Actions for Damages for Air Pollution Injuries

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IT IS EVERYWHERE NOW AND NO ONE ESCAPES IT. THE INTENSIFYING PROBLEM OF AIR POLLUTION HAS REACHED PROPORTIONS SUFFICIENT TO CREATE ALARM AND DISMAY IN EVEN THE MOST CALLOUS CITIZEN. YET THE ECOCLOGICAL ENTHUSIASM OF THE GOVERNMENT AND SOME PUBLIC INTEREST GROUPS SEEMS TO HAVE WANED, AND OUR OVERREACHING DESIRE FOR INDUSTRIAL GROWTH CONTINUES TO KICK ENVIRONMENTAL PROBLEMS ASIDE IN ALL BUT A FEW CASES. IN VIEW OF THE THREAT TO LIFE AND GENERAL DAMAGE CAUSED BY AIR POLLUTION, IT IS ESSENTIAL THAT NO PHASE OF THE ANTI-POLLUTION EFFORT BE NEGLECTED, AND FOR THIS REASON INDIVIDUAL SUITS FOR DAMAGES AGAINST POLLUTERS OF THE AIR WILL CONTINUE TO BE VITAL.

THERE IS NO WAY TO MINIMIZE THE SERIOUS DANGERS OF THIS PROBLEM. IT HAS ALREADY BEEN CONCLUDED THAT THE SEGMENT OF THE AMERICAN POPULATION LIVING IN POLLUTED URBAN AREAS IS TWICE AS LIKELY TO DIE FROM RESPIRATORY AILMENTS BETWEEN THE AGES OF 50 AND 70 AS THEIR COUNTERPARTS IN RELATIVELY NON-POLLUTED AREAS. THERE HAS ALSO BEEN A GENERAL RISE IN DISEASE ATTRIBUTABLE TO AIR POLLUTION INCLUDING VARIOUS FORMS OF POISONING, LUNG DAMAGE, CANCER AND HEART DISEASE. IN ADDITION TO THIS PERSONAL INJURY, AIR POLLUTION DAMAGE TO PROPERTY IN THIS COUNTRY HAS BEEN ESTIMATED TO EXCEED ELEVEN BILLION DOLLARS A YEAR. IT WOULD BE SENSELESS TO ALLOW POLLUTERS TO CONTINUE INFLECTING THEIR WASTES UPON THE AESTHETICS, PERSONS, AND PROPERTY OF THE INDIVIDUALS IN OUR SOCIETY WITHOUT COMPENSATION BEING SOUGHT. THE PURPOSE OF THIS ARTICLE IS TO REMIND THE GENERAL PRACTICING ATTORNEY OF THE POSSIBILITY OF PRIVATE LAWSUITS FOR DAMAGES IN AIR POLLUTION CASES, AND TO GUIDE HIM IN HIS FIRST APPROACHES TO THE LAW IN THIS FIELD.

2. See Rheingold, Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere, 33 BROOKLYN L. REV. 17 (1966) (hereinafter cited as Rheingold).
This assertion of private rights will do much to protect the individual client and aid in the control of a burgeoning problem. And, while not a new approach, it is an increasingly popular one. There are many cases fifty to a hundred years old, but the volume of pollution litigation has grown considerably in the last twenty years. This volume is expected to continue to grow for several reasons: the public consciousness of pollution has grown, air pollution statutes have proliferated, an enlarged body of scientific data is available to plaintiffs, specialized agencies are present to advise and furnish expert witnesses, and the case law trend is toward protection of the plaintiffs. All this points to a profitable and vitally useful practice in air pollution suits and it becomes clear that, once again, private interest and public interest go hand-in-hand.

II. TRADITIONAL THEORIES OF SUIT

Not surprisingly, negligence, trespass, and nuisances have developed through the years as the traditional theories upon which pollution suits have been based. But there are other bases for suit which should be examined. A very important one is the statutory basis. The attorney should always look first to the statutory law, an admonition that is frequently forgotten. True, it is not often that a statute specifically authorizes a private suit. Indeed, it appears that so far only one statute serves as a basis for suit in the pollution field. But even if the statute does not create a right to sue

5. A very early case in which the defendant was found to be committing a nuisance by allowing his hog sty to corrupt the plaintiff's air is William Alfred's case, 77 Eng. Rep. 816 (K.B. 1611). Damages and an injunction were awarded. See also Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 92 (1911).


