

Winter 1994

A Guide to the Common Law of Nuisance in South Carolina

Bradford W. Wyche

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Wyche, Bradford W. (1994) "A Guide to the Common Law of Nuisance in South Carolina," *South Carolina Law Review*. Vol. 45 : Iss. 2 , Article 5.

Available at: <https://scholarcommons.sc.edu/sclr/vol45/iss2/5>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

A GUIDE TO THE COMMON LAW OF NUISANCE IN SOUTH CAROLINA

BRADFORD W. WYCHE*

I.	INTRODUCTION	338
II.	HISTORICAL BACKGROUND	339
III.	THE SPECIAL INJURY RULE	341
IV.	PRIVATE NUISANCE ACTIONS: WHAT DOES THE PLAINTIFF HAVE TO PROVE?	347
	A. <i>Interest in Land</i>	347
	B. <i>Interference</i>	347
	1. <i>Materiality Requirement</i>	347
	2. <i>Anticipatory Nuisances</i>	348
	3. <i>Surface Waters</i>	349
	C. <i>Defendant's Conduct</i>	350
	1. <i>Negligence Approach</i>	351
	2. <i>Strict Liability Approach</i>	351
	3. <i>Restatement Approach</i>	354
	4. <i>The "No Balancing" (and Recommended) Approach for South Carolina</i>	357
V.	DEFENSES	361
	A. <i>Coming to the Nuisance</i>	361
	B. <i>Contributory Negligence</i>	363
	C. <i>Regulatory Compliance (and Non-Compliance)</i>	363
	D. <i>Statute of Limitations</i>	365
	E. <i>Lack of Control</i>	366
	F. <i>Sovereign Immunity and Inverse Condemnation</i>	367
VI.	REMEDIES	370
	A. <i>Actual Damages</i>	370
	B. <i>Punitive Damages</i>	372
	C. <i>Injunctive Relief</i>	372
VII.	THE FUTURE ROLE OF COMMON LAW NUISANCE IN ENVIRONMENTAL LITIGATION	379

* Attorney, Wyche, Burgess, Freeman & Parham, P.A., Greenville, South Carolina.

To a surprising degree, the legal history of the environment has been written by nuisance law. There is no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land use and of technological abuse. . . . Nuisance theory and case law is the common law backbone of modern environmental and energy law.

1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW:
AIR AND WATER § 1.1, at 1-2 (1986).

I. INTRODUCTION

The common law of nuisance has been described in such unflattering terms as a "legal grab bag,"¹ "a good word to beg a question with,"² and by Prosser himself as an "impenetrable jungle."³ Nonetheless, the South Carolina jungle is worth exploring because the nuisance cause of action has afforded relief in this state against the ill effects of a wide variety of activities, including an automobile junkyard,⁴ funeral home,⁵ baseball games,⁶ fertilizer plant,⁷ sawmill,⁸ religious services,⁹ dog pen,¹⁰ sewage treatment lagoon,¹¹ truck terminal,¹² gold mine,¹³ and rock quarry.¹⁴ In South Carolina, as elsewhere, no field of human endeavor is immune from being characterized, under the right set of facts and circumstances, as a nuisance.¹⁵

1. *Chicago & N.W. Ry. v. Tyler*, 482 F.2d 1007, 1010 (8th Cir. 1973).

2. *Id.* (quoting Ezra R. Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 326 (1914)).

3. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS]; see also 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 2.4, at 48 (1986) ("[N]uisance law straddles the legal universe, virtually defies synthesis, and generates case law to suit every taste." (footnotes omitted)).

4. *Bowlin v. George*, 239 S.C. 429, 123 S.E.2d 528 (1962).

5. *Fraser v. Fred Parker Funeral Home*, 201 S.C. 88, 21 S.E.2d 577 (1942).

6. *Carter v. Lake City Baseball Club, Inc.*, 218 S.C. 255, 62 S.E.2d 470 (1950).

7. *Woods v. Rock Hill Fertilizer Co.*, 102 S.C. 442, 86 S.E. 817 (1915).

8. *White v. Halsey Lumber Co.*, 96 S.C. 420, 81 S.E. 11 (1914).

9. *Morison v. Rawlinson*, 193 S.C. 25, 7 S.E.2d 635 (1940).

10. *Blanks v. Rawson*, 296 S.C. 110, 370 S.E.2d 890 (Ct. App. 1988).

11. *Lever v. Wilder Mobile Homes, Inc.*, 283 S.C. 452, 322 S.E.2d 692 (Ct. App. 1984).

12. *Dill v. Dance Freight Lines*, 247 S.C. 159, 146 S.E.2d 574 (1966).

13. *Williams v. Haile Gold Mining Co.*, 85 S.C. 1, 66 S.E. 117 (1909).

14. *Davis v. Palmetto Quarries Co.*, 212 S.C. 496, 48 S.E.2d 329 (1948).

15. Despite the large number of federal and state environmental statutes, the common law

This article will first present a brief review of the nuisance doctrine's history. Next, it will discuss the "special injury rule" as it applies to both public and private nuisances. Then, the focus will turn to private nuisance claims, including the elements, possible defenses, and remedies. Finally, the future role of nuisance in environmental litigation will be explored.

II. HISTORICAL BACKGROUND

The term "nuisance" is derived from the Latin word *nocumentum*, meaning simply "harm."¹⁶ In England, nuisance described any interference with a person's right to use and enjoy his land. Blackstone defined the term as "any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another."¹⁷ The South Carolina definition is basically the same: Nuisance is "anything which works hurt, inconvenience, or damage; anything which essentially interferes with the enjoyment of life or property."¹⁸

remains an individual's principal means of obtaining redress for environmental harm. Although many statutes allow "citizen suits" against violators, the citizens who prevail will secure monetary relief only for their attorneys and the government. *See generally* Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws* (pts. 1-3), 13 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10309 (Oct. 1983), 14 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10063, 10407 (Feb. & Nov. 1984) (analyzing the mechanics of bringing citizens' suits and the remedies available to private plaintiffs under federal environmental statutes). These suits certainly promote the public interest in improving environmental quality, but the private interest in securing relief for environmental injuries has traditionally been, and will likely continue to be, resolved under the common law. Indeed, South Carolina's basic environmental statute, the Pollution Control Act, S.C. CODE ANN. §§ 48-1-10 to -350 (Law. Co-op. 1987 & Supp. 1993), specifically reserves all rights and remedies "existing in equity or under the common law." S.C. CODE ANN. § 48-1-240 (Law. Co-op. 1987).

The common law of nuisance in South Carolina has recently become a subject of national interest. In the widely publicized decision of the United States Supreme Court in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), the Court considered Lucas's claim that South Carolina's prohibition against any development of his two beachfront lots amounted to an unconstitutional taking of property. The Court held that the state could avoid the payment of compensation only by showing that the intended development of the lots would create a nuisance under state law. *Id.* at 2900. The case was remanded to the South Carolina Supreme Court for this determination. *Id.* at 2901-02.

On remand, the South Carolina Supreme Court held that the "Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas's desired use of his land; nor has our research uncovered any such common law principle." *Lucas v. South Carolina Coastal Council*, ___ S.C. ___, ___, 424 S.E.2d 484, 486 (1992). The court then remanded the case to the trial court to determine damages, but the parties later settled.

16. F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 481 (1949).

17. 3 WILLIAM BLACKSTONE, COMMENTARIES *216.

18. *State ex rel. Lyon v. Columbia Water Power Co.*, 82 S.C. 181, 191, 63 S.E. 884, 889 (1909), *quoted in* *Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 253, 125 S.E.2d 628, 632 (1962); *Peden v. Furman Univ.*, 155 S.C. 1, 16, 151 S.E. 907, 912 (1930). Although "life" is referred to in the definition, the plaintiff must have some interest in real property in order to state

The roots of the nuisance doctrine are traceable to two thirteenth century English common law causes of action for interference with real property—trespass and assize of novel disseisin.¹⁹ To recover in trespass, landowners had to show the defendant's actual entry onto their property or the entry of some tangible matter that the defendant put in motion.²⁰ Disseisin required proof, not only of an entry, but also of the defendant's intent to dispossess, or "disseise," the landowner from the land. Disseisin has been described as "trespass plus."²¹

However, neither trespass nor disseisin applied when the interference arose from conduct occurring entirely on the defendant's property. Thus, during the thirteenth century, a new writ, assize of nuisance, was developed that permitted injured landowners to seek redress against this kind of "off site" conduct.²² Later, when the English courts lessened the rigid rules and procedures of the common law courts by developing the general writ of action on the case, nuisance claims were increasingly pursued under this writ.²³

At the same time, the courts were developing a criminal remedy for interference with the rights of the general public. These so-called public

19. See A.K.R. KIRALFY, *THE ENGLISH LEGAL SYSTEM* 36 (7th ed. 1984) (discussing the elements of trespass and assize of novel disseisin).

20. PROSSER AND KEETON ON TORTS, *supra* note 3, § 13, at 70-72.

21. KIRALFY, *supra* note 19, at 36 (citing C.H.S. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 57 (photo. reprint 1970) (1949)).

22. See generally William A. McRae, Jr., *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948) (tracing the history of public and private nuisances from medieval times); P.H. Winfield, *Nuisance as a Tort*, 4 CAMBRIDGE L.J. 189, 190-92 (1931) (relating the concept of nuisance as a tort to the rule of *Rylands v. Fletcher*, negligence principles, and trespass to land).

The South Carolina Supreme Court has recognized the historical distinction between nuisance and trespass: "A trespass is a direct and forcible invasion of one's property, producing a direct and immediate result, and a nuisance is a species of invasion of another's property, producing indirect or consequential injury by agencies wrongfully operating outside of the property injured." *Allen v. Union Oil & Mfg. Co.*, 59 S.C. 571, 578, 38 S.E. 274, 276-77 (1901) (citing H.G. WOOD, *THE LAW OF NUISANCES* § 13 (3d ed. 1893)); see also *Ravan v. Greenville County*, ___ S.C. ___, 434 S.E.2d 296, 306 (Ct. App. 1993) ("The distinction between trespass and nuisance is that trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property, whereas nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment [of his property].") (citing WILLIAM H. RODGERS, JR., *HANDBOOK ON ENVIRONMENTAL LAW* § 2.13, at 154 (1977)).

However, nuisance and trespass are close cousins, and in environmental litigation it is rare for the defendant's activity not to be challenged under both causes of action. For example, "the flooding of the plaintiff's land, which is a trespass, is also a nuisance if it is repeated or of long duration." *RESTATEMENT (SECOND) OF TORTS* § 821D cmt. e (1979) [hereinafter *RESTATEMENT*]. Indeed, "the line between trespass and nuisance has become wavering and uncertain." PROSSER AND KEETON ON TORTS, *supra* note 3, § 87, at 622.

23. See, e.g., *William Aldred's Case*, 77 Eng. Rep. 816 (K.B. 1610) (action on case for nuisance caused by a "swine sty").

nuisances, which could involve “obstructed highways, lotteries, unlicensed stage-plays, common scolds, and a host of other rag ends of the law,” were subject to prosecution by the Crown.²⁴ The remedy for public nuisances “remained exclusively a criminal one until the sixteenth century, when it was recognized that a private individual who had suffered special damage might have a civil action in tort for the invasion of the public right.”²⁵

Despite a shared surname, private and public nuisances have little in common. A private nuisance is “a civil wrong, based on a disturbance of rights in land,”²⁶ while a public nuisance is “a species of catch-all criminal offense, consisting of an interference with the rights of the community at large.”²⁷ Indeed, “it would have been fortunate if they had been called from the beginning by different names.”²⁸ Unfortunately, the distinction between the two doctrines is frequently overlooked in the case law, contributing to much of the confusion surrounding the law of nuisance.

III. THE SPECIAL INJURY RULE

Like the English courts, the South Carolina Supreme Court has subscribed to a broad definition of public nuisance: “A public nuisance exists wherever acts or conditions are subversive of public order, decency, or morals, or constitute an obstruction of public rights.”²⁹

The kinds of “acts or conditions” that have been held to be public nuisances under this standard include maintaining a “disorderly house,”³⁰

24. Newark, *supra* note 16, at 482.

25. PROSSER AND KEETON ON TORTS, *supra* note 3, § 86, at 618 (footnote omitted).

26. *Id.* (footnote omitted).

27. *Id.* (footnote omitted).

