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ENVIRONMENTAL LAW—THE NUANCES OF NUISANCE IN A PRIVATE ACTION TO CONTROL AIR POLLUTION

With a long-standing national policy favoring increase in gross national product, it is not surprising that the affluent society has concomitantly become the effluent society. The situation was subtly depicted in Washchak v. Moffat where the Pennsylvania Supreme Court, adopting language from a lower court, said: "Without smoke, Pittsburgh would have remained a very pretty village." Although environmental legislation, environmental activism and public concern with the environment has increased substantially during the last decade, industry continues to adulterate the atmosphere. Government response, often slow and fraught with conflicting interests, leaves the private citizen with the task of attempting to alleviate the situation or suffering the effects of silence. The individual willing to bear the burden of litigation in pursuit of cleaner air will discover that a nuisance action is perhaps the most powerful weapon available. In an effort to explore the potentialities of a nuisance action for the private citizen desirous of alleviating air pollution, this article will examine the requirements for maintaining a successful nuisance action, the remedies available to the private citizen maintaining a nuisance action, and the possible defenses which may be raised against a nuisance action.

Air pollution was labeled a nuisance as early as 1611 in William Alfred's Case where an injunction and damages were awarded the plaintiff whose air was being adulterated by the defendant's hog sty. The court found the defendant to be committing a nuisance despite his pleading that the maintenance of hogs was necessary for the sustenance of man and that a person should not have so delicate a nose that he cannot bear the smell of hogs. The court reasoned that since the law gave an action for air and light, "a fortiori an action lies in the case at Bar for infecting and corrupting the air." Since its debut in William Alfred's Case, nui-
sance has played a leading role in environmental litigation, and "it is probably the most widely relied upon theory used in environ-
mental actions today."5

A major problem with the theory of nuisance is its lack of definitional clarity. As one commentator has stated, "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. It has meant all things to all men . . . . There is general agreement that it is incapable of any exact or comprehensive definition."6 Responsibility for much of the confusion lies in the fact that nuisance has developed through a series of accidents in order to deal with the invasions of different kinds of interests and, necessarily, the various types of conduct causing such invasions.7 The majority view, however, regards nuisance as the invasion of a legal right6 and "a field of tort liability, rather than a type of tortious conduct. It has reference to the interests invaded, to the damage or harm inflicted, and not to any particular kind of act or omission which has led to the invasion."9

5 Cartwright, Handling of Air and Water Pollution Cases by the Plaintiff, 9 Forum 639, 642-43 (1973-74).


7 Prosser, supra note 6, § 86, at 571-72.


9 Prosser, supra note 6, § 87, at 573-74; see Durrance v. Sanders, 329 So. 2d 25, 29 (Fla. Dist. Ct. App. 1976). "[A] negligent interference with the use and enjoyment of land is private nuisance in respect to the interest invaded, and negligence in respect to the type of conduct which causes the invasion." Restatement of Torts, Scope and Introductory Note to Chapter 40, at 222 (1939).

Not all authorities are in agreement with this view, however. One view regards nuisance as being no different from any other tort. Under this view, nuisance is wrongful conduct which interferes with a public right or with the use and enjoyment of land. Seavey, Nuisance: Contributory Negligence and Other Mysteries, 65 Harv. L. Rev. 984, 985 (1952). The limitation to the consequences of the conduct is not in accordance with customary usage of other terms in the law of torts. Nuisance is conduct followed by particular kinds of results. In an injunction against threatened nuisance it is the conduct which is enjoined and not the consequences, although the prohibition may be against the conduct which results in the consequences. Id. at 985.

Another view regards nuisance as either the type of conduct resulting in a particular kind of harm or the particular kind of harm incurred. 1 F. Harper & F. James, The Law of Torts § 1.24, at 72-73 (1956). And finally, nuisance has been viewed as including "both the elements of wrongful conduct and the consequences that must follow." Keeton, Trespass, Nuisance, and Strict Liability, 59 Colum. L. Rev. 457, 464 (1959) (emphasis added). While the success of a nuisance action is
Basically, nuisance is a term used to describe the invasion of two distinct interests, private and public. Private nuisance was the earliest theory relied upon in air pollution cases between private litigants in the United States. It is a civil wrong, involving an interference with the use and enjoyment of land, and the remedy for such an interference lies in the hands of the individual whose rights have been disturbed. Such an invasion includes "endangering the health and well being of the inhabitants of the land as well as direct interference with economic use of the land itself." But as private nuisance has developed over the years, it "has tended to give greater protection to property interests than to interests based on personal comfort or well being." In each case the action based on private nuisance is derived from, and the protection is limited to, the plaintiff's interest in land.

The concept of private nuisance works two ways, however, and the policy of protecting the interest in the use and enjoyment of land applies equally as well to the defendant. A court, therefore, may be faced with recognizing the right of each party to use and enjoy his property, subject to an identical right in the opposing party. Thus, the law of private nuisance has been referred to as "the dividing line between the right of any owner to use his property as he so desires and the recognition of that right in another."

A public nuisance is a "species of catch-all criminal offense," and "was always a common law crime." When common law crimes were eliminated, and crimes became a matter of statute

dependent upon the proof of both a particular kind of harm and a particular type of conduct creating that harm, it is difficult to conceptualize a nuisance as being regarded as two distinct concepts at the same time, that is, both conduct and harm.


PROSSER, supra note 6, § 86, at 572-73.


Id.


PROSSER, supra note 6, § 86, at 573.

PROSSER, supra note 6, § 88, at 586.
only, broad criminal statutes were enacted in most states providing criminal penalties for public nuisances. These statutes either made no attempt to define public nuisance or at best defined it in a rather broad or nebulous fashion and have been uniformly construed to include the same interferences with rights of the public that would have been public nuisances at common law. Public nuisance does not, however, embody the typical criminal characteristics inherent in other statutorily defined crimes.

Generally speaking, a public nuisance involves an interference with an interest common to the general public as opposed to an interest peculiar to one or more individuals. "It is not necessary, however, that the entire community be affected, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right." Even though a number of interferences with private rights will not add up to a public nuisance, any activity that substantially interferes with the private interests of a considerable number of persons in a community will normally also interfere with some public right.

As possible causes of action to alleviate air pollution problems, private and public nuisance have little or nothing in common except that each involves the elements of harm, inconvenience or

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11 See Bryson & Macbeth, Public Nuisance, the Restatement (Second) of Torts, and Environmental Law, 2 ECOLOGY L.Q. 241, 247 (1972) [hereinafter cited as Bryson & MacBeth].
23 Prosser, supra note 6, § 88, at 585; Restatement (Second) of Torts § 821B, Comment g (Tent. Draft No. 17, 1971).
24 Costas v. City of Fond Du Lac, 24 Wis. 2d 409, 414, 129 N.W.2d 217, 220 (1964) ("The test is not the number of persons injured but the character . . . of the right impinged upon.").

"It should be noted, however, that in some states there are statutes defining a public nuisance to include interference with 'any considerable number of persons,' and under these statutes no public right, as such, need be involved." Restatement (Second) of Torts § 821B, Comment g (Tent. Draft No. 17, 1971).
25 Prosser, Private Action for Public Nuisance, 52 VA. L. Rev. 997, 1002 (1966). "Thus the pollution of a stream which merely affects a large number of riparian owners is a private nuisance only; but it becomes a public one when it kills the fish." Id. at 1001.
annoyance to someone which exist in all tort liabilities. Much of the confusion inherent in the concept of nuisance today could have been avoided had public and private nuisance been called by different names from the beginning. The use of the word nuisance to describe both, however, has resulted in the application of the same rules, with minor differences, to each.

STANDING

While a private nuisance action is maintainable by a private citizen, the general rule is that a private individual lacks standing to maintain a private action for a public nuisance. The primary reason proffered for this rule is the fear of a multiplicity of suits as expressed in Blackstone:

[Public] nuisances are such inconvenient or troublesome offenses as annoy the whole community in general, and not merely some particular person, and therefore are not actionable; as it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow-subjects.

This argument proves less persuasive, however, where injunctive relief is sought, which is the situation with the majority of public nuisance cases involving air pollution. In addition, denying a private citizen standing to sue for a public nuisance in order to eliminate air pollution might very well generate duplication of litigation where the only action available to a private citizen may be a mandamus action against a public official to force him to institute actions against a defendant causing the public nuisance.
The second reason often espoused for denying a private action for a public nuisance is the likelihood that parties will bring actions for minimal damages. This argument is enervated, however, by the fact that "the expense and vexation of legal proceedings is not lightly undertaken."

A plaintiff should not be discouraged from bringing a private action for a public nuisance, however, since he may fall within the exception to the general rule denying standing by proving that he has suffered some special injury or particular damage not incurred by the public generally. While authorities are in disagreement as to what constitutes a special injury, the majority view regards a special injury as an injury suffered by the plaintiff which is different in kind rather than in degree from that suffered by other members of the public exercising the same public right. An injury


31 Restatement (Second) of Torts § 821C, Comment a (Tent. Draft No. 17, 1971); Bryson & Macbeth, supra note 21, at 253.


Essentially the controversy has centered upon whether the plaintiff must show that he has suffered an injury different in kind, different in degree, or both. Prosser represents the majority view which requires an injury different in kind. If the injury is greater in degree only, then the plaintiff lacks standing. Prosser, supra note 6, § 88, at 587-88.

