for "the destruction of all houses within musket-range of the fort," including the claimant's house.³⁹² The purpose was to prevent the reinforced Confederate soldiers from taking positions in the houses.³⁹³ The Senate Committee on Claims concluded that the "burning of the house to prevent its being used by the sharpshooters of the enemy was a taking by the government of private property for public use, for which compensation should be made."³⁹⁴

President Grant declared in his veto message that the payment of this claim would invite the presentation of demands for very large sums of money against the government for necessary and unavoidable destruction of property by the army. According to him,

[i]t is a general principle of both international and municipal law that all property is held subject, not only to be taken by the government for public uses, in which case, under the Constitution of the United States, the owner is entitled to just compensation, but also subject to be temporarily occupied, or even actually destroyed, in times of great public danger, and when the public safety demands it; and in this latter case governments do not admit a legal obligation on their part to compensate the owner. The temporary

387. *Mitchell*, 54 U.S. at 136. Lord Mansfield, commenting about the case of Captain Gambier, said that the decision was "very likely erroneous." *Mostyn*, 1 Cowp. at 181.

388. *United States v. Pac. R.R.*, 120 U.S. 227, 236-37 (1881).

389. *Pacific R.R.*, 120 U.S. at 237.

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.* at 238.

occupation of, injuries to, and destruction of property caused by actual and necessary military operations, is generally considered to fall within the last-mentioned principle. If a government makes compensation under such circumstances, it is a matter of bounty rather than of strict legal right.³⁹⁵

It seems that the reasoning of President Grant in this veto message is consistent with the principles set forth in *Caltex*. In both situations, the property was destroyed at a time of great public danger, as part of military operations to prevent the enemy from gaining a strategic advantage.

The notion that the sovereign has the right to destroy private property in times of great public danger when the public safety demands it, seems to have gotten its initial imprimatur in a 1606 English ruling known as the *Salt peter Case*.³⁹⁶ This case dealt with the right of the sovereign to utilize private property for defense purposes in time of war.³⁹⁷ The question was what prerogative the King had in digging and taking of saltpeter from the freehold estates of subjects, to make gunpowder to be used in defense of the realm.³⁹⁸ The objective was to avoid having to buy saltpeter in foreign countries because of the difficulty involved.³⁹⁹ The case discussed the principle that if enemies come upon coastal lands, the King has the right to make trenches or bulwarks for the defense of the realm because this is for the public benefit.⁴⁰⁰ In doing so, the King must take care not to “undermine, weaken, or impair any of the walls or foundations of any houses” or “barns, stables, dove-houses, mills, or any other buildings.”⁴⁰¹ The court also laid out guidelines to be observed by the King’s workers in digging up saltpeter—such as restoring the property to good condition after digging, and working only between sunrise and sunset.⁴⁰²

*Harrison v. Wisdom*⁴⁰³ involved the defense of public necessity asserted by private individuals (rather than public officials) to justify the destruction of private stores of liquor before an invading army entered the city.⁴⁰⁴ This case, decided by a Tennessee court, is similar to the Captain Gambier situation mentioned above, except that here the liquor was

395. *Id.* (quoting CONG. GLOBE, 42d Cong., 2d Sess. 4155 (1872) (veto message of President Ulysses S. Grant, Cong. Globe)).

396. 12 Co. 12 (1606).

397. *Salt peter*, 12 Co. at 12.

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.* at 13.

402. *Id.* at 14.

403. 54 Tenn. 99, 1872 WL 3738 (1872).

404. *Harrison*, 54 Tenn. 99, 1872 WL 3738 at *1.

destroyed to prevent the enemy, rather than one's own soldiers, from getting to the liquor supply.

In February 1862, citizens of Clarksville, Tennessee, convened a meeting to see what they could do to protect themselves in anticipation of an immediate invasion by the Union Army.⁴⁰⁵ The citizens believed they needed to act on their own based on public necessity inasmuch as the municipal government had collapsed.⁴⁰⁶ Fort Donelson, only thirty miles away, had capitulated to the Federal forces.⁴⁰⁷ At the time there was a large quantity of whiskey and other liquor in the hands of merchants and dealers in Clarksville, and the people feared that if it should fall into the hands of the Federal soldiers, "then flushed with victory and inflamed with the evil passions of civil war," their lives would be in peril.⁴⁰⁸

The choice of evils was either to destroy the liquor supply or to allow the soldiers to find it, with the likely outcome that they would get intoxicated and excessively rowdy. The people thus decided to destroy the liquor stocks, and to levy a special tax in order to raise a fund to reimburse those whose property was thus destroyed.⁴⁰⁹ Later, one merchant (apparently who had not been reimbursed) sued some of the citizens who participated in the destruction of the liquor, to recover damages.⁴¹⁰ Apparently the other merchants filed separate lawsuits.⁴¹¹

The judge instructed the jury as follows:

If it appears the destruction of the whiskey was done under the belief that it was necessary to the safety of the public, that is a question resting with you from the proof. Whether that the danger was imminent and impending, or that the citizens had reasonable grounds to believe that the destruction of the property was necessary for the public safety, to ascertain that you will look to the proof. In arriving at your conclusion on this point you will look to the state and condition of the country, the fall of fort Donelson, the advance of the hostile forces, the nature of the property destroyed, its effects upon men, and the consequences that might result from permitting it to fall into the hands of hostile forces. . . . [I]f you

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. *See id.* at *2. It was noted in the appeal that the trial judge had been present at the citizens' meeting but took no part in the debates, and refused to disqualify himself from presiding in the trial. *Id.*

are satisfied that the danger was imminent and impending, and the destruction of the property a public necessity for the safety of the public, then the defendants were justified in its destruction. . . . It must not be imaginary, but real danger to the public, as stated.⁴¹²

The jury found in favor of the defendants, based on public necessity.⁴¹³ No damages were awarded for the loss of property.⁴¹⁴ The appellate court upheld the verdict and pronounced that the right to destroy property in cases of extreme emergency may be exercised by individuals in any proper case, free from all liability for the value of the property destroyed.⁴¹⁵ The court noted that the usual cases of public necessity are “to prevent the spread of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity.”⁴¹⁶ The court reasoned that the advance of a hostile army is “among the exigencies when such a necessity might exist to justify the destruction of private property.”⁴¹⁷

Another case of military necessity in which an aggrieved landowner was denied compensation involved the following facts: During the invasion of the British in 1814-15, in order to prevent the British troops from bringing up munitions to the city of New Orleans, a commanding officer caused a levee to be cut through, and this in turn inundated the plantation of a citizen. The inundation remained until the departure of the invading army, and caused destruction of crops and expenses on the claimant’s part to repair the levee. The losses were denied on the grounds that they were sustained in the necessary operations of war, for which the United States was not liable.⁴¹⁸

*United States v. Pacific Railroad Co.*⁴¹⁹ was another case in which a claimant was denied compensation for property that was destroyed due to military necessity. In this case, Union Army forces during the Civil War destroyed bridges of a railroad company as they retreated, in order to impede the advance of the Confederate Army.⁴²⁰ The railroad sued the government for damages.⁴²¹ The Supreme Court held that this act did not

412. *Id.*

413. *Id.* at *1.

414. *Id.*

415. *Id.* at *6.

416. *Id.*

417. *Id.*

418. *United States v. Pac. R.R. Co.*, 120 U.S. 227, 236 (1881) (citing AMERICAN STATE PAPERS, Class XIV, Claims, 835 (1822); 38 ANNALS OF CONG. 311 (1822)).

419. 120 U.S. 227 (1887).

420. *Pac. R.R.*, 120 U.S. at 229.

421. *Id.* at 228.

constitute a compensable taking by the United States under the Fifth Amendment:

The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss.⁴²²

The Court added:

The principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the government is not responsible, is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been . . . “a matter of bounty rather than of strict legal right.”⁴²³

The Court distinguished situations involving the *destruction* of property during battle and supportive maneuvers due to military necessity, and the *appropriation* of property for the use by the military,

where property of loyal citizens is taken for the service of our armies, such as vessels, steam-boats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause.⁴²⁴

422. *Id.* at 234.

423. *Id.* at 239.

424. *Id.*

Where, as pointed out above, the Government should pay compensation for the appropriation of property for the service of the military, the compensation is apparently not based on the Takings Clause but on the principle of implied promise in contract law. This principle was set forth in an 1871 Supreme Court case, *United States v. Russell*.⁴²⁵ The case involved the seizure, pursuant to military order, of three steamboats owned by Russell, by the Union Army during the Civil War.⁴²⁶ The boats were used to carry government freight in furtherance of the war effort.⁴²⁷ Following this service, the vessels were returned to the owner.⁴²⁸ The owner sued the government for compensation for the use of his steamboats.⁴²⁹ The Supreme Court said that clearly the emergency was such that officers were justified in ordering the steamboats into the service of the United States, due to “imperative military necessity.”⁴³⁰

Extraordinary and unforeseen occasions arise . . . beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner.⁴³¹

The Court added:

Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.⁴³²

425. 80 U.S. 623 (1871).

