THE ROLE OF PRIVATE NUISANCE LAW IN THE CONTROL OF AIR POLLUTION

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The first time man drew breath and exhaled, there was man-made pollution. The first conflict over human emissions into the air probably came when a caveman's campfire smoke blackened his neighbor's cave. When this act was repeated, it became the first air pollution nuisance and was probably abated by a swinging club.

As man became more sophisticated, both his pollutants and his legal classifications and remedies became more complex. At an early date an important distinction arose which is still made today. Interference with the use and enjoyment of land was distinguished from interference with the possession thereof. The former was a nuisance and proof of substantial injury was a predicate to liability.[1] The latter was termed a trespass, for which liability was absolute, that is, there was liability regardless of care or actual extent of injury for any act found to be a trespass.[2]

A nuisance could be either private or public. A private nuisance was an interference with the rights of another individual to the use and enjoyment of his property and was actionable as a tort in a private civil action. On the other hand, a public nuisance was a wrong done to the public by the use of one's property and was, at least initially, a criminal matter. Thus, there was very little relationship between the two. They were and are distinct fields of law with little in common but their name.[3]

PUBLIC NUISANCE

Public air pollution nuisance law has slowly evolved toward modern air pollution statutory regulation. The process was particularly slow until the industrial revolution and even then was retarded by government protection of industry. Usually those persons most seriously affected by such polluters as the factories of England's infamous black belt — the workers and poor classes — were in no position to seek any remedy.

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[1] *See* Pottock v. Continental Can Co., 211 A.2d 622 (Del. 1965); Patterson v. Peabody Coal Co., 3 Ill. App. 2d 311, 122 N.E.2d 48 (1954). *See also* Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 415 (1942).

[2] RESTATEMENT OF TORTS § 158 (1939); W. PROSSER, TORTS § 13, at 63-65 (3d ed. 1964).

[3] *See* Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966); Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 411 (1942).

However, the reform movements of the twentieth century, coupled with the great increase in problems caused by industrialization and urbanization, led to a gradually increasing willingness by government and the courts to control public dangers such as air pollution. Public nuisances became more clearly defined and tests were written into ordinances outlawing particular emissions, usually smoke.[4]

By the middle of the twentieth century, the problem of air pollution as it affected the population as a whole had grown too large and complex for the case by case approach of traditional public nuisance abatement procedures. The automobile probably had more to do with this than any other factor. Such a useful machine could hardly be banned altogether, yet the problem created by this transitory source of pollution defied the case by case method. Even before the advent of the car, the scope of the air pollution problem created by burgeoning industrial urban complexes was becoming too large to handle within the traditional public nuisance framework. It became apparent that it was the cumulative effect of the emissions of many polluters and not the emissions of any one car or factory that was the real problem, yet traditional public nuisance law required that injury be clearly attributable to specific defendants. Thus, in response to a pressing need, came the air pollution statutes of the past twenty years.

The degree to which air pollution statutes have affected the evolution of public air pollution nuisance law is demonstrated by the view of the Pennsylvania supreme court that such statutes preempt public nuisance law in the field of air pollution.[5]

PRIVATE NUISANCE

Private nuisance law developed quite differently, and an action to abate a private nuisance is in no way precluded because of the overlapping applicability of an air pollution statute.[6] It was recognized as early as the 16th century that the same act can create both a public and a private nuisance.[7] Where damages different from those suffered

[4] The Supreme Court approved the use of the Ringelmann test of smoke blackness in upholding the constitutionality of smoke ordinances in 1916. Northwestern Laundry v. Des Moines, 239 U.S. 486 (1916).

[5] Commonwealth v. Glen Alden Corp., 418 Pa. 57, 210 A.2d 256 (1965).

[6] *See* Reynolds Metals Co. v. Martin, 337 F.2d 780 (9th Cir. 1964); Renken v. Harvey Aluminum, Inc., 226 F. Supp. 169 (D. Ore. 1963).

However, a Delaware case appears to have taken a stricter view, holding that resort to equity to abate air pollution alleged to be a private nuisance was premature and the administrative relief under Delaware's air pollution statutes should first be resorted to. Schofield v. Material Transit, Inc., 206 A.2d 100 (Del. 1960). However, this case involved a class action for a private nuisance that was well within the traditional scope of a public nuisance, and only an injunction, not damages, was sought.

[7] W. PROSSER, TORTS § 89, at 608 (3d ed. 1964). *See, e.g.*, Awad v. McColgan, 357 Mich. 386, 98 N.W.2d 571 (1959); Hill v. Stokely-Van Camp, Inc., 260 Minn. 315, 109 N.W.2d 749 (1961); Costas v. City of Fond Du Lac, 24 Wis. 2d 409, 129 N.W.2d 217 (1964).

by the public in general can be shown, an action in tort or equity for the private nuisance will lie.[8] Thus, a private nuisance action is a separate weapon against air pollution, completely independent of air pollution statutes.

Private nuisance law, unfortunately, has become extremely confused by conceptual problems. It has become a "legal garbage can"[9] utilized for inapplicable and even ridiculous fact situations.[10] Part of the confusion stemmed from differences in terminology, but much also resulted from a misunderstanding of the relationship of negligence and nuisance.