28. *Id.*

29. State v. Turner, 198 S.C. 487, 495, 18 S.E.2d 372, 375 (1942) (citing 20 R.C.L. Nuisances § 7 (1929)). The supreme court has added that a nuisance, to be public, must affect a number of people. See Morison v. Rawlinson, 193 S.C. 25, 32, 7 S.E.2d 635, 638 (1940) (stating that “a public nuisance must be in a public place or where the public frequently congregate”); see also Emory v. Hazard Powder Co., 22 S.C. 476, 483 (1885) (“There may be a private as well as a public nuisance, the distinction being dependent upon the number affected, but the fact of nuisance itself does not depend upon number.”); State v. Rankin, 3 S.C. 438, 447 (1872) (“Whether it is the one or the other, depends upon the extent of its existence.”). But see Bowlin v. George, 239 S.C. 429, 434-35, 123 S.E.2d 528, 531 (1962) (“[A] nuisance may affect a considerable number of persons in the same manner and yet not be a public nuisance . . .”) (quoting Woods v. Rock Hill Fertilizer Co., 102 S.C. 442, 450-51, 86 S.E. 817, 820 (1915)); RESTATEMENT, *supra* note 22, § 821B cmt. g (“Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.”).

30. Turner, 198 S.C. 487, 18 S.E.2d 372.

selling alcohol,³¹ obstructing a navigable river,³² and operating a hazardous waste landfill.³³ Furthermore, the use of buildings for prostitution³⁴ and gambling³⁵ are defined by statute as public nuisances, while certain crimes, such as malicious injury to real property,³⁶ may involve public nuisances.

In addition, the South Carolina Department of Health and Environmental Control (DHEC) has authority under the Pollution Control Act "to prevent or abate nuisances" affecting public health.³⁷ Another statute allows DHEC to issue orders and rules "for the purpose of suppressing nuisances dangerous to the public health."³⁸ Pursuant to this authority, DHEC has defined public health nuisances by regulation.³⁹ In one well known case, DHEC relied on the public nuisance doctrine to seek the shutdown of a chemical facility that posed serious health risks to nearby residents.⁴⁰ State and local authorities in other jurisdictions also have used the doctrine successfully in environmental cases.⁴¹

Individuals, too, can seek relief against a public nuisance. Under the "special injury rule," however, an individual can recover in tort for a public nuisance only by establishing "some injury to himself differing in kind, and not merely in degree, from that suffered by the general public."⁴²

31. State *ex rel.* Lyon v. City Club, 83 S.C. 509, 65 S.E. 730 (1909).

32. State v. South Carolina Ry., 28 S.C. 23, 4 S.E. 796 (1888).

33. Neal v. Darby, 282 S.C. 277, 318 S.E.2d 18 (Ct. App. 1984).

34. S.C. CODE ANN. § 15-43-10 (Law. Co-op. 1976).

35. *Id.* § 16-19-140.

36. *See id.* § 16-11-520.

37. *Id.* § 48-1-280.

38. *Id.* § 44-1-140. It should be noted, however, that a project specifically authorized by the legislature has been held immune from challenge as a public nuisance. *Law v. City of Spartanburg*, 148 S.C. 229, 146 S.E. 12 (1928) (enjoining enforcement of a municipal ordinance which prohibited construction of a tubercular hospital that had been specifically authorized by the legislature), *cited in* *Home Sales, Inc. v. City of N. Myrtle Beach*, 299 S.C. 70, 81, 382 S.E.2d 463, 469 (Ct. App. 1989) (*per curiam*) ("Nothing is a public nuisance which the law itself authorizes.").

39. *See* S.C. CODE REGS. 61-46 (1992).

40. *See* John Harleston & Kathleen M. Harleston, *The Suffolk Syndrome: A Case Study in Public Nuisance Law*, 40 S.C. L. REV. 379 (1989).

41. *See, e.g.,* State of New York v. Shore Realty Corp., 759 F.2d 1032, 1050-52 (2d Cir. 1985) (holding corporate owner and individual principal of corporation liable under public nuisance doctrine to abate contamination caused by prior owner); *Village of Wilsonville v. SCA Services, Inc.*, 426 N.E.2d 824 (Ill. 1981) (enjoined continued operation of hazardous waste landfill as an anticipated public nuisance).

42. *Woods v. Rock Hill Fertilizer Co.*, 102 S.C. 442, 450, 86 S.E. 817, 820 (1915).

The Restatement imposes the additional requirement that the injury, even if special, must be suffered while "exercising the right common to the general public that was the subject of interference." RESTATEMENT, *supra* note 22, § 821C(1). Plaintiffs seeking private recovery based on a public nuisance have encountered difficulties with this requirement in other jurisdictions. Some courts have dismissed the public nuisance claim because the plaintiff did not

Much of the South Carolina case law on nuisances involves application of the "special injury rule." For example, pecuniary loss resulting from the obstruction of a navigable stream is not a "special injury,"⁴³ contrary to the Restatement position.⁴⁴ On the other hand, a suit can be maintained when the obstruction causes physical damage to the plaintiff's boat.⁴⁵ Similarly, the court has found a special injury when the obstruction of a public road materially impaired a plaintiff's access to property.⁴⁶ However, if other feasible means of access exist, the court will not find a special injury.⁴⁷

When the nuisance interferes with both a public right and the use and enjoyment of the plaintiff's own land, the nuisance is both a private and public one. In this case, the plaintiff may maintain an action for the private nuisance itself and for the public nuisance because the particular harm suffered is of a

suffer a special injury while exercising the public right. *See Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 316 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985) (holding that plaintiff, in cleaning up its own property, suffered no special damage because it was not harmed while exercising the public right to pure water); *Hanlin Group, Inc. v. International Minerals & Chem. Corp.*, 759 F. Supp. 925, 936-37 (D. Me. 1990) (finding that loss of use and enjoyment of private land is not a special harm in the exercise of a public right); *cf. Burgess v. M/V Tamano*, 370 F. Supp. 247, 250 (D. Me. 1973) (holding that commercial fishers and clam diggers could maintain private action for public nuisance when an oil spill interfered with the exercise of their public right to harvest fish and clams), *aff'd*, 559 F.2d 1200 (1st Cir. 1977).

The South Carolina appellate courts have not faced the issue of whether the plaintiff, in a private action based on a public nuisance, must prove that the special injury was sustained in the actual exercise of a public right.

43. *South Carolina Steamboat Co. v. Wilmington, C. & A. R.R.*, 46 S.C. 327, 24 S.E. 337 (1896) (holding that lost profits caused by the obstruction of a river are not a special injury); *Steamboat Co. v. Railroad Co.*, 30 S.C. 539, 9 S.E. 650 (1889) (holding that expense incurred in removing portion of boat to go under defendant's bridge is not a special injury); *Carey v. Brooks*, 19 S.C.L. (1 Hill) 365 (1833) (holding that expense incurred in removing an obstruction and loss resulting from shipping delays are not special injuries). In these cases, the court also held that the injury must be not only special but direct. This proposition, however, is contrary to the South Carolina rule that allows the recovery of consequential damages in tort actions. F. PATRICK HUBBARD & ROBERT L. FELIX, *THE SOUTH CAROLINA LAW OF TORTS* 499-501 (1990).

44. *See* RESTATEMENT, *supra* note 22, § 821C cmt. h, illustration 10.

45. *Drews v. E.P. Burton & Co.*, 76 S.C. 362, 57 S.E. 176 (1907).

46. *Huggin v. Gaffney Dev. Co.*, 229 S.C. 340, 92 S.E.2d 883 (1956); *see also Bethel Methodist Episcopal Church v. City of Greenville*, 211 S.C. 442, 45 S.E.2d 841 (1947) (reversing city council resolution abandoning part of street that provided the only access to petitioner's church); *Brown v. Hendricks*, 211 S.C. 395, 45 S.E.2d 603 (1947) (allowing private cause of action brought by adjoining landowners of obstructed public alley); *Gray & Shealy v. Charleston & W.C. Ry.*, 81 S.C. 370, 62 S.E. 442 (1908) (holding petitioner entitled to a new trial on the issue of defendant's obstruction of a public road where this issue was decided in the trial court without testimony).

47. *Burrell v. Kirkland*, 242 S.C. 201, 130 S.E.2d 470 (1963) (*per curiam*) (dissolving injunction that prevented obstruction of public road because plaintiff had the same means of access as others); *Cherry v. City of Rock Hill*, 48 S.C. 553, 26 S.E. 798 (1897) (finding no special harm from relocation of public road when plaintiff had an alternative route).

different kind than that suffered by the public.⁴⁸ If possible, the plaintiff should include a public nuisance claim in the complaint because “prescriptive rights, the statute of limitations and laches do not run against the public right, even when the action is brought by a private person for particular harm.”⁴⁹

The special injury rule does not apply to private nuisance claims. Yet the South Carolina Supreme Court overlooked this basic principle in several early decisions, with astonishing consequences. For example, in *Belton v. Wateree Power Co.*,⁵⁰ the plaintiff brought a private nuisance action, alleging that the defendant’s dam created “stagnant pools which bred malarial mosquitoes, causing sickness, the removal of his tenants, and consequent depreciation of the value of his land.”⁵¹ At trial the plaintiff recovered judgment, but the supreme court reversed because “the activities and effects of the mosquitoes were not confined to the premises of the plaintiff, but were prevalent in that whole community” and, therefore, “the damage suffered by the plaintiff was not peculiar to himself.”⁵² Accordingly, the nuisance was found to be public, not private, and the complaint was dismissed.⁵³

The court reached the same result on nearly identical facts in *Baltzeger v. Carolina Midland Railway*,⁵⁴ in which the plaintiff’s private nuisance complaint alleged that the ponded water emitted “nauseous odors and gases, which poison and pollute the air in and around the plaintiff’s . . . dwelling house, . . . and . . . caused the death of one of plaintiff’s children, who was made sick by the offensive and nauseous gases emitted from [the] stagnant waters.”⁵⁵ The court held, however, that because “the causes which led to the plaintiff’s injury might reasonably be expected to affect others in the neighborhood, . . . his injury was not special.”⁵⁶

Belton and *Baltzeger* are wrong on all counts. First, the court should not have applied the special injury rule to the private nuisance claims. Second, even if the claims were based on a public nuisance, interfering with the use and enjoyment of the plaintiff’s property is clearly a special injury. Surely it is unfair—indeed perverse—to allow a defendant to escape liability in a private nuisance action because the impact of his conduct is so severe that the entire community suffers from it.⁵⁷

48. RESTATEMENT, *supra* note 22, § 821C cmt. e.

49. *Id.*; *see also* State v. Rankin, 3 S.C. 438, 448-49 (1872) (finding no prescriptive right to maintain a public nuisance).

50. 123 S.C. 291, 115 S.E. 587 (1922) (en banc).

51. *Id.* at 295, 115 S.E. at 588.

52. *Id.* at 296, 115 S.E. at 588.

53. *Id.*

54. 54 S.C. 242, 32 S.E. 358 (1899).

55. *Id.* at 244, 32 S.E. at 359.

56. *Id.* at 250, 32 S.E. at 361.

57. The reasoning in *Baltzeger* is particularly illogical. To obtain damages for the

Later South Carolina decisions recognize the proper approach. In *Deason v. Southern Railway*,⁵⁸ a divided court affirmed the judgment entered on a jury verdict against the defendant who obstructed the flow from the plaintiff's pond.⁵⁹ In *Woods v. Rock Hill Fertilizer Co.*,⁶⁰ the plaintiff alleged that odors, dust, and grit from the defendant's fertilizer plant polluted the air, ruined her vegetable garden, and caused the plaintiff's nervousness and anxiety. The court held the special injury rule was irrelevant, stating:

[T]he [special injury] rule does not apply, and there is no reason for its application, when a plaintiff states, as his cause of action, that which is *prima facie* only a private nuisance, even though it may appear from his complaint that a determinate number of other persons are or may be similarly affected by it, for a nuisance may affect a considerable number of persons in the same manner and yet not be a public nuisance, and, in that event, if the individuals so affected were denied the private remedy of an action, they would be without any remedy at all, because, if it is not a public nuisance, it is not subject to indictment.⁶¹

In a case involving the application of South Carolina law, the Fourth Circuit Court of Appeals expressly approved this principle in *Sullivan v. American Manufacturing Co.*⁶² Reviewing the cases decided by the South Carolina Supreme Court, the Fourth Circuit determined that *Deason* had implicitly overruled *Baltzger*.⁶³ The court distinguished *Belton* as not being "a nuisance case at all, but involv[ing] the right to recover consequential damages resulting from the damming of a stream under legislative authority."⁶⁴

accumulation of surface water, the plaintiffs had to establish the presence of a nuisance per se. See *infra* notes 85-93 and accompanying text. The court found the complaint insufficient to support a claim of nuisance per se, *id.* at 247, 32 S.E. at 360, and yet dismissed the complaint because the nuisance was a public one. *Id.*

Belton and *Baltzger* are not the only cases in which the court has improperly applied the special injury rule. See, e.g., *McMeekin v. Central Carolina Power Co.*, 80 S.C. 512, 61 S.E. 1020 (1908) (dismissing the plaintiff's suit despite the allegation that the defendant's dam had inundated the plaintiff's property); *Manson v. South Bound R.R.*, 64 S.C. 120, 41 S.E. 832 (1902) (denying standing to owners of property on a bluff overlooking a public park to challenge the establishment of a railroad station in the park); *Threatt v. Brewer Mining Co.*, 49 S.C. 95, 26 S.E. 970 (1896) (reversing judgment in plaintiff's favor merely because plaintiff, whose principal complaint was that his farm lands had been destroyed by tailings from defendant's mine, was allowed to testify about how the tailings interfered with his use of two public roads).