7. Id. at 123-4.

8. The Clayton Antitrust Act, 15 U.S.C. §15 (1914) allows recovery of treble damages by anyone damaged in his business or property by reason of anything forbidden in the antitrust laws. While not an antipollution statute, this was used as the basis of suit in United States v. Automobile Manufacturers Association, Inc., 1969 Trade Cas. 72,907 (C.D. Cal.). There an antitrust suit was filed by the Department of Justice against the four major automobile producers alleging that they unlawfully conspired to delay development and installation of antipollution devices for cars. The federal district court enjoined the defendants and they submitted to the judgment without trial or
in so many words, still it may be useful, for although it allows only a governmental unit to enforce its provisions, violation of its provisions may constitute the basis for a negligence per se action. The fact that the statute is penal in character does not prevent its use in imposing civil liability, but the plaintiff must show that he is within the class intended to be protected by the statute and that the harm suffered was generally the kind that the statute was intended to prevent.9

A more common theory of suit is the negligence of the defendant. Of course, in this case the plaintiff must prove a lack of due care in the exercise of defendant’s duty which resulted in the plaintiff’s injury. This proof may occasionally be simple and easy. For example, in Greyhound Corp. v. Blakely,10 the plaintiff was a passenger on defendant’s bus where she inhaled air containing a toxic amount of carbon monoxide. In a negligence action she was awarded a substantial recovery for the nerve and brain damage she suffered. But it is more likely that the plaintiff will encounter severe, perhaps insurmountable problems in proving causation, especially where there are multiple polluters. However, several authorities say that much of this problem can be overcome by joining the major polluters in the area as class defendants.11

Many of the major air pollution suits have been based on negligence and they are instructive of the various causation problems which may be encountered. An exemplary case is Hagy v. Allied Chemical and Dye Corp.12 There the plaintiffs sued for personal injuries sustained while driving past the defendant’s plant through a sulphuric smog created by the

finding of fact. The city of New York (joined by several other urban areas and individuals as amici curiae) appealed asking for a clause in the decree enabling the consent decree to be admissible as evidence that the charges were true, thus aiding future private suits, but the appeal was denied by the U.S. Supreme Court in City of New York v. United States, 397 U.S. 248 (1970). Nevertheless, a number of private civil suits for treble damages have been filed. See N. Landau and P. Rheingold, The Environmental Law Handbook §4.7(b) (1971). See also S.C. Code §63-195.28 (Supp. 1970).

10. 252 F.2d 401 (9th Cir. 1958).
defendant’s release of sulphur dioxide during a known temperature inversion. Negligence was admitted. The plaintiffs claimed that the smog aggravated Mrs. Hagy’s previously undiagnosed cancer of the larynx and Mr. Hagy’s heart condition. Mrs. Hagy’s larynx was later removed due to the cancer and it was the plaintiff’s contention that the cancer was dormant but became active due to aggravation by the smog, and that the removal of the larynx might have been averted were it not for this aggravation. Medical testimony was taken that sulphur dioxide severely irritates the tissues of the throat and that it could cause the cancer to “light up.” The defendants asserted that, as a matter of law, the evidence was insufficient to support the implied finding of the jury that there was such a causal connection between the defendant’s negligence and plaintiffs’ injury. The court affirmed the verdict of the trial court for the plaintiffs saying,

The burden did not rest upon respondents to prove that the removal of respondent’s larynx would not have been necessary but for her exposure to the smog; the burden was rather upon appellants to convince the jury that the operation would have been ultimately necessary in any event, even though the cancerous larynx had not been traumatized by the irritation of the smog.\textsuperscript{13}

Mrs. Hagy was awarded $25,000 and her husband was awarded $5,000.00.

In \textit{Hagy}, the “take your victim as you find him” tort concept was not challenged, but in a more recent case it was a part of the decision. In \textit{Heckt v. Beryllium Corp.},\textsuperscript{14} the plaintiff resided several miles from the defendant’s plant and inhaled the emissions of the plant which was the only major source of beryllium in the area. In 1950, the Atomic Energy Commission established a toxicity level for beryllium that should not be exceeded in out-plant areas. Prior to 1950 there were no regulations, but the defendant knew of the toxicity of beryllium. From 1951 to 1955 the defendant’s emissions exceeded the permitted safe maximum. The trial court granted the defendant a judgment \textit{non obstante veredicto} on the basis of expert testimony that the plaintiff’s illness could have been caused by the 1951-55 emissions only if she had been overexposed to toxic emissions prior to 1951. The upper court reversed on appeal, ruling that because of the unknown de-

\textsuperscript{13} Id. at 370, 265 P.2d at 92.

\textsuperscript{14} 424 Pa. 140, 226 A.2d 87 (1966).
gree of exposure before 1951 and the dangerous nature of the substance, the excessive emissions of 1951-55 constituted negligence, and the defendant was liable for all the harm caused by its negligent act even though the injury is enhanced by an unknown physical condition caused by the pre-1951 emissions.18

While Hagy and Heck did not meet overly difficult causation problems, they do serve to illustrate the types of difficulties which might be faced. For example, is your client’s emphysema a result of the effluent of the paper mill or the fertilzer plant, or the fact that emissions from automobiles in the city have been equated with smoking two packs of cigarettes a day? Did the paint on your house turn brown because of the sun or air pollution? It is not hard to imagine these problems. Yet the same scientific explosion which helped bring about the pollution problem offers some solutions. Medical studies increasingly are linking pollution to disease. Specific substances when emitted frequently cause specific injuries such as fluoride gases, beryllium dust, welding fumes, coal dust, asbestos dust, cement and fertilizer offcasts, refineries’ exhausts, etc. Some substances, such as benzpyrenes from gasoline, are carcinogenic.16 It is obvious that experts and technical data must be relied upon. It seems however, that most medical experts are willing to testify to aggravation of a preexisting condition or disease rather than direct causation.17