At common law, a "nuisance per se" or nuisance by law was distinguished from a "nuisance per accidens" or nuisance in fact. The former was such an interference as would be a nuisance at all times and under all circumstances.[11] A nuisance in fact was a nuisance only because of the location or circumstances.[12] Either resulted in absolute liability — liability regardless of the degree of care exercised — when substantial injury was shown. Clearly, a lawful business could never be a nuisance per se.[13]

Absolute Nuisance

In the middle of the 19th century a new and unfortunate distinction was made. The development of the law of negligence caused courts to attempt to distinguish between nuisances that required proof of negligence and those that did not.

The rule of the case of *Rylands v. Fletcher*,[14] itself having nothing

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[8] *See* Arizona Copper Co. v. Gillespie, 230 U.S. 46 (1913); Karpisek v. Cather & Sons Constr., Inc., 174 Neb. 234, 117 N.W.2d 322 (1962); Wilson v. Parent, 228 Ore. 354, 365 P.2d 72 (1961). *See also* Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997-99 (1966).

Maryland has taken the view that the special injury shown need not be different in kind, but only in degree, from that suffered by the public. Bishop Processing Co. v. Davis, 213 Md. 465, 132 A.2d 445 (1957).

[9] Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942). It has also been called a "catch-all of ill-defined rights." Wilbourne, *Municipal Nuisance Liability: A Problem In Characterization*, 38 CONN. B.J. 51, 64 (1964).

[10] *See* Carroll v. New York Pie Baking Co., 215 App. Div. 240, 213 N.Y.S. 553 (1926) (cockroaches baked in a pie were termed a "nuisance").

[11] *See* Koeber v. Apex-Albuq Phoenix Express, 72 N.M. 4, 380 P.2d 14 (1963).

[12] *Id.* If the act complained of was not a nuisance per se, the plaintiff had to show clearly that he was deprived of the use and enjoyment of his property, and the existence of a nuisance was a question of fact. *See* Dill v. Excel Packing Co., 183 Kan. 513, 331 P.2d 539 (1958).

[13] Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785 (1946); Southeastern Liquid Fertilizer Co. v. Chapman, 103 Ga. App. 773, 120 S.E.2d 651 (1961); Larsen v. Village of Lava Hot Springs, 88 Idaho 64, 396 P.2d 471 (1964).

For examples of businesses held not to be nuisances per se, see Cullum v. Topps-Stillman's, Inc., 1 Mich. App. 92, 134 N.W.2d 349 (1965) (operation of an incinerator); Harless v. Workman, 145 W. Va. 266, 114 S.E.2d 548 (1960) (operation of a coal crusher and loading tipple); Sohns v. Jensen, 11 Wis. 2d 449, 105 N.W.2d 818 (1960) (burning junked automobiles, producing smoke and soot).

See also Comment, *The Law of Nuisance in Iowa*, 12 DRAKE L. REV. 107, 108 (1963), where it is said that no case exists in Iowa where a lawful act was found to be a nuisance per se. For a similar statement as to Oklahoma, see Comment, *Nuisance: A Problem in Oklahoma*, 13 OKLA. L. REV. 224, 225 (1960).

[14] L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 300 (1868).

to do with a nuisance, but rather involving a trespass, was seized upon to formulate the distinguishing test. *Rylands* applied liability regardless of care to one who keeps an unnatural and inherently dangerous thing on his property when that thing escapes and injures another's property. *Rylands*, when generalized, placed emphasis on the actor's knowledge of a risk of harm from the nature of the thing he kept on his land. From this knowledge the courts imputed intent. When this *Rylands* theory, that in some kinds of cases liability attached without proof of lack of due care, was incorporated into American tort law, it became the "ultra-hazardous activity" rule of absolute liability, which in nuisance law became "absolute nuisance."[15] Whenever one realized that there was a risk of harm when he allowed an emission, the nuisance he created was intentional and he was liable for any substantial interference with his neighbor's rights regardless of his care or of the reasonableness of his use of his property.[16]

The greatest significance of the absolute nuisance doctrine is its treatment, in effect, of all "intentional" nuisances as ultra-hazardous activities. This would seem to set up an unintentional "nuisance by negligence" as a separate tort with different guidelines and rules. This demonstrates a failure to understand that while negligence can be the

[15] Two of the earliest cases that applied the *Rylands* doctrine to nuisance situations in the United States were *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 A. 900 (1890) and *Frost v. Berkely Phosphate Co.*, 42 S.C. 402, 20 S.E. 280 (1894). Both cases involved emissions of gasses.

The tentative draft of the *Restatement (Second) of Torts* uses the term "abnormally dangerous activity" instead of "ultra-hazardous activity." RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (Tent. Draft No. 10, 1964).

[16] *See* Taylor v. Cincinnati, 143 Ohio St. 426, 55 N.E.2d 724 (1944). *See also* Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399 (1942); Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984 (1952).