426. *Russell*, 80 U.S. at 624.

427. *Id.* at 625.

428. *Id.* at 626.

429. *Id.*

430. *Id.* at 629.

431. *Id.* at 627.

432. *Id.* at 629.

Thus, the Court ordered that damages be paid to reimburse the owner for the use of the steamboats, for his own services and expenses in navigating them, and for the crews provided in transporting government freight.⁴³³ The Court based its decision not on the Takings Clause of the Fifth Amendment, but on the theory of *implied promise* on the part of the United States to pay a reasonable compensation for the services rendered.⁴³⁴

Another case involving the destruction of property due to military necessity was *Juragua Iron Co. v. United States*,⁴³⁵ in which the Supreme Court denied recovery to the American owners of a factory that had been destroyed by American soldiers in Cuba because it was thought that the structure housed the germs of a contagious disease.⁴³⁶ United States troops, during the war with Spain in 1898, were engaged in military operations in Cuba, and sought to prevent the spread of yellow fever, which threatened the lives of United States troops, by destroying all buildings which might contain the fever germs.⁴³⁷ Various structures owned by the claimant, who owned an iron works facility and numerous dwellings occupied by its employees, were destroyed by order to the commanding officer by the advice of his medical staff.⁴³⁸ The Court held that the destruction of the property was a necessity of war, required for the health and safety of the troops at that location, and did not give rise to a legal right of compensation.⁴³⁹

The Court mentioned that its ruling applied despite the fact that the property appropriated for military use was owned by an American citizen, and that the case was governed by the general rule that property found in enemy territory is enemy property regardless of the status of the owner.⁴⁴⁰ The Court of Claims, which initially decided the *Juragua* case, stated in its opinion:

The law seems to be well settled that when a citizen of one belligerent country is doing business in the other belligerent country, and has built up and purchased property there which has a

433. *Id.* at 630.

434. *Id.* “[I]t is quite clear that the obligation in this case to reimburse the owner of the steamboats was of a character to raise an implied promise on the part of the United States to pay a reasonable compensation for the service rendered . . .” *Id.*

435. 212 U.S. 297 (1909).

436. *Juragua Iron Co.*, 212 U.S. at 301.

437. *Id.*

438. *Id.*

439. *Id.* at 311.

440. *Id.* at 306.

permanent situs, such property is subject to the same treatment as property of the enemy.⁴⁴¹

The Supreme Court emphatically affirmed that idea:

The plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted; indeed, subject under the laws of war to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy.⁴⁴²

We might observe that this case seems to depart from the *Mostyn* case, mentioned above, in which Captain Gambier had to pay damages to a claimant for the destruction of a house in which liquor was served to the troops. In both the *Mostyn* case and the *Juragua Iron* case, the destruction of property was accomplished for the health and welfare of the troops.

In *Aris Gloves, Inc. v. United States*,⁴⁴³ an American corporation owning three glove manufacturing plants liberated by the U.S. Army in East Germany, sued in the Court of Claims for compensation after the Government handed over the plants to Russia and Czechoslovakia as part of an agreement for the division of German territory in August, 1945.⁴⁴⁴ The properties were seized by the Germans on the ground that they were United States enemy property.⁴⁴⁵ "Toward the end of the war, . . . the territory in which plaintiff's three plants were located was liberated from German occupation" and came under the authority of the United States Military Command.⁴⁴⁶ Thereafter, the area encompassing one of plaintiff's plants was incorporated into the Russian zone of occupation, and under the Potsdam Agreement Russia was authorized to dismantle and remove all industrial equipment therein.⁴⁴⁷ The two other plants of the plaintiff, located in Czechoslovakia, came under control of Czechoslovakia and when a Communist regime took control of the government, these two plants were nationalized.⁴⁴⁸ Thus, all three of plaintiff's manufacturing plants were

441. *Juragua Iron Co. v. United States*, 42 Ct. Cl. 99, 1907 WL 886, at *9 (Jan. 28, 1907).

442. *Juragua Iron Co.*, 212 U.S. at 306.

443. 420 F.2d 1386 (Ct. Cl. 1970).

444. *Aris Gloves*, 420 F.2d at 1387-88.

445. *Id.* at 1388.

446. *Id.*

447. *Id.*

448. *Id.*

confiscated and transferred away by the United States as a kind of war booty, “but without the payment of any compensation by any of the three countries involved (Germany, Russia, or Czechoslovakia).”⁴⁴⁹

The plaintiff contended that the above set of circumstances amounted to taking of its property by the Government without just compensation.⁴⁵⁰ It was plaintiff’s position that the Government “should be obliged to compensate it for its losses since defendant failed to protect its property interests, and since defendant even went to the point of actually authorizing a third party to take control of plaintiff’s property without first requiring just compensation.”⁴⁵¹

The Court of Claims agreed that the Government by its action deprived the plaintiff of its interest in the property, and enabled Russia and Czechoslovakia to obtain the use or benefit of the property, but nonetheless the plaintiff was not entitled to recover either under the Fifth Amendment or on the basis of an implied contract.⁴⁵² The main basis for denial of the claim was the general rule “that all property located in enemy territory, regardless of ownership, is in time of war regarded as enemy property subject to the laws of war.”⁴⁵³ At the time of the taking, the United States was engaged in a war. Therefore, the question must be governed by those cases which deal with wartime appropriations of private property.

The court relied heavily on *Juragua Iron Co. v. United States*, which we discussed above.⁴⁵⁴ The court stated:

It should be noted further that the Court of Claims in deciding *Juragua* even went to the point of ruling that if the plaintiff’s property was not considered as “enemy property,” there would still be no means of recovery for the plaintiff since the destruction was justified by the necessity of carrying on military operations.⁴⁵⁵

The court further stated that “we feel that certain governmental actions which might appear to be a taking should not be so labeled when they are the result of a wartime situation.”⁴⁵⁶ As a separate issue, the court said that the action was proper even though the war was over.⁴⁵⁷ According to the

449. *Id.*

450. *Id.* at 1390.

451. *Id.*

452. *Id.* at 1394.

453. *Id.* at 1391 (citing *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909); *Young v. United States*, 97 U.S. 39 (1877); *Lamar v. Browne*, 92 U.S. 187 (1875)).

454. *See id.* at 1391-92.

455. *Id.* at 1392.

456. *Id.*

457. *Id.*

court, "The war power continues past the end of hostilities and into that period during which the evils which gave rise to the hostilities are sought to be remedies."⁴⁵⁸

Another case from World War II, *Franco-Italian Packing Co. v. United States*,⁴⁵⁹ involved a claim by fishermen who were prevented from carrying on their normal fishing operations.⁴⁶⁰ A fish catching and processing business sued for losses resulting when naval officers ordered two of plaintiff's fishing vessels seized and ordered into port at Balboa.⁴⁶¹ The issue considered by the Court of Claims was whether the actions of U.S. naval officers in preventing plaintiff's ships from continuing fishing operations amounted to an appropriation of the ships to which they were entitled to compensation under the Takings Clause of the Fifth Amendment.⁴⁶²

Immediately after Pearl Harbor, on December 7, 1941, military and naval commanders charged with the defense of the Panama Canal believed that the next Japanese attack would be on the Panama Canal.⁴⁶³ They decided to secure the western approaches to the Panama Canal to better detect the presence of any unknown or unidentified, and presumably hostile, forces in the region.⁴⁶⁴

The military command in the region intercepted radio messages from tuna clippers, including those of plaintiff, and the messages were transmitted in secret code.⁴⁶⁵ It was known that companion fishing vessels would signal each other when large schools of tuna were located, and the use of coded messages was to prevent competitive vessels from coming into the location.⁴⁶⁶ Commanders were further aware that some Japanese nationals were serving on the crews of tuna vessels.⁴⁶⁷ They therefore regarded the fishing vessels with suspicion.⁴⁶⁸ They believed that Americans among the fishing crews might be captured and coerced into providing military information to the enemy, and that fishing vessels might be seized by the Japanese naval authorities.⁴⁶⁹ They thus concluded that the fishing

458. *Id.*

459. 128 F. Supp. 408 (Ct. Cl. 1955).

460. *Franco-Italian Packing Co.*, 128 F. Supp. at 409-10.

461. *Id.* at 410.