The most difficult causation problem arises where there are multiple polluters. Can compensation be recovered for damages suffered from inhalation of general mixed polluted air? Several diseases and types of property damage result from chronic exposure to generally polluted air.18 The suggested answer is to eliminate any alternative causes by joining all possible major polluters as defendants.19 Indeed, this

15. Rheingold, supra note 3 at 20. See also ANNOT., 54 A.L.R. 2d 764 (1957).
16. Id.
17. Van Doren, Air Pollution—Expanding Citizens Remedies, 32 Ohio St. L.J. 16 (1971).
18. Sec, Rheingold, supra note 3, at 20.
was tried on a grand scale in the case of *Diamond v. General Motors Corp.* which was a class action in behalf of the population of Los Angeles County requesting an injunction to restrain the defendants from discharging pollutants into the atmosphere of the county, and other relief. Joined as defendants were 200 major polluters in the county including automobile manufacturers, innumerable plants, and six airlines. The defendants' demurrer was sustained. Nevertheless, there is ample precedent for the joinder of several defendants where pollutants are mixed.

Causation in the area of property damage has been handled without much trouble in the cases. Further problems may arise in proving that defendant's behavior was negligent. Here again an exemplary case may be helpful and *Reynolds Metals Co. v. Yturbiende* is particularly useful. The plaintiff sought damages for personal injuries caused by fluoride poisoning. The fluorides were alleged to be windborne from Reynolds's plant to the plaintiff's farm where they were inhaled and ingested with food grown on the farm. The case centered on whether the fluorides came from the defendant's plant and caused the plaintiff's injuries, and whether the defendant was negligent in allowing the fluoride to escape in amounts large enough to injure the plaintiff. As to the former question, it was stipulated that some fluorides did escape from the defendant's plant and fall at times on plaintiff's farm. Tests by an Oregon State University horticulturist showed generally that there was a direct relationship between the proximity to the defendant's works and the amount of fluorine that was found in plant life (plaintiff's farm was about 1½ miles away), and that there were substantial amounts of fluorine in plants found in plaintiff's land. No proof was given as to what quantities of fluo-

20. No. 947429, Superior Court for the County of Los Angeles, California (1969).
24. 258 F.2d 321 (9th Cir. 1958).
rides were in the gases and air passing over the plaintiff's land, but proof was given that these are toxic. Likewise, there was no showing of exactly where the escaped fluorides actually settled. There was proof of fluorosis damage in the plaintiff's cattle and also evidence that the glass in the plaintiff's home had become etched by acid, probably hydrofluoric acid which was one of the defendant's effluents. Substantial medical testimony linked plaintiff's disabilities with the fluorides escaping from the plant. The court ruled that this evidence was sufficient for the jury to determine whether defendant's effluent had caused plaintiff's injuries.

In regard to the question of negligence, the court said that in determining the standard of care in this case it should refer to the defendant's knowledge of potential dangers, for it was his duty to be aware of the dangers incident to his activities. The defendant's conduct was to be examined in view of this knowledge. The defendant was fully aware of the dangers involved in the escape of fluorides. The question then was, in view of this knowledge, was there failure to use reasonable care for the protection of the plaintiff. The defendant argued and proved that he was using the latest pollution control devices. The court stressed the superior knowledge of the defendant and the duty such knowledge placed on him,\(^2^5\) and testimony that ordinarily, persons in the plaintiff's position would not suffer fluorosis from a nearby plant. Thus the case was a proper one for the application of the res ipso loquitur inference of negligence, and the lower court judgment for the plaintiffs was upheld.

While touching on it, *Yturbi* de does not answer a major question in the negligence anti-pollution actions. That is, what is the standard of care to be applied in these private air pollution suits. Must the defendant use the latest pollution control devices, even if his profit margin will be drastically reduced, or is his duty of care met by using the devices which others around him are using? The question is not yet settled. The standard adopted obviously will depend upon the courts' view of the social utility and urgency of air pollution control.\(^2^6\) However, two recent cases, neither founded in negligence, may indicate a trend. In *Renken v. Harvey Aluminum*,

\(^2^5\) The court referred here to *Restatement (Second) of Torts §289* (1965).