Prosser suggests that a good reason for not including a degree test as a separate type of special injury is because of the difficulty in "fixing any lines of demarcation in terms of 'degree' of public damage." Prosser, supra note 6, § 88, at 587. Such a task, however, appears to be no more difficult than drawing the precise line which separates an injury which is different in kind from that suffered by the general public.

Rothstein espouses the degree test and has found at least two jurisdictions which require the plaintiff to prove that he has suffered an injury which is both different in kind and different in degree, and he refers to such a prerequisite as the most stringent standing rule. Rothstein, supra, at 457; see Clabaugh v. Harris, 27 Ohio Misc. 153, 155-56, 273 N.E.2d 923, 925 (C.P. 1971); International Shoe Co. v. Heatwole, 126 W. Va. 888, 892, 30 S.E.2d 537, 540 (1944).

35 Prosser, supra note 6, § 88, at 587; Restatement (Second) of Torts § 821C
suffered by the plaintiff which is greater in degree from that suffered by the general public is not, by itself, sufficient to entitle him to a private action for a public nuisance.\(^9\) The difference in the degree of the injury, however, cannot be entirely ignored when it has a bearing upon whether or not there has been suffered an injury which is different in kind. A plaintiff who exercises a public right extraordinarily more than the general public usually has a special reason for doing so, and that reason invariably amounts to a different kind of interest in the public right, the injury of which satisfies the special injury rule.\(^6\)

A plaintiff may establish injury which is different in kind by demonstrating that the public nuisance has resulted in: (1) personal injury to the plaintiff;\(^4\) (2) physical harm to the plaintiff’s land;\(^3\) (3) particular pecuniary loss to the plaintiff;\(^5\) or (4) some other injury peculiar to the plaintiff and not shared by the general public in the exercise of a public right.\(^4\) When a public nuisance interferes with the use and enjoyment of a plaintiff’s land, he has sustained a special injury and may either bring a private action for a public nuisance or proceed under a private nuisance action.\(^6\)

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\(^{29}\) Profser, supra note 6, § 88, at 587-88; Restatement (Second) of Torts § 821C, Comment b (Tent. Draft No. 17, 1971).

\(^{40}\) Profser, supra note 6, § 88, at 588; Restatement (Second) of Torts § 821C, Comment c (Tent. Draft No. 17, 1971).


This position derives from the common law emphasis on the protection of property rights and the common law fiction that each piece of land is unique.

\(^{43}\) Profser, supra note 6, § 88, at 590-91; Restatement (Second) of Torts § 821C, Comment h (Tent. Draft No. 17, 1971); see Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 184, 494 P.2d 700, 706 (1972). Plaintiff’s pecuniary loss must be particular to the plaintiff and not so general or widespread as to affect the entire public. Profser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1015 (1966).

\(^{44}\) See generally Profser, supra note 6, § 88, at 588-91.

City of Monticello v. Rankin, 521 S.W.2d 79, 80-81 (Ky. 1975); Profser, supra note 6, § 88, at 58-9; Rothstein, Private Actions for Public Nuisance: The Standing Problem, 76 W. Va. L. Rev. 453, 460 (1974); see, e.g., Costas v. City of Fond Du Lac, 24 Wis. 2d 409, 413-14, 129 N.W.2d 217, 219-20 (1964).
This situation, where the plaintiff has the opportunity to proceed under either private nuisance or public nuisance, has been referred to as a mixed nuisance. Although the plaintiff may proceed under either theory, public nuisance may be preferable since it is well settled that prescriptive rights, the statute of limitations and laches do not run against it as they do against a private nuisance.

The unanimous agreement among jurisdictions about some form of special injury as a prerequisite to a private action for a public nuisance was challenged recently in the Florida courts in the case of *Save Sand Key, Inc. v. United States Steel Corp.* The plaintiff, a nonprofit citizens' group, brought suit to enjoin the defendant from interfering with certain alleged vested prescriptive rights of its members shared in common with the public in a portion of the beach area of Sand Key. The trial court dismissed the plaintiff's claim on the ground that the plaintiff lacked standing to sue by failing to demonstrate a special injury. The district court of appeals reversed the plaintiff's dismissal, and after recognizing the trend in expanding standing to parties except in nuisance cases impugned the special injury rule. Rather than succumb to the traditional argument that a multiplicity of suits would result from permitting plaintiff to bring a private action for a public nuisance without the traditional requisite showing of a special injury, the appellate court recognized four practical considerations debilitat- ing the argument: (1) the deterring economic influence of the high cost of litigation; (2) the precedential value of a prior decided case on a given issue; (3) the increasing number of class actions in which inheres the doctrine of res judicata; and (4) the fact that spite or harassment suits will not be tolerated by the courts.

The district court's rejection of the special injury rule was short lived, however, as the Supreme Court of Florida quashed the decision of the district court and remanded the case with directions to reinstate the order of the trial court. The supreme court condemned the district court's divergence from such a well established...
area of the law, without rebutting any of the reasons for change offered by the district court.\footnote{Id. at 11-13.}

A few states have enacted statutes permitting individuals to sue on behalf of the state as private attorneys general to enjoin public nuisances.\footnote{FLA. STAT. ANN. § 60.05(1) (Supp. 1977); MICH. COMP. LAWS §§ 691.1201-1207 (Supp. 1972); WIS. STAT. ANN. § 823.02 (1977); see Comment, The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution, 16 WAYNE L. REV. 1085, 1127-31 (1970).} "In the absence of such statutory authorization, no case has been found in which a private individual has been held to have standing to sue for a public nuisance in the absence of a particular damage to him."\footnote{PROSSER, supra note 6, § 88, at 587 n.68.}

A potential avenue available to the private litigant desirous of instituting a public nuisance action is the class action. In theory, class action procedures offer potentially significant contributions to the success of public nuisance actions since public nuisances invariably affect a group or class of persons. A class action procedure expunges the traditional arguments supporting denial of a private action for a public nuisance.\footnote{See text accompanying notes 30-35 supra.} The res judicata effect of a class action militates against the fear of a multiplicity of suits,\footnote{Doren, Air Pollution Expanding Citizens Remedies, 32 OHIO ST. L.J. 16, 28 (1971).} and the likelihood of actions for only minimal damages is lessened.\footnote{See generally Schuck, Air Pollution as a Private Nuisance, 3 NAT. RESOURCES LAW. 475 (1970).} A significant feature of the class action in the area of nuisance law is its emphasis on the aggregate interests of plaintiff class members when the court resorts to balancing the equities.\footnote{See text accompanying notes 85-118 infra.}

Although the great potential of the class action in environmental litigation has been noted by one commentator,\footnote{See Note, The Viability of Class Actions in Environmental Litigation, 2 ECOLOGY L.Q. 533 (1972).} class actions based on public nuisance theory, in practice, have been far from successful.\footnote{See generally Note, Developments in the Law of Federal Class Litigation-Catch 22 in Rule 23, 10 HOUS. L. REV. 337 (1973).} Two reasons have been offered for the apparent lack of success. First, in order to recover damages class members
must overcome the barrier created by the special injury rule.\(^6\) Secondly, the plaintiff must satisfy all of the requirements for maintaining a class action.\(^2\) Illustrative of the difficulties inherent in satisfying these requirements is the Supreme Court's decision in *Zahn v. International Paper Co.*,\(^3\) which has drained much of the vitality out of environmental class actions in federal courts by requiring each class member to satisfy the jurisdictional amount.\(^4\)

A rather unique case pointing out some of the problems with satisfying the requirements for maintaining a class action in environmental litigation is *Diamond v. General Motors Corp.*\(^6\) In *Diamond* the plaintiff brought a class action on behalf of 7,119,184 residents of the County of Los Angeles against 293 industrial corporations and municipalities and additional unknown persons as defendants. The complaint, relying on theories of public nuisance, trespass, negligence, and strict liability, sought billions of dollars in damages and an injunction restraining the defendants from further pollution emission. The plaintiff alleged that the class members suffered "shortening of life span; increased chances of suffering heart attack; emphysema; lung cancer; damage to and destruction of body tissue; eye irritation; brain damage; exhaustion due to lack of oxygen; fatigue, and many other injuries."\(^6\) Although several orders of dismissal were made by the trial court, separately dismissing the action with respect to certain defendants, the appellate court reviewed the judgment upon the original record before the trial court. Affirming the judgment of the trial court, the appellate court listed three reasons why a class action could not be maintained: (1) there were significantly distinct interests within the alleged class; (2) the right of each class member to recover was dependent upon substantial issues which had to be litigated between individual plaintiffs and defendants; and (3) the large number of parties involved, the diversity of their interests, and the immensity of issues all in one action made the proceeding unmanageable.\(^6\)

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\(^{62}\) Id.
\(^{64}\) "Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case . . . ." Id. at 301.
\(^{66}\) Id. at 380 n.7, 97 Cal. Rptr. at 644 n.7.
\(^{67}\) Id. at 379-80, 97 Cal. Rptr. at 642.
Summarizing the standing situation under public nuisance, it appears that the problems inherent in maintaining a class action proceeding and the application of the special injury rule to class actions seeking damages leave the special injury rule, in most cases, as the only potential avenue of standing available to the private citizen seeking relief for a public nuisance. The special injury rule, however, is an impediment to any recovery under a private action for a public nuisance. Continued support for the special injury rule is found only in its historical roots. While other areas of the law have submitted to logic and espoused more liberal rules of standing, the special injury rule remains an isolated barrier to the progressive development of rules of standing in the area of public nuisance.