462. *Id.* at 413.

463. *Id.* at 410.

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

vessels in the area constituted a serious threat to the security of the Panama Canal.⁴⁷⁰

Naval officials issued orders to regard fishing vessels and similar craft in offshore water with suspicion, and to search, sink or seize them, as justified.⁴⁷¹ In addition, it was ordered that all fishing operations in the western approaches to the Panama Canal be terminated, and that all fishing vessels that remained there be seized and escorted into the Balboa, the closest American port, to be inspected and searched and to have their crews interrogated.⁴⁷² It was deemed impractical to engage in a less severe course, such as simply searching the vessels at sea and interviewing the crews.⁴⁷³ This could subject the naval ships to attack by Japanese submarines while they lay at rest in the waters during such searches.⁴⁷⁴ On December 20, 1941, after the fishing vessels were brought into Balboa, orders were given to the captains of the vessels, including the two owned by the plaintiff, to leave Balboa Harbor and embark to San Pedro, California.⁴⁷⁵

The plaintiff sued for damages resulting from its inability to use its vessels for fishing purposes.⁴⁷⁶ The claim was also made for the value of fish and other property that were destroyed or jettisoned as a result of the termination of its fishing operations, and other damages.⁴⁷⁷

The Court of Claims concluded: “The exercise of [the Government’s] regulatory and police powers, war powers or emergency powers in cases of imminent peril to the general welfare do not fall within the fifth amendment limitation, although taking of private property often resulted.”⁴⁷⁸ The court made clear a distinction between an exercise of the eminent domain power, which would require compensation under the Fifth Amendment, and an exercise of the police power, which does not require compensation.⁴⁷⁹ Accordingly, a compensable taking occurs when “a property interest is taken from the owner and applied to the public use because the use of such property is beneficial to the public,” while in contrast, “in the exercise of the police power, the owner’s property interest is restricted or infringed

470. *Id.*

471. *Id.*

472. *Id.* at 410-11.

473. *Id.* at 410.

474. *Id.*

475. *Id.* at 412-13.

476. *Id.* at 408.

477. *Id.*

478. *Id.* at 413-14 (citing *Miller v. United States*, 78 U.S. 268, 305 (1870)).

479. *Id.* at 419.

upon because his continued use of the property is or would otherwise be injurious to the public welfare.”⁴⁸⁰

In this case, the ships were not seized or ordered into port for use by the United States, “but the action was taken entirely as a defensive measure” to defend western approaches to the Panama Canal from enemy attack.⁴⁸¹ The action was justified because of the sneak attack on Pearl Harbor plus the interception of coded messages from the fishing fleet that could have been a threat.⁴⁸²

The court underscored that the action in this case involved necessary military measures.⁴⁸³ The actions of the naval officers in interrupting the fishing operations were “clearly emergency actions demanded by the circumstances taken in the national defense, and were completely unrelated to a direct appropriation of plaintiff’s property for public use.”⁴⁸⁴ The court noted that none of the property lost by the plaintiff was physically taken by naval officers. The loss of fishing profits was an incidence of the naval action.⁴⁸⁵ The accidental spoilage of fish and destruction of bait were all consequential results of the naval actions, but was not a taking that would be compensable under the Fifth Amendment.⁴⁸⁶ The court relied in part on the *Pacific Railroad* case which was discussed above, for the proposition that the government was immune from liability for confiscation of private property taken and destroyed, where the action was to prevent the property from falling into enemy hands, or to protect the health of troops, or as an incidental element of defense against hostile attack.⁴⁸⁷

In *Hamilton v. Kentucky Distilleries Co.*,⁴⁸⁸ the Supreme Court construed the War-Time Prohibition Act,⁴⁸⁹ passed on November 11, 1918, which prohibited the sale of distilled spirits for beverage purposes until such time as the President issues a proclamation indicating the termination of demobilization of forces in Germany.⁴⁹⁰ The purpose of the Act was to conserve manpower of the nation and to increase efficiency in the production of arms, munitions, ships, food and clothing for the armed forces. The

480. *Id.* at 414.

481. *Id.*

482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.* (citing *United States v. Pacific Railroad*, 120 U.S. 227, 239 (1887)).

488. 251 U.S. 146 (1919).

489. War Time Prohibition Act, ch. 212, 40 Stat. 1045, 1046 (1918).

490. *Hamilton*, 251 U.S. at 153.

Kentucky Distilleries and another company sued to have the Act declared unconstitutional.⁴⁹¹ The Supreme Court considered several issues.

First, the Court considered whether the Act was void because it takes private property for public purposes without compensation, in violation of the Takings Clause of the Fifth Amendment.⁴⁹² It was argued that Congress, under the war powers granted to it, might temporarily regulate the sale of liquor, and even forbid the sale of liquor in order to guard and promote the efficiency of the war effort, but not without making compensation.⁴⁹³ The Court concluded that “[t]here was no appropriation of the liquor for public purposes.”⁴⁹⁴ The Act simply fixed a period of seven months and nine days from its passage during which those engaged in the business might dispose of stocks on hand free from any restrictions, following which the restrictions took effect.⁴⁹⁵ The Court said this was a reasonable period during which merchants might freely dispose of their stocks of distilled spirits.⁴⁹⁶

Second, the petitioners also argued that even though the President had not issued a proclamation announcing the completion of demobilization of forces, the Act had ceased to be valid because in fact the war was over. The Court replied:

In view of facts of public knowledge . . . that the treaty of peace has not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it can not even be said that the man power of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid.⁴⁹⁷

*Youngstown Sheet & Tube Co. v. Sawyer*⁴⁹⁸ is one of the most famous cases that pertains to the Korean War.⁴⁹⁹ In 1951, a dispute between steel companies and their employees over new collective bargaining agreements threatened to result in a stoppage of steel production.⁵⁰⁰ To avert a nationwide strike, President Harry S. Truman, believing he had inherent

491. *Id.*

492. *Id.* at 154-55.

493. *Id.* at 155.

494. *Id.* at 157.

495. *Id.*

496. *Id.*

497. *Id.*

498. 343 U.S. 579 (1952).

499. *Youngstown*, 343 U.S. at 590.

500. *Id.* at 582-83.

powers as President to seize most of the nation's steel mills to prevent labor disputes from stopping steel production, and to thereby avert a national catastrophe, issued an executive order directing the Secretary of Commerce to take possession of and operate most of the nation's steel mills.⁵⁰¹ The order contained a finding that the President's action was necessary to avoid a national catastrophe, because a work stoppage would immediately imperil the national defense, and steel production was indispensable to all weapons and other materials in the nation's war effort in Korea.⁵⁰² The Secretary in turn directed the presidents of the various seized companies to serve as operating managers for the United States.⁵⁰³ They were directed to carry on their activities in accordance with regulations and directions of the Secretary.⁵⁰⁴

The steel companies sued to challenge the validity of the seizure as not authorized by an act of Congress or any constitutional provisions.⁵⁰⁵ The District Court granted a preliminary injunction restraining the Secretary from continuing the seizure and possession of the plants and from acting under the executive order.⁵⁰⁶

The Supreme Court affirmed. The Court stated, "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself[,]" that Congress had not authorized the seizure,⁵⁰⁷ and that the President has no constitutional authority under the circumstances to seize private property for national defense even though an emergency existed.⁵⁰⁸ The Court suggested that Congress, not the President, has authority to condemn a "plant, factory, or industry in order to promote industrial peace."⁵⁰⁹ Thus, the Court held that the President, as Commander-in-Chief, has no ultimate power to take possession of private property in order to keep labor disputes from disrupting production of steel needed for prosecuting a war; rather, this is a function for the Congress.⁵¹⁰

The Court noted that Congress had explicitly rejected granting authority to the President to seize plants in order to deal with labor disputes when it enacted the Labor Management Relations Act of 1947 (the Taft-

501. *Id.* at 583.

502. *Id.* at 582-83.

503. *Id.* at 583.

504. *Id.*

505. *Id.* at 584.

506. *Id.*

507. *Id.* at 585.

508. *Id.* at 587-89.

509. *Id.* at 631.

510. *Id.* at 587.

Hartley Act).⁵¹¹ In a concurring opinion, Justice Clark pointed out that, instead of seizing the companies, the President could have sought injunctive relief under that Act for an eighty-day period against a work stoppage if, in his opinion, “a threatened or actual strike affecting an entire industry will, if permitted to occur or to continue, imperil the national health or safety.”⁵¹² In the event a strike is not settled within the eighty-day injunction period, the Act directs the President to submit to Congress “a full and comprehensive report. . . together with such recommendations as he may see fit to make for consideration and appropriate action.”⁵¹³ Congress, in turn, would have the opportunity “to determine whether special legislation should be enacted to meet the emergency at hand.”⁵¹⁴ Congress had authorized a procedure which the President declined to follow.⁵¹⁵ Thus, the President had a reasonable, legal way out of the emergency other than taking the unilateral action he did.