\(^2^6\) *Juergensmeyer, supra note 2* at 1147.
Inc.\textsuperscript{27} an injunction was sought to force the defendant to cease his trespass on plaintiff's orchard through the settling of his effluent fluoride particles. The constant settling of the fluorides was a continuous trespass which the court considered interchangeable with nuisance. The court determined that the installation of certain antipollution devices would greatly reduce the escape of the harmful fluorides. Rather than grant damages for the past and prospective trespasses, the court ordered the defendant to install the devices within one year or be enjoined from operation. The court stated:

\begin{quote}
[O]nce the plaintiffs established that fluorides were deposited on their lands from the plant of the defendant, the burden of going forward with the evidence was on the defendant to show that the use of its property, which caused the injury, was unavoidable or that it could not be prevented except by the expenditure of such vast sums of money as would substantially deprive it of the use of its property.\textsuperscript{28}
\end{quote}

\textit{Renken} thus suggests that the standard will be that polluters must use all available control devices as long as the expense does not substantially deprive them of the use of their property.

In the most recent case, \textit{Boomer v. Atlantic Cement Co.},\textsuperscript{29} the court awarded the plaintiff $185,000 permanent damages for depreciation of property values caused by dust and other chemical products thrown into the air by defendant's rock quarry. The court refused, however, to issue an injunction, balancing the economic equities in favor of the defendant and taking note of the fact that defendant was using the most modern control devices. Judge Jasen, dissenting from the refusal to enjoin quarry operations, indicated that the standard set forth in \textit{Renken} may not be enough. Said the judge:

\begin{quote}
I am aware that the trial court found that the most modern dust control devices available have been installed in defendant's plant, but, I submit, this does not mean that \textit{better} and more effective dust control devices could not be developed within the time allowed to abate the pollution.

Moreover, I believe it is incumbent upon the defendant to develop such devices, since the cement company, at the time the plant commenced production (1962), was well aware of plaintiff's presence in the area as well as of the probable consequences of its contemplated operation. Yet, they still chose to build and operate the plant at this site.
\end{quote}

\textsuperscript{28} Id. at 174.
\textsuperscript{29} 26 N.Y.2d 219, 309 N.Y.S.2d 312 (1970).
In a day when there is a growing concern for clean air, highly
developed industry should not expect acquiescence by the courts, but
should, instead, plan its operations to eliminate contamination of our
air and damage to its neighbors.30

Perhaps, then, the standard of care of the future will
require the polluter to participate in the development of more
effective air pollution control devices. Perhaps the courts will
begin to realize that in an era of rapidly intensifying air pol-
lution problems, industry cannot be allowed to defend its con-
duct with a mere “I’m doing all I can.” The technological
capacity of the United States indicates that more can be done,
and it is becoming more apparent that the courts have a
strong role to play in compelling more to be done.

One theory of air pollution suits that has been frequently
seen in the courts is nuisance. It has even been facetiously
alleged that the first air pollution nuisance action arose when
a caveman’s campfire smoke entered his neighbor’s cave, and
that the remedy was abatement by club.31 In any case it’s
clear that nuisance actions for air pollution extend back hun-
dreds of years,32 and, as might be expected, several difficulties
with this theory have developed. The trouble here is not what
is the law; it is what is a nuisance. To make the problem even
more interesting, there is a categorization problem within
the categorization problem. It would be well then to review
a few basics.

To begin, there are probably as many definitions of
nuisance as there are attorneys in the United States. One
succinct definition is:

“Nuisance” is anything that unlawfully works inconvenience or dam-
age to others from unreasonable or unlawful use of property.33

The interference with the plaintiff’s interests must be sub-
stantial, the standard being definite offensiveness, inconven-
ience, or annoyance to the normal person in the community.34
Historically there have been two lines of development, classi-
fied as public nuisance and private nuisance. A private nui-

30. Id. at 231, 309 N.Y.S.2d at 322.
31. Porter, The Role of Private Nuisance Law in the Control of Air Pol-
lution, 10 Auz. L. Rev. 107 (1968) [hereinafter cited as Porter].
32. See note 5, supra.
34. PROSSER, THE LAW OF TORTS §88 (3rd ed. 1964) [hereinafter cited as
PROSSER].
sance is a civil wrong, based on a disturbance of rights in land, whose remedy lies in the hands of the individual offended. 36 A public nuisance consists of an interference with the rights of the community at large, which may include virtually anything, and the remedy lies in the hands of the state. 37 Theoretically, the two have almost nothing in common, except that each causes inconvenience to someone. 38

The first difficulty stems directly from this dichotomy, for the application of public nuisance is severely restricted. To be considered public, the nuisance must affect an interest common to the general public, rather than one peculiar to a few individuals. 38 If the action is classified as a public nuisance, generally only the state or its agents may proceed against the polluter. 39 It is well settled law that for an individual to have cause of action in public nuisance he must be able to show that he has suffered special damage over and different from the ordinary damage caused to the public at large. 40 The rule is that the plaintiff's damage must be different in kind, rather than in degree, from that shared by the general public. 41 On the other hand, it has been suggested that while the plaintiff has no action for infringement of a theoretical right which he shares with the public at large, he is entitled to relief when that infringement also causes him substantial harm. 42 That is, where the plaintiff suffers personal injury, harm to his chattels, or interference with the use and enjoyment of his land the nuisance becomes a private