Complexities about standing are barriers to justice; in removing the barriers the emphasis should be on the needs of justice. One whose legitimate interest is in fact injured by illegal action of an agency or officer should have standing because justice requires that such a party should have a chance to show that the action that hurts his interest is illegal.

**Basis of Liability for Nuisance**

Liability for private nuisance results only when the defendant's conduct results in an invasion of the plaintiff's interest in the use and enjoyment of land and when the invasion is either intentional and unreasonable or unintentional and otherwise actionable under principles governing liability for negligence, recklessness or abnormally dangerous activities. Subject to exceptions where liability is created by special statutes which may be regarded as a legislative declaration of unreasonableness, liability for public nuisance may rest upon either intentional conduct, negli-

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69 A liberalization of standing for public nuisance would obviate the need for plaintiffs and courts to distort and mutilate factual situations and remedies so as to enable a case to fall within the property-protection pale of private nuisance. Bryson & Macbeth, *supra* note 21, at 276.


71 E.g., Folmar v. Elliot Coal Mining Co., 441 Pa. 592, 596, 272 A.2d 910, 912 (1971); Harless v. Workman, 145 W. Va. 266, 275, 114 S.E.2d 548, 553 (1960); Prosser, *supra* note 6, § 87, at 574; Restatement (Second) of Torts § 822 (Tent. Draft No. 17, 1971).
gence or strict liability, provided the invasion causes substantial harm. 72

An invasion of another’s interest is intentional when the defendant acts for the purpose of causing the invasion or knows that it is resulting or substantially certain to result from his conduct. 73 Most air pollution nuisances are continuing or recurrent in nature. 74 As a result, the majority of air pollution nuisances are intentional since the defendant either originally intends the invasion or is aware that the invasion is resulting from his activity. 75

With regard to unintentional invasions of another’s interests, certain broad principles of liability have been developed and are embodied in the rules governing liability for negligent, reckless and abnormally dangerous conduct. 76 Each of these bases of liability carries an element of unreasonableness as a prerequisite to rendering it actionable. 77 Since there is no element of unreasonableness inherent in the concept of an intentional invasion, it is added as a prerequisite to rendering an intentional invasion actionable 78 in order to permit those intentional invasions which are reasonable. 79

Although the concept of unreasonableness with regard to an intentional invasion of another’s interest is analogous to the concept of unreasonable risk under the law of negligence, they are different in one important respect. 80 The concept of unreasonable risk conveys the idea of a foreseeable threat of harm created by the conduct of the defendant of such a character that a reasonable person would not subject others to such a risk. 81 Unreasonableness, under the law of nuisance, however, deals with the character and

74 Id.; Prosser, Nuisance Without Fault, 20 Tex. L. Rev. 399, 416 (1942).
75 Restatement (Second) of Torts § 822, Comment g (Tent. Draft No. 17, 1971).
76 Id. Comment h.
77 See id. Comment g.
78 See text accompanying notes 84-88 infra.
extent of the harm caused rather than that threatened. Thus, a nuisance may consist of an unreasonable interference with the interests of another which causes harm, even though the defendant has created no unreasonable risk, as the latter concept is developed in the law of negligence.

Drawing the line between what is a reasonable interference and an unreasonable interference is a difficult task. Life in modern society involves an unavoidable clash of individual interests since nearly all human activities interfere to some extent with others or at least involve some risk of interference. Each individual must be expected to endure some inconvenience rather than curtail the freedom of action of others. The law of nuisance, therefore, is very largely a series of adjustments and compromises limiting the rights and privileges of individuals. The process of reaching a level of activity which will permit two or more individuals to conduct their respective affairs without unduly interfering with the other, or others, is known as "balancing the equities." The process of balancing the equities, in order to determine whether an invasion is unreasonable, involves weighing the utility of the defendant's conduct against the gravity of the resulting harm to the plaintiff. This weighing process involves "a comparative evaluation of conflicting interests in various situations according to objective legal standards" and applies equally well to both private and public nuisance.

Various factors which are conducive toward a determination that an interference with a public right is unreasonable include those circumstances where the conduct involves the same kind of interference with the public health, safety, peace or convenience which constituted the common law crime of public nuisance. In

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1 Id. at 73.
2 Id.
4 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 2.02, at 2-23 (1977).
7 Bryson & Macbeth, supra note 21, at 265 n.14.
Board of Commissioners v. Elm Grove Mining Co., the plaintiff, Board of Ohio County, was seeking to abate a public nuisance affecting the public health which was created by the defendant. The nuisance was a burning gob pile which was located outside one of the defendant's mines and which exuded sulphur dioxide in quantities deleterious to the health of the community. While affirming the trial court's finding that the gaseous emanations from the burning gob pile constituted a public nuisance, the West Virginia Supreme Court emphasized the importance of the public health factor in the balancing process:

"Public health comes first. Even in as useful and important industry as the mining of coal, an incidental consequence, such as here involved, cannot be justified or permitted unqualifiedly, if the health of the public is impaired thereby.

Notwithstanding a business be conducted in the regular manner, yet if in the operation thereof, it is shown by facts and circumstances to constitute a nuisance affecting public health "no measure of necessity, usefulness or public benefit will protect it from the unflinching condemnation of the law.""

When determining whether an interference with a public right is unreasonable, a circumstance which may very likely eliminate the need to apply the balancing process occurs where the defendant's conduct is proscribed by a statute, ordinance or administrative regulation. All of the states have various statutes declaring certain conduct or conditions to be public nuisances because they interfere with rights of the general public, and these statutes amount to a legislative declaration that the conduct or condition proscribed amounts to an unreasonable interference with a public right. Such statutes are conclusive as to the reasonableness of the defendant's interference.

With respect to the law of private nuisance there are four primary factors important in determining the gravity of harm resulting from an intentional invasion of another's interest in the use and enjoyment of land, although the list is not exhaustive of all the factors which may have a bearing on the harm involved.

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90 122 W. Va. 442, 9 S.E.2d 813 (1940).
91 Id. at 451, 9 S.E.2d at 817. See also United States v. Reserve Mining Co., 380 F. Supp. 11, 55-56 (D. Minn. 1974).
93 Id. Comment c.
94 Id.
95 RESTATEMENT (SECOND) OF TORTS § 827, Comment f (Tent. Draft No. 17, 1971).
1. "[T]he extent of the harm involved" is dependent upon the degree and duration of the interference.

2. "[T]he character of the harm involved" is interrelated with the consideration of the extent of the harm. Where the invasion involves physical damages to property, the gravity of the harm is usually considered great even though the extent of the harm is relatively slight. But where the invasion involves only personal discomfort, annoyance or inconvenience, the gravity of the harm is generally regarded as slight unless the extent of the harm is substantial and continuing.

3. "[T]he social value which the law attaches to the type of use or enjoyment invaded" how much social value will be attached to the type of use or enjoyment invaded will depend upon the extent to which such use or enjoyment advances or protects the general public good.

4. "[T]he suitability of the particular use or enjoyment invaded to the character of the locality" sound public policy demands that land be used for purposes best suited to the character of that locality, and that persons desiring to make use of land should do so in a locality best suited for that particular use. The better suited a particular use is with regard to a particular locality,

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Restatement (Second) of Torts § 827, Comment f (Tent. Draft No. 17, 1971).
the greater is the gravity of harm resulting from any interference with that use.\(^{104}\) The character or nature of a locality is not fixed, however, and is likely to change over time. What may have been suitable for a particular locality in the past may no longer be so at the present. Thus, the suitability of a particular use or enjoyment of land to its locality is determined at the time of the invasion rather than at the time the use or enjoyment began.\(^{105}\)

The various factors which are important in determining the utility of conduct which causes an intentional invasion of another's interest in the use and enjoyment of land and which are to be weighed against the factors involved in determining the gravity of harm include the following:

1. "[T]he social value which the law attaches to the primary purpose of the conduct":\(^{106}\) The amount of social value which is attached to the primary purpose of the defendant's activity is the primary factor in determining the amount of social utility the defendant's conduct embodies.\(^{107}\) The defendant's conduct has social value if it in some way advances or protects the general public good.\(^{108}\) Since there is no universal standard by which courts can measure the amount of social value embodied in the primary purpose of the defendant's conduct, they should consider the community standards of relative social value prevailing at the time of the invasion in addition to what has traditionally been regarded as the relative social value of various types of human conduct.\(^{109}\)

2. "[T]he suitability of the conduct to the character of the locality":\(^{110}\) Certain areas, by reason of either their physical character or the accident of community growth, are devoted to certain activities. Incompatible areas, such as industrial and residential areas, are usually segregated from one another in order to avoid

\(^{101}\) Id.