A principal concern of the steel companies was that even if the properties were *unlawfully* taken by government officials for public use, they might be denied compensation for any damages which they would suffer.⁵¹⁶ They would be denied compensation because prior decisions of the Supreme Court had cast doubt on the right to recover in the Court of Claims for properties unlawfully taken by government officials for public use.⁵¹⁷ In addition, the companies were concerned that the seizure “of these going businesses were bound to result in many present and future damages of such a nature as to be difficult, if not incapable, of measurement.”⁵¹⁸

*American Manufacturers Mutual Insurance Co. v. United States*⁵¹⁹ also involved the destruction of property occasioned by military necessity.⁵²⁰ The owners of a ship, the *S.S. Santo Domingo*, sued its insurance company to recover for the loss of the ship.⁵²¹ “The ship was seized by rebels while

511. *Id.* at 601-02 (Frankfurter, J., concurring).

512. *Id.* at 663 (Clark, J., concurring) (quoting Taft-Hartley Act, 29 U.S.C. § 176).

513. *Id.* (quoting Taft-Hartley Act, 29 U.S.C. § 176).

514. *Id.*

515. *See id.* (“The Selective Service Act of 1948 gives the President specific authority to seize plants which fail to produce goods.”).

516. *Id.* at 585.

517. *Id.* It seems that the steel companies’ concern here was misplaced. The two cases they cited were *Hooe v. United States*, 218 U.S. 322 (1910) (denying a claim for rent from the Government above and beyond what the Congress had appropriated); and *United States v. North American Co.*, 253 U.S. 330 (1920) (allowing a claim for compensation under theory of implied promise, after the Secretary of War appropriated claimant’s land to provide quarters for troops, but denying interest as not authorized by statute).

518. *Id.*

519. 453 F.2d 1380 (Ct. Cl. 1972).

520. *Am. Mfr. Mut. Ins. Co.*, 453 F.2d at 1381.

521. *Id.* at 1380.

in port in the City of Santo Domingo in the Dominican Republic” in 1965.⁵²² Thereafter, rebels directed small arms and automatic weapon fire against soldiers of the United States Army who were occupying parts of the city to protect United States citizens.⁵²³ “The U.S. army returned the fire and sank the ship.”⁵²⁴

The insurance company defended the suit by claiming that the policy contained an exclusion of claims arising from certain acts of the United States Government, “to wit: capture, seizure, arrest, restraint, detainment, preemption, confiscation, or requisition.”⁵²⁵ The District Court held against the insurance company, finding that none of these situations existed.⁵²⁶ The company in turn settled the claim by paying the ship owners \$800,000.⁵²⁷

Thereafter the insurance company filed suit against the United States for subrogation of the insurance payment, claiming “that the sinking of the ship was the taking of private property for public use by the United States without just compensation. The court held that there was no taking of the ship by the United States either for public use or otherwise.”⁵²⁸

Certainly, if the government had intended to use the ship, it would not have sunk it. Also, even if it could be argued that there was a taking because of the destruction of the vessel, it was a noncompensable taking. It is clear that the ship was destroyed in connection with the carrying on of military operations of the United States Army for the protection of its citizens in what amounted to a civil war. . . . In other words, the vessel was destroyed as a part of the fortunes of war and by actual and necessary military operations in attacking and defending against enemy forces.⁵²⁹

National Board of YMCAs v. United States,⁵³⁰ involved a “suit against the United States for damages done by rioters to buildings occupied by United States troops during the riots in Panama on January [9,] 1964.”⁵³¹ The riots started when an unruly mob of 1500 people marched into the Panama Canal Administration Building and raised a Panamanian flag.⁵³²

522. *Id.*

523. *Id.*

524. *Id.*

525. *Id.* at 1380-81.

526. *Id.* at 1381.

527. *Id.*

528. *Id.*

529. *Id.* (citation omitted).

530. 395 U.S. 85 (1969).

531. *Nat'l Bd. of YMCAs*, 395 U.S. at 86.

532. *Id.* at 87.

The petitioner owned two buildings nearby, the YMCA Building and the Masonic Temple, which were situated next to each other.⁵³³ Members of the mob proceeded to the buildings owned by the petitioner, entered them, began looting and wrecking the interiors, and started a fire in the YMCA Building.

U.S. Army troops entered the buildings and ejected the rioters. “The mob [then proceeded] to assault the soldiers with rocks, bricks, plate glass, Molotov cocktails, and intermittent sniper fire. The troops moved inside the buildings to protect themselves. The buildings remained under siege throughout the night.”⁵³⁴ The next morning the YMCA was set afire from a barrage of Molotov cocktails.⁵³⁵ The troops withdrew to the parking lot, and then sought protection from the mob in the Masonic Temple.⁵³⁶ The mob exerted extensive fire-bomb activity against that structure as well.⁵³⁷ “On January 13, the mob dispersed.”⁵³⁸ There was extensive damage to the YMCA building, and considerable damage to the Masonic building.⁵³⁹

The troops had entered the petitioner’s buildings in order to protect the buildings under attack.⁵⁴⁰ They expelled the rioters from the buildings, but they also were forced to retreat into the buildings.⁵⁴¹ The Court articulated a “particular intended beneficiary” test for determining whether compensation was owed under the Fifth Amendment.⁵⁴² Under the test, when a “private party is the particular intended beneficiary of the governmental activity, fairness and justice do not require that losses which may result from that activity be borne by the public as a whole, even though the activity may also be intended incidentally to benefit the public.”⁵⁴³

According to the Court:

fairness and justice do not require that losses which may result from that activity be borne by the public as a whole, even though the activity may also be intended incidentally to benefit the public. . . . Were it otherwise, governmental bodies would be liable under the Just Compensation Clause to property owners

533. *Id.*

534. *Id.*

535. *Id.*

536. *Id.* at 87-88.

537. *Id.* at 88.

538. *Id.*

539. *Id.*

540. *Id.* at 90.

541. *Id.*

542. *Id.* at 92.

543. *Id.* (internal quotation marks omitted).

every time policemen break down the doors of buildings to foil burglars thought to be inside.⁵⁴⁴

The Court added:

The Constitution does not require compensation every time violence aimed against government officers damages private property. Certainly, the Just Compensation Clause could not successfully be invoked in a situation where a rock hurled at a policeman walking his beat happens to damage private property. Similarly, in the instant case, we conclude that the temporary, unplanned occupation of petitioners' buildings in the course of battle does not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment.⁵⁴⁵

In a concurring opinion, Justice Stewart seemed to affirm the general principle that the government ordinarily pays for private property used to shelter its officials:

If United States military forces should use a building for their own purposes—as a defense bastion or command post, for example—it seems to me this would be a Fifth Amendment taking, even though the owner himself were not actually deprived of any personal use of the building. Since I do not understand the Court to hold otherwise, I join its judgment and opinion.⁵⁴⁶

Here, the suggestion is that if soldiers use someone's property to seek shelter or as a defensive position, compensation for the taking would be required. This is the same principle as in the *Russell* case, above, involving the appropriation of steamboats to transport military freight.

Justices Black and Douglas dissented in the *YMCA* case, arguing that the troops indeed moved into these buildings to protect themselves while carrying out the mission of safeguarding the entire zone from the rioters.⁵⁴⁷ The Army used the buildings as a shelter and fortress, rather than to protect the buildings for the good of the owners.⁵⁴⁸ The occupation of the buildings was for the general benefit of the public, that is, for the purpose of protecting the troops in its effort to thwart the rioters.⁵⁴⁹ Thus, according to the dissent, the Government rather than the individual should bear the loss.⁵⁵⁰

544. *Id.* (internal quotation marks omitted).

545. *Id.* at 93.

546. *Id.* at 94 (Stewart, J., concurring).

547. *Id.* at 99 (Black, J., dissenting).

548. *Id.*

549. *Id.*

550. *Id.*

The implication of the ruling is that damage resulting from police activity constitutes a compensable taking when the particular intended beneficiary of the action is the public as a whole.