35. Id. at §87.
36. Id. In S. C. it has been said, "Whatever tends to endanger life or generate disease and affects the health of the community, whatever shocks the public morals and sense of decency, and whatever shocks the religious feelings of the community, or tends to its discomfort, is generally at common law a 'public nuisance' and a crime." State v. Turner, 198 S.C. 487, 496, 18 S.E.2d 372, 375 (1942).
37. Prosser, supra note 34, at §87.
38. Id. at §89.
39. Id.
41. Prosser, supra note 34, at §89. See, e.g., Belton v. Wateree Power Co. 123 S.C. 291, 115 S.E. 587 (1922). Note, however, that the rule does not preclude a negligence action brought upon the same facts. Kneese v. City of Columbia, 128 S.C. 375, 128 S.E. 100 (1924).
42. Prosser, supra note 34, at §89. This concept has been referred to as "mixed nuisance" in South Carolina in Deason v. Southern Ry., 142 S.C. 328, 140 S.E. 575 (1927).
as well as a public one.\textsuperscript{43} Even so, the adherence of the courts to the difference in kind rule remains important for it is argued that most instances of air pollution are public nuisances rather than private due to the wide diffusion of pollutants through shifting winds and air currents. This being true, our increased awareness of the widespread effects of even localized air pollution may severely limit application of private nuisance as the "kinds" of common damages which we perceive are increased.\textsuperscript{44} It is hoped that the rise in anti-pollution statutory law will solve this problem, and it is offered that state statutes are increasingly preempting public nuisance law in the field of air pollution.\textsuperscript{45}

Even if the action is categorized as private nuisance, however, there are problems to be faced, such as the conceptual and categorization problems seen in common law involving "nuisance per se" and "nuisance per accidens." The former was such an interference as would be a nuisance at all times and under all circumstances while the latter was a nuisance only because of its location or the circumstances surrounding its operation.\textsuperscript{46} Both resulted in liability regardless of the degree of care shown when substantial injury occurred. It is obvious that a lawful business could never be a nuisance per se.\textsuperscript{47} Trouble first developed when the trespass case of \textit{Royland's v. Fletcher}\textsuperscript{48} somehow became the rule of absolute liability in nuisance law. That is, if one realized that his emissions

\textsuperscript{43} See, \textit{e.g.}, Karpisek \textit{v.} Cather & Sons Const. Inc., 174 Neb. 234, 117 N.W.2d 322 (1962); Heiml \textit{v.} Pecher, 330 Pa. 232, 198 A. 797 (1938). An illustrative case is Sullivan \textit{v.} American Mfg. Co., 33 F.2d 690 (1929). Here the plaintiff sought to recover damages to property and health resulting from effluent from defendant's bagging plant in Charleston, S. C. The evidence showed that defendant's plant emitted gases, vapors, dust & lint which were blown by the winds over the whole neighborhood, inconveniencing and discomforting those who resided there. The trial court ruled that this was a public nuisance and nonsuited the plaintiff as having injuries different only in degree from others in the neighborhood. The Court of Appeals reversed, recognizing the different in kind rule, but saying that an injury to private property or to the health and comfort of an individual in the enjoyment of his property is in its nature damage of a special character within the meaning of the rule.

\textsuperscript{44} Juergensmeyer, \textit{supra} note 2, at 1135.


\textsuperscript{46} Porter, \textit{supra} note 31, at 109.

\textsuperscript{47} Id.

\textsuperscript{48} L.R. 1 Ex. 265 (1866).
would probably result in injury to his neighbor, he was liable despite his exercise of reasonable care. The effect of this was to indicate that intentional nuisances were to be treated differently from unintentional negligent nuisances, ignoring the basic fact that negligence is not a necessary element in the proof of a nuisance. The confusion was compounded by the definition set out in the Restatement of Torts referring to private nuisance in terms of intent and reasonableness. The general result has been an inability of the courts to settle on the proper bases of liability for nuisance and the decisions vary widely. Professor Prosser has set out the three major bases, however:

[L]iability for nuisance may rest upon an intentional invasion of the plaintiff's interests, or a negligent one, or conduct which is abnormal and out of place in its surroundings, and so falls fairly within the principle of strict liability.

By far the greater number . . . are intentional . . . in the sense that the defendant has created or continued the condition causing the nuisance with full knowledge that the harm to the plaintiff's interest is substantially certain to follow.

But a nuisance may also result from conduct which is merely negligent, where there is no intent to interfere in any way with the plaintiff, but merely a failure to take precautions against a risk apparent to a reasonable man.