\(^{102}\) Id.


\(^{104}\) Restatement (Second) of Torts § 828, Comment a (Tent. Draft No. 17, 1971).

\(^{105}\) Id. Comment d. Most pollution producing activities have some social value, therefore, it is unlikely that this particular factor will be very helpful to plaintiffs.

\(^{106}\) Id. Comment e; see Traiteur v. Abbott, 27 Ill App. 3d 277, 282, 327 N.E.2d 130, 134 (1975).

\(^{107}\) Restatement (Second) of Torts § 828 (Tent. Draft No. 17, 1971); see, e.g., Fuchs v. Curran Carbonizing & Eng'r Co., 279 S.W.2d 211, 218 (Mo. Ct. App. 1955).
unnecessary conflict. Thus, a plaintiff will be in a precarious position to complain of industrial pollution when he locates his home in the center of a manufacturing district. On the other hand, a corporation cannot expect to locate a factory in a residential section without possibly being subject to liability for creating a nuisance. Courts, forced to determine the paramount use to which a locality is devoted, are engaging in a process of judicial zoning. In those areas where the use of land is subject to zoning ordinances, however, the question of reasonable use may be moot by reason of statutory predetermination.

3. "Whether it is impracticable to prevent or avoid the invasion, if the activity is maintained" an invasion is practicably avoidable if the defendant can substantially reduce or eliminate the harm without incurring prohibitive expense or hardship. But where the defendant would be forced to abandon his activity or incur substantial expense or hardship to reduce the harm materially, the invasion is not practicably avoidable.

A defendant cannot rely on any single one of the above factors weighed in determining the utility of his conduct, for it is only when his conduct has utility with respect to all of these factors that its merit will ever be sufficient to outweigh the gravity of the harm it causes. For example, a defendant operating a manufacturing plant with substantial social value in an industrial district may, nevertheless, be liable under the law of nuisance if it is practicable for that defendant to eliminate unnecessary pollution emissions without incurring substantial expense.

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111 PROSSER, supra note 6, § 89, at 599; see, e.g., Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 721, 82 N.W.2d 151, 158 (1957).
In addition to establishing an unreasonable interference with an interest, a plaintiff seeking to create liability for a nuisance must also show that the unreasonable invasion causes substantial harm. The requirement of establishing a substantial harm, as will be seen, is not as involved as proving the requisite unreasonable interference with the plaintiff's interests.

The standard for determining whether there is a substantial harm is objective and requires definite offensiveness, inconvenience, or annoyance to the normal person or ordinary reasonable man in the particular community rather than the persons who happen to be using or occupying the land. Such an interference or harm must be real and appreciable and involve more than petty annoyance or slight inconvenience. While there is seldom any difficulty in satisfying the substantial harm requirement where a detrimental change in the physical condition of the land has occurred, there is difficulty in finding a substantial interference where the invasion entails only personal discomfort and annoyance. Application of the reasonable man test is decisive in the latter situation. In applying this objective standard, the "location, character and habits of the particular community are to be taken into account in determining what is offensive or annoying to a normal person in it."

The continuance or recurrence of an interference is only one, and not necessarily a conclusive, factor in determining whether the harm is so substantial as to amount to a nuisance. Although any single substantially harmful interference with a plaintiff's interests caused by liability forming conduct subjects the defendant to lia-

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119 E.g., Green v. Castle Concrete Co., 509 P.2d 588, 590 (Colo. 1973); Lynn Mining Co. v. Kelly, 394 S.W.2d 755, 759 (Ky. 1965); Prosser, supra note 6, § 87, at 577; Restatement (Second) of Torts § 821F (Tent. Draft No. 16, 1970).
122 Restatement of Torts § 822, Comment g (1939); see Frauner v. Battle Creek Coop. Creamery, 173 Neb. 412, 421-22, 113 N.W.2d 518, 524 (1962).
123 See Restatement of Torts § 822, Comment g (1939).
125 Prosser, supra note 6, § 87, at 580.
bility, a continuation or recurrence of the interference may be necessary in order to cause substantial harm.

In summary, there are two primary prerequisites to establishing a basis of liability for a nuisance. In order for there to be liability under the law of nuisance the invasion must result in both an unreasonable interference with and substantial harm to the plaintiff’s interests.

**Remedies**

Once it is determined that a nuisance does in fact exist, the focus of the court turns to the type of relief that is to be granted. Generally speaking there are three remedies available to plaintiff: (1) abatement by self-help; (2) damages; and (3) injunction. The cases make no distinction among the available remedies for private and public nuisance.

The privilege of abatement of a nuisance by self-help is closely related to the privilege of using reasonable force to protect the exclusive possession of land from trespass. It may be resorted to in an effort to protect those things which are of daily convenience and use, require an immediate remedy, and cannot wait for the cumbersome process of ordinary formal procedures. The privilege includes the use of any reasonable force in a reasonable manner which may be necessary to eliminate the nuisance, but it is abused where the damage caused by the abatement is disproportionate to the threatened harm. The privilege must be exercised

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126 Restatement of Torts, Scope and Introductory Note to Chapter 40, at 223 (1939).
127 Restatement (Second) of Torts § 821F, Comment g (Tent. Draft No. 16, 1970).
128 Confusion often arises when courts combine the above principles of liability under nuisance with common law concepts embodied in certain labels found in the law of nuisance such as absolute nuisance, nuisance per se and nuisance per accidens. Use of these terms by courts creates confusion in the area of nuisance law and often demonstrates judicial failure to grasp the basic principles. See generally Prosser, supra note 6, § 87, at 582-83.
130 Bryson & Macbeth, Public Nuisance, the Restatement (Second) of Torts, and Environmental Law, 2 Ecology L.Q. 241, 265 n.114 (1972).
132 Prosser, supra note 6, § 90, at 606.
within a reasonable time after discovery of the nuisance or after the nuisance should have been discovered.\textsuperscript{133}

Since the establishment of a nuisance deals with debatable questions of reasonableness and substantial harm, the actor who elects to abate a nuisance by self-help assumes a risk of making an erroneous determination that a nuisance ever existed in addition to assuming a risk of using unreasonable force to abate the nuisance. The fact that the actor has an honest belief that a nuisance does in fact exist is no protection from criminal prosecution or civil liability.\textsuperscript{134}

Before embarking on an examination of the legal and equitable remedies available through formal action, it should be noted that the failure of courts to distinguish nuisance as an action at law for damages from the suit for injunction in equity has been the cause of much confusion.\textsuperscript{135} Equity looks at the factual situation in its totality and determines the appropriate remedy without much regard to the legal categories of tort liability observed in cases at law.\textsuperscript{136} This disregard of legal classifications creates confusion when cases in equity are cited as precedents in actions at law.\textsuperscript{137}

The establishment of a nuisance is sufficient to entitle the plaintiff to damages in an action at law, and no further balancing of equities or of comparative hardships is necessary.\textsuperscript{138} The question of the measure of damages requires an initial determination of whether the nuisance is permanent or temporary. The concept of a permanent nuisance, although vague, seems to involve a policy determination that the defendant should be permitted to continue the nuisance on a single payment of damages.\textsuperscript{139} The following factors will likely lead to the conclusion that the nuisance is per-

\textsuperscript{133} Id. at 605. "[I]f there has been sufficient delay to allow a resort to legal process, the reason for the privilege fails, and the privilege with it." Id.

\textsuperscript{134} Id.

\textsuperscript{135} \textit{Restatement (Second) of Torts} § 822, Comment d (Tent. Draft No. 17, 1971).

\textsuperscript{136} Id.; see Coleman v. Estes, 281 Ala. 234, 238, 201 So. 2d 391, 394-95 (1967); Dutton v. Rocky Mountain Phosphates, 151 Mont. 54, 74, 438 P.2d 674, 684 (1968).

\textsuperscript{137} \textit{Restatement (Second) of Torts} § 822, Comment d (Tent. Draft No. 1971).

\textsuperscript{138} \textit{Prosser, supra} note 6, § 90, at 603.