A final case in this section, *Westminster Investing Corp. v. G. C. Murphy Co.*,⁵⁵¹ while not involving military action, involved destruction of property during riots that followed the assassination of Dr. Martin Luther King, Jr., in April, 1968. Property owned by Westminster Investing Corporation was destroyed.⁵⁵² The company sued Murphy, which held a lease on the property, and Murphy in turn impleaded the District of Columbia, alleging it was liable for negligence and abandonment of duty in failing to train its police properly in riot-control methods, and also in failing to provide adequate protection during the riots.⁵⁵³ Liability was alleged to be “based on the duty of the District of Columbia to protect life and property during riots.”⁵⁵⁴

The court affirmed the district court’s granting of a motion to dismiss the complaints.⁵⁵⁵ The court stated that it is the “unvarying” rule that “in the absence of legislation, municipalities and other governmental bodies are not pecuniarily liable for destruction and injury [occasioned by] rioting mobs.”⁵⁵⁶ “No reported case holds a governmental body liable in these circumstances, or indicates that there could be liability without a statute or ordinance. All the statements by courts are the other way.”⁵⁵⁷ The court noted the problems that might be occasioned even if municipal law authorized the imposition of liability:

Shall responsibility be imposed without fault on the part of the governmental entity or only if fault is proved, and if the latter what extent of fault should be enough? If some sort of culpability is made a prerequisite, should there be an exception for high-level “discretionary” determinations? Or is it preferable, on the whole, to adopt a scheme of participatory insurance? Shall there be recovery for personal injury as well as for property loss? With respect to property damages, what elements should be included—merely the actual value of lost or destroyed physical property, or also lost profits, or business opportunities, and other intangible losses? Is there to be a top limit on awards, either a flat monetary

551. 434 F.2d 521 (D.C. Cir. 1970).

552. *Westminster Investing*, 434 F.2d at 522.

553. *Id.*

554. *Id.*

555. *Id.* at 526.

556. *Id.* at 523.

557. *Id.*

sum or a percentage figure? Can adequate financial resources for the payments be made available? Shall coverage be extended to the victim alone or may his insurer stand in his shoes? Shall the compensation plan be executed through an administrative mechanism or shall the courts be used?⁵⁵⁸

The court quoted Justice Harlan in the *YMCA* case:

[O]ur decision today does not in any way suggest that the victims of civil disturbances are undeserving of relief. But it is for the Congress (or other legislative body), not this Court, to decide the extent to which those injured in the riot should be compensated, regardless of the extent to which the police or military attempted to protect the particular property which each individual owns.⁵⁵⁹

The *Westminster* case also involved a cause of action for “intentional abandonment” of duties owed by the municipality to prevent and suppress rioting.⁵⁶⁰ This cause of action alleged damages based on a

deliberate refusal to [deploy] available police [to] the claimant’s [neighborhood,] the allocation of available police resources to [other] areas[,] an administrative decision not to use police at a certain location because of danger to them or the likelihood of increasing or extending the violence[,] . . . and an administrative determination that to permit the use of guns would result in too many deaths or injuries to rioters.⁵⁶¹

The court concluded, however, that the claim of “intentional abandonment” was, as with the other causes of action sounding in negligence, not appropriate for the court to resolve without guidance or instruction from legislation on the subject.⁵⁶²

D. PUBLIC NECESSITY IN DESTROYING PROPERTY BY CIVIL AUTHORITIES OR PRIVATE PARTIES

In this section, cases will be discussed in which individuals have sought compensation for damage or destruction of private property justified by public necessity. These are situations involving the police power exercised by the authorities or, in the absence of authorities, by private individuals. First, situations in which private property has been destroyed to

558. *Id.* at 523-24.

559. *Id.* at 525 (quoting Nat’l Bd. of Young Men’s Christian Ass’ns v. United States, 395 U.S. 85, 96 (1969) (Harlan, J., concurring)).

560. *Id.*

561. *Id.*

562. *Id.* at 526.

prevent the spread of a fire that threatens a community will be considered. Then other situations will be examined, such as the destruction of property to avert a flood or to prevent the spread of disease. Finally, situations in which private property has been damaged or destroyed by the police in the course of apprehending criminal suspects will be analyzed.

As will be seen, courts have almost never granted claims for compensation in the *proper* exercise of police power:

[I]n its legitimate exercise the police power often works not only damage to property, but destruction of property. Injury to property can, and often does, result from the demolition of buildings to prevent the spread of conflagration, from the abandonment of an existing highway, from the enforced necessity of improving property in particular ways to conform to police regulations and requirements. . . . And equally well settled and understood is the law that in the exercise of this same power property may in some and indeed in many instances be utterly destroyed. The destruction of buildings of diseased animals, of rotten fruit, of infected trees, are cases that at once come to mind as applicable to both personalty and realty.⁵⁶³

1. *Fire Cases*

An area of public necessity involves fire emergencies. It is clearly the right of the authorities as well as private individuals, when a fire threatens a whole community, to destroy property of a few to prevent the fire from spreading. To do otherwise is considered a “folly”:

We find, indeed, a memorable instance of folly recorded in the 3 *Vol. of Clarendon’s History*, where it is mentioned, that the *Lord Mayor of London*, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. [sic] belonging to the Lawyers of the Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.⁵⁶⁴

In *Surocco v. Geary*,⁵⁶⁵ plaintiffs sued for damages for the “blowing up with gunpowder, and [destruction of] their house and store, with goods

563. *Gray v. Reclamation Dist.* No. 1500, 163 P. 1024, 1031 (Cal. 1917).

564. *Respublica v. Sparhawk*, 1 U.S. 357, 363 (1788) (emphasis added).

565. 3 Cal. 69 (1853).

therein[.]”⁵⁶⁶ The defense argued that to prevent the spread of the fire from a public conflagration raging in the city of San Francisco, on Christmas Eve, 1849, it was necessary to blow up and thereby destroy plaintiffs’ house.⁵⁶⁷ The evidence showed that the fire was very close to the site of plaintiffs’ building and that its destruction was inevitable even if it had not been blown up.⁵⁶⁸ The court reiterated the common law view that such destruction, done for the public’s benefit, to prevent a fire from spreading over the whole town, is justified, and there is no liability for compensation.⁵⁶⁹

The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of a vessel; with the trespassing upon the lands of another, to escape death by an enemy. . . . A house on fire, or those in its immediate vicinity, which serve to communicate the flames, becomes a nuisance, which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience, and the interests of society. Were it otherwise, one stubborn person might involve a whole city in ruin, by refusing to allow the destruction of a building which would cut off the flames and check the progress of the fire, and that, too, when it was perfectly evident that his building must be consumed.⁵⁷⁰

Often enough, in cases of destruction of buildings based on public necessity to prevent the spread of fire, the structures were likely to have been destroyed anyway, but the necessitous action destroyed them sooner than otherwise might have been the case.⁵⁷¹ If the plaintiff can show that the destruction would not otherwise have occurred, or that the necessity of the destruction was not sufficiently imminent to justify the action taken, the plaintiff might win damages.⁵⁷²

566. *Surocco*, 3 Cal. at 70.

567. *Id.*

568. *Id.* at 74.

569. *Id.* at 71.

570. *Id.* at 73.

571. *Id.* at 74.

572. *Id.*

For example, *Bishop & Parsons v. Mayor of Macon*⁵⁷³ involved a fire that broke out in the city of Macon, Georgia in August 1844.⁵⁷⁴ The Mayor directed that plaintiff's building be blown up in order to arrest the spread of the fire.⁵⁷⁵ Plaintiff contended that this was done prematurely, and that plaintiff was thereby prevented from removing numerous goods, wares and merchandise from the building and saving them.⁵⁷⁶

To begin with, the court expressed the *erroneous* view that the aggrieved party is entitled to compensation under the Just Compensation Clause of the Fifth Amendment:

[I]t is now well settled, that in a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity, the private property of an individual may be *lawfully* taken, and used or destroyed for the relief, protection or safety of the many. And in all such cases—while the agents of the public who officiate are protected from individual liability, the sufferers are nevertheless entitled, under the Constitution, to just compensation from the public for the loss.⁵⁷⁷

This portion of the opinion is flatly at odds with the general principles of compensation that we discussed in Part B., that an aggrieved party is not entitled to compensation for damages occasioned by acts of public necessity.⁵⁷⁸

The court noted further that, where as a necessary result of the fire or other public calamity the property would have been destroyed in any event, the plaintiff would not be entitled to compensation for blowing up the building before the principal fire reached it.⁵⁷⁹ In this case, the fire would have destroyed plaintiff's building even if the actors had not ordered it destroyed before the fire came upon that location.⁵⁸⁰ However, the plaintiff sought to prove that the blowing up of the building was premature, that plaintiff and his servants and friends, who had been removing various goods from the building, were told to evacuate it because they were advised the building was going to be blown up right away.⁵⁸¹ However, in fact

573. 7 Ga. 200, 1849 WL 1663 (1849).

574. *Bishop*, 1849 WL 1663, at *1.