58. 142 S.C. 328, 140 S.E. 575 (1927).

59. *Id.* at 333, 140 S.E.2d at 576.

60. 102 S.C. 442, 86 S.E. 817 (1915).

61. *Id.* at 450-51, 86 S.E. at 820.

62. 33 F.2d 690 (4th Cir. 1929).

63. *Id.* at 694.

64. *Id.* at 694-95.

*Bowlin v. George*⁶⁵ most recently addressed this issue. The plaintiff complained that “an enormous and extensive automobile junk yard” had become a “breeding place for mosquitoes,” causing the plaintiff and his wife “to remain indoors and preventing them from enjoying their property and the simple pleasures of life to which they are entitled.”⁶⁶ Relying on *Baltzeger* and *Belton*, the defendant demurred, arguing that the plaintiff had not alleged a special injury.⁶⁷ The trial court overruled the demurrer, and a unanimous supreme court affirmed, stating:

Whether the junk yard in question is or may become a public nuisance need not be decided, for under the allegations of the complaint it is as to respondent a private nuisance. He is not complaining of the violation of a right of a public nature or one held in common with the rest of the public. He alleges the invasion of a private right, namely, the interference with the reasonable enjoyment of his property and the depreciation in its value. We think it is quite clear that he is entitled to maintain this action.⁶⁸

The court found *Woods* “conclusive of the question,”⁶⁹ *Sullivan* a “well considered opinion,”⁷⁰ and *Baltzeger* and *Belton* “distinguishable.”⁷¹

In sum, although cases like *Baltzeger* and *Belton* lurk in the background, there is little doubt that the special injury rule is irrelevant in private nuisance actions in this state. Even where private recovery against a public nuisance is sought, interference with the use and enjoyment of the plaintiff’s own property will be deemed a “special injury.”⁷²

65. 239 S.C. 429, 123 S.E.2d 528 (1962).

66. *Id.* at 431, 123 S.E.2d at 529.

67. *Id.* at 433, 123 S.E.2d at 530.

68. *Id.* at 435, 123 S.E.2d at 531.

69. *Id.*

70. *Bowlin*, 239 S.C. at 436, 123 S.E.2d at 531.

71. *Id.* at 436, 123 S.E.2d at 531-32. It should be noted that in *Jones v. Seaboard Air Line Railway*, 67 S.C. 181, 194, 45 S.E. 188, 193 (1903), which preceded *Belton*, the court held that interference with “the right to the unimpaired use of [plaintiff’s] land on the banks of the river” constituted a special injury.

72. An interesting issue is whether a citizen, in the role of a “private attorney general” rather than as one seeking personal relief, has standing to challenge a public nuisance. Under the Restatement, any citizen, as a representative of the general public, has the right to maintain an action to enjoin a public nuisance. RESTATEMENT, *supra* note 22, § 821C(2)(c).

The South Carolina appellate courts have not resolved this issue. The supreme court had the opportunity to do so in *Sloan v. City of Greenville*, 235 S.C. 277, 111 S.E.2d 573 (1959), in which a taxpayer contended that a public nuisance or “purpresture” would be created by the issuance of a building permit to construct a parking building that would encroach upon the public streets. The city challenged the plaintiff’s standing; however, the court refused, on procedural grounds, to address the question and then held that the city lacked the authority to issue the

IV. PRIVATE NUISANCE ACTIONS: WHAT DOES THE PLAINTIFF HAVE TO PROVE?

This section considers what the plaintiff must prove to establish the defendant's liability in a private nuisance action. The elements to be considered include (1) interest in land, (2) interference, and (3) the nature of the defendant's conduct.

A. *Interest in Land*

The plaintiff must have some legal interest in land to state a claim for private nuisance.⁷³ Any interest in land is sufficient to support a suit; fee simple ownership is not required. For example, tenants have been allowed to recover in South Carolina;⁷⁴ in other jurisdictions, even persons in possession⁷⁵ and easement holders⁷⁶ have maintained nuisance actions. Recovery, however, is "limited to the interest of the plaintiff. Thus a tenant may recover damages for the depreciation in market value of his term, but not for that of the reversion, in which he has no interest"⁷⁷

B. *Interference*

1. *Materiality Requirement*

In South Carolina an action in trespass will lie for even the slightest invasion of the plaintiff's interest in the exclusive possession of property.⁷⁸

permit. *Id.* at 287-88, 111 S.E.2d at 578-79.

Standing requirements have been addressed in other contexts. Contrary to the federal rule, the South Carolina Supreme Court has allowed taxpayers to challenge the disbursement of government funds. *See, e.g.,* *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985) (*per curiam*); *Lee v. Clark*, 224 S.C. 138, 77 S.E.2d 485 (1953). Otherwise, however, the general rule is that plaintiffs must "show a personal interest other than that shared in common by all members of the public." *Blandon v. Coleman*, 285 S.C. 472, 475, 330 S.E.2d 298, 300 (1985); *see also* *Culbertson v. Blatt*, 194 S.C. 105, 112, 9 S.E.2d 218, 221 (1940) (holding that citizens not directly injured by an executive or legislative action do not have standing to challenge the defendants' holding of public office) (relying on *Ex parte Levitt*, 302 U.S. 633 (1937)). This rule is consistent with the "actual or imminent" injury test applied in the federal courts. *See, e.g.,* *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

73. PROSSER AND KEETON ON TORTS, *supra* note 3, § 87, at 621.

74. *Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co.*, 84 S.C. 306, 63 S.E. 548 (1909).

75. *Brink v. Moeschl Edwards Corrugating Co.*, 133 S.W. 1147 (Ky. 1911).

76. *Webber v. Wright*, 126 A. 737 (Me. 1924); *Herman v. Roberts*, 23 N.E. 442 (N.Y. 1890).

77. PROSSER AND KEETON ON TORTS, *supra* note 3, § 87, at 621.

78. *Norvell v. Thompson*, 20 S.C.L. (2 Hill) 470 (1834); *accord* *Snow v. City of Columbia*,

However, a claim in nuisance is actionable only if the interference with the use and enjoyment of property is "material" or "great."⁷⁹ The underlying principle is that "[p]eople who live in organized communities must of necessity suffer some inconvenience and annoyance from their neighbors."⁸⁰ The point at which an interference becomes actionable depends on the facts. Even baseball games can be enjoined as a nuisance if they are accompanied by glaring lights, deafening loudspeakers, and beer-drinking fans without access to bathroom facilities.⁸¹

2. Anticipatory Nuisances

Satisfying the materiality test is particularly difficult where the defendant's activity has not yet begun.⁸² In these "anticipatory nuisance" cases, the

305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991), *cert. denied*, Feb. 4, 1992 (stating that any entry is wrongful and entitles the party in possession to at least nominal damages); *Few v. Keller*, 63 S.C. 154, 41 S.E. 85 (1902). *Contra* *Bradley v. American Smelting & Ref. Co.*, 709 P.2d 782, 791 (Wash. 1985) (rejecting common law rule and requiring proof of "actual and substantial damages" in trespass actions).

79. *Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152, 159, 130 S.E.2d 363, 367 (1963). According to the RESTATEMENT, *supra* note 22: "[T]here must be a real and appreciable interference with the plaintiff's use or enjoyment of his land before he can have a cause of action." § 821F cmt. c; *accord* *Robie v. Lillis*, 299 A.2d 155, 158 (N.H. 1972) ("Essential to a finding of either a public or a private nuisance is a determination that the interference complained of is substantial."); *see also* *McLauchlin v. Charlotte & S.C. R.R.*, 39 S.C.L. (5 Rich.) 583, 594 (1850) (landowner must anticipate some unpleasant uses of adjoining lands).

80. *Winget*, 242 S.C. at 159, 130 S.E.2d at 367.

81. *Carter v. Lake City Baseball Club, Inc.*, 218 S.C. 255, 62 S.E.2d 470 (1950). One confusing statement in the case law needs clarification. In *Crosby v. Southern Railway*, 221 S.C. 135, 139, 69 S.E.2d 209, 210 (1952), the supreme court interpreted the decision in *Allen v. Union Oil & Mfg. Co.*, 59 S.C. 571, 38 S.E. 274 (1901), as standing for the proposition that an actionable nuisance requires physical injury to real estate, not just discomfort, inconvenience or personal injury. However, *Allen* involved the question of whether a claim for injury to real property survived the death of the plaintiff. 59 S.C. at 579-80, 38 S.E. at 277. The court held that only those nuisances which caused physical injury to real estate survived within the meaning of the applicable statutory provision; it did not hold that a nuisance is actionable only if it causes such injury, as the opinion makes clear: "So, also, smoke, dust, cinders, particles of lint cotton, may become a nuisance, but action therefor will not survive, under the statute, unless they injuriously and materially affect the physical condition of the real property, as distinguished from mere annoyance, discomfort, inconvenience or injury to the person." *Id.* at 579, 38 S.E. at 277.

The Restatement also makes clear that the nuisance cause of action extends beyond damage to real property: "'Interest in use and enjoyment' also comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land." RESTATEMENT, *supra* note 22, § 821D cmt. b; *cf.* *Woods v. Rock Hill Fertilizer Co.*, 102 S.C. 442, 449, 86 S.E. 817, 819 (1915) (allowing testimony about the impact of the defendant's plant on members of the plaintiff's family "because it tend[ed] to show the nature and extent of plaintiff's damages, since she ha[d] the right to have them live with her and enjoy the comforts of her home").

82. *E.g.*, *Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 256-57, 125 S.E.2d 628, 634

supreme court imposes a heavy burden on the plaintiff:

[E]quity will not interfere where the anticipated nuisance is doubtful, contingent, or conjectural. To entitle one to injunctive relief against a threatened or anticipated nuisance, public or private, it must appear that a nuisance will inevitably or necessarily result from the act or thing which it is sought to enjoin.⁸³

There is no reported decision in South Carolina where the plaintiff has been able to make such a showing.⁸⁴

3. *Surface Waters*

Where the interference with the plaintiff's land is caused by surface waters,⁸⁵ the plaintiff must overcome the "common enemy rule."⁸⁶ A good restatement of the rule is found in *Johnson v. Williams*:⁸⁷

The law is well settled in this State that surface water is a common enemy, and every landowner has the right to use such means as he deems necessary for the protection of his property from damages it would cause, except that (1) a landowner must not handle surface water in such a way as to create a nuisance, and (2) he must not by means of a ditch or other artificial means collect surface water and cast it in concentrated form upon the lands of another.⁸⁸

(1962), *cited in* *Welborn v. Page*, 247 S.C. 554, 563, 148 S.E.2d 375, 379 (1966).

83. *Strong*, 240 S.C. at 254, 125 S.E.2d at 633.

84. *See Welborn*, 247 S.C. 554, 148 S.E.2d 375 (denying injunctive relief against proposed automobile wrecking service); *Strong*, 240 S.C. 244, 125 S.E.2d 628 (denying injunctive relief against proposed grocery store); *Moss v. South Carolina State Highway Dep't*, 223 S.C. 282, 75 S.E.2d 462 (1953) (refusing to issue temporary restraining order against relocation of highway); *Emory v. Hazard Powder Co.*, 22 S.C. 476, 483 (1885) (stating that "mere fears of the plaintiff" are insufficient basis for nuisance action); *Roach v. Combined Util. Comm'n*, 290 S.C. 437, 351 S.E.2d 168 (Ct. App. 1986) (denying injunctive relief against proposed sewage treatment plant); *Charleston Comm. for Safe Water v. Commissioners of Pub. Works*, 286 S.C. 10, 331 S.E.2d 371 (Ct. App. 1985) (holding that plaintiff failed to meet burden of showing that proposed fluoridation of city's water supply would constitute a nuisance).

85. Surface waters have been defined as "waters of a casual and vagrant character, which ooze through the soil, or diffuse or squander themselves over the surface, following no definite course." *Brandenburg v. Zeigler*, 62 S.C. 18, 21, 39 S.E. 790, 791 (1901) (quoting *Lawton v. South Bound R. Co.*, 61 S.C. 548, 552, 39 S.E.2d 752, 753 (1901)).

86. *See generally* William T. Toal, Note, *Surface Water in South Carolina*, 23 S.C. L. REV. 82 (1971). The common enemy rule was first adopted in *Edwards v. Charlotte, C. & A. Railroad*, 39 S.C. 472, 18 S.E. 58 (1893).

87. 238 S.C. 623, 121 S.E.2d 223 (1961).