In the cases involving the heavy smoke and sulphur emissions of the smelter operations in Arizona's Verde Valley, the courts found that the smelter operators were aware of the emissions they were allowing and, applying absolute nuisance law, found liability. Damages alone were awarded; the plaintiffs sought no injunctions. United Verde Copper Co. v. Ralston, 46 F.2d 1 (9th Cir. 1931); United Verde Copper Co. v. Jordan, 14 F.2d 299 (9th Cir. 1926); Kovacovich v. Phelps Dodge Corp., 62 Ariz. 193, 156 P.2d 240 (1945); United Verde Copper Co. v. Kovacovich, 42 Ariz. 159, 22 P.2d 1085 (1933); United Verde Extension Mining Co. v. Ralston, 37 Ariz. 554, 296 P. 262 (1931).

One earlier Arizona case took a more lenient view, holding that the locality and surroundings were of first importance in determining whether a lawful business was a nuisance. MacDonald v. Perry, 32 Ariz. 39, 255 P. 494 (1927) (case involved septic tanks and ditches). A later case applied the *MacDonald* holding to an automobile junk yard. Kubby v. Hammond, 68 Ariz. 17, 198 P.2d 134 (1948). However, in the same year as this latter case, dust from an airport settling on a nearby boarding school was held to be an absolute nuisance with liability regardless of care and the airport operation was enjoined. Brandes v. Mitterling, 67 Ariz. 349, 196 P.2d 464 (1948).

Since there have been no recent cases in point, there may be some question as to whether the Arizona supreme court would still apply the absolute nuisance doctrine in air pollution cases in light of the recent developments in modern private nuisance law, such as the guidelines laid down by the RESTATEMENT OF TORTS (see text accompanying note 19, *infra*).

cause of a nuisance, negligence is not a necessary element in the proof of a nuisance.[17]

The use of absolute nuisance law in many states is particularly illogical since those same states have rejected the *Rylands* doctrine and its American cousin — ultra-hazardous activity strict liability. In those states, merely by proceeding in nuisance instead of trespass, a plaintiff can invoke the law supposedly rejected.[18]

Nuisance Under the Restatement

The American Law Institute recognized the tangle of nuisance law and attempted to clarify it in its 1939 *Restatement of Torts.* The *Restatement* defined private nuisance in terms of intent *and reasonableness,* and relegated both negligence and the ultra-hazardous activity doctrine to a limited role.[19] Thus, a nuisance under the *Restatement* definition is an intentional and unreasonable interference with the use and enjoyment of another's property. The *Restatement* emphasizes that if the interference was unintended, it may still be actionable within the ordinary rules of negligence, recklessness or ultra-hazardous activity if the proper elements of these torts can be shown. "Intent" has been construed to mean knowledge of the interference being caused, actual intent to cause it, or knowledge that it is substantially certain to result from one's act.[20]

Under the *Restatement* view it appears to be more difficult to find nuisance liability for air pollution than under the absolute nuisance doctrine. The 1966 case of *Wright v. Masonite Corp.*[21] amply demonstrates this difficulty. Formaldehyde fumes put a grocery store out of business in North Carolina, and although the defendant's factory was found to be the source of the injury and extensive monetary damages were sustained by plaintiff, recovery was denied because the interference was found to be unintended under the *Restatement* definition. In an

[17] *See, e.g.,* Shields v. Wondries, 154 Cal. App. 2d 249, 316 P.2d 9 (1957); Thorson v. City of Minot, 153 N.W.2d 764 (N.D. 1967); Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 299 P. 306 (1924). *See also* W. PROSSER, TORTS § 88, at 595 (3d ed. 1964).

[18] For example, Texas has held that *Rylands v. Fletcher* would not be followed in that state, *Turner v. Big Lake Oil Co.,* 128 Tex. 155, 96 S.W.2d 221 (1936), and that the doctrine of strict liability for ultra-hazardous activity does not obtain there, *Vrazel v. Bieri,* 294 S.W.2d 148 (Tex. Civ. App. 1956); but in 1965 the operator of a rock crusher was found liable for the dust nuisance he created *regardless of his degree of care.* Collins Constr. Co. of Texas, Inc. v. Tindall, 386 S.W.2d 218 (Tex. Civ. App. 1965). For discussion see Prosser, *Nuisance Without Fault,* 20 TEX. L. REV. 399, 409-10 (1942).

[19] RESTATEMENT OF TORTS § 822 (1939).

[20] RESTATEMENT OF TORTS § 825 (1939). One case has held that a continuous or recurring act must be characterized as intentional for purposes of the *Restatement.* E. Rauh & Sons Fertilizer Co. v. Shreffler, 139 F.2d 38 (6th Cir. 1943). This seems illogical, as it places emphasis upon the act, while under the *Restatement* it is knowledge of the effect of the act and not the act itself that is determinative.

[21] 368 F.2d 661 (4th Cir. 1966). The court relied heavily on *Morgan v. High Penn Oil Co.,* 238 N.C. 185, 77 S.E.2d 682 (1953). For a well-written note on the *Wright* case see 24 WASH. & LEE L. REV. 314 (1967).

earlier case, *Waschak v. Moffat*,[22] the Pennsylvania court denied recovery for damages resulting from gases emitted by defendant's banks of coal waste materials, ruling that the use was not unreasonable.