575. *Id.*

576. *Id.*

577. *Id.* at *3.

578. *Id.*

579. *Id.* at *1.

580. *Id.* at *3.

581. *Id.*

there was about an hour to spare until the fire would have reached the adjacent structure, so the plaintiff would have had sufficient time to remove valuable goods from the premises.⁵⁸² The imminence of the danger was remote enough that the action could well have been deferred, at least for up to an hour, and the plaintiff in turn could well have saved a significant portion of the property within the structure that got destroyed.⁵⁸³

The court remanded the case for a new trial so that the jury could consider the amount of damages for the loss of plaintiff's goods, according to proof.⁵⁸⁴ However, it appears clear that the plaintiff in this case would not be entitled to compensation for loss of the structure itself since in any case it would have been burned by the natural progression of the fire.⁵⁸⁵

In an unusual and bitterly contested fire case from England, a divided appeals court in *Cope v. Sharpe*,⁵⁸⁶ reversed the trial court and ordered judgment to be entered for the defendant based on the necessity doctrine.⁵⁸⁷ The plaintiff, the landowner, sued the defendant, who had hunting rights to plaintiff's property, alleging damages for trespass from a backfire that the defendant's gamekeeper started in April 1909.⁵⁸⁸ After a serious heath fire had erupted on plaintiff's property, about fifty men were engaged in trying to stop it.⁵⁸⁹ The gamekeeper started a backfire some distance away in an effort to prevent the main fire from spreading.⁵⁹⁰ Soon afterwards the main fire was extinguished.⁵⁹¹ Meanwhile, the backfire spread and caused damages to the plaintiff's lands.⁵⁹²

After three trials in which there were two mistrials, the jury returned a verdict finding gamekeeper's acts were not *in fact* necessary for the protection of the property.⁵⁹³ The jury determined that the fire would have been extinguished, and in fact had been extinguished, without the aid of the backfire which the defendant had created.⁵⁹⁴ Had the defendant not started the backfire, the main fire would have been extinguished by the men who

582. *Id.*

583. *Id.*

584. *Id.* at *4.

585. *Id.* at *3.

586. [1912] 1 K.B. 496.

587. *Cope*, 1 K.B. at 497.

588. *Id.* at 496.

589. *Id.* at 496-97.

590. *Id.* at 496.

591. *Id.*

592. *Id.*

593. *Id.* at 498.

594. *Id.*

were dousing it and, in the end, the defendant's backfire caused a net *increase* in damage.⁵⁹⁵

The jury also found that the defendant's acts, while not actually necessary, were nonetheless *reasonably* necessary in the circumstances, as suggested in the judge's instructions.⁵⁹⁶ That is, the jury found that the method adopted by the gamekeeper for the protection of the property was reasonably necessary under the circumstances.⁵⁹⁷ Nonetheless, the trial judge held that the method used by the defendant was not in fact necessary, and ruled in favor of damages for the plaintiff.⁵⁹⁸

The appellate court considered what standard should be applied in evaluating the defendant's gamekeeper's action in starting the backfire, where, as it turned out, it was not in fact necessary to avert a greater danger.⁵⁹⁹ The court held that the action in burning the backfire to prevent a larger fire from spreading was justified because it appeared *reasonably* necessary to protect the property from the threatened danger of the larger fire, even though it was not *in fact* necessary to avert the danger, since the main fire was soon afterwards extinguished.⁶⁰⁰

In the appellate decision, Lord Buckley stated:

[The jury] affirmed that there was a real and imminent danger against which it was necessary to provide, and by the word "reasonably" they affirmed that the acts which the defendant did were acts reasonably done to meet that real and imminent danger. . . . They found that the defendant's acts were not in fact (i.e., in the result), but were in reason, necessary.⁶⁰¹

Lord Buckley disagreed on the trial judge's standard and acknowledged that if there was a real and imminent danger, the defendant was entitled to act, and the test was "whether his acts were reasonably necessary in the sense of acts which a reasonable man would properly do to meet a real danger."⁶⁰²

In a separate concurring opinion, Lord Kennedy agreed with the reasonableness standard in evaluating the actor's appraisal of the necessity to start the backfire:

[T]ake the case of the jettison of cargo at sea. Could it properly be contended that the legal justification of the jettison depends upon

595. *Id.*

596. *Id.* at 496.

597. *Id.*

598. *Id.* at 497.

599. *Id.* at 500.

600. *Id.* at 502.

601. *Id.* at 504.

602. *Id.*

proof that in fact, as things have happened, it was *actually* necessary for the safety of the adventure, and that a jettison made reasonably in order to preserve the adventure from imminent peril of destruction in a gale must be held to be unjustifiable, if the owner of the goods jettisoned can prove that, after the jettison took place, a sudden fall of the wind or a sudden change in its direction removed the peril and that, therefore, the adventure would in fact have been preserved without the jettison? In my humble judgment, this question ought to be answered in the negative. . . .⁶⁰³

Thus, the court held first that the necessity defense applies if the danger to be averted exists *in fact*. Here, in fact, the heath fire was raging and imperiled the surrounding lands—so that, *in fact*, there was an imminent danger that required action.⁶⁰⁴ Second, the court held that the defendant’s action in averting the greater evil was reasonably necessary, and that the reasonableness of the action was sufficient to invoke the necessity doctrine, even though, in fact, the action turned out to be unnecessary.

The court suggested in dictum that had the defendant been merely a volunteer rather than a lessee, the court would “require very special circumstances to justify, on the ground of reasonable necessity, his forcible entry into the premises of another against the will of the owner, in order to help in extinguishing a fire.”⁶⁰⁵ This portion of the opinion appears to be unsound, and is not generally followed. As mentioned in the discussion of public necessity in section III.A, private individuals as well as public authorities are entitled to take reasonable action in the name of public necessity,⁶⁰⁶ including tearing down or destroying buildings.⁶⁰⁷

2. *Cases Involving Floods, Infectious Disease, and a Mad Dog*

In an 1881 case, *Newcomb v. Tisdale*,⁶⁰⁸ the Supreme Court of California considered the necessity defense in diverting flood waters. The defendants unlawfully cut a levee off the Sacramento River, causing water to flood and “inundate the lands of plaintiffs, and destroy” growing crops of

603. *Id.* at 507-08 (Kennedy, L.J.). In maritime law, it is well settled that there is a privilege to jettison cargo to save a vessel from destruction, and the loss is to be divided among the vessel and cargo whose safety has been secured by the action. Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personalty*, 39 HARV. L. REV. 307, 317 (1926).

604. *Cope*, 1 K.B. at 504.

605. *Id.* at 509.

606. *See* RESTATEMENT (SECOND) OF TORTS § 196 cmt. e (2007).

607. *See id.* § 196 cmt. f.

608. 62 Cal. 575 (1881).

grain.⁶⁰⁹ The plaintiffs sued for damages, and the defendants raised the defense that the levee was cut in order to save life and property.⁶¹⁰ The evidence indicated that at times the river reached excessive height and breaks over its banks, flooding property for miles in extent, endangering the lives of the defendants and others.⁶¹¹

The defendants argued that the river became full to its utmost capacity and that it was still rising, that natural outlets to ease the volume of water were obstructed, and that its condition was an imminent threat to human lives and property in the vicinity.⁶¹² The defendants, in order to prevent the public calamity, proceeded to remove the obstructions, and in consequence of their action, diverted the water, thereby causing other persons' lands to become flooded instead.⁶¹³

The trial judge refused to let the jury consider this defense.⁶¹⁴ On review, it was held that "such necessity existed" and therefore the case should have been submitted to the jury.⁶¹⁵ The appellate court suggested that if, on remand, the jury were to find that the action averted imminent peril to *lives* as well as property, the defendant would not be liable to pay compensation for damages. The majority decision seems consistent with the view in section 196 of the *Restatement* that in situations of *public necessity*, the aggrieved party may not be entitled to compensation for damages.⁶¹⁶

There was a dissent in *Newcomb*, in which the judge did not consider this a situation where life was in peril.⁶¹⁷ The defendants apparently had the time and opportunity to cross a turbulent river in a great flood and take the time to cut open the obstruction; they doubtless would have had time to remove their families from the area before the lands got inundated.⁶¹⁸ The dissent suggested that this was not an instance in which the actors sought to avert a greater evil, but rather a comparable evil was substituted for the one averted.⁶¹⁹ The flood waters were simply shifted from one group of landowners to another group.⁶²⁰

609. *Newcomb*, 62 Cal. at 576.

610. *Id.*

611. *Id.* at 576-77.

612. *Id.* at 577.

613. *Id.*

614. *Id.* at 576.