88. *Id.* at 633, 121 S.E.2d at 228.

Efforts to modify or abandon the rule in South Carolina have been unsuccessful.⁸⁹

Of interest here, of course, is the nuisance exception to the common enemy rule. This exception has the potential to swallow the rule if the downstream landowner is required to show only the presence of a nuisance in the broad sense of "anything which works hurt, inconvenience, or damage."⁹⁰ Indeed, language from several cases implies that the exception encompasses any kind of nuisance.⁹¹ On the other hand, case law frequently describes the nuisance exception as involving only a nuisance per se, an activity which is "dangerous at all times and under all circumstances to life, health or property."⁹² As only one South Carolina case has found an activity to be a nuisance per se,⁹³ the exception to the common enemy rule, if confined to this kind of nuisance, will make it exceedingly difficult for landowners to recover for surface water interference.

C. Defendant's Conduct

Does the plaintiff prevail in a private nuisance action merely by showing interference with the use and enjoyment of the property, or must the plaintiff also prove that the defendant acted negligently or intentionally? Surprisingly, this fundamental issue remains unresolved in South Carolina. Other jurisdictions have approached the problem in at least four ways. These approaches are examined below, with the final one being recommended for use in South Carolina.

89. See, e.g., *Irwin v. Michelin Tire Corp.*, 288 S.C. 221, 341 S.E.2d 783 (1986) (refusing to adopt "New Jersey rule" which imposes liability for decreasing land's absorptive capacity by installing an artificial drainage system); *Williams v. Skipper*, 284 S.C. 261, 325 S.E.2d 577 (Ct. App. 1985) (per curiam) (refusing to overrule the "common enemy" rule and adopt the "reasonable use" rule).

90. See *supra* note 18 and accompanying text.

91. *Johnson v. Williams*, 238 S.C. at 633, 121 S.E.2d at 228; *Johnson v. Phillips*, ___ S.C. ___, 433 S.E.2d 895, 899 (Ct. App. 1993); *Glenn v. School Dist. No. Five*, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988).

92. *Baltzeger v. Carolina Midland Ry.*, 54 S.C. 242, 247, 32 S.E. 358, 360 (1899). For other cases citing this language, see, e.g., *Fairey v. Southern Railway*, 162 S.C. 129, 133, 160 S.E. 274, 275 (1931); *Deason v. Southern Railway*, 142 S.C. 328, 333, 140 S.E. 575, 576 (1927). More recently, the court of appeals described the nuisance per se as "one of the two exceptions to the common enemy doctrine." *Williams v. Skipper*, 284 S.C. at 262, 325 S.E.2d at 578; see also *Suddeth v. Knight*, 280 S.C. 540, 545, 314 S.E.2d 11, 14 (Ct. App. 1984) (stating that the "common enemy" rule is subject to "the general law regarding nuisances" and then applying the nuisance per se test).

93. *Deason*, 142 S.C. 328, 140 S.E. 575 (refusing to disturb the jury's finding that the defendant's activity constituted a nuisance per se). Relying on *Deason*, the South Carolina Court of Appeals in *Suddeth*, 280 S.C. 540, 314 S.E.2d 11, reversed the trial judge's granting of a nonsuit in a surface water drainage case.

1. Negligence Approach

One option is to require the plaintiff to prove the defendant's negligence. The South Carolina Supreme Court, however, has held that negligence does not have to be proven in a nuisance case: "A nuisance is, in itself, a wrongful act; therefore, it is not necessary to prove negligence [sic], which is another wrong, in order to recover damages caused by the *nuisance*, as negligence is no part of that cause of action."⁹⁴ The Fourth Circuit also has held that under South Carolina law a plaintiff may recover in nuisance "without proof of negligence."⁹⁵

2. Strict Liability Approach

A second approach, which prevailed in the early English cases,⁹⁶ is to impose strict liability on the defendant. The creator of a nuisance would be liable whether or not the interference is caused negligently or intentionally.

The South Carolina appellate courts have not directly addressed this approach; however, several cases are relevant to the issue. In *Frost v. Berkeley Phosphate Co.*,⁹⁷ involving a nuisance action for damages caused by emissions from the defendant's fertilizer plant, the trial judge instructed the jury that the defendant was required to use his property "as not to unlawfully and unreasonably injure his neighbor's property."⁹⁸ Relying in part on *Rylands v. Fletcher*,⁹⁹ the supreme court held that this instruction was in error:

On the contrary, we think if one uses his own land for the prosecution of some business from which injury to his neighbor would either necessarily

94. *Drews v. E.P. Burton & Co.*, 76 S.C. 362, 366, 57 S.E. 176, 178 (1907) (emphasis in original).

95. *Jackson v. Atlantic Coast Line R.R.*, 317 F.2d 95, 96 (4th Cir. 1963) (per curiam) (citing e.g., *Conestee Mills v. City of Greenville*, 160 S.C. 10, 158 S.E. 113 (1931)).

That negligence does not have to be proved in a nuisance case is implicitly recognized by the legislature in South Carolina's "right to farm" statute. See S.C. CODE ANN. §§ 46-45-10 (Law. Co-op. 1987 & Supp. 1993). Section 46-45-30 provides that an agricultural facility that has been in operation at least a year and was not a nuisance when it began shall not become a nuisance as the result of changes in land use in the area. This protection, however, does not apply "whenever a nuisance results from the negligent, improper, or illegal operation of an agricultural facility or operation." *Id.* § 46-45-30.

In South Carolina negligence need not be proved in a trespass action. *Baldwin v. Postal Tel. Cable Co.*, 78 S.C. 419, 422, 59 S.E. 67, 68 (1907).

96. PROSSER AND KEETON ON TORTS, *supra* note 3, § 87, at 624.

97. 42 S.C. 402, 20 S.E. 280 (1894).

98. *Id.* at 403, 20 S.E. at 281.

99. 19 L.T.R. 220 (H.L. 1868).

or probably ensue, he is liable if such injury does result, even though he may have used reasonable care in the prosecution of such business.¹⁰⁰

This statement, of course, is the essential principle of *Rylands v. Fletcher*.¹⁰¹

The English case, however, has fared poorly in South Carolina since the *Frost* decision. In *Allison v. Ideal Laundry & Cleaners*,¹⁰² propane gas escaped from a tank at the defendant's business, causing a catastrophic explosion. Describing *Rylands v. Fletcher* as "generally repudiated" in the United States,¹⁰³ the supreme court refused to hold the defendant strictly liable for the negligence of the independent contractor.

*Snow v. City of Columbia*¹⁰⁴ involved water damage to the plaintiffs' residence as the result of a leaking pipe in the city's water main. It was undisputed that the city had no knowledge of the leak until after the plaintiffs' loss. The trial court directed a verdict in favor of the city on the negligence claim but in favor of the plaintiffs on both the strict liability and trespass causes of action. No nuisance claim was involved in this case.¹⁰⁵

The South Carolina Court of Appeals reversed and remanded the case for a new trial solely on the negligence cause of action.¹⁰⁶ The court emphatically rejected the plaintiffs' position that the city should be held strictly liable:

The rule in *Rylands v. Fletcher* forms no part of the common law of South Carolina.

. . . .

At common law, tort liability has primarily been grounded not on the notion that the defendant by his *mere* act or omission has caused harm to the plaintiff, but rather on the notion that the defendant by his *wrongful* act or omission has caused harm to the plaintiff.

. . . Fault remains a foundational principle of tort liability today.

. . . .

. . . If fault is not involved, the common law ordinarily leaves the

100. *Frost*, 42 S.C. at 409, 20 S.E. at 283.

101. 19 L.T.R. 220. For a general discussion of *Rylands v. Fletcher* and its role in the development of the doctrine of strict liability, see PROSSER AND KEETON ON TORTS, *supra* note 3, § 78, at 545-59. For an update on the development of *Rylands v. Fletcher* in England, see Andrew Bryce et al., *Strict Liability in England for Environmental Pollution*, NAT. RESOURCES & ENV'T, Spring 1993, at 38.

102. 215 S.C. 344, 55 S.E.2d 281 (1949).

103. *Id.* at 349-50, 55 S.E.2d at 282. The observation, however, is incorrect. "It is still commonly, and erroneously, said that *Rylands v. Fletcher* is rejected by the great majority of the American courts." WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 78, at 509 n.98 (4th ed. 1971).

104. 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991), *cert. denied*, Feb. 4, 1992.

105. *Id.* at 545, 409 S.E.2d at 798.

106. *Id.* at 556, 409 S.E.2d at 804.

shifting of risk to private agreement or statute.¹⁰⁷

The court of appeals, therefore, held that the trial judge erred in not dismissing the strict liability claim and in not allowing the jury to decide whether the city was at fault.¹⁰⁸

The court of appeals, however, noted that so-called "ultrahazardous activities" are among the "few narrowly defined categories" for which strict liability traditionally has been imposed under the common law.¹⁰⁹ This view is consistent with the position of the First and Second Restatements, which limit the rule of *Rylands v. Fletcher* to "ultrahazardous"¹¹⁰ and "abnormally dangerous"¹¹¹ activities, respectively.

There are at least four other relevant cases. In *Wallace v. A.H. Guion & Co.*,¹¹² the South Carolina Supreme Court adhered to the Restatement rule in holding that the blasting of dynamite is an ultrahazardous activity because "high explosives are used and it is impossible to predict with certainty the extent or severity of its consequences."¹¹³ In *Hatfield v. Atlas Enterprises, Inc.*,¹¹⁴ the court refused to apply the abnormally dangerous activities doctrine to fireworks manufacturers and distributors. In *Ravan v. Greenville County*, the court of appeals indicated that "[w]ere we to adopt the *Restatement's* criteria, we would not be inclined to hold the corporate respondents' activities [of handling hazardous waste] were abnormally dangerous as a matter of law. However, we leave that determination to our Supreme Court should it consider further review of this case."¹¹⁵ The parties in *Ravan* did not petition the supreme court to hear the case. Finally, the Fourth Circuit recently held that South Carolina "currently does not recognize strict liability for damages caused by hazardous waste disposal or reclamation."¹¹⁶

Thus, at present, blasting is the only activity that the South Carolina Supreme Court has declared as ultrahazardous or abnormally dangerous. It remains to be seen if the court will extend the doctrine to other activities. But even if it does, it is doubtful that many nuisances will be on the list.¹¹⁷ At

107. *Id.* at 548-52, 409 S.E.2d at 799-801.

108. *Id.* at 556, 409 S.E.2d at 804.

109. *Snow*, 305 S.C. at 549-50, 409 S.E.2d at 800.

110. RESTATEMENT OF TORTS § 520 (1938).

111. RESTATEMENT, *supra* note 22, §§ 519-20.

112. 237 S.C. 349, 117 S.E.2d 359 (1960).

113. *Id.* at 354, 117 S.E.2d at 361 (quoting RESTATEMENT OF TORTS § 520 (1938)).

114. 274 S.C. 247, 262 S.E.2d 900 (1980).

115. __ S.C. __, 434 S.E.2d 296, 305 (Ct. App. 1993).

116. *Shockley v. Hoechst Celanese Corp.*, 996 F.2d 1212 (4th Cir. 1993) (per curiam) (table dispositive), 1993 WL 241179, at *5. See *infra* notes 310-12 and accompanying text.

117. It should be noted that federal and state trial judges in hazardous waste disposal cases in South Carolina have permitted juries to determine whether the defendant should be held strictly

least the kinds of activities that the South Carolina courts have found to be nuisances—junkyards, funeral homes, barking dogs and truck terminals¹¹⁸—can hardly be described as ultrahazardous or abnormally dangerous. Except for *Frost v. Berkeley Phosphate Co.*,¹¹⁹ whose precedential value is now questionable at best, there is no support in the South Carolina case law for imposing strict liability on the defendant who engages in these kinds of “normal” activities.

3. Restatement Approach

A third approach is set forth in section 822 of the Restatement, which requires a showing that the interference is either “(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.”¹²⁰

Two essential elements must be proven under section 822(a): the intent to interfere, and the unreasonableness of the interference. The Restatement defines an interference as intentional if the defendant “(a) acts for the purpose of causing it or (b) knows that it is resulting or is substantially certain to result from his conduct.”¹²¹ It is not necessary that the interference “be inspired by malice or ill will. . . . An invasion so inspired is intentional, but so is an invasion that the actor knowingly causes in the pursuit of a laudable enterprise without any desire to cause harm.”¹²²

Where intent is considered an essential element of the cause of action, nuisance falls outside the scope of the strict liability doctrine. As Prosser and Keeton explain:

A source of much confusion has resulted from the notion that if liability is imposed on those who act reasonably in intentionally interfering with others, then such liability is a kind of liability without fault. It is not; rather, it is liability for harm caused by an intentional invasion; and it may be no justification for not paying for the harm caused that the defendant inflicted the harm reasonably in his own interest or that of the general public.¹²³

The Restatement also points out that “when the conduct is continued after

liable. See *infra* notes 305-08 and accompanying text.