\url{https://researchrepository.wvu.edu/wvlr/vol80/iss1/5}
permanent: (1) the nuisance can reasonably be expected to continue indefinitely into the future without reduction;\textsuperscript{140} and (2) the nature of the nuisance is such that a court of equity would not abate it by injunction because of its value to the community or the relations between the parties.\textsuperscript{141} The measure of damages for a permanent nuisance includes the diminution in property value which is calculated by determining the difference between the market value of the plaintiff's property before and after the commencement of the nuisance.\textsuperscript{142}

A nuisance which is abatable and not permanent in nature is a temporary nuisance.\textsuperscript{143} The measure of damages for a temporary nuisance includes the diminution of the rental or use value of the property for the duration of the temporary nuisance up to the time of trial.\textsuperscript{144} In addition to recovery for property damages, damages for personal discomfort and inconvenience,\textsuperscript{145} injury to health,\textsuperscript{146} or reasonable expenses incurred on account of the nuisance\textsuperscript{147} may be recovered by the plaintiff for either a permanent or a temporary nuisance.\textsuperscript{148}


\textsuperscript{141} See Reynolds Metals Co. v. Wand, 308 F.2d 504, 509 (9th Cir. 1962).

\textsuperscript{142} E.g., City of Tucson v. Apache Motors, 74 Ariz. 98, 101, 245 P.2d 255, 257 (1952); Varjabedian v. City of Madera, 134 Cal. Rptr. 305, 309, 310 (Ct. App. 1976); Dobbs, \textit{supra} note 139, § 5.4, at 333.

\textsuperscript{143} Lynn Mining Co. v. Kelly, 394 S.W.2d 755, 758, 759 (Ky. 1965); Dobbs, \textit{supra} note 139, § 5.3, at 333; see Nitram Chems., Inc. v. Parker, 200 So. 2d 220, 231 (Fla. Dist. Ct. App. 1967).

\textsuperscript{144} E.g., Lynn Mining Co. v. Kelly, 394 S.W.2d 755, 760 (Ky. 1965); Cooper Tire & Rubber Co. v. Johnston, 234 Miss. 432, 106 So. 2d 889 (1958).


\textsuperscript{146} E.g., Dodd v. Glen Rose Gasoline Co., 194 La. 1, 193 So. 349 (1940); Greer v. City of Lennox, 79 S.D. 28, 107 N.W.2d 337 (1961).


\textsuperscript{148} Nitram Chems., Inc. v. Parker, 200 So. 2d 220, 225 (Fla. Dist. Ct. App. 1967).

One attorney has listed seven basic categories of damages recoverable in air pollution cases: (1) medical, hospital and related expenses for a person whose health is impaired by reason of the pollution; (2) pain, suffering, and discomfort sustained by such a person; (3) loss of consortium by the spouse of such a person; (4) property damage including the cost of repair, replacement or correction of damage and the necessary cost measures taken to prevent further damage; (5) diminution in market value of the property for a permanent nuisance or rental value
The determination of whether a nuisance is temporary or permanent also determines whether the plaintiff must bring a single action for past and prospective damages or may bring successive actions for the nuisance. If the nuisance is permanent, all damages both past and prospective must be recovered in one action, but if the nuisance is temporary, successive suits may be brought for the continuing interference and resulting damages.

While damages may sufficiently compensate plaintiffs for injuries both past and future, such a remedy does nothing in the way of ameliorating pollution. The possibility of recovery of punitive damages, however, may provide a useful incentive for polluters to take preventive pollution control measures since punitive damages may be substantially larger than actual damages. Generally, punitive damages will only be awarded in those cases where the defendant’s actions have been so flagrant that malice may be attributed to him or where he has intentionally and continuously caused the emission of pollution with a reckless disregard for others. But the trend appears to be toward a liberalization of the definition of malice for purposes of punitive damages. In McElwain v. Georgia-Pacific Corp., the plaintiff brought an action under the law of nuisance for injuries suffered from toxic gases, fumes, smoke and particles which blew onto his land from the defendant’s paper mill. The court stated that “[t]he intentional disregard of the interest of another is the equivalent of legal malice, and justifies punitive damages . . . .” The court further held that punitive damages would be appropriate if the defendant had not done everything reasonably possible to minimize the damage to adjoining prop-

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for temporary nuisance; (6) damages for loss of normal use and enjoyment of one’s property; and (7) damages for annoyance, inconvenience and discomfort. Hadden, *Civil Action Against Air Pollution*, 49 Mich. St. B.J. 34 (August 1970).


15 E.g., Reynolds Metals Co. v. Wand, 308 F.2d 504, 508 (9th Cir. 1962); City of Tucson v. Apache Motors, 74 Ariz. 98, 101, 245 P.2d 255, 257 (1952).

16 E.g., Reynolds Metals Co. v. Wand, 308 F.2d 504, 509-10 (9th Cir. 1962); Caldwell v. Knox Concrete Prods., Inc., 54 Tenn. App. 393, 406, 391 S.W.2d 5, 11 (1964).


20 Id. at 249, 421 P.2d at 958; accord, Claude v. Weaver Constr. Co., 261 Iowa 1225, 1231, 158 N.W.2d 139, 144 (1968).
The dissenting opinion compared the award of punitive damages under such a liberal definition of malice to an injunction issued without a careful consideration of the equitable values involved and observed that punitive damages can often have the same effect as an injunction.

Ordinarily, a plaintiff will couple his claim for damages with a prayer for an injunction to abate the nuisance. There are a number of reasons why injunctive relief is preferable to a recovery of damages. First, damages are often difficult to ascertain in a pollution suit. For example, what is the value, in dollars, of the inconvenience and irritation suffered by persons or of the harm to the health of persons living adjacent to a pollution exuding factory? Second, even when damages are easily assessed, the expense of a recovery may very well exceed the amount recoverable, especially where the plaintiff is only awarded temporary damages and is forced to bring successive actions to collect further damages. Third, damages are poor social investments as they do nothing to improve the quality of the environment and usually fail to put an end to the pollution. If the defendant has paid permanent damages, he may be encouraged to do nothing for he has already paid the price to continue his pollution. Even if the defendant is faced with continual suits, he may find that it is less expensive to pay damages than to install pollution abatement devices.

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156 Id. at 261-62, 421 P.2d at 964-65. "[T]he burden of making compensation to all persons injured may prove so heavy as to render it impractical to continue the activity. In this case, the weighing process is more nearly like that involved in a suit for an injunction." RESTATEMENT (SECOND) OF TORTS § 828, Comment h (Tent. Draft No. 17, 1971).
159 See text accompanying note 151 supra.
160 In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.
161 "Mr. Shoemaker, Manager of appellant's plant, when asked why he didn't
nally, while damages may only be recovered when harm has already been suffered, injunctive relief is available in a proper case against the threat of future harm.\textsuperscript{163}

An injunction is an equitable remedy, therefore it must be clear that the plaintiff has no adequate remedy at law, usually in the form of money damages, before he may be entitled to injunctive relief.\textsuperscript{164} If money damages will adequately compensate the plaintiff for his injury, then injunctive relief should be denied.\textsuperscript{165} Usually, the determination of whether the legal remedy is sufficiently adequate to preclude equitable relief is a matter left to the court’s discretion.\textsuperscript{166} Damages, however, will often be deemed inadequate where: (1) the injury suffered cannot be accurately calculated in terms of dollars;\textsuperscript{167} (2) the injury to the plaintiff is irreparable;\textsuperscript{168} (3) the injury is continuous in nature;\textsuperscript{169} or (4) the usefulness of the plaintiff’s land is seriously impaired.\textsuperscript{170} Since most pollution

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\item use better fluoride controls, said: "It is cheaper to pay claims than it is to control fluorides." Reynolds Metals Co. v. Lampert, 324 F.2d 465, 466 (9th Cir. 1963), cert. denied, 376 U.S. 910 (1964).
\item Prosser, supra note 6, \S 90, at 603; see, e.g., Monsanto Chem. Co. v. Fincher, 272 Ala. 534, 537, 133 So. 2d 192, 195 (1961); Sohns v. Jensen, 11 Wis. 2d 449, 462, 105 N.W.2d 818, 825 (1960). But see McQuill v. Shell Oil Co., 40 Del. Ch. 410, 415-17, 183 A.2d 581, 584-85 (1962).
\item Dobbs, supra note 139, \S 2.10, at 108; Prosser, supra note 6, \S 90, at 603; see, e.g., Christopher v. Jones, 231 Cal. App. 2d 408, 415-16, 41 Cal. Rptr. 828, 833 (1964); Harden Chevrolet Co. v. Pickaway Grain Co., 27 Ohio Op. 2d 144, 147, 194 N.E.2d 177, 180 (C.P. 1961). Restatement of Torts \S 938, Comment c (1939).
\item A plaintiff seeking an injunction need not demonstrate the inadequacy of other remedies by prior resort to them. Id. \S 934.
\item See Kriener v. Turkey Valley Community School Dist., 212 N.W.2d 526, 536 (Iowa 1973); Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 725, 82 N.W.2d 151, 160 (1957).
\item Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1002-04 (1965); see Costas v. City of Fond Du Lac, 24 Wis. 2d 409, 415, 129 N.W.2d 217, 220 (1964). It is often extremely difficult to measure the amount of harm done to health, property and the environment in general. See, e.g., Reynolds Metals Co. v. Yturbide, 258 F.2d 321, 323-26 (9th Cir. 1958), cert. denied, 358 U.S. 840 (1958).
\item Prosser, supra note 6, \S 90, at 603; Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1003 (1965); see Sullivan v. Jones & Laughlin Steel Co., 208
\end{itemize}
suits involve an invasion resulting in continuous, irreparable injury where damages are indeterminate, the plaintiff will most likely not be denied an injunction solely on the basis that his remedy at law is adequate.