615. *Id.*

616. *Id.*; RESTATEMENT (SECOND) OF TORTS § 196 cmt. e (1956).

617. *Id.* at 579 (Myrick, J., dissenting).

618. *Id.*

619. *Id.*

620. *Id.* at 578.

The Supreme Court case of *Miller v. Schoene*⁶²¹ involved public necessity in destroying trees to prevent the spread of an infectious plant disease.⁶²² The facts of the case were as follows: “[A] state entomologist[] ordered the plaintiff[] to cut down a large number of ornamental red cedar trees growing on [plaintiff’s] property,” in order to prevent the trees from spreading an infectious plant disease to the apple orchards within two miles of the vicinity.⁶²³ The plant disease could be spread by spores from one plant to the other over a radius of at least two miles.⁶²⁴ The value of red cedar was small as compared with that of the apple orchards of Virginia.⁶²⁵ The damage to the plaintiff was about \$5000 to \$7000, while the damage to the apple orchards in the vicinity would have been somewhat greater, especially in view of the importance of the apple industry to the state’s economy. At the time of this case, apple growing was one of the principal agricultural pursuits in Virginia. According to the law under which the trees were ordered destroyed, the host trees of a communicable plant disease were deemed a public nuisance, subject to destruction. The law provided for procedures for a hearing on the determination of the state entomologist, and appellate review. The Court stated:

[T]he state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. . . . When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other.⁶²⁶

The Court added that Virginia did not have to compensate owners of cedar trees destroyed to save apple trees because where the public interest is concerned, it is one of the distinguishing characteristics of the police power to prefer the public interest over the property interest of the individual, “to

621. 276 U.S. 272 (1928).

622. *Miller*, 276 U.S. at 280.

623. *Id.* at 277.

624. *Id.* at 278.

625. *Id.* at 279.

626. *Id.*

the extent even of its destruction.”⁶²⁷ According to the Court, the choice of protecting the financial prosperity of the apple industry was motivated by considerations of social policy, it was not unreasonable, or “unavoidable,” and did not involve any denial of due process.⁶²⁸

In *Seavy v. Preble*,⁶²⁹ the Supreme Court of Maine considered what precautions could be taken to prevent the spread of smallpox or other contagious diseases. The plaintiff was a smallpox patient who sought damages against the defendants for trespass and removal of wallpaper in his home. The defendant was the city physician, and there were 107 cases of smallpox in the city that winter. He and other physicians testified that it was necessary “in order to cleanse a room in which small-pox patients have been confined to remove the paper from the walls.”⁶³⁰ Doctors and nurses testified that the wallpaper in the plaintiff’s room, particularly near his bed, was soiled and that the patient must have spit a good deal and that his saliva soiled the wallpaper.⁶³¹ The best medical advice at the time suggested the necessity of removing the paper and whitewashing the wall with quicklime.⁶³² The city physician ordered this in the rooms of other smallpox patients as well.⁶³³

The court stated that in order to prevent the spread of smallpox or other contagious diseases,

persons may be seized and restrained of their liberty or ordered to leave the state; private houses may be converted into hospitals and made subject to hospital regulations; buildings may be broken open and infected articles seized and destroyed, and many other things done which under ordinary circumstances would be considered a gross outrage upon the rights of persons and property. This is allowed upon the same principle that houses are allowed to be torn down to stop a conflagration. *Salus populi suprema lex*—the safety of the people is the supreme law—is the governing principle in such cases.⁶³⁴

The court added that in determining the extent of precautions to be taken, “[i]n all cases of doubt the safest course should be pursued remembering

627. *Id.* at 279-80.

628. *Id.* at 280.

629. 64 Me. 120, 1874 WL 3642 (1874).

630. *Seavy*, 64 Me. 120, 1874 WL 3642, at *2.

631. *Id.*

632. *Id.*

633. *Id.*

634. *Id.* at *1.

that it is infinitely better to do too much than run the risk of doing too little.”⁶³⁵

In *Putnam v. Payne*,⁶³⁶ the plaintiff brought an action for damages in connection with the killing of his dog.⁶³⁷ The dog was very vicious and had frequently attacked persons passing in the street.⁶³⁸ “The plaintiff below had frequently been [apprised] of the ferocious acts of his dog, and had been requested by [his] neighbors to kill or confine him. . . . The dog in question had been bitten, a few days [earlier,] by a mad dog[.]” which perhaps was rabid.⁶³⁹ Because of concerns in the village about mad dogs, an ordinance provided for restraining dogs, and it was “lawful for any person to kill any dog which should be found at large in the village.”⁶⁴⁰ The defendant, “in passing through the village, [saw] the plaintiff’s dog running loose and shot him dead.”⁶⁴¹ While the action was not taken by a government official, it was authorized under the local ordinance, and the court said that there would be no liability for damages.⁶⁴²

The court concluded that “the defendant was fully justified in killing the dog under the circumstances, upon common law principles” of necessity.⁶⁴³ The dog was a dangerous and unruly animal, and yet his owner permitted him to run at large.⁶⁴⁴ The public safety demanded that something be done.⁶⁴⁵ In addition, the dog had been bitten by a mad dog and may well have had a contagious disease that would further jeopardize the citizens.⁶⁴⁶

3. *Cases Involving Destruction or Harm to Property by Police in Apprehending Criminal Suspects*

Numerous state courts have refused to grant compensation when private property is damaged or destroyed as a result of police action in the course of apprehending criminal suspects.⁶⁴⁷ The reasoning is that the

635. *Id.*

636. 13 Johns. 312 (N.Y. Sup. 1816).

637. *Putnam*, 13 Johns. at 312.

638. *Id.*

639. *Id.*

640. *Id.*

641. *Id.*

642. *Id.*

643. *Id.*

644. *Id.*

645. *Id.*

646. *Id.*

647. *See, e.g.,* *Customer Co. v. City of Sacramento*, 895 P.2d 900, 923 (Cal. 1995), *cert. denied*, 516 U.S. 1116 (1996); *Patel v. United States*, 823 F. Supp. 696, 699 (N.D. Cal. 1993); *Bray v. Houston County*, 348 S.E.2d 709, 710-11 (Ga. Ct. App. 1986); *McCoy v. Sanders*, 148 S.E.2d 902, 906 (Ga. Ct. App. 1966); *Ind. State Police v. May*, 469 N.E.2d 1183, 1184 (Ind. Ct.

damage is not a taking, but rather a tort, and in turn the aggrieved party frequently cannot recover under a tort claim unless there is evidence of unreasonable governmental activity.⁶⁴⁸ Essentially, the courts find a “public necessity” exception to justify non-compensation,⁶⁴⁹ a position that, as mentioned in Section III.B., is affirmed by the *Restatement*.

Customer Co. v. City of Sacramento,⁶⁵⁰ involved the police’s use of tear gas to apprehend a criminal who had taken refuge in a liquor store. The owner of a convenience store sued under the state constitution’s “Just Compensation” clause to recover damage to his store and its contents caused when police acted to apprehend a suspect who had taken refuge in the building.⁶⁵¹ The damage occurred when police launched twelve or thirteen tear gas canisters into the building, causing property damage in excess of \$275,000, which included “nearly \$90,000 in contaminated inventory, approximately \$150,000 to dispose of this hazardous waste, and over \$18,000 to repair the building and fixtures.”⁶⁵² The California Supreme Court held, over a vigorous dissent, that the property of the store owner was not taken for a “public use,” but that the use benefited a particular individual.⁶⁵³

The court stated that “law enforcement officers must be permitted to respond to emergency situations that endanger public safety, unhampered by the specter of constitutionally mandated liability for [the] resulting damage to private property and by the ensuring potential for disciplinary action.”⁶⁵⁴ The court further stated that “it is a specific application of the general rule that damage to, or even destruction of, property pursuant to a valid exercise of the police power often requires no compensation under the just compensation clause.”⁶⁵⁵ According to the court, the plaintiff might have a remedy under the state’s Tort Claims Act, if negligence could be proven and certain immunity provisions did not apply to the police conduct, but not under the state’s “Just Compensation” clause.⁶⁵⁶

App. 1984); *Blackman v. City of Cincinnati*, 42 N.E.2d 158, 160 (Ohio 1942); *Sullivant v. City of Oklahoma City*, 940 P.2d 220, 227 (Okla. 1997).

648. *See, e.g., Customer Co.*, 895 P.2d at 901; *Ind. State Police*, 469 N.E.2d at 1184; *Sullivant*, 940 P.2d at 223.

649. *See generally*, Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 627, 653-57 (1988) (discussing cases where the Supreme Court found actions justified by emergency situations).

650. 895 P.2d 900 (Cal. 1995), *cert. denied*, 516 U.S. 1116 (1996).