118. See cases cited *supra* notes 4-14.

119. 42 S.C. 402, 20 S.E. 280 (1894).

120. RESTATEMENT, *supra* note 22, § 822.

121. RESTATEMENT, *supra* note 22, § 825.

122. *Id.* cmt. c.

123. PROSSER AND KEETON ON TORTS, *supra* note 3, § 91, at 653.

the actor knows that the invasion is resulting from it, further invasions are intentional.”¹²⁴ Thus, a company that continues to emit pollutants after it is notified that they are blowing onto the plaintiff’s land is deemed to have intended that result.¹²⁵

There is support in the South Carolina case law for the Restatement’s rules on intent. In *Snow v. City of Columbia*,¹²⁶ the court of appeals addressed the meaning of intent under the law of trespass: “Intent is proved by showing that the defendant acted voluntarily and that he knew or should have known the result would follow from his act.”¹²⁷ The Restatement definition of intent in nuisance cases is based on the same principle: An interference is intentional if the defendant “knows that it is resulting or is substantially certain to result from his conduct.”¹²⁸

In South Carolina, as in most jurisdictions, nuisances do not arise from a single or isolated act. In holding that an oil spill into a creek did not support a nuisance claim, the supreme court held: “A nuisance generally involves the idea of continuity or recurrence, rather than occasional or temporary injury or annoyance. A single isolated occurrence or act, which if regularly repeated would constitute a nuisance, is not a nuisance, until it is regularly repeated.”¹²⁹ Nuisance cases usually involve continuously occurring conduct. In these cases, proving the requisite intent to interfere should not be a difficult

124. RESTATEMENT, *supra* note 22, § 825 cmt. d.

125. See *Bradley v. American Smelting & Ref. Co.*, 709 P.2d 782-785-86 (Wash. 1985) (en banc). It is probably not necessary that the defendant know the identity of the affected landowners. *Id.* at 786 (stating that the owner and operator of copper smelter “had to appreciate with substantial certainty that the law of gravity would visit the effluence upon someone, somewhere”).

126. 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991), *cert. denied*, Feb. 4, 1992.

127. *Id.* at 553, 409 S.E.2d at 802; see also *Jacobson v. Crown Zellerbach Corp.*, 539 P.2d 641, 643 (Or. 1975) (en banc) (“‘Intentional,’ as used in this context, means that the act was done with the knowledge that it would result in damage to another, not that it was done for the purpose of perpetrating injury.” (citing *e.g.*, *Furrer v. Talent Irrigation Dist.*, 466 P.2d 605 (Or. 1970))).

Both the South Carolina Supreme Court and the Court of Appeals have held that the defendant cannot be held liable in a nuisance action unless an “act” is shown. *Clemson Univ. v. First Provident Corp.*, 260 S.C. 640, 653, 197 S.E.2d 914, 920 (1973) (“There is no evidence in this case that the respondents did any acts that could be construed as a nuisance.”); *Home Sales, Inc. v. City of N. Myrtle Beach*, 299 S.C. 70, 82, 382 S.E.2d 463, 469 (Ct. App. 1989) (per curiam) (“[T]o constitute an actionable nuisance, a wrongful act of the defendant must be shown . . .”). Obviously, a prerequisite to proving intent is evidence that the defendant committed some kind of affirmative act.

128. RESTATEMENT, *supra* note 22, § 825(b).

129. *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 568, 183 S.E.2d 438, 443 (1971) (citations omitted). *But see Crosby v. Southern Ry.*, 221 S.C. 135, 69 S.E.2d 209 (1952) (refusing to dismiss nuisance action for damages caused by blocking of access to plaintiff’s property for about twenty four hours).

matter. While the initial interference may have been unintended, the conduct becomes intentional once the defendant is aware of the interference.

The second element that must be proved under section 822(a) is the unreasonableness of the interference with the use and enjoyment of the plaintiff's property. Whether the interference is unreasonable depends upon the results of a balancing test in which the "gravity of the harm" to the plaintiff is weighed against the "utility of the conduct" of the defendant. In evaluating the "gravity of the harm," the following factors are important: the extent of the harm; the character of the harm; the social value that the law attaches to the type of use or enjoyment invaded; the suitability of the particular use or enjoyment invaded to the character of the locality; and the burden on the plaintiff of avoiding the harm.¹³⁰

Consideration of the "utility of the conduct" of the defendant involves the following factors: the social value that the law attaches to the primary purpose of the conduct; the suitability of the conduct to the character of the locality; and the impracticability of preventing or avoiding the invasion.¹³¹

In general, the plaintiff will not recover unless he proves that the gravity of his harm outweighs the utility of the defendant's conduct (and, of course, that the defendant acted intentionally).¹³² There are, however, five exceptions to this general rule.¹³³

There is some support in the South Carolina case law for this kind of balancing approach. In *Winget v. Winn-Dixie Stores, Inc.*,¹³⁴ the supreme court referred to several of the Restatement factors in explaining how nuisance determinations are made:

What is a reasonable use and whether a particular use is a nuisance cannot be determined by any fixed general rules, but depends upon the facts of each particular case, such as location, character of the neighborhood, nature of the use, extent and frequency of the injury, the effect upon the enjoyment of life, health, and property, and the like. A use of property in one locality and under some circumstances may be lawful and reason-

130. RESTATEMENT, *supra* note 22, § 827.

131. *Id.* § 828.

132. RESTATEMENT, *supra* note 22, § 826(a).

133. The exceptions are (1) where the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible; (2) the defendant's conduct is for the sole purpose of causing harm to the plaintiff and is contrary to the common standards of decency; (3) the invasion is severe and greater than the plaintiff should be required to bear without compensation; (4) the harm is significant and it would be practicable for the defendant to avoid the harm in whole or in part without undue hardship; and (5) the harm is significant, and the use or enjoyment interfered with is well suited to the character of the locality and the defendant's conduct is unsuited to the locality. RESTATEMENT, *supra* note 22, §§ 826(b), 829-31.

134. 242 S.C. 152, 130 S.E.2d 363 (1963).

able, which under other circumstances would be unlawful, unreasonable, and a nuisance.¹³⁵

Similarly, in *Young v. Brown*,¹³⁶ the court stated that “due regard must be had to the correlative rights of the parties” in determining whether an activity should be declared a private nuisance.¹³⁷ The court of appeals recently cited this statement with approval in *Ravan v. Greenville County*.¹³⁸

Section 822(b) of the Restatement goes on to impose liability for *unintentional* interferences that result from negligent, reckless, or abnormally dangerous conduct. It is difficult to understand what useful purpose is served by allowing the plaintiff to base a nuisance cause of action on this type of conduct. The plaintiff, of course, is free to pursue a separate negligence claim, and, if the facts and jurisdiction permit, a strict liability claim. Indeed, even in jurisdictions that follow the section 822(b) rule courts have “expressed reservations about permitting a cause of action that merely reiterates plaintiff’s negligence and strict liability claims.”¹³⁹ In any event, the issue is of little importance in South Carolina which, as previously discussed, has rejected the application of negligence principles in nuisance cases and to date has confined the abnormally dangerous activities doctrine to the blasting of dynamite.

4. The “No Balancing” (and Recommended) Approach.

The Restatement devotes fifteen pages to an explanation of what “gravity of harm” and “utility of conduct” mean and how they should be considered and balanced by the fact-finder.¹⁴⁰ One emerges from a careful reading of that explanation with anything but a clear understanding of how the process works. In jury trials, a judge adhering to the Restatement approach faces a formidable task indeed of drafting a comprehensible instruction on this subject.

More important, however, it is simply wrong to employ a balancing test at the liability stage of the proceeding. By imposing upon the plaintiff the obligation of proving that his harm, however unreasonable or “grave” it may

135. *Id.* at 160, 130 S.E.2d at 367 (quoting 39 AM. JUR. *Nuisances* § 16 (1942)).

136. 212 S.C. 156, 46 S.E.2d 763 (1948).

137. *Id.* at 169, 46 S.E.2d at 679.

138. ___ S.C. ___, 434 S.E.2d 296, 307 (Ct. App. 1993).

139. *Jersey City Redev. Auth. v. PPG Indus.*, 655 F. Supp. 1257, 1265 (D.N.J. 1987), *superseded by statute on other grounds as stated in Mayor & Council v. Klockner & Klockner*, 811 F. Supp. 1039, 1051 (D.N.J. 1993); *see also Copart Indus., Inc. v. Consolidated Edison Co. of N.Y., Inc.*, 362 N.E.2d 968, 973 (N.Y. 1977) (“I believe the readiness with which [the majority] uses the term ‘negligence’ in the context of this action for nuisance is counterproductive to the eradication of the confusion which has so long plagued that subject.”) (Fuchsberg, J., dissenting).

140. RESTATEMENT, *supra* note 22, §§ 826-28.

be, outweighs the utility of the defendant's conduct, the Restatement improperly includes in the inquiry the importance of the defendant's activity — a matter that should be of no relevance in determining *liability* in nuisance cases.¹⁴¹

An old environmental case illustrates the point. In *Madison v. Ducktown Sulfur, Copper & Iron Co.*,¹⁴² several farmers brought a nuisance against two companies engaged in the mining and smelting of copper. The plaintiffs owned "thin mountain lands" with an aggregate value of only \$1,000,¹⁴³ while the defendants were responsible for over half of the county's tax revenues and maintained an industry upon which 10-12,000 people were "practically dependent."¹⁴⁴

The *Ducktown* court, however, did not employ any type of balancing test in holding the defendants liable under the common law of nuisance. That test was reserved for the remedy stage where the court, in effect, held that the "utility" of the defendants' operations was of such overwhelming importance to the area that the plaintiffs were entitled to damages, but not injunctive relief. Thus, "the farmers did not have to establish that their injury outweighed the social usefulness of the defendant's activity, but only that an unreasonable burden had been imposed on them. The balancing applies to determining the remedy, not the liability."¹⁴⁵

There is support in the South Carolina case law for this approach. In *Fraser v. Fred Parker Funeral Home*,¹⁴⁶ Parker moved his funeral home from the town's business district into a residential area whereupon twelve of his new neighbors promptly filed suit to shut down the operation. Parker obtained a license from the town to operate his business and did everything possible to minimize the impact on the residents of the area. The "preparation room" was concealed, the deceased were delivered at the back of the home from a secluded side street, and the property was tastefully landscaped. Some neighborhood children even played with Parker's children in the funeral home

141. The comments candidly admit that "the problem of determining utility in these cases is fundamentally the same as in negligence cases . . ." RESTATEMENT, *supra* note 22, §§ 828 cmt. c.

142. 83 S.W. 658 (Tenn. 1940)

143. *Id.* at 659, 666.

144. *Id.* at 660, 661.

145. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY, TEACHERS MANUAL 69 (1992) [hereinafter PLATER]. The same principle is followed in the well-known case of *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970). See *infra* notes 247-49 and accompanying text. There the court did not apply any kind of balancing test in finding that the defendant's \$45 million cement plant had caused a nuisance entitling the plaintiffs to a recovery. The nature of that recovery (permanent damages rather than injunctive relief) was determined by weighing the plaintiffs' interests against the impact of an injunction on the defendant and the community.

146. 242 S.C. 152, 130 S.E.2d 363 (1963).

yard.¹⁴⁷

The case was referred to a special master who found that the funeral home was conducted "under modern scientific and sanitary methods, and in an unostentatious and considerate manner appropriate to the administration of a dignified and necessary calling."¹⁴⁸ Consequently, the special master recommended dismissal of the complaint.

The circuit judge rejected the master's report in a lengthy decree which made it clear that the funeral home's impact on the plaintiffs created a nuisance: "I do find that with all the consideration that the defendant's manager has evidenced toward his neighbors, the operation of this undertaking establishment as now located has materially, tangibly and substantially injured the plaintiffs in their lawful use of their several properties."¹⁴⁹ To protect the "greatest of all institutions, the home,"¹⁵⁰ the circuit judge issued an injunction permanently closing down the business.

The South Carolina Supreme Court affirmed the circuit court's ruling in a 3-2 decision in which every justice expressed an opinion. Chief Justice Bonham agreed with the circuit judge. Justice Stukes, affirming, found it significant that no zoning ordinance or "other control" was in effect.¹⁵¹ Acting Justice Oxner emphasized the "particular facts involved" in concurring with the majority.¹⁵²

In his dissenting opinion, acting Associate Justice Lide emphasized the absence of "the slightest evidence of lack of care on the part of the defendant,"¹⁵³ the license that the town issued to Parker,¹⁵⁴ and the wide divergence in the residents' opinions on the funeral home.¹⁵⁵ Some residents found the funeral home "exceedingly distasteful," while others testified that it was a very pleasing sight.¹⁵⁶ Justice Lide strongly objected to the injunction because there was no evidence of any physical injury to the residents in the area.¹⁵⁷ Dissenting Justice Baker expressed his "profound conviction that this Court by its majority ruling has impinged upon a fundamental right of property, and has undertaken to do what the legislative authorities of the municipality in question have with obvious deliberation refrained from doing."¹⁵⁸

147. *Id.* at 110-17, 21 S.E.2d at 586-89 (Lide, J., dissenting).