Establishment of an inadequate remedy at law is not enough by itself, however, to entitle the plaintiff to injunctive relief. Upon request for injunctive relief, the court engages in a second balancing process known as the doctrine of comparative hardships. As noted above, before the court finds that a nuisance does in fact exist, it engages in a balancing process in an effort to determine whether or not the defendant’s conduct has resulted in an unreasonable invasion of the plaintiff’s interests. Once a nuisance is found to exist, liability for damages is in order even though the defendant’s conduct may embody great utility and the amount of harm suffered by the plaintiff is relatively small. But for purposes of determining whether injunctive relief is in order with regard to the same conduct, additional factors must be considered. It may be reasonable to allow the continuance of an activity creating a nuisance by requiring the payment of damages, yet that same activity might be deemed too important to be discontinued by the issuance of an injunction.

Basically, the doctrine of balancing comparative hardships involves balancing the relative hardships likely to result to the defendant and society if an injunction is granted against the hard-

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Pa. 540, 555, 57 A. 1065, 1071 (1904).


172 See text accompanying notes 85-118 supra.


174 City of Monticello v. Rankin, 521 S.W.2d 79, 81 (Ky. 1975); RESTATEMENT OF TORTS, Scope and Introductory Note to Chapter 40, at 224 (1939).


A plaintiff must meet a greater burden of proof to obtain an injunction as a court is more likely to find that the defendant’s conduct is unreasonable enough to warrant damages but not so unreasonable as to warrant an injunction. Comment, Air Pollution, Nuisance Law, and Private Litigation, 1971 Utah L. REv. 142, 143.
ships likely to be suffered by the plaintiff and society in the event that an injunction is denied. Obviously, the ultimate resolution of this second balancing process will be fraught with the value judgments of a particular judge with regard to broad policy questions facing the court. Two polar views concerning the balancing of comparative hardships are found in *Whalen v. Union Bag & Paper Co.* and *Hulbert v. California Portland Cement Co.* on the one hand and *Madison v. Ducktown Sulphur, Copper & Iron Co.* and *Boomer v. Atlantic Cement Co.* on the other.

Both *Whalen* and *Hulbert* were early twentieth century cases in which the courts were unwilling to balance comparative injuries to the detriment of the plaintiff landowners. In *Whalen*, the plaintiff was a lower riparian landowner situated on the same creek upon which the defendant's pulp mill was located. The defendant's mill represented an investment of over $1,000,000 and employed somewhere between 400 and 500 persons. The mill, along with other industries, discharged its pollutant by-products into the creek and thereby substantially reduced the purity of the water. The plaintiff owned 225 acres of farmland, the use and value of which had been deleteriously affected by the polluted stream.

Although the court was well aware that the plaintiff's actual injury from the continuance of the pollution emissions would be small as compared to the great loss which would result to the defendant by the issuance of the injunction, it, nevertheless, reinstated the trial court's injunction which had been denied by the appellate division. While the court did not expressly embark on a balancing of hardships inquiry, it did note that the plaintiff's injury was not the only harm resulting from the defendant's pollution.

It can hardly be said that this injury is unsubstantial, even if we should leave out of consideration the peculiarly noxious character of the pollution of which the plaintiff complains. The

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178 208 N.Y. 1, 101 N.E. 805 (1913).
179 161 Cal. 239, 118 P. 928 (1911).
180 113 Tenn. 331, 83 S.W. 658 (1904).
182 208 N.Y. 1, 3, 101 N.E. 805, 805 (1913).
waste from the defendant's mill is very destructive both to vegetation and animal life and tends to deprive the waters with which it is mixed of their purifying qualities.\textsuperscript{183}

In its final analysis the court was unwilling to permit one landowner, causing a nuisance which substantially injured another landowner, to continue the nuisance even if he paid for continuing the nuisance. The court stated:

Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich.\textsuperscript{184}

In \textit{Hulbert v. California Portland Cement Co.},\textsuperscript{185} the defendant operated a cement plant which represented an investment of $800,000 and employed around 500 persons at a payroll of about $420,000 a year. The defendant incorporated the best, most modern equipment and methods available in manufacturing its product, but its plant continued to emit dust and smoke into the air as by-products of the production process. The defendant had consulted the best engineers and was making every effort to alleviate the unavoidable emissions, and there was no other profitable location for the defendant to conduct its business. The plaintiffs were adjacent landowners seeking an injunction to prevent the defendant from operating its plant from which emanated dust particles which formed an incrustation on all of the trees and plants growing on the plaintiffs' lands in addition to adding discomfort to the plaintiffs' lives by seeping into their homes. The deposits of dust on the plaintiffs' citrus fruit decreased its value, and the deposits on the limbs and leaves of the trees rendered cultivation and harvesting more costly than it otherwise would have been.

The defendant urged that "the resulting injuries must be balanced by the court and that where the hardship inflicted upon one party by the granting of an injunction would be very much greater than that which would be suffered by the other party if the nuisance were permitted to continue, injunctive relief should be denied."\textsuperscript{186} After considering the question of balancing the compara-

\textsuperscript{183} Id. at 4-5, 101 N.E. at 806.
\textsuperscript{184} Id. at 5, 101 N.E. at 806.
\textsuperscript{185} 161 Cal. 239, 118 P. 928 (1911).
\textsuperscript{186} Id. at 246, 118 P. at 931.
tive hardships, the court affirmed the granting of the injunction. The opinion of the court quoted with approval one of the strongest rejections of the balancing process to date:

"Of course, great interests should not be overthrown on trifling or frivolous grounds, as where the maxim de minimus non curat lex is applicable; but every substantial, material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital and large interests that the poor man is ultimately enabled to become a capitalist himself. If the smaller interest must yield to the larger, all small property rights, and all small and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few; and their development to a condition of great value and importance, both to the individual and the public, would be arrested in its incipiency."187

On the opposite extreme of the position taken by the courts in Whalen and Hulbert is found the position taken by the court in Madison v. Ducktown Sulphur, Copper & Iron Co.188 In Ducktown, the defendants, as a part of their manufacturing process, reduced copper ore and thereby caused large volumes of smoke to be emitted. These pollutants were disseminated by the winds to the plaintiffs' adjacent lands causing injuries to their trees and personal injuries in the nature of discomfort. The defendants accounted for approximately one half of the total tax base for the county in which they were located and employed somewhere between 2400 and 2600 persons. The entire population of 12,000 people in the community in which the defendants were located were dependent either directly and indirectly upon the defendants. The defendants were using the only method known to reduce copper ore and had made every attempt to eliminate the deleterious effects of the process. It was further found that there was no location more remote to which the defendants' operations could be transferred, and that if an injunction was granted as prayed, the defendants would be forced to cease operations and close down.

The court determined that the facts clearly set out a case of nuisance entitling the plaintiffs to a recovery in damages, but it denied the plaintiffs any injunctive relief after balancing the comparative injuries to the parties and the public. The court reasoned:

187 Id. at 251, 118 P. at 933 (quoting Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753, 807 (C.C.D. Cal. 1884)).
188 113 Tenn. 331, 83 S.W. 658 (1904).
In order to protect by injunction several small tracts of land, aggregating in value less than $1,000, we are asked to destroy other property worth nearly $2,000,000, and wreck two great mining and manufacturing enterprises, that are engaged in work of very great importance, not only to their own owners, but to the... State, and to the whole country as well, to depopulate a large town, and deprive thousands of working people of their homes and livelihood, and scatter them broadcast. The result would be practically a confiscation of the property of the defendants for the benefit of the complainants—an appropriation without compensation.... [I]n a case of conflicting rights, where neither party can enjoy his own without in some measure restricting the liberty of the other in the use of property, the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances.\textsuperscript{189}

In \textit{Boomer v. Atlantic Cement Co.},\textsuperscript{190} the New York Court of Appeals, by adopting an approach similar to that taken in \textit{Ducktown}, overruled a long line of cases,\textsuperscript{191} beginning with \textit{Whalen}, which eschewed the balancing of comparative hardships doctrine. In \textit{Boomer}, plaintiff landowners brought an action against the defendant for damages and injunctive relief alleging injury to their property from dirt, smoke and vibrations emanating from the defendant's plant. The defendant operated one of the world's largest and most modern cement plants employing over 300 people with an investment in excess of $45 million and using the best air pollution abatement equipment available.

The court found the ultimate question to be "whether the court should resolve the litigation between the parties now before it as equitably as seems possible; or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives."\textsuperscript{192} Although the court preferred to defer the greater problem of air pollution to the legislative and executive branches of government while deciding only the immediate dispute among the parties in the case, it tacitly engaged in balancing the comparative hardships as justification for denial of the requested injunction.