This should not lead to a conclusion that it is impossible to recover under the *Restatement* guidelines. In a Pennsylvania case subsequent to *Waschak* involving the same type of coal refuse dumps and similar injuries from the poisonous gases seeping onto plaintiff's property, the interference was found both intentional and unreasonable and recovery was allowed.[23] In another case, *Associated Metals & Minerals Corp. v. Dixon Chemical & Research, Inc.*,[24] a plaintiff recovered an award of three hundred thousand dollars for damage to steel stored on its property from sulphur dust blowing from defendant's plant. The court found an intentional and unreasonable interference, although it also used the term "absolute nuisance" indicating some confusion with the *Restatement* view.

NUISANCE LAW AND AIR POLLUTION

Under both the *Restatement* and absolute approaches to private nuisance law, individual civil suits can be useful in the battle against air pollution. Air pollution statutes are designed to regulate pollution over a sizable geographic area and to protect the public at large and they may have inadequate strength or flexibility to deal with the problem of pollutants concentrated in the immediate area of the source. This can be remedied to some extent by the use of a private suit, bringing the great flexibility of equitable relief into play.[25]

Enforcement of the provisions of an air pollution statute depends on public authorities and an individual has no role to play except to complain. Thus, only by use of a private nuisance action can an individual bring direct pressure to bear on a polluter. Also, only through such an

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[22] 379 Pa. 441, 109 A.2d 310 (1954).

[23] Evans v. Moffat, 192 Pa. Super. 204, 160 A.2d 465 (1960).

[24] 82 N.J. Super. 281, 197 A.2d 569 (Super. Ct. App. Div. 1963).

[25] Equity may adjust its remedy to the need in a nuisance case. Alfred Jacobshagen Co. v. Dockery, 243 Miss. 511, 139 So. 2d 632 (1962); Sans v. Ramsey Golf & Country Club, 50 N.J. Super. 127, 141 A.2d 335 (Super. Ct. App. Div. 1958). In a case where smoke and vapors from four charcoal kilns settled on and damaged plaintiff's property only in damp overcast weather, the court framed an injunction that limited the kilns only during such weather. Flippin v. McCabe, 228 Ark. 495, 308 S.W.2d 824 (1958). *See also* Herring v. H.W. Walker Co., 409 Pa. 126, 185 A.2d 565 (1962).

An injunctive suit does not bar a later suit for damages. Guttinger v. Calaveras Cement Co., 160 Cal. App. 2d 460, 325 P.2d 145 (1958).

Also, equity will allow a suit to enjoin a prospective nuisance when it clearly appears that a nuisance will occur from a contemplated act and damage will be irreparable. *See, e.g.*, Larsen v. Village of Lava Hot Springs, 88 Idaho 64, 396 P.2d 471 (1964); O'Laughlin v. City of Fort Gibsen, 389 P.2d 506 (Okla. 1964); Strong v. Winn-Dixie Stores, Inc., 240 S.C. 244, 125 S.E.2d 628 (1962); Sohns v. Jensen, 11 Wis. 2d 449, 105 N.W.2d 818 (1960). Thus, to a limited extent, an individual can obtain a prior guarantee against air pollution which is a remedy available only in those air pollution statutes utilizing a permit system, and, of course, even then not available to an individual.

action can an individual collect damages to remedy past or future injuries from pollution.

Where there are several defendants whose pollutants have combined to work the injury, they may be joined, so that the mere fact that there is a complicated merger of pollutants does not in itself prevent a recovery.[26] Nonetheless, the use of a private nuisance action is a strictly limited weapon in the anti-air pollution arsenal, as the normal elements of any tort action must be alleged and proven — causation, injury and damage.[27]

Limitations

It must be noted that not every interference with the use and enjoyment of property is actionable, even under absolute nuisance. The interference must be a substantial[28] and continuing one[29] as seen by or affecting a person of "ordinary sensibilities."[30] Further, in crowded modern society, the right to the use and enjoyment of property is not always to be protected by an injunction, even when damages would be inadequate relief. This may be particularly true in an industrial urban area.[31] Especially in a less-populated community, the importance of a

[26] Jordan v. United Verde Copper Co., 9 F.2d 144 (D. Ariz. 1925). Of course, the plaintiff has the burden of showing within a reasonable degree of certainty the share of each defendant in the damages. Smith v. Pittston Co., 203 Va. 711, 127 S.E.2d 79 (1962).

One of the problems in bringing a suit for a private nuisance is the cost of the litigation, especially attorney fees. This can be lessened by several individuals with the same injury joining in suit. In a Utah case, 61 farmers joined in a suit against a smelter for damages to crops. Anderson v. American Smelting & Ref. Co., 265 F. 928 (D. Utah 1919). *See also* Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904).

[27] Fuchs v. Curran Carbonizing & Eng'r Co., 279 S.W.2d 211 (Mo. 1955). However some assistance may be obtained by a plaintiff through the use of the doctrine of res ipsa loquitur. *See* Reynolds Metals Co. v. Yturbide, 258 F.2d 321 (9th Cir. 1958); Columbia So. Chem. Corp. v. Johnson, 297 S.W.2d 373 (Tex. Civ. App. 1956) (chlorine gas stained and corroded automobiles).

[28] W. PROSSER, TORTS § 88, at 598 (3d ed. 1964). *See* Patterson v. Peabody Coal Co., 3 Ill. App. 2d 311, 122 N.E.2d 48 (1954) (interference was found not to be substantial).