148. *Id.* at 112, 21 S.E.2d at 587.

149. *Id.* at 92, 21 S.E.2d at 579.

150. *Id.* at 96, 21 S.E.2d at 581.

151. *Fraser*, 201 S.C. at 107, 21 S.E.2d at 585 (Stukes, J., concurring).

152. *Id.* at 108-09, 21 S.E.2d at 585 (Oxner, J., concurring).

153. *Id.* at 119, 21 S.E.2d at 590.

154. *Id.* at 116, 21 S.E.2d at 589.

155. *Id.* at 114-17, 21 S.E.2d at 588-89.

156. *Fraser*, 201 S.C. at 116, 21 S.E.2d at 588-89.

157. *Id.* at 124, 21 S.E.2d at 592.

158. *Id.* at 129-30, 21 S.E.2d at 594-95. In *Young v. Brown*, a unanimous supreme court

Whatever one may think of the *Fraser* court's remedy of shutting down the defendant's business, the court's analysis in determining the defendant's liability is consistent with the "no balancing" approach. The critical issue is whether the interference is unreasonable, not whether the defendant's conduct is reasonable or has "utility." Thus, although the defendant's conduct in operating the funeral home was exemplary, the interference was determined to be unreasonable in light of the facts of the particular case — a determination typically made by the fact-finder. Moreover, the defendant's intent to interfere was clear because he knew of, and took steps to alleviate, the impact the business would have on his neighbors.

*Winget v. Winn-Dixie Stores, Inc.*¹⁵⁹ involved a private nuisance action against the owner and operator of a grocery store. The jury returned a verdict in favor of the plaintiff, and the defendant appealed the trial court's denial of both its motion for judgment non obstante verdicto (j.n.o.v.) and its motion for a new trial. The South Carolina Supreme Court remanded the case for a new trial because of errors in certain evidentiary rulings.¹⁶⁰ The court's discussion of the trial judge's denial of the motion for j.n.o.v. is of interest here. The court focused on "the normal and necessary incidents" to the operation of a business, holding that such incidents "cannot be condemned as a nuisance."¹⁶¹ The trial court, therefore, had ruled correctly because "[t]he record gives rise to a reasonable inference that such acts were not normal or necessary incidents of the operation of the business."¹⁶²

The court missed the mark: The proper inquiry was not whether the defendant operated its business in a normal or necessary manner, but whether the interference caused by the operation was unreasonable. A business can be operated normally and yet still create a nuisance by causing unreasonable interference with the use and enjoyment of a plaintiff's property. This principle is recognized by the *Fraser* majority, but overlooked by the *Winget* court.¹⁶³

refused to overturn *Fraser*, stating: "After mature consideration, we are still of the opinion that this case was properly decided." 212 S.C. 156, 166, 46 S.E.2d 673, 677 (1948). In *Young* the court sustained the overruling of a demurrer to a complaint involving the planned construction of a cemetery near the plaintiff's residences. *Id.* at 172, 46 S.E.2d at 680; cf. *DeBorde v. St. Michael & All Angels Episcopal Church*, 272 S.C. 490, 252 S.E.2d 876 (1979) (per curiam) (holding that a cemetery in a large wooded lot that was not visible to surrounding landowners did not constitute a private nuisance).

159. 242 S.C. 152, 130 S.E.2d 363 (1963).

160. *Id.* at 165, 130 S.E.2d at 370.

161. *Id.* at 160, 130 S.E.2d at 367.

162. *Id.* at 162, 130 S.E.2d at 368.

163. The South Carolina Supreme Court also recognized this principle when it reversed a trial court's dismissal of a complaint, holding that "the normal, nonnegligent operation of the supermarket" may constitute a private nuisance. *Strong v. Winn-Dixie Stores, Inc.*, 235 S.C. 552, 556, 112 S.E.2d 646, 647 (1960); accord, *Knoff v. American Crystal Sugar Co.*, 380

In conclusion, liability determinations in nuisance cases in South Carolina (and elsewhere) should be fairly simple and straightforward:

- (1) Has there been unreasonable¹⁶⁴ interference with the use and enjoyment of the plaintiff's property?
- (2) Was the defendant's conduct the legal cause of that interference?
- (3) Did the defendant intend to cause the interference?

Assuming the absence or inefficacy of any special defense, an affirmative answer to each of these questions should mean a finding of liability against the defendant. The importance or utility of the defendant's activity should not be a relevant consideration in the determination of liability in nuisance cases. As discussed below, however, that should be a relevant factor in determining the appropriate remedy.¹⁶⁵

V. DEFENSES

The defendant's filing of the customary "general denial" answer to a nuisance complaint will have the effect of denying (1) that there has been any interference with the use and enjoyment of the plaintiff's property, (2) that the interference is substantial, (3) that the interference is intentional and unreasonable, (4) that the interference was proximately caused by the defendant, and (5) that the interference has caused any damage. In addition, the defendant may assert one or more affirmative or special defenses, several of which are discussed below.

A. *Coming to the Nuisance*

The defense of "coming to the nuisance" is typically asserted in situations in which the plaintiff's property was acquired at the time the nuisance was fully established. It is similar to assumption of the risk, the doctrine that bars recovery by a plaintiff who freely and voluntarily confronts a known risk with full awareness of the consequences.¹⁶⁶

N.W.2d 313, 317 (N.D. 1986) ("Proof of absence of negligence is not a defense to an action grounded in nuisance, because the focus is upon the condition created and not upon the exercise of care or skill by the defendant . . ."); *Weida v. Ferry*, 493 A.2d 824, 826 (R.I. 1985) ("Over a half century ago it was emphasized that nuisance liability is distinguished from negligence liability because a nuisance claim is predicated upon an unreasonable injury rather than unreasonable conduct." (citing *Braun v. Iannotti*, 175 A. 656 (R.I. 1934))).

164. In South Carolina, "unreasonable" is synonymous with "material" or "great." *See supra* notes 79-81 and accompanying text.

165. *See infra* notes 250-85 and accompanying text.

166. *See, e.g., King v. Daniel Int'l Corp.*, 278 S.C. 350, 354, 296 S.E.2d 335, 337 (1982) (explaining that the respondent only assumed the risk "if she had freely and voluntarily exposed herself to a *known danger* of which she understood and appreciated the danger") (emphasis in original) (citing *e.g., Canady v. Martschink Beer Distribs.*, 255 S.C. 119, 177 S.E.2d 475

Most courts do not hold, as a matter of law, that the plaintiff who "comes to the nuisance" is barred from asserting a nuisance claim. As Prosser summarizes the majority view: "[T]he purchaser is entitled to the reasonable use and enjoyment of his land to the same extent as any other owner, so long as he buys in good faith and not for the sole purpose of a vexatious lawsuit."¹⁶⁷ The purchaser, however, may have difficulty recovering damages because the purchase price of the property presumably reflected the adjoining nuisance. In one remarkable case, a real estate developer acquired property near the defendant's cattle feedlot operation and sued to enjoin the nuisance.¹⁶⁸ The court agreed that a permanent injunction was appropriate, but ordered the developer, having brought residents to the nuisance, to compensate the defendant for the costs of relocating or shutting down his business.¹⁶⁹

There is little discussion of the coming to the nuisance defense in any reported decision in South Carolina. Two conflicting statements of dictum appear in the case law. In *Young v. Brown*,¹⁷⁰ the court stated that "one is not in a position to complain who builds or buys a home near a cemetery already established."¹⁷¹ But in another case, the court expressed disapproval of the defense:

As a rule, it is no justification for maintaining a nuisance that a party complaining of it came voluntarily within its reach. Thus, according to the weight of authority, the fact that a person voluntarily comes to a nuisance by moving into the sphere of its injurious effects, or by purchasing adjoining property or erecting a residence or building in the vicinity after the nuisance is created, does not prevent him from recovering damages for injuries sustained therefrom, or deprive him of the right to enjoin its maintenance, especially where, by reason of changes in the structure or business complained of, the annoyance has been since increased.¹⁷²

Most jurisdictions are unwilling to deny a day in court to the plaintiff who comes to the nuisance. However, when the plaintiff appeared on the scene is a relevant consideration at both the liability and remedy stages of the nuisance case.¹⁷³

(1970)).

167. PROSSER, *supra* note 103, § 91, at 611 (footnotes omitted).

168. *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972) (en banc).

169. *Id.* at 708.

170. 212 S.C. 156, 46 S.E.2d 673 (1948).

171. *Id.* at 171, 46 S.E.2d at 680.

172. *Carter v. Lake City Baseball Club, Inc.*, 218 S.C. 255, 272, 62 S.E.2d 470, 478 (1950) (quoting 39 AM. JUR. *Nuisances* § 197 (1942)); cf. *Henry v. Southern Ry.*, 93 S.C. 125, 75 S.E. 1018 (1912) (stating that plaintiff was on notice of defendant's dam and associated right to flood pasture rented by plaintiff, and, therefore, plaintiff would have a claim only for defendant's negligent operation of dam).

173. See RESTATEMENT, *supra* note 22, § 840D; John D. Ingram, *Coming to the Nuisance*:

B. Contributory Negligence

Because the supreme court has held that negligence does not have to be proved in a nuisance case, contributory negligence would not be a proper defense.¹⁷⁴

C. Regulatory Compliance (and Noncompliance)

Nuisance litigation often involves a defendant who possesses one or more governmental licenses or permits. Examples include a local permit to build a structure and a federal or state permit to discharge pollutants. In a nuisance suit, how important is it that the government permitted the activity or discharge in question? How does it affect the suit if the plaintiff shows that the defendant has violated the terms of a permit or license?

In South Carolina, a license or permit to construct or operate a business affords no immunity against a nuisance action.¹⁷⁵ In *Neal v. Darby*,¹⁷⁶ the South Carolina Court of Appeals held that the trial judge was required to give only sufficient weight to the defendant's state and federal permits;¹⁷⁷ these permits did not preclude a determination that a hazardous waste landfill located in close proximity to a tributary of the area's water supply constituted a public nuisance.¹⁷⁸

Nor Shall Private Property Be Taken Without . . ., 5 N. ILL. U. L. REV. 181 (1985); Ferdinand S. Timio, Annotation, "Coming to Nuisance" as a Defense or Estoppel, 42 A.L.R.3D 344 (1972).

174. See *supra* notes 94-95 and accompanying text. *Contra* RESTATEMENT, *supra* note 22, § 840B (recognizing contributory negligence as a proper defense to a nuisance suit when the nuisance is alleged to result from the defendant's negligent conduct).

While there is no South Carolina case on point, courts in other jurisdictions have not been receptive to efforts by plaintiffs to avoid the contributory negligence defense by couching what is essentially a negligence claim under the nuisance doctrine. As one court held:

Merely attaching the label 'nuisance' to an action for personal injuries does not alter the nature of the action. Where the acts or omissions constituting negligence are the identical acts which it is asserted give rise to a cause of action for nuisance, the rules applicable to negligence will be applied.

Randall v. Village of Excelsior, 103 N.W.2d 131, 135 (Minn. 1960) (citing *Jablon v. City of New York*, 31 N.Y.S.2d 764 (Sup. Ct. 1941)).

175. See, e.g., *Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152, 158, 130 S.E.2d 363, 366 (1963) (citing e.g., 66 C.J.S. *Nuisances* § 17(c) (1950)); *Ryan v. Copes*, 45 S.C.L. (11 Rich.) 217, 238 (1858) (stating that a city license is "entitled to higher estimation than the opinions of private individuals" when determining whether the defendant's actions are a nuisance). Most jurisdictions follow the rule that compliance with a governmental permit is not a complete defense to a nuisance action. See, e.g., *Galaxy Carpet Mills, Inc. v. Massengill*, 338 S.E.2d 428 (Ga. 1986).

176. 282 S.C. 277, 318 S.E.2d 18 (Ct. App. 1984).

177. *Id.* at 285, 318 S.E.2d at 23.

178. *Id.* at 286, 318 S.E.2d at 24.

Government permits can be two-edged swords, and plaintiffs will make every effort to introduce into evidence a defendant's failure to comply with an applicable law or regulation. In negligence cases, such evidence is admissible and constitutes negligence per se,¹⁷⁹ leaving the plaintiff with the burden of proving only causation and damages.