\textsuperscript{189} \textit{Id.} at 366-67, 83 S.W. at 666-67.
\textsuperscript{190} 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).
\textsuperscript{191} \textit{Id.} at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.
\textsuperscript{192} \textit{Id.} at 222, 257 N.E.2d at 871, 309 N.Y.S.2d at 314.
The court considered two alternative remedies: (1) granting the injunction but postponing its effect until a specified date in order to give the defendant an opportunity to develop its technology sufficiently to eliminate the nuisance and (2) granting the injunction conditioned on the payment of permanent damages by the defendant. The court rejected the first alternative stating that it would be unfair to place the burden of developing effective pollution abatement equipment on a single corporation when such a task would require the combined resources and efforts of the entire industry. On the other hand, the court believed that the second alternative would properly compensate the plaintiffs for all of their damages both past and future. In addition the court felt that it was "reasonable to think that the risk of being required to pay permanent damages to injured property owners by cement plant owners would itself be a reasonable effective spur to research for improved techniques to minimize nuisance." In effect, the court's ground for denial of the injunction, notwithstanding the fact that there did exist a nuisance and that the plaintiffs suffered substantial damage, was the large disparity in economic consequences between sufferance of the nuisance by the plaintiffs and enforcement of the injunction.

Although neither of the two extreme views represented by the four previously discussed cases is the best alternative available, the two views, when considered together, point to an equitable, middle of the road approach. When confronted with pollution cases founded on nuisance, courts should balance the comparative hardships in determining whether or not to issue an injunction in order to maximize the public welfare, but they should do so properly. Naturally, the hardships likely to be suffered by the defendant as a result of issuance of the injunction, and by the

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193 Id. at 225, 257 N.E.2d at 873, 309 N.Y.S.2d at 316-17.
194 Id. at 225-26, 257 N.E.2d at 873, 309 N.Y.S.2d at 317. The responsibility of taking the lead in developing more effective pollution abatement equipment by the defendant, a single corporation, may not have been so unfair as the court indicated. It was pointed out by the court that the defendant operated one of the world's largest cement plants of its kind. If the leader in a particular industry cannot be expected to assume a prominent role in alleviating air pollution, then it can hardly be expected that the particular industry will ever clean up its operations.
195 26 N.Y.2d at 226, 228, 257 N.E.2d at 873, 875, 309 N.Y.S.2d at 317, 319.
196 Id. at 226, 257 N.E.2d at 873, 309 N.Y.S.2d at 317.
197 Id. at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.
198 See Juergensmeyer, Control of Air Pollution Through the Assertion of Private Rights, 1967 DUKE L.J. 1126, 1134.
plaintiff as a result of denial of the injunction, must be considered. Courts must not stop here, however, as public policy decisions are based upon how the public is affected. Therefore, the hardships likely to be suffered by the public in the event injunctive relief is denied, in addition to the hardships likely to be suffered by the public in the event injunctive relief is granted, must also be considered. It is at this juncture that the court in Boomer erred in balancing the comparative hardships. In Boomer, the court considered the hardships that would have been suffered by the public had injunctive relief been granted, but it failed to consider the hardships suffered by the public because of its denial of injunctive relief. Thus, the court distorted the comparative hardships balancing test in favor of the defendant.

Consideration of those public interest factors favoring refusal of injunctive relief will often include the number of persons employed by the defendant, the tax contributions to the revenue of the local community and state made by the defendant, and the general boost to the economic well-being of the community provided by the defendant's enterprise. It is noteworthy that all of these factors can be broken down into dollar figures. Those public interest factors favoring the grant of injunctive relief should include the deleterious medical, ecological and aesthetic effects on the entire public resulting from continuation of the defendant's operations. Of the three, the medical or public health factor is the most significant. These public interest factors favoring the plaintiff are not readily broken down into dollar figures.

Thus, a major problem lies in the absence of a common denominator with which to compare public interest factors favoring the defendant against those favoring the plaintiff. Simply because there is no easily derivable common denominator with which to compare public interest factors, however, does not mean that those factors not capable of being broken down into dollar figures should

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200 See City of Monticello v. Rankin, 521 S.W.2d 79, 81 (Ky. 1975).
201 See, e.g., Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1121 (7th Cir. 1976) (defendant's contribution also included improvement of the environment through its recycling efforts); Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 724, 82 N.W.2d 151, 159-60 (1957).
be ignored as they were in Boomer. Ignoring such factors would result in the absence of any public interest consideration on the plaintiff's side in almost all cases. In an effort to aid the court in balancing the comparative hardships of the parties and the public, the plaintiff should offer as much empirical evidence and expert testimony as possible which indicate the extent of the deleterious effects caused by continuation of the defendant's operations.

When balancing the comparative hardships, it should be kept in mind that injunctive relief is not a single remedy, but rather an arsenal of remedies which is flexible in nature. The choice is not one of simply closing a plant down or permitting its operation to continue subject to the payment of damages. Various species of injunctive relief may be adopted to a particular situation including: an injunction requiring the defendant to apply existing technology to abate the emission of pollution, an injunction to take effect after a set period of time, thus giving the defendant an opportunity to eliminate the nuisance, an injunction prohibiting


An extension of time before an injunction takes effect might be allowed on a showing of a good faith attempt to eliminate the nuisance. Proof of substantial expenditures allocated to environmental research and development might be indicia of such a good faith attempt. See D. Dobbs, Law of Remedies § 5.7, at 360-61 (1973); Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1064 (1965).

An alternative route might be to permit the defendant to try new means of avoiding the nuisance while at the same time requiring the defendant to make periodic reports back to the court or a master. If this approach does not too deeply involve the court in the operation of a business, it may well afford an appropriate solution to a sensitive controversy. A classic example of the effectiveness of this approach occurred in Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); 237 U.S. 474 (1915); 240 U.S. 650 (1916).

Defendants should not be permitted to rely on existing technology, however, to justify their conduct. As stated by Judge Jansen in his dissenting opinion in Boomer:

[Even though] the most modern dust control devices available have been installed in defendant's plant, . . . this does not mean that better and more effective dust control devices could not be developed within the time allowed to abate the pollution.

only that part of the activity which is causing the nuisance or manner in which the activity is carried on; an injunction coupled with an award of damages; or any variety of injunctive relief tailored to fit a particular set of facts.

Even when a plaintiff has established that he has no adequate remedy at law and that the comparative hardships are balanced in his favor, injunctive relief may still be denied where his misconduct proves him unworthy of such equitable relief or where his unreasonable delay in bringing suit operates to the prejudice of the defendant. A plaintiff cannot expect injunctive relief when he fails to come to court with clean hands. Thus, a plaintiff’s misconduct prior to suit, even though it does not amount to a crime or tort, may cause injunctive relief to be denied if the misconduct relates to the controversy over which the injunctive relief is sought and if it is of such a nature as to render the plaintiff’s interest undeserving of injunctive protection. For example, a plaintiff who buys land, knowing that it is a dumping ground for debris from a mine, primarily for the purpose of using the threat of injunction against the dumping of the debris in order to coerce purchase of the plaintiff’s land by the mine owner at an extortionate price, will be denied injunctive relief because of his misconduct.

A plaintiff will also be denied injunctive relief where the defendant successfully raises the defense of laches. Laches occurs from the plaintiff’s unreasonable delay in bringing suit even for a period of time shorter than the prescribed statute of limitations.

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209 See Mandell v. Pasquaretto, 76 Misc. 2d 405, 410-11, 350 N.Y.S.2d 561, 567-68 (Sup. Ct. 1973). “The most familiar application of these rules is found in a case where a repeated or continuing tort is enjoined for the future and compensated in damages for the past.” Restatement of Torts § 943, Comment c (1939).

210 “Within very broad limits, the court is free to adjust the interests of the plaintiffs, the defendants and the public by devising an individually tailored remedy to fit the particular case.” Township of Hanover v. Town of Morristown, 108 N.J. Super. 461, 487, 261 A.2d 692, 705 (Super. Ct. Ch. Div. 1969).

211 Prosser, supra note 6, § 90, at 604; Restatement of Torts § 940 (1939).


213 Restatement of Torts § 940, Comment b (1939).

214 Id.

when he knew or should have known of the nuisance, and the delay has operated to the prejudice of the defendant or has weakened the court’s facility of administration.\(^\text{214}\) The defense of laches is similar to the defense of a plaintiff’s misconduct, the difference being that in the former the plaintiff fails to take affirmative action to the detriment of the defendant, whereas in the latter the plaintiff does take affirmative action but to the detriment of the defendant.

Although there are a few hurdles which must be overcome by a plaintiff seeking injunctive relief as a remedy to his sufferance of a nuisance, the obstacles are not insurmountable, and the flexibility of injunction as an equitable remedy offers the potential for custom-fitted relief designed especially for the plaintiff’s situation. In addition, injunctive relief is a powerful tool available for use by a court ingenious enough to use it, and it operates as an excellent incentive to compel industry to develop effective pollution abatement equipment.