[29] *See* Cyr v. Town of Brookfield, 153 Conn. 261, 216 A.2d 198 (1965); Southeastern Liquid Fertilizer Co. v. Chapman, 103 Ga. App. 773, 120 S.E.2d 651 (1961).

A New York case gave recovery for damages from ammonium sulphide vapors that escaped from a train tank car and discolored the paint on sixteen homes. McKenna v. Allied Chemical & Dye Corp., 8 App. Div. 2d 463, 188 N.Y.S.2d 919 (1959). This case demonstrates confusion of nuisance and negligence.

[30] *See* Riblet v. Ideal Cement Co., 57 Wash. 2d 619, 358 P.2d 975 (1961); Bie v. Ingersoll, 27 Wis. 2d 490, 135 N.W.2d 250 (1965). *See also* Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 415-16 (1942).

There is, however, a presumption in at least one state that a plaintiff is such a person of ordinary sensibilities. Lamesa Cooperative Gin v. Peltier, 342 S.W.2d 613 (Tex. Civ. App. 1961). Also, a court may take into consideration the fact that a particular use made of plaintiff's property is more sensitive to interference than others might be. Gronn v. Rogers Constr., Inc., 221 Ore. 226, 350 P.2d 1086 (1960) (mink farm disturbed by loud noises).

[31] "[T]he right of a person to pure air may be surrendered in part by his election to live in a city where the atmosphere is impregnated with smoke, soot, and other impurities. These statements are especially applicable to one who elects to live in

particular industry to the economy may rule out an injunction for practical reasons. In *Koseris v. J. R. Simplot Co.*,[32] damages to a cinderblock building and a two acre tract were compared to a business with over a thousand employees and an annual payroll of over one and a quarter million dollars that could not be adequately regulated to prevent injury without being put out of business. The injunction, correctly, was refused. This is often referred to as the doctrine of comparative injury[33] which is often used to limit relief, although it is not always a determining factor if the plaintiff's injury cannot be adequately remedied by an award of damages.[34]

When an injunction is sought, zoning ordinances can also be a consideration. While such ordinances are usually not determinative of the reasonableness of a particular activity so as to prevent a successful suit for an injunction,[35] they are sometimes given great weight.[36] It should also be noted that merely because a proposed activity would violate a zoning law, it is not a nuisance. Absent other factors that would make the activity a nuisance, an individual has no standing to sue to prevent the violation.[37]

Defenses

In addition to these considerations, nuisance actions may be subject

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or adjacent to an industrial district." Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 718, 82 N.W.2d 151, 158 (1957).

[32] 82 Idaho 263, 352 P.2d 235 (1960).

[33] *Id. See also* York v. Stallings, 217 Ore. 13, 341 P.2d 529 (1959); Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 P. 306 (1924). In both cases injunctions were refused despite serious injury to the plaintiffs on the basis of the importance of the lumbering business to the economies of Oregon and Washington, although damages were awarded.

The doctrine of comparative injury raises the serious question whether such a weighing system may constitute an unconstitutional "taking" or condemnation by a private business with the assistance of the courts. Lester, *Nuisance — As A "Taking" of Property*, 17 U. MIAMI L. REV. 537 (1963).

[34] The doctrine was rejected in *Arizona Copper Co. v. Gillespie*, 230 U.S. 46 (1913). In *Anderson v. American Smelting & Refining Co.*, 265 F. 928 (D. Utah 1919), it was said that even though the smelter involved was important to the community, it would be enjoined if it could not be regulated to operate without harm to the plaintiff farmers. *See also, e.g.*, Ozark Bi-Products v. Bohannon, 224 Ark. 24, 271 S.W.2d 354 (1954); Gerrish v. Wishbone Farm, Inc., 231 A.2d 622 (N.H. 1967); Crushed Stone Co. v. Moore, 396 P.2d 811 (Okla. 1962).

[35] *See* Bauman v. Piser Undertakers Co., 34 Ill. App. 2d 145, 180 N.E.2d 705 (1962); Bie v. Ingersoll, 27 Wis. 2d 490, 135 N.W.2d 250 (1965).

[36] *See* Dawson v. Laufersweiler, 241 Iowa 850, 43 N.W.2d 726 (1950); Weltshe v. Graf, 323 Mass. 498, 82 N.E.2d 795 (1948).

Apparently three states — California, Colorado and New York — refuse injunctive relief for any use permitted by a zoning ordinance. McNeill v. Redington, 67 Cal. App. 2d 315, 154 P.2d 428 (1944); Robinson Brick Co. v. Luthi, 115 Colo. 106, 169 P.2d 171 (1946); Bove v. Donner-Hanna Coke Corp., 236 App. Div. 37, 258 N.Y.S. 229 (1932); Gerring v. Gerber, 28 Misc. 2d 271, 219 N.Y.S.2d 558 (Sup. Ct. 1961). *See also* Comment, *Zoning Ordinances and Common Law Nuisance*, 16 SYRACUSE L. REV. 860 (1965).