Unfortunately there are also some practical problems to be considered in a private nuisance action. The polluter may have acquired a prescriptive right to pollute if his emissions have continued over a period of time. Or, the plaintiff may be estopped from bringing the action because they “came to

50. Porter, supra note 31, at 111. Professor Prosser has recognized the confusion and has stated that nuisance has reference only to the interests invaded and not to any particular act or omission which has led to the invasion. See generally Prosser, supra note 34, at §§88.
51. Restatement of Torts §822 (1939).
53. Prosser, supra note 34, §§88 at 595-6.
54. See, e.g., Dangels v. McLean Fire Brick Co., 287 F. 2d 14 (6th Cir. 1923); Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 928 (1911).

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the nuisance.” But despite this seeming multitude of problems, the digests are replete with nuisance actions brought for the recovery of air pollution damages, many of which have been successful.

Many of these problems can be avoided by proceeding on another traditional theory: trespass. There are even distinct advantages to be had with this theory, namely, statutes of limitations are usually longer for trespass actions than for nuisance and theoretically no damage need be shown for the plaintiff to prevail. Further, modern cases have broadened the scope of trespass so as to make it more inclusive of air pollution problems. For example, one leading case is *Fairview Farms, Inc. v. Reynolds Metals Co.*, in which the plaintiff brought a trespass action seeking the recovery of $3,000 damages for injury to his farm and cattle. The injury was allegedly caused by airborne gases, liquids, and solids containing fluorides which came from defendant’s plant and settled upon plaintiff’s farm. The defendant argued that the particles were so minute as to be invisible and that therefore the proper action was nuisance, but the court considered the trespass action well founded. It said that the historical distinction between trespass and nuisance concerned a court’s ability to ascertain if some direct invasion was in fact made. So, intangibles and unseens such as odors and gases were historically nuisances rather than trespasses. But the two torts are not mutually exclusive. The court held that with the aid of modern scientific detecting methods it could determine the existence of a physical entry of tangible matter, even if unseen, and that a deposit of this matter on plaintiff’s farm was a trespass. Damages were awarded for the longer period of the trespass statute of limitations.

Similarly, in *Martin v. Reynolds Metals Co.*, the intrusion of fluoride particulates from defendant’s plant was considered a trespass. There the defendants asserted that the mere settling of the deposits on the plaintiff’s land was not a


58. 221 Ore. 86, 342 P.2d 790 (1959).
sufficient breaking and entering or direct invasion to constitute a trespass. But the court disagreed:

[I]n this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released. In fact, the now famous equation $E = MC^2$ has taught us that mass and energy are equivalents, and that our concept of "things" must be reframed.

Of these, we must look to the character of the instrumentality which is used in making an intrusion upon another's land; we prefer to emphasize the object's energy or force rather than its size. Viewed in this way we may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.

III. NEW THEORIES OF SUIT

In addition to the well-known theories discussed above, there are several new theories of suit for air pollution damages which have been suggested. One which has already had some development is the ultrahazardous activities (strict liability) theory of liability. The concept is that where one carries on that type of activity which is considered extrahazardous or abnormally dangerous, he will be liable for all the damages resulting from this activity, regardless of carefulness or intent. While he is allowed to engage in this activity and cannot be enjoined from carrying it on, he is strictly responsible for any injuries which ensue.

Cases brought upon this theory have had variable success. The leading case, Luthringer v. Moore, was successful. Mr. Luthringer, a drugstore employee, was injured when he worked in the store over a basement where the defendant had released deadly hydrocyanic gas in an effort to exterminate vermin. The plaintiff based his suit on strict liability resulting from defendant's engagement in an ultrahazardous activity. The court stated:

One who carries on an ultrahazardous activity is liable to another whose person, land, or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm. . . . An activity is ultrahazardous if it (a) necessarily involves a risk of harm

59. Id. at 93-94, 342 P.2d at 793-94.

60. 31 Cal. 2d 489, 190 P.2d 1 (1948).
to the person, land, or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.61

The plaintiff was awarded $10,000 damages.

In a case following Luthringer, the plaintiff recovered damages to her cotton crop which resulted when the chemical dust manufactured by defendant and used by a third party for his rice crop drifted and settled on plaintiff's cotton.62 The court recited portions of Luthringer, pointed out that the perils attending the use of the dust were well known, and stated that when one casts into the air a substance which he knows may do damage to others either in ignorance or indifference as to how far it will travel and what damage it will do, the rule of strict liability should be applied. It is important to note here, however, that the court did not grant judgment against the third party who actually used the dust. Thus, even though the court cited Luthringer and spoke in terms of ultrahazardous activity, this case may actually lend more support for an action based on products liability.

In a third case, Fritz v. E. I. duPont de Nemours & Co.,63 the ultrahazardous activity theory was not successful. There the court found that the use of chlorine gas was not so unusual or hazardous that the defendant should have foreseen the risk of injury, and therefore the defendant was not strictly liable. Despite this setback some authorities claim that there is a decided trend of extension of the concept of strict liability to those who pollute the air.64 Others are not so optimistic and suggest that the plaintiff be able to complain of nuisance, trespass, or negligence, too.65 Conversely, if these fail, perhaps the attorney should consider an ultrahazardous activity approach.