651. *Customer Co.*, 895 P.2d at 901-04.

652. *Id.* at 904.

653. *Id.* at 923.

654. *Id.* at 910-11.

655. *Id.* at 909.

656. *Id.* at 915.

*Wegner v. Milwaukee Mut. Ins. Co.*⁶⁵⁷ involved a similar situation.⁶⁵⁸ A fleeing suspect took refuge in the plaintiff's residence.⁶⁵⁹ Police surrounded the house and, when the suspect ignored orders to surrender, fired tear gas and "flash-bang" grenades into the house.⁶⁶⁰ As a result, they captured the suspect, but caused damage to the plaintiff's home in the amount of \$71,000.⁶⁶¹

The Minnesota court seemed motivated by a sense of fundamental fairness, in refusing to allow the city to defend the claim based on public necessity:

We believe the better rule, in situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, is for the municipality to compensate the innocent party for the resulting damages. . . . At its most basic level, the issue is whether it is fair to allocate the entire risk of loss to an innocent homeowner for the good of the public. We do not believe the imposition of such a burden on the innocent citizens of this state would square with the underlying principles of our system of justice.⁶⁶²

*Wallace v. City of Atlantic City*⁶⁶³ involved damage to apartment doors caused by a police drug raid. The court held that the government should bear the costs because the damage was incurred for the benefit of the public.⁶⁶⁴ The court relied on the "intended beneficiary" test of the *YMCA* case, which was discussed in Section III.C., noting that in this case the "particular intended beneficiary was the public, rather than a private individual, [thus] compensation [is] warranted."⁶⁶⁵

In *Steele v. City of Houston*,⁶⁶⁶ escaped prisoners took refuge in plaintiff's house.⁶⁶⁷ In order to capture the escapees, police set fire to the house, destroying it and its contents. The Texas Supreme Court concluded that the residence was taken "for the public use . . . by proof that the City ordered the destruction of the property because of real or supposed public

657. 479 N.W.2d 38 (Minn. 1991).

658. *Wegner*, 479 N.W.2d at 39.

659. *Id.*

660. *Id.*

661. *Id.*

662. *Id.* at 42.

663. 608 A.2d 480 (N.J. Super. Ct. 1992).

664. *Wallace*, 608 A.2d at 484.

665. *Id.* at 483.

666. 603 S.W.2d 786 (Tex. 1980).

667. *Steele*, 603 S.W.2d at 789.

emergency to apprehend armed and dangerous men who had taken refuge in the house.”⁶⁶⁸ Here the court seemed to take on the YMCA “intended beneficiary” approach by suggesting the police action was for the safety of the public rather than for a private individual.

The court also recognized the traditional emergency exception to claims for just compensation by stating: “The defendant City of Houston may defend its actions by proof of a great public necessity. Mere convenience will not suffice.”⁶⁶⁹ The court then seemed to ignore this comment in saying, in the next paragraph, that the property owner was entitled to compensation, without a determination whether the police were responding to an emergency: “We do not hold that the police officers wrongfully ordered the destruction of the dwelling; we hold that the innocent third parties are entitled by the [Texas] Constitution to compensation for their property[,]”⁶⁷⁰ and judgment was entered for the plaintiff.

The *Wegner*, *Wallace* and *Steele* opinions do not represent the weight of authority. Almost every other court that has considered the question has denied compensation for damages caused by reasonable police conduct in apprehending criminal suspects.

In *Blackman v. City of Cincinnati*,⁶⁷¹ the owner of an automobile sued to recover damages resulting when a police officer entered plaintiff’s automobile and ordered him to pursue a vehicle containing fleeing suspect.⁶⁷² Plaintiff’s car was damaged during the chase when it collided with parked truck. The Ohio Supreme Court denied a claim for compensation under the “Takings Clause” of the Ohio Constitution, saying that this provision was not intended to apply to personal property such as an automobile.⁶⁷³

In *Indiana State Police v. May*,⁶⁷⁴ police fired tear gas into the plaintiff’s home to capture a felony suspect who had taken refuge there, and compensation for the damages was denied.

In *McCoy v. Sanders*,⁶⁷⁵ a landowner sued under the “Takings Clause” of the Georgia Constitution for damages that resulted when police drained his pond (killing all the fish, and damaging the pond) to search for a murder victim.⁶⁷⁶ The court stated that “[u]nder certain circumstances and

668. *Id.* at 792.

669. *Id.*

670. *Id.* at 793.

671. 42 N.E.2d 158 (Ohio 1942).

672. *Blackman*, 42 N.E.2d at 159.

673. *Id.* at 160.

674. 469 N.E.2d 1183 (Ind. 1994).

675. 148 S.E.2d 902 (Ga. Ct. App. 1966).

676. *See McCoy*, 148 S.E.2d at 903.

conditions, a municipality may, acting under its police power for the general welfare of the public, take or use the property of a person or corporation without paying compensation therefor.”⁶⁷⁷

And, in *Patel v. United States*,⁶⁷⁸ the court denied compensation when police, in executing an arrest warrant, fired smoke grenades, tear gas and flash grenades into plaintiff’s residence, causing fire that destroyed residence.

IV. CONCLUSION

Courts have been vigilant in upholding the *privilege* of necessity, both public and private, in connection with the invasion of property rights in order to avert a greater evil. However, the question of compensation has been somewhat case-specific. Many of the results seem intuitive, while others seem unfair.

In cases of private necessity, there is a kind of anomaly in the law: agents can be obligated to pay compensation to those who suffer loss at their hands even though it was permissible to have caused that loss. This anomaly seems based on the intuitive sense that as between the individuals concerned, it is fair that the one whose interests are advanced by the act should bear the cost of harm done in the process, rather than imposing the loss on one who derives no benefit from the act. This principle has been criticized. Phillip Montague, for example, argues that only a wrongful act can give rise to a duty to compensate, so one who is driven by necessity to harm another’s property ought not owe compensation.⁶⁷⁹

When an act of private necessity is non-negligent and *involuntary*, as in some of the aircraft emergency landing situations examined in this article, the injured party is *not* entitled to compensation. This result has been criticized, for “[t]he person who finds her body or property damaged will find it little consolation that her injurer acted without fault. (In fact, she will in a pragmatic sense find in that situation a greater wrong to herself, since our present tort system will allow her no compensation at all.)”⁶⁸⁰

The infringement of property rights in situations of public necessity does not carry with it an obligation to pay compensation, even though often enough the material harm is greater than with acts of private necessity (*e.g.*, blowing up a bridge to prevent enemy troops from gaining an advantage, or

677. *Id.* at 904.

678. 823 F. Supp. 696 (N.D. Cal. 1993).

679. See Phillip Montague, *Rights and Duties of Compensation*, 13 PHIL. & PUB. AFFAIRS 79, 84 (1984).

680. Howard Klepper, *Torts of Necessity: A Moral Theory of Compensation*, 9 LAW & PHIL. 223, 226 (1990).

burning down a house to flesh out a criminal suspect). In both instances the doctrine of necessity justifies the action. However, in the case of public necessity the explanation for not requiring compensation appears to rest on the idea that the actor who performs an act of public necessity thereby averts a public calamity; the actor as such gains no personal advantage from the situation, but the public at large does, while in situations of private necessity the actor or some other individual has benefited, not the public at large. Thus, it would be unfair to impose a duty of compensation on one who acts to avert a public disaster.

To the extent an aggrieved party is not legally entitled to compensation for the material harm resulting due to public necessity, there is nonetheless a moral obligation to provide compensation, either through ad hoc statutory enactments, or by broad statutory schemes. As President Grant stated in his veto message, mentioned in Part III.C, “[i]f a government makes compensation under such circumstances, it is a matter of bounty rather than of strict legal right.”⁶⁸¹ In those situations of public necessity where compensation has in fact been awarded, as where the property was taken by the military for later use, or where there has been unnecessary destruction of property, courts have been careful to note that the theory of compensation is based on implied promise in contract law, rather than on the Takings Clause of the Fifth Amendment.

Just what constitutes a necessitous circumstance and a reasonable choice between two evils is something that varies from time and place, and juries are entitled to assess the necessity doctrine according to evolving standards. In this regard, George Washington once wrote: “[W]hat is sometimes good may at other times be evil, and what is sometimes wrong may sometimes be right when it serves a good enough end—*depending on the situation*.⁶⁸²

681. *United States v. Pac. R R. Co.*, 120 U.S. 227, 238 (1887) (CONG. GLOBE, 42 Cong., 2d Sess. 4155 (1872) (veto message of President Ulysses S. Grant)).

682. JOSEPH FLETCHER, *SITUATION ETHICS* 123 (1966).