[37] Hutson v. Continental Oil Co., 136 So. 2d 714 (La. 1961); Boerschinger v. Elkay Enterprises, Inc., 26 Wis. 2d 102, 132 N.W.2d 258 (1965).

to several defenses. Laches may be found[38] or the statute of limitations invoked.[39] In limited contexts contributory negligence,[40] and, more frequently, assumption of the risk[41] may be raised. A specialized form of assumption of the risk is sometimes allowed as a defense in nuisance cases — "coming to the nuisance."[42] This was an important factor in a case referred to earlier, *Waschak v. Moffat*,[43] where the coal operations complained of had existed long before plaintiff, knowing of the possibility of harm, moved nearby.

A neighborhood may change its character over a period of time so that a use that might once have been unreasonable may not now be so.[44] Conversely, of course, a business not once a nuisance may become one because of the change of neighborhood character.[45]

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[38] Waiting ten years before bringing an action to abate a nuisance in the form of poisonous smoke and gases, while the defendant invested hundreds of thousands of dollars into building up his plant, was held to constitutes laches. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904). However, it is not laches if the nuisance was one that gradually increased in annoyance and aggravation. Protokowicz v. Lesofski, 69 N.J. Super. 436, 174 A.2d 385 (Super. Ct. Ch. 1961). The defense of laches cannot be raised if the action is for a public nuisance causing special damage to an individual. Wade v. Campbell, 200 Cal. App. 2d 54, 19 Cal. Rptr. 173 (1962).

It must be remembered that laches is not merely delay, but delay that is harmful to the defendant. Coleman v. Estes, 201 So. 2d 391 (Ala. 1967).

[39] *See, e.g.*, Consolidated Chem. Indus., Inc. v. White, 227 Ark 177, 297 S.W.2d 101 (1957); Lynn Mining Co. v. Kelly, 394 S.W.2d 755 (Ky. 1965); Hawkins v. Wallace, 384 S.W.2d 507 (Ky. 1964).

[40] The weight of authority would limit it to those cases where negligence was the cause of the nuisance. *See* Carabetta v. City of Meriden, 145 Conn. 338, 142 A.2d 727 (1958); Krauth v. Geller, 54 N.J. Super. 442, 149 A.2d 271 (Super. Ct. App. Div. 1959). *See also* Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1023-27 (1966); Wilbourne, *Municipal Nuisance Liability: A Problem in Characterization*, 38 CONN. B.J. 51 (1964).

There is authority, however, that contributory negligence should always be available as a defense, even against an absolute nuisance. *See* Curtis v. Kastner, 220 Cal. 185, 30 P.2d 26 (1934); Deane v. Johnston, 104 So. 2d 3 (Fla. 1958). *See also* Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984 (1952).

[41] All of the authorities cited in note 40, *supra*, agree that in all nuisance cases, assumption of the risk can be raised as a valid defense.

[42] However most jurisdictions have rejected the idea that one who moves next to an existing business cannot complain of it as a nuisance. *See* Mahone v. Autry, 55 N.M. 111, 227 P.2d 623 (1951); City of Rochester v. Charlotte Docks Co., 114 N.Y.S.2d 37 (Sup. Ct. 1952). *See also* Kennedy & Porter, *Air Pollution: Its Control and Abatement*, 8 VAND. L. REV. 854 (1955). *But see* Harden Chevrolet Co. v. Pickaway Grain Co., 27 Ohio Op. 2d 144, 194 N.E.2d 177 (Ohio Com. Pl. 1961) (automobile dealer who located near an operating grain elevator was not allowed to complain of the elevator's activities as a nuisance despite damages suffered).

The doctrine is still followed in Oregon, at least when the nuisance complained of arises from the performance of a government function. East St. Johns Shingle Co. v. City of Portland, 195 Ore. 505, 246 P.2d 554 (1952).

[43] 379 Pa. 441, 109 A.2d 310 (1954).

[44] "Once the [neighborhood] decline begins, the presumption seems to favor the commercial growth." Levitin, *Change of Neighborhood in Nuisance Cases*, 13 CLEV.-MAR. L. REV. 340, 347 (1964).

[45] Levitin, *Change of Neighborhood in Nuisance Cases*, 13 CLEV.-MAR. L. REV. 340 (1964). An earlier civil suit determination that a business did not constitute a nuisance did not bar a subsequent determination that it had become one. City of Girard v. Girard Egg Corp., 87 Ill. App. 2d 74, 230 N.E.2d 294 (1967).

There is also a possibility that a prescriptive right may be obtained to maintain a private nuisance,[46] although it is less likely to arise in air pollution cases than in other types of nuisance actions. Proving such a prescriptive right to pollute a neighbor's air would be very difficult since it would have to be shown that the interference was substantial and actionable continuously throughout the period in order to establish that the use was "adverse" to the owner.[47]

Damages

The question of the measure of damages for an air pollution nuisance arises frequently and necessitates a determination whether the nuisance is "temporary" or "permanent." The distinction is hard to draw, but a permanent nuisance generally is an interference that can reasonably be expected to continue indefinitely into the future without reduction.[48] The measure of damages for a permanent nuisance is the difference between the market value of the plaintiff's property for his uses before and after the inception of the nuisance as an actionable interference.[49] For a temporary nuisance, the measure is the diminution of the use value of the property through the duration of the nuisance up to the time of the trial.[50] The usual test for the latter would be the decrease in rental value,[51] although the market value of the property initially might be used to determine the reasonable limitation of damages.[52] In addition, special damages for personal annoyance, inconvenience and discomfort may be recovered for either type of nuisance.[53]

The determination of temporary or permanent nuisance also determines whether successive suits for damages may be brought. All dam-

[46] *See* United Verde Copper Co. v. Ralston, 46 F.2d 1 (9th Cir. 1931); Dangelo v. McLean Fire Brick Co., 287 F. 14 (6th Cir. 1923); Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944); Curry v. Farmers Livestock Market, 343 S.W.2d 134 (Ky. 1961); W.G. Duncan Coal Co. v. Jones, 254 S.W.2d 720 (Ky. 1953). *See also* Annot., 152 A.L.R. 343 (1944). *But see* Hall v. Budde, 293 Ky. 436, 169 S.W.2d 33 (1943).