Another new theory, not yet well developed in the case law is products liability. Historically, manufacturers and suppliers of defective equipment have frequently been sued for the escape of gas from their products or other product ori-

61. Id. at 498, 190 P.2d at 7.
63. 45 Del. 427, 75 A.2d 256 (1950).
64. N. Landau and P. Rheingold, THE ENVIRONMENTAL LAW HANDBOOK, §1.7(d) (1971).
65. Juergensmeyer, supra note 2, at 1152.
mented dangers.\textsuperscript{66} But the theory is not expected to be limited to these cases and is hoped to have great future potential for air pollution suits.\textsuperscript{67} The most powerful case is hoped to be made against the major automobile manufacturers inasmuch as automobiles account for between forty and sixty percent of all air pollution.\textsuperscript{68} The law is clear that the negligent manufacturer of a product is liable for the injury resulting from the use of his defective product, and it is equally clear that the manufacturer’s duty extends to those without privity, but whom the manufacturer should expect to be endangered by its probable use.\textsuperscript{69} The negligence here would be the design of a vehicle and its manufacture in a way which allows the emission of large amounts of dangerous exhaust fumes.\textsuperscript{70} Causation problems could be overcome by joining the major auto makers and having the suit brought by persons who would be particularly exposed to these exhausts, like taxi drivers or traffic police. The difficult part would be proving that the manufacturers had failed to exercise due care to minimize the dangerous emissions. But there has already been one suit charging the manufacturers with complicity in the failure to develop new anti-pollution devices, and there will be others.\textsuperscript{71} The success of any of these would suffice to show negligent or intentional wrongdoing. Or, rapidly developing concepts of strict product liability might sweep away the need to prove negligence.\textsuperscript{72}

Several other possible theories, without much basis in the case law, have been suggested by the scholars.\textsuperscript{73} Some of these are: (1) stockholder derivative suits against corporate directors for breach of fiduciary duties, (2) suits against


\textsuperscript{67} Esposito, \textit{supra} note 19 at 38.

\textsuperscript{68} Id. Another target may be the major oil companies if it can be shown that the gasoline presently used is formulated to produce unnecessary pollutants. Rheingold, \textit{supra} note 3, at 29 n.64.

\textsuperscript{69} \textit{See generally} Prosser, \textit{supra} note 34, at §§96-97.


\textsuperscript{71} \textit{See} note 8, \textit{supra}.

\textsuperscript{72} Esposito, \textit{supra} note 19, at 39 n.31.

\textsuperscript{73} \textit{See} Esposito, \textit{supra} note 19, at 40-51; N. Landau and P. Rheingold, \textit{The Environmental Law Handbook} §§1.7-8 (1971).
public officials for failure to abate pollution nuisances, (3) antitrust suits, and (4) suits grounded in civil rights and the Constitution. The success of these theories has yet to be proven but the attorney should be aware of particular situations in which they apply.

IV. DAMAGES

The rules for damages in air pollution cases are generally the same as for any tort action. When the suit is founded in nuisance, however, there are certain considerations which must be attended to. Essentially, a distinction is made between permanent and temporary nuisances. The distinction is often difficult to make, but a permanent nuisance generally is "an interference that can reasonably be expected to continue indefinitely into the future without reduction." Thus, any air pollution which is not readily corrected or abated is a permanent nuisance. For a permanent nuisance, the measure of damages is the diminution or depreciation in property value; i.e., 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. Environmental pollution due to an unreasonable use of property which interferes with another's interest is a temporary nuisance, which should be abated. But damages also may be recovered, measured by the diminution of the use value of the property while the nuisance continues up to the time of trial. This diminution is usually tested by the decrease in rental value, although the market value of the property might be referred to in determining the reasonableness of the damage award. Of course, in addition to property damages, special damages for personal

74. See Lynn Mining Co. v. Kelley, 393 S.W.2d 755 (Ky. 1961).
discomfort, annoyance or inconvenience, injury to health, or reasonable expenses may be recovered for either permanent or temporary nuisances.  

This distinction between permanent and temporary nuisance is also important in determining whether or not successive actions may be brought. If it is a permanent nuisance action, all damages, past and prospective, must be recovered in one suit, but if the nuisance is temporary, successive suits may be brought for the continuing interference. The statute of limitations is also said not to run on a temporary nuisance cause of action since the injury is continuing and new damages are accruing constantly. In any case, the equitable and legal remedies for pollution are concurrent, and damages may be recovered even if an injunction has been issued.