Should evidence of noncompliance have a similarly conclusive effect in nuisance litigation? Professor Rodgers writes that "[t]he violation of a permit or effluent standard generally is per se evidence of unreasonable operation for purposes of nuisance law."¹⁸⁰ This view, however, is inconsistent with the basic tenet of the doctrine which, as discussed previously, focuses on whether the interference is unreasonable, not on whether the defendant acted unreasonably.¹⁸¹ Thus, noncompliance with a permit should not mean that the defendant's activity is a nuisance per se.¹⁸²

179. *See, e.g., Reed v. Clark*, 277 S.C. 310, 317, 286 S.E.2d 384, 388 (1982) (citation omitted) ("It is well-settled that causative violation of an applicable statute constitutes actionable negligence and is evidence of recklessness, willfulness and wantonness."). However, the plaintiff must show the following to prove that the defendant owed a duty of care based on a statute: "(1) That the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *Rayfield v. South Carolina Dep't of Corrections*, 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988), *cert. denied*, 298 S.C. 204, 379 S.E.2d 133 (1989).

180. 1 RODGERS, *supra* note 3, § 2.11, at 99 (footnote omitted).

181. *See supra* text accompanying notes 120-65.

182. The South Carolina Pollution Control Act contains a puzzling provision that raises some question as to whether regulatory violations can even be admitted into evidence in common law suits. Section 48-1-250 provides:

Causes of action resulting from the violation of the prohibitions contained in this chapter inure to and are for the benefit of any person or persons damaged as the result of any such violation. A determination by the Department that pollution exists or a violation of any of the prohibitions contained in this chapter, whether or not actionable by the State, create no presumption of law or fact inuring to or for the benefit of persons other than the State.

S.C. CODE ANN. § 48-1-250 (Law. Co-op. 1987).

This provision does not represent the General Assembly's finest hour of legislative drafting. What the first sentence grants — claims based on violations of the Act are for the benefit of persons damaged thereby, the second sentence seems to take away — violations of the Act do not inure to the benefit of anyone except the State. No legislative history or reported decision sheds any light on the section's meaning.

There is an unreported federal court decision in South Carolina which discusses § 48-1-250. In *Davis v. Owens-Corning Fiberglas Co.*, Civil Action No. 80-784-3 (D.S.C. 1982), the plaintiffs complained that fluoride emissions from the defendant's plant constituted a nuisance entitling them to damages and injunctive relief. There was evidence that emissions from the plant frequently violated the South Carolina gaseous fluoride standard. The court, sitting without a jury, held that the plaintiffs failed to prove any causal connection between the plant's emissions and their damages. In dictum, the court addressed § 48-1-250:

[T]he fact that the defendant may have violated air quality standards established by the State of South Carolina "creates no presumption of law or fact inuring to or for

D. Statute of Limitations

Nuisances, like other torts in South Carolina, are subject to the state's basic three-year statute of limitations.¹⁸³ Little case law on the application of the statute of limitations to nuisance claims exists. In inverse condemnation cases, however, the principle is well settled in South Carolina that when the taking is temporary or abatable, "there arises a continuing cause of action, and while limitations begin to run at the occurrence of the first actual damage, the landowner may at any time recover for injury to his land which occurred within the statutory period."¹⁸⁴ There is no reason to believe that the rule is any different in private nuisance cases involving temporary or abatable nuisances.¹⁸⁵

Most nuisances can be abated by installing technological controls on the offending activity. In these cases, the plaintiff's cause of action should be a continuing one.¹⁸⁶

the benefit of persons other than the state." Section 48-1-250, *South Carolina Code of Laws* (1976). Proof that the defendant has not always been completely in compliance with fluoride standards established by the State of South Carolina does not, in and of itself, entitle the plaintiffs to relief in this action.

Order dated January 20, 1982 at 8. The court did not consider the first sentence of § 48-1-250.

As previously noted, it is well settled that the violation of an applicable law or regulation constitutes negligence per se. It is hard to believe that the General Assembly, through the ambiguously written § 48-1-250, intended to abandon this principle in a field as important as environmental protection. It may be that the section's second sentence reflects a concern about the prejudicial impact of an administrative agency's determination that a regulatory violation has occurred. Admitting into evidence the agency's notice of violation, administrative order, or penalty assessment arguably would be as prejudicial to the defendant as allowing investigating police officers in automobile accident cases to testify that they issued a ticket to one of the parties; in the latter case, such testimony is not allowed. S.C. CODE ANN. § 56-5-6160 (Law. Co-op. 1991). The second sentence may be saying, albeit unartfully, that this kind of testimony will not be admitted in environmental cases. While the regulatory standard, like the speed limit, and monitoring results, like eye-witness testimony about speed, are admissible, it is for the jury to decide whether a violation actually occurred, and the agency's determination in that regard would not be admissible.

183. S.C. CODE ANN. § 15-3-530 (Law. Co-op. Supp. 1993).

184. *McCurley v. South Carolina State Highway Dep't*, 256 S.C. 332, 335, 182 S.E.2d 299, 300 (1971) (quoting *Hilton v. Duke Power Co.*, 254 F.2d 118, 122 (4th Cir. 1958)); *accord Conestee Mills v. City of Greenville*, 160 S.C. 10, 158 S.E. 113 (1931); *Glenn v. School Dist. No. Five*, 294 S.C. 530, 366 S.E.2d 47 (Ct. App. 1988).

185. See Michael A. DiSabatino, Annotation, *When Statute of Limitations Begins to Run as to Cause of Action for Nuisance Based on Air Pollution*, 19 A.L.R.4TH 456, 460 (1983) (noting general agreement among the courts that where the nuisance is abatable by reasonable means, "a nuisance action can be brought for damages at least for those injuries incurred within the applicable limitations period regardless of when the nuisance began").

186. The perpetrator of an abatable nuisance might be able to obtain a prescriptive right to maintain the nuisance, although no South Carolina cases have so held. The statutory period for obtaining a prescriptive right is ten years. S.C. CODE ANN. § 15-67-210 (Law. Co-op. 1976);

E. Lack of Control

A defendant may be able to avoid liability by showing that he did not have possession or control of the property or instrumentality allegedly responsible for the nuisance. In *Clark v. Greenville County*,¹⁸⁷ the plaintiffs sought the recovery of property damage for groundwater contamination allegedly caused by an old county landfill. The defendants included Greenville County, four companies that generated waste disposed of at the landfill, and a company that transported waste to the site.

The trial court granted the summary judgment motion of the corporate defendants on the nuisance claim, ruling:

Plaintiffs failed to prove essential elements of their nuisance cause of action. First, the claimed conditions on plaintiffs' properties were not caused by activities of the corporate defendants as a neighbor, because the corporate defendants never owned, designed, constructed, operated, maintained or closed the landfill. Second, plaintiffs did not demonstrate a contemporaneous interference with their property rights by the corporate defendants, because the corporate defendants did not use the landfill during the time plaintiffs owned their properties.¹⁸⁸

Describing the "historical purpose" of the private nuisance cause of action as that of "protecting neighboring landowners,"¹⁸⁹ the trial court refused to extend the doctrine beyond that purpose.

The South Carolina Supreme Court affirmed on the grounds that "one who has no control over property at the time of the alleged nuisance cannot be held liable therefor."¹⁹⁰ Because there was no evidence that "the corporate respondents had control over the landfill or the hazardous waste once it was deposited at the landfill," the lower court "correctly ruled the corporate respondents could not be liable for nuisance because they had no control over the property allegedly used as a nuisance."¹⁹¹ The supreme court did not address the second ground for the trial judge's ruling (that the respondents did not use the landfill at the time the plaintiffs owned their property).

The decision has important implications for nuisance cases involving waste disposal sites. Waste generators and transporters involved in common law suits in South Carolina should not hesitate to seek dismissal of the

cf. *Jordan v. Lang*, 22 S.C. 159 (1885) (finding the defendant had a prescriptive right to irrigate because he used water in violation of plaintiff's riparian rights for twenty years).

187. ___ S.C. ___, 437 S.E.2d 117 (1993).

188. Order dated March 20, 1992, at 5, *Clark* (90-CP-23-4683).

189. *Id.*

190. ___ S.C. ___, 437 S.E.2d at 119.

191. *Id.*

nuisance claim based on *Clark*. If the claim is to survive, the plaintiff will have to offer evidence that the defendant retained some degree of control over the waste after it left his possession. One possible theory is Section 427B of the Restatement, which provides that liability can be imposed on a person who retains an independent contractor to perform work likely to create a nuisance or trespass.¹⁹² This theory was not involved in *Clark*, but in a federal suit in South Carolina, the court submitted to the jury the question of whether a generator of waste products delivered to an off-site chemical reclamation facility was liable under the theory of Section 427B for soil and groundwater contamination caused by operations at the facility.¹⁹³

F. Sovereign Immunity and Inverse Condemnation

In *McCall v. Batson*,¹⁹⁴ the South Carolina Supreme Court abolished the doctrine of sovereign immunity in South Carolina for torts committed by state and local governments.¹⁹⁵ Galvanized into the action, the General Assembly enacted the South Carolina Tort Claims Act¹⁹⁶ the following year. The Act declares that "total immunity from liability on the part of the government is not desirable,"¹⁹⁷ but provides that "neither should the government be subject to unlimited nor unqualified liability for its actions."¹⁹⁸ The Act limits the amount of damages that may be recovered¹⁹⁹ and provides thirty-one specific exceptions to the waiver of immunity.²⁰⁰

192. RESTATEMENT, *supra* note 22, § 427B.

193. *Shockley v. Hoechst Celanese Corp.*, 793 F. Supp. 670 (D.S.C. 1992), *aff'd in part, rev'd in part*, 996 F.2d 1212 (4th Cir. 1993) (*per curiam*).

Another defendant in the suit was the former owner and operator of the reclamation facility who sold the contaminated site to another party in 1977. This defendant's nuisance liability, too, was determined by the jury. Allowing that claim to go to the jury is consistent with Section 840A of the Restatement which provides that a vendor of land upon which a nuisance exists "for which he would be subject to liability if he continued in possession remains subject to liability for the continuation of the nuisance after he transfers the land." RESTATEMENT, *supra* note 22, § 840A. *Clark* would not appear to change that result since the former owner had "control over the property allegedly used as a nuisance." ___ S.C. at ___, 437 S.E.2d at 119.

The court also submitted to the jury the question of whether the present owner of the contaminated site was liable in nuisance. That result also appears unaffected by *Clark* because the present owner does have control over the source of the contamination. See RESTATEMENT, *supra* note 22, § 839 cmt. d (stating that possessor of land may be liable for failure to abate nuisance even though possessor had no part in its creation).

194. 285 S.C. 243, 329 S.E.2d 741 (1985).

195. *Id.* at 244, 329 S.E.2d at 741.

196. S.C. CODE ANN. § 15-78-10 to -190 (Law. Co-op. Supp. 1993).

197. *Id.* § 15-78-20(a).

198. *Id.*

199. *Id.* § 15-78-120.

200. *Id.* § 15-78-60.

The seventh exception states: "The governmental entity is not liable for a loss resulting from . . . a nuisance."²⁰¹ Thus, state and local governments continue to be immune from common law nuisance actions. Despite this immunity, the government remains subject to liability under the constitutional doctrine of inverse condemnation. The proscription against taking private property for public purposes without just compensation found in article I, section 13 of the South Carolina Constitution²⁰² has been the focal point of scores of suits against the nuisance-like activities of governmental bodies.

To establish a claim for inverse condemnation, the plaintiff must demonstrate four elements: "(1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence."²⁰³

The principle underlying the first element is that "it is difficult, if not impossible, to take anything from someone negatively or by failing to act."²⁰⁴ Thus, overloaded or clogged sewer lines,²⁰⁵ a broken water main,²⁰⁶ an improperly designed school building,²⁰⁷ an inadequate drainage system,²⁰⁸ and the denial of a building permit²⁰⁹ do not involve "affirmative, positive, [and] aggressive"²¹⁰ acts that subject the government to liability for a taking of private property. On the other hand, raising the level of a public street,²¹¹ removing sidewalks and building supports,²¹² pulling loose a gas line,²¹³ diverting groundwater,²¹⁴ and preventing a landowner

201. S.C. CODE ANN. § 15-78-60(7).

202. S.C. CONST. art. I, § 13 ("Except as otherwise provided in this Constitution, private property shall not be taken . . . for public use without just compensation being first made therefor.").

203. *Rolandi v. City of Spartanburg*, 294 S.C. 161, 164, 363 S.E.2d 385, 387 (Ct. App. 1987) (citing *Berry's on Main, Inc. v. City of Columbia*, 277 S.C. 14, 281 S.E.2d 796 (1981)).

204. *Brown v. School Dist.*, 251 S.C. 220, 225, 161 S.E.2d 815, 817 (1968).

205. *See Collins v. City of Greenville*, 233 S.C. 506, 105 S.E.2d 704 (1958), *overruled on other grounds by Berry's on Main, Inc.*, 277 S.C. 14, 281 S.E.2d 796; *Rolandi*, 294 S.C. 161, 363 S.E.2d 385.