[47] *See* United Verde Copper Co. v. Ralston, 46 F.2d 1 (9th Cir. 1931); Curry v. Farmers Livestock Market, 343 S.W.2d 134 (Ky. 1961).

[48] For a good discussion of the distinctions involved, see Lynn Mining Co. v. Kelly, 393 S.W.2d 755, 757 (Ky. 1965).

[49] *See, e.g.*, City of Tucson v. Apache Motors, 74 Ariz. 98, 245 P.2d 255 (1952); Greer v. City of Lennox, 79 S.D. 28, 107 N.W.2d 337 (1961); Economy Furniture, Inc. v. Jirasek, 345 S.W.2d 951 (Tex. Civ. App. 1961).

[50] *See, e.g.*, Pinkerton v. Pritchard, 71 Ariz. 117, 223 P.2d 933 (1950); Lynn Mining Co. v. Kelly, 394 S.W.2d 755 (Ky. 1965); Cooper Tire & Rubber Co. v. Johnston, 234 Miss. 432, 106 So. 2d 889 (1958).

[51] *See* Karpisek v. Cather & Sons Constr., Inc., 174 Neb. 234, 117 N.W.2d 322 (1962) (monthly rental value was shown to have dropped from ninety to seventy-five dollars).

[52] In *Adams Construction Co. v. Bentley*, 335 S.W.2d 912 (Ky. App. 1960), an award of twenty-five hundred dollars was held to be excessive for interference for a year from a nuisance affecting property originally valued at most at sixteen thousand dollars.

[53] *See* Cooper Tire & Rubber Co. v. Johnston, 234 Miss. 432, 106 So. 2d 889 (1958) (award of thirty-six hundred dollars for depreciation in rental value and five hundred dollars for annoyance, inconvenience and discomfort).

ages, past and prospective, must be collected in one suit when the nuisance is characterized as permanent.[54] The determination also is of importance for purposes of the statute of limitations which is said not to run on a cause of action arising from a temporary nuisance since the injury is continuing and new damages accrue constantly.[55]

One question of some interest is whether punitive damages should be available in a nuisance action. Since such damages may be substantially larger than actual damages they could provide a useful incentive to a polluter to take preventive measures. Generally punitive damages will be awarded only in cases where the defendant's actions have been unusually flagrant so that some malice may be imputed to him.[56] However, a recent case in Oregon, *McElwain v. Georgia-Pacific Corp.*,[57] considerably liberalized the definition of malice for purposes of punitive damages. In that case plaintiff was injured when toxic gases, fumes, smoke and particles blew onto his land from defendant's paper mill. The court stated, "The intentional disregard of the interest of another is the equivalent of legal malice, and justifies punitive damages. . . ."[58] A strong dissent likened the award of punitive damages under such a liberal definition of malice to an injunction issued without careful consideration of the equitable values involved between the parties and noted that punitive damages can often have the same effect as an injunction.[59]

Trespass Law and Air Pollution

Thus far, consideration has been given solely to the use of private nuisance law against air pollution emissions. However, there is also a possibility of using common law or statutory trespass law, although the interference must be such as to interfere with the possession of the property and not merely with its use and enjoyment. The distinction is tenuous, but traditionally has been made in terms of the necessity that an invasion be identifiable and visible before it can constitute a tres-

[54] *See, e.g.*, City of Tucson v. Apache Motors, 74 Ariz. 98, 245 P.2d 255 (1952); Hawkins v. Wallace, 384 S.W.2d 507 (Ky. 1964); Caldwell v. Knox Concrete Prod., Inc., 54 Tenn. App. 393, 391 S.W.2d 5 (1964).

In Arkansas, however, successive recoveries may be had for injuries from a permanent nuisance and, presumably, prospective damages could not be obtained. Consolidated Chem. Indus., Inc. v. White, 227 Ark. 177, 297 S.W.2d 101 (1957).

[55] *See* Lynn Mining Co. v. Kelly, 394 S.W.2d 755 (Ky. 1965); Caldwell v. Knox Concrete Prod., Inc., 54 Tenn. App. 393, 391 S.W.2d 5 (1965).

[56] *See* Newman v. Nelson, 350 F.2d 602 (10th Cir. 1965) (although the court noted that punitive damages are assessable for persistent maintenance of a private nuisance, it failed to define "persistent"); Gorman v. Sabo, 210 Md. 155, 122 A.2d 475 (1956); Southland Co. v. Aaron, 224 Miss. 780, 80 So. 2d 823 (1955).