Of greater importance, perhaps, than compensatory damages is the possibility of recovery of punitive damages since they are likely to be substantially larger than actual damages. Generally, punitive damages will be awarded only where the defendant's actions have been so flagrant that malice may be attributed to him or where his pollution has intentionally and persistently been maintained with a reckless disregard for others. Thus, an asphalt plant was held liable for punitive damages based on the willful disregard of surrounding property when it continued its pollution of the air unabated despite the numerous complaints of neighbors. And, in the outstanding case of Reynolds Metals Co. v. Lampert, treble punitive damages were awarded when testimony showed that the plant management was aware that harmful fluorides were being emitted and that their attitude was that it was cheaper

80. The exemplary case here is Cooper Tire & Rubber Co. v. Johnston, 234 Miss. 432, 106 So.2d 889 (1958) where $3600 was awarded for depreciation in rental value and $500 was awarded for annoyance and discomfort.
82. Reynolds Metals Co. v. Wand, 308 F.2d 504 (9th Cir. 1962).
83. Lynn Mining Co. v. Kelly, 394 S.W.2d 755 (Ky. 1965).
87. 324 F.2d 465 (9th Cir. 1963).
to pay claims than abate the nuisance. Further, the trend appears to be toward broadening the conception of malice for punitive damages purposes. In the recent Oregon case of McElwain v. Georgia-Pacific Corp., the plaintiff sued in nuisance for injuries suffered when toxic gases, fumes, smoke and particles blew onto his land from the defendant's paper mill. The court said that "the intentional disregard of the interest of another is the equivalent of legal malice, and justified punitive damages. . ." The court held that punitive damages would lie if the jury found that the defendant had not done everything reasonably possible to minimize the damage to adjoining property. It has been suggested that this decision now means that failure of the defendant to keep abreast of and utilize the most adequate pollution control technology will render him liable for punitive damages.

Equally as important are several practical considerations. Where the plaintiff is faced with multiple defendants in that all offending sources are sued, there are precedents for joint and several liability taken from water pollution cases. If not all the polluters can be named as defendants, however, the situation is more difficult. But it has been asserted that under the doctrine that a tortfeasor is anyone who has caused substantial injury, although not the totality of it, a suit could be brought against the major polluters only. Here, the burden would usually be put upon the plaintiff to show the harm that each defendant did to him, but again there is water pollution precedent for placing the burden on the defendant to limit his liability.

In regard to practicalities, one successful attorney has listed seven basic categories of damages which may be recov—

88. 421 P.2d 957 (Ore. 1967).
89. Id. at 958.
90. Esposito, supra note 19, at 37.
91. Tidal Oil Co. v. Pease, 153 Okla. 137, 5 P.2d 389 (1931). See generally Prosser, supra note 34, at §42. However, some cases require the plaintiff to prove what part of the damage was attributable to each defendant. See, e.g., Vaughn v. Burnette, 211 Ga. 206, 84 S.E.2d 568 (1954).
92. Rheingold, supra note 3, at 31. See generally Restatement (Second) of Torts §431 (1965).
93. See Prosser, supra note 34, at §41.
ered in air pollution cases. They are: (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 cost of necessary measures taken to prevent further damage, (5) diminution in market value of the property for a permanent nuisance or rental value for temporary nuisance, (6) damages for loss of normal use and enjoyment of one's property, and (7) damages for annoyance, inconvenience and discomfort. He points out that tort lawyers should have no trouble with the first four categories but warns against confusing the last two for the same thing. They are not and he distinguishes them by saying that number six is damage sustained by a plaintiff in his capacity as the occupier of realty while number seven consists of damages sustained by him as an individual in the daily routines of life. The elements of number seven are analogous to pain and suffering and are best left to the jury, but with number six the jury may consider the rental value of the premises in assessing the loss of use and enjoyment.

Finally, this attorney evaluates settlement factors. In his successful case, the most valuable elements were the "intangible" damages such as normal use and enjoyment.

The greatest part of the verdicts appeared to be for these even when claims were also made for actual bodily injury or disease. Personal injury was second. There seemed to be little regard paid to claims for diminution of market values. The awards varied approximately in proportion to the plaintiff's exposure to the pollution. It was his conclusion, then, that the jury may be more impressed with the value of interference with the normal day-to-day living and comfort than with actual tangible damages.

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96. *Id.* at 36.
97. *Id.* at 37.
V. Conclusion

The expanding scope of the problem and the multiplicity of legal considerations inevitably limits the educational value of any single article on private suits for air pollution damages. As in any rapidly developing field of law, great effort and time must be invested by the attorney in exploring every avenue of attack and in versing himself in the latest trends. But it is hoped that the survey approach of this note will remind the practicing attorney of the potentialities of private air pollution suits, and will caution him as to some of the major areas of concern. Substantial recoveries are being made in suits based upon negligence, nuisance, trespass and strict liability, and the future holds promise that this will continue to be a rapidly growing area of private practice. The unshrinking extent of public concern will require the attorney to participate in the fight on air pollution not only as a community leader, but also as a professional warrior. It is an unusual opportunity for the practicing attorney to pursue worthwhile reward while contributing a positive benefit to mankind. It is an opportunity which should not be ignored.

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