**Pitfalls of a Nuisance Action**

Although nuisance offers great potential with respect to abatement of air pollution, many pitfalls await the reformer relying on the theory of nuisance as a tool for resolving environmental problems. While many authorities may be cited for the proposition that contributory negligence can never be a defense to an action based on nuisance,\(^\text{215}\) such an absolute statement is not completely true.\(^\text{216}\) Whether or not contributory negligence may be used as a defense to a nuisance action will depend upon the type of defendant’s conduct which creates the nuisance\(^\text{217}\) in addition, of course, to the type of responsive conduct on the part of the plaintiff.\(^\text{218}\)

\(^{214}\) *Restatement of Torts* § 939, Comment a (1939); see Coleman v. Estes, 281 Ala. 234, 238, 201 So. 2d 391, 394 (1967); Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 351-56, 83 S.W. 668, 662-64 (1904).

\(^{215}\) See Prosser, *supra* note 6, § 91, at 608 n.11.


\(^{218}\) See generally Prosser, *supra* note 6, § 65.
In addition, a plaintiff cannot be too dilatory in bringing a private nuisance action because the statute of limitations may be raised, as in other torts, as an adequate defense. Since a nuisance is not established until an unreasonable invasion of the plaintiff's interests causes substantial harm, the statute of limitations will not begin to run until such harm has been incurred.

Another pitfall awaits the plaintiff where two or more defendants each contribute to the plaintiff's harm. Generally, when two or more defendants, acting independently, create a nuisance from air pollution emissions causing substantial harm to the plaintiff's interests, the plaintiff has the burden of proving some definite harm resulting from the emissions of each defendant. While this burden of proof may be difficult to sustain and will probably require the aid of expert testimony, the jury will have some liberty in estimating the actual loss caused by each defendant. When the defendants act in concert or breach a joint duty in creating the nuisance, they will be held jointly and severally liable as joint tortfeasors. It should be noted that where a single, indivisible harm is sustained as a result of the independent but concurring acts of two or more defendants, there is an increasing tendency to impose joint and several liability for the damage caused by the acts. It should be remembered, in such cases, that the harm must be indivisible in nature and not practicably apportionable between or among the defendants.


The statute of limitations is not an adequate defense against a public nuisance. See text accompanying note 47 supra.

\[20\] See text accompanying note 119 supra.

\[21\] 1 F. Grad, Treatise on Environmental Law § 2.02, at 2-33 (1977); see Lynn Mining Co. v. Kelly, 394 S.W.2d 755, 758 (Ky. 1965).


\[23\] 1 F. Grad. Treatise on Environmental Law § 2.02, at 2-40 (1977); see Food Mach. & Chem. Corp. v. Meader, 294 F.2d 377 (9th Cir. 1961).


\[26\] Id. at 693-94; see 1 F. Grad, Treatise on Environmental Law § 2.02, at 2-40 (1977).

If the defendant has been polluting for quite some time, his action may have ripened into a prescriptive right to continue a private nuisance. In effect, the law rewards the defendant for his patient and assiduous polluting. Applicability of this defense, however, is limited to only those nuisances that are continuous, of a constant amount and of an unvarying quality. Such a limitation may very likely eliminate most defenses asserting prescriptive rights since the emission of pollution will usually vary in degree with changes in production.

A final obstacle which may possibly trouble the plaintiff is the doctrine of coming to the nuisance. Under the doctrine of coming to the nuisance, one who takes up residence near an already existing nuisance must bear the consequences of the nuisance without complaint. The defense of coming to the nuisance was first successfully pleaded in England, in 1826, in the case of Rex v. Cross. Beginning in 1838, the English courts gradually began repudiating the defense of coming to the nuisance until finally it was said: "[T]he old notion of people losing their rights of complaint because they come to a nuisance, has been long since exploded."

Although the doctrine is not universally accepted in the United States, vestiges of it remain. In East St. Johns Shingle

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228 Curry v. Farmers Livestock Mkt., 343 S.W.2d 134, 137 (Ky. 1961); Juergensmeyer, Control of Air Pollution Through the Assertion of Private Rights, 1967 DUKE L.J. 1126, 1136; Schuck, Air Pollution as a Private Nuisance, 3 NAT. RESOURCES LAW. 475, 485 (1970); see, e.g., Hulbert v. California Portland Cement Co., 161 Cal. 239, 244, 118 P. 928, 930 (1911).

Prescriptive rights are applicable with respect to private nuisance but not public nuisance. See, e.g., Fertilizing Co. v. Hyde Park, 97 U.S. 659, 668-69 (1878); Smejkal v. Empire Lite-Rock, Inc., 547 P.2d 1363, 1365 (Or. 1976). See text accompanying note 47 supra.


230 See, e.g., West Ky. Coal Co. v. Rudd, 328 S.W.2d 156, 160 (Ky. 1959).


The doctrine of coming to the nuisance is analogous to the doctrine of assumption of the risk. See 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.28, at 83 (1956); PROSSER, supra note 6, § 91, at 611.


234 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 2.02, at 2-24 (1977); Schuck, Air Pollution as a Private Nuisance, 3 NAT. RESOURCES LAW. 475, 484 (1970).
Co. v. City of Portland, the defendant municipality along with other enterprises dumped its sewage into a slough. Later the plaintiffs began operating shingle mills, using the slough to transport logs to their mills. The plaintiffs claimed that the sewage dumped into the slough by the defendants increased their costs of operations by covering the logs, thereby constituting a public nuisance from which they suffered special injury.

The court denied the plaintiffs any relief, relying on the defendant's defense of the doctrine of coming to the nuisance. The court reasoned that granting the plaintiffs any relief would be inviting parties to speculate about the purchase of property in the vicinity of an existing operation with an eye to collecting damages out of the harm created by such operation. The court did, however, limit its decision to the factual situation where the defendant is a municipality which creates a nuisance by an authorized governmental function and where the plaintiff is operating an industrial concern and has commenced operations after the defendant has begun the operations causing the complained-of nuisance. The court specifically denied a complete embracement of the doctrine of coming to the nuisance. In addition to the argument made by the court in East St. Johns in favor of the doctrine of coming to the nuisance, it might be argued that the doctrine prevents the same speculators from forcing the defendant to repurchase the land at an exorbitant cost.

The majority view rejects the doctrine of coming to the nuisance as an absolute defense to a nuisance action. Support for the majority view is found in the argument that the doctrine is out of place in modern society where people often have no real choice as to whether or not they will reside in an area adulterated by air pollution. In addition, the doctrine is contrary to public policy

225 195 Or. 505, 246 P.2d 554 (1952).
226 Id. at 507-08, 246 P.2d at 555.
227 Id. at 525, 246 P.2d at 563.
228 Id.


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in the sense that it permits a defendant to condemn surrounding land to endure a perpetual nuisance simply because he was in the area first.\textsuperscript{242} Another reason given for rejecting the doctrine is that an owner of land subject to a nuisance would either have to bring suit before selling his land in order to attempt to receive the full value of the land or reconcile himself to accepting a depreciated price for the land since no purchaser would be willing to pay full value for land subject to a nuisance against which he is barred from bringing an action.\textsuperscript{243}

Although the majority view rejects the doctrine of coming to the nuisance as an absolute defense to a nuisance action, many authorities support the view that it is a factor to be considered in determining whether or not the defendant has caused an unreasonable interference with the plaintiff's interests,\textsuperscript{244} or, more broadly, that it is a factor to be considered in determining whether or not a nuisance exists.\textsuperscript{245} Such a position is untenable, however, because the fact that the plaintiff owned the land prior or subsequent to the defendant's creation of the complained condition is irrelevant to whether or not the condition is a nuisance. Of course purchase of land subject to a nuisance in bad faith by the plaintiff may bar him from injunctive relief.\textsuperscript{246}

CONCLUSION

Nuisance is a powerful tool for the private litigant desirous of resolving environmental problems. Although the problem of standing, the requirement of proving an unreasonable interference with the plaintiff's interests, and the many defenses and pitfalls which inconspicuously await the plaintiff create a significant threat to the success of a nuisance action, these obstacles are not insur-


\textsuperscript{243} 41 Calif. L. Rev. 148, 149 (1953).


\textsuperscript{245} See text accompanying notes 84-88 supra.

\textsuperscript{246} See text accompanying notes 209-12 supra.
mountable and may be overcome. A private litigant intent on alleviating air pollution should not hesitate to include an allegation of nuisance in his complaint. At the same time the private litigant should be aware that other theories of recovery are available such as actions based on trespass, negligence, strict liability, products liability, stockholders’ derivative suits, antitrust violations and statutory violations.

Although salutary legislation is slowly engulfing the area of environmental law, private citizens cannot afford to rely on the initiative of government agencies to implement the purposes of these new acts. Enforcement of environmental legislation is often fraught with politics, capitalistic influence and bureaucratic apathy, and the individual should not be forced to suffer the consequences of such deleterious shortcomings. Availability of a nuisance action to the private citizen is one bit of assurance that the environment in which we live will remain livable; the existence of tomorrow is dependent on the precautions of today.

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