[57] 421 P.2d 957 (Ore. 1966).

[58] *Id.* at 958.

[59] *Id.* at 960. The earlier Oregon case of *Martin v. Reynolds Metals Co.*, 221 Ore. 86, 342 P.2d 790 (1959), disapproved punitive damages in this type of case, but apparently was overruled by the majority opinion in the *McElwain* decision.

pass.[60] Visibility alone, however, is not even enough. For example, soot and ashes accumulating on the land of another has been held not to be a trespass.[61] Most gas emissions, which today make up the bulk of objectionable pollutants, are not visible invasions within the scope of trespass. Thus in *Arvidson v. Reynolds Metals Co.*,[62] a 1954 Washington case, fluoride gases and particulate matter that poisoned cattle lands were held not to constitute a trespass.

However, in 1959, the Oregon supreme court recognized the questionable propriety of distinguishing trespass from nuisance on the basis of the size or visibility of the invading particle, and in *Martin v. Reynolds Metals Co.*[63] held that it was the existence of an identifiable interference with the right to possession of the property, and not the nature or size of the invading particle which determined the existence of a trespass. This case also involved fluoride gases and particulate matter poisoning cattle lands. The aluminum reduction plant involved was the same one in question in the *Arvidson* case. Thus, the Washington and Oregon views are in sharp conflict.

The *Martin* decision is a distinct step towards a complete merger of nuisance and trespass, with absolute liability, that is, liability without fault, the result.[64] In *Martin*, the Oregon court still recognized a distinction between trespass and nuisance,[65] however, in another case the same year in the federal district court in Oregon, *Fairview Farms v. Reynolds Metals Co.*,[66] the plaintiff's recovery would have been barred by a statute of limitations if no more than a nuisance was found. The court did not hesitate to find a trespass. Thus, there is a real question as to the meaningfulness of the distinction remaining between nuisance and trespass in Oregon.

The Oregon approach makes it much more likely that an air pollution nuisance will also constitute a trespass, and when that is the case,

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[60] *See* Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963). *See also* Keeton, *Trespass, Nuisance and Strict Liability*, 59 COLUM. L. REV. 457 (1959); Lester, *Nuisance — As a "Taking" of Property*, 17 U. MIAMI L. REV. 537 (1963).

[61] King v. Columbian Carbon Co., 152 F.2d 636 (5th Cir. 1945).

[62] 125 F. Supp. 481 (W.D. Wash. 1954).

[63] 221 Ore. 86, 342 P.2d 790 (1959).

[64] "Since we hold that the intrusion in this case constituted a trespass it is immaterial whether the defendant's conduct was careless, wanton and willful or entirely free from fault." *Id.* at 93, 342 P.2d at 797-98. *See also* Keeton, *Trespass, Nuisance and Strict Liability*, 59 COLUM. L. REV. 457 (1959); Lester, *Nuisance — As a "Taking" of Property*, 17 U. MIAMI L. REV. 537 (1963); Yerke, *The Law of Nuisance in Oregon*, 1 WILLAMETTE L.J. 289 (1960); Comment, *A Trend Toward Coalescence of Trespass and Nuisance: Remedy For Invasion of Particulates*, 1961 WASH. L.Q. 62 (1961).

[65] 221 Ore. 86, 89, 342 P.2d 790, 792 (1959).

[66] 176 F. Supp. 178 (D. Ore. 1959). For other cases applying the *Martin* trespass rule see Reynolds Metals Co. v. Martin, 337 F.2d 780 (9th Cir. 1964); Renken v. Harvey Aluminum, Inc., 226 F. Supp. 169 (D. Ore. 1963).

the defendant's intent and the reasonableness of his actions become immaterial. It would thus be much easier to recover damages, and since a trespass is a more serious interference with the rights of another, it may also be easier to gain an injunction under the Oregon view.

In any event, private tort action is a much more potent weapon against air pollution in Oregon than in any other state at present.[67] Although the Oregon view has not been accepted by any other jurisdiction, if such a trend developed it would counter the weakening effect of the *Restatement's* narrow definition of nuisance. Such a trend is not unlikely since the narrow distinctions made at common law are often ignored in modern legal conceptualism. If nuisance and trespass are to be effectively merged, it may well be that a more distinct definition of trespass will have to be developed, and its rule of absolute liability tempered somewhat to suit particular circumstances.

Conclusion

From the foregoing survey of private air pollution tort law it should be apparent that the effectiveness of such actions often depends upon the particular jurisdiction. Nonetheless the potential advantages accruing to those who can overcome the difficulties involved make it an avenue of attack on localized air pollution problems that should not be overlooked in the shadow of the air pollution control statutes.

[67] In the year before *Martin*, a Georgia case applied a venue statute for trespass rather than nuisance in a suit for injury from the odors from a rendering plant, and made the broad statement that a nuisance is a trespass. That statement was unexplained and the opinion is so vague that it is unclear whether the court intended to make such a controversial and dramatic change in the law without explanation. Bennett v. Bagwell & Stewart, Inc., 214 Ga. 115, 103 S.E.2d 561 (1958). There was a strong dissent that there was no trespass involved, thus indicating that the majority knew full well what it was saying. If Georgia has in fact merged nuisance and trespass it has gone even further than Oregon.