206. *See Belue v. City of Spartanburg*, 276 S.C. 381, 280 S.E.2d 49 (1981), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

207. *See Brown*, 251 S.C. 220, 161 S.E.2d 815.

208. *See McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 154 (Ct. App. 1986).

209. *See Gasque v. Town of Conway*, 194 S.C. 15, 8 S.E.2d 871 (1940), *overruled on other grounds by McCall*, 285 S.C. 243, 329 S.E.2d 741.

210. *Rolandi v. City of Spartanburg*, 294 S.C. 161, 164, 363 S.E.2d 385, 387 (Ct. App. 1987).

211. *Newsome v. Town of Surfside Beach*, 300 S.C. 14, 386 S.E.2d 274 (Ct. App. 1989).

212. *Berry's on Main, Inc. v. City of Columbia*, 277 S.C. 14, 281 S.E.2d 796 (1981).

213. *Kline v. City of Columbia*, 249 S.C. 532, 155 S.E.2d 597 (1967).

214. *South Carolina Dep't of Highways & Pub. Transp. v. Balcome*, 289 S.C. 243, 345 S.E.2d 762 (Ct. App. 1986).

from filling her land basin²¹⁵ have been held sufficiently positive and aggressive to satisfy the first element of liability.

The second element, proof of a "taking," has been construed broadly by the supreme court. It is unnecessary to show an actual physical invasion of property,²¹⁶ for any damage will be deemed the equivalent of a taking: "South Carolina has taken the broadest possible view of 'what is a taking' and has construed the least actual 'damage' to be a 'taking' as distinguished from the Federal rule, and that of many states, in making a distinction between 'taking' and 'damaging'."²¹⁷ This principle is expressed repeatedly in the case law.²¹⁸ Therefore, any nuisance should satisfy the "taking" requirement.

As to the requirement that the taking be for a "public use," the court has observed that "[t]he meaning of the term[] is flexible, and is not confined to what may constitute a public use at any given time."²¹⁹ Indeed, the term public use has proved so flexible that it is difficult to reconcile some of the cases. In one case, the court held that "[p]ublic benefit and public use are not synonymous in the better and more clearly constitutional view."²²⁰ The court later relied on this point in holding that damage to property caused by the government's unclogging of a sewer line did not involve a taking for a public use.²²¹ Yet in another, more recent case, the court clearly equates public benefit with public use: "As long as the use is of benefit, utility or advantage to the public, the use is a public one within the meaning of the law of eminent domain."²²²

215. *Hill v. City of Hanahan*, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984).

216. *Chick Springs Water Co. v. State Highway Dep't*, 159 S.C. 481, 492, 157 S.E. 842, 846 (1931) ("There may be a taking of property in the constitutional sense although there has been no actual entry within its bounds and no artificial structure has been erected upon it.") (citing 10 R.C.L. *Eminent Domain* § 61 (1929)), *overruled on other grounds by* *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

217. *Webb v. Greenwood County*, 229 S.C. 267, 278, 92 S.E.2d 688, 692 (1956).

218. *See, e.g.*, *Stoddard v. Western Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1206 (4th Cir. 1986); *Spradley v. South Carolina State Highway Dep't*, 256 S.C. 431, 434, 182 S.E.2d 735, 737 (1971); *South Carolina State Highway Dep't v. Wilson*, 254 S.C. 360, 366, 175 S.E.2d 391, 395 (1970); *Gasque v. Town of Conway*, 194 S.C. 15, 21, 8 S.E.2d 871, 873 (1940), *overruled on other grounds by* *McCall*, 285 S.C. 243, 329 S.E.2d 741; *Milhous v. State Highway Dep't*, 194 S.C. 33, 39, 8 S.E.2d 852, 854-55 (1940); *Balcome*, 289 S.C. at 246, 345 S.E.2d at 765.

219. *Gasque*, 194 S.C. at 23, 8 S.E.2d at 874.

220. *Bookhart v. Central Elec. Power Coop., Inc.*, 219 S.C. 414, 431, 65 S.E.2d 781, 788 (1951) (per curiam).

221. *Collins v. City of Greenville*, 233 S.C. 506, 512, 105 S.E.2d 704, 708 (1958), *overruled on other grounds by* *Berry's on Main, Inc. v. City of Columbia*, 277 S.C. 14, 281 S.E.2d 796 (1981).

222. *Timmons v. South Carolina Tricentennial Comm'n*, 254 S.C. 378, 393, 175 S.E.2d 805, 812 (1970), *cert. denied*, 400 U.S. 986 (1971).

If the government is using its own property in such a way that neighboring property is damaged, the plaintiff can satisfy the public use requirement. For example, in *Lindsey v. City of Greenville*,²²³ where the release of dam water destroyed the plaintiff's crop, the court rejected the city's argument that this destruction was not a taking for a public use, stating: "It is conceded that the construction, operation and maintenance of the dam and reservoir by the defendant was a public use. The damages sustained by the plaintiff resulted from the operation of such project. Under these circumstances, the damages sustained by plaintiff constituted a taking for public use."²²⁴

The *Lindsey* court also addressed the final element of the inverse condemnation claim—the requirement that the taking have "some degree of permanence."²²⁵ The court found that this requirement was satisfied simply because "[i]t is reasonably inferable that in the normal operation of defendant's project such discharge of waters from its reservoir will be repeated in the future."²²⁶ The plaintiff thus was confronted with "a situation basically permanent in nature."²²⁷ In *Stoddard v. Western Carolina Regional Sewer Authority*,²²⁸ the Fourth Circuit relied on *Lindsey* in rejecting the defendant's argument that the planned closing of a sewage plant resulted in only a temporary taking of the plaintiffs' downstream properties.²²⁹

VI. REMEDIES

Three basic remedies are potentially available to the plaintiff who successfully establishes the defendant's liability in a nuisance case: actual damages, punitive damages, and injunctive relief. Each is discussed below.

A. Actual Damages

A critical factor in determining the type of actual damages recoverable by a successful plaintiff is whether the nuisance is temporary or permanent. The basic principle is that for a permanent nuisance, the standard is "the difference between the value of the land before the injury and its value after the injury,"²³⁰ whereas for a temporary nuisance, the plaintiff "can recover the

223. 247 S.C. 232, 146 S.E.2d 863 (1966).

224. *Id.* at 239, 146 S.E.2d at 867.

225. *See supra* text accompanying note 203.

226. *Lindsey*, 246 S.C. at 238, 146 S.E.2d at 867.

227. *Id.* at 238, 146 S.E.2d at 866.

228. 784 F.2d 1200 (4th Cir. 1986).

229. *Id.* at 1207-08.

230. *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 569, 183 S.E.2d 438, 443 (1971); *see also Ravan v. Greenville County*, __ S.C. __, __, 434 S.E.2d 296, 307 (Ct. App. 1993) ("The measure of damages for permanent injury to real property by pollution, whether by nuisance,

depreciation in the rental or usable value of the property caused by the pollution."²³¹

The South Carolina appellate courts have not yet had to grapple with the "tricky" and "treacherous" distinction between a permanent and a temporary nuisance.²³² The general rule followed by most jurisdictions is that a nuisance will be deemed permanent if it is likely to continue indefinitely in the future.²³³ Support for this rule in South Carolina can be found in inverse condemnation cases where courts have found a permanent taking if it is reasonable to believe that the government's activity will be repeated in the future.²³⁴

In some cases, the plaintiff may seek to recover damages based on the cost of restoring or cleaning up the property. The courts are divided on the issue of whether the cost of restoration is recoverable if it exceeds the property's fair market value.²³⁵ The issue is particularly important in groundwater contamination cases where the cost of remediation can far exceed the value of the property. The Restatement supports the recovery of the cost of restoring the property to its original condition unless the cost would be "disproportionate to the diminution in the value of the land."²³⁶ However, if the property is used "for a purpose personal to the owner," the Restatement allows recovery of that cost even if it is disproportionate.²³⁷ There is no reported South Carolina case addressing this question.

The plaintiff in a nuisance action is entitled to recover not only for the

trespass, negligence, or inverse condemnation is the diminution in the market value of the property." (footnote omitted)).

231. *Gray*, 256 S.C. at 561, 183 S.E.2d at 443.

232. See 1 RODGERS, *supra* note 3, § 2.13, at 109-10.

233. See RESTATEMENT, *supra* note 22, § 930(1); William B. Johnson, Annotation, *Measure and Elements of Damages for Pollution of Well or Spring*, 76 A.L.R.4TH 629, 634 (1990). For statute of limitations purposes, "temporary" and "permanent" have entirely different meanings. See *supra* notes 183-86 and accompanying text.

234. See *supra* notes 225-29 and accompanying text.

235. Compare *G & A Contractors, Inc. v. Alaska Greenhouses, Inc.*, 517 P.2d 1379 (Alaska 1974) (allowing remediation costs even though greatly in excess of property's value) with *Newsome v. Billups*, 671 S.W.2d 252 (Ky. Ct. App. 1984) (denying remediation costs because they exceeded property's value).

236. RESTATEMENT, *supra* note 22, § 929 cmt. b.

237. *Id.* In *Board of County Comm'rs v. Slovek*, 723 P.2d 1309 (Colo. 1986) (en banc), the Colorado Supreme Court held:

If the damage is repairable, and the costs, although greater than original value, are not wholly unreasonable in relation to that value, and if the evidence demonstrates that payment of market value likely will not adequately compensate the property owner for some personal or other special reason, we conclude that the selection of the cost of restoration as the proper measure of damages would be within the limits of a trial court's discretion.

Id. at 1317.

harm to his proprietary interest but also for any special damages, such as "damages for loss of peace of mind, unhappiness, annoyance, and deprivation of enjoyment of property, livestock and crop losses, injury to cattle and decreases in milk production, damages to domestic animals, plants, clothes on the line and paint on the house, and a variety of other out-of-pocket expenses."²³⁸ Recovery of lost profits, too, has been allowed.²³⁹ In any event, where the plaintiff establishes the existence of a nuisance, he is entitled to at least nominal damages.²⁴⁰

B. Punitive Damages

In nuisance suits, punitive damages are recoverable where the defendant has acted recklessly, willfully, wantonly or maliciously.²⁴¹

C. Injunctive Relief

No nuisance is "permanent" because "any nuisance man creates, man can abate."²⁴² The polluting factory can be equipped with a scrubber, the noisy trucks can be routed another way, or the volume can be turned down. Even in the cases where location, rather than operation, makes the defendant's activity a nuisance, as in *Fraser v. Fred Parker Funeral Home*,²⁴³ the nuisance can be abated by shutting down the business.

In nuisance actions, the "better approach" is to allow the plaintiff to elect between treating the nuisance as permanent (and recovering past and future damages) or as temporary (and recovering past damages only).²⁴⁴ But the

238. 1 RODGERS, *supra* note 3, § 2.13, at 111-12 (footnotes omitted).

239. *Id.* § 2.13, at 112-13; *see also* Ayers v. Township of Jackson, 525 A.2d 287, 294 (N.J. 1987) (upholding "quality of life" award of damages as "derived from the law of nuisance").

240. *See* Johnson v. Phillips, ___ S.C. ___, 433 S.E.2d 895 (Ct. App. 1993).

241. *See* Sample v. Gulf Ref. Co., 183 S.C. 399, 191 S.E. 209 (1937); *see also* Jackson v. Atlantic Coast Line R.R., 317 F.2d 95 (4th Cir. 1963) (per curiam) (punitive damages warranted where oil deposits continued despite plaintiff's repeated complaints); Touchberry v. Northwestern R.R., 88 S.C. 47, 70 S.E. 424 (1911) (finding that jury award of punitive damages was proper when defendant was informed that its railroad track had caused flooding of plaintiff's lands, but took no steps to correct problem).

242. Moy v. Bell, 416 A.2d 289, 294 (Md. Ct. Spec. App. 1980).

243. 201 S.C. 88, 92, 21 S.E.2d 577, 579 (1942).

244. 1 RODGERS, *supra* note 3, § 2.13, at 109; *see* Cox v. Cambridge Square Towne Houses, Inc., 236 S.E.2d 73, 75 (Ga. 1977) (giving plaintiff "the right to elect to treat the nuisance as temporary and sue for all those damages which have occurred within the past four years, or . . . may elect to sue for all future damages as well and put an end to the matter"); *cf.* Mason v. Apache Mills, 81 S.C. 554, 561, 62 S.E. 399, 402 (1908) ("But, obviously, when [plaintiff] elects to take damages for the anticipated future trespass, he cannot have compensation by the recovery of damages, and at the same time an injunction to restrain the trespass.").

In *Cauthen v. Lancaster Cotton Oil Mills*, 96 S.C. 342, 80 S.E. 615 (1914), the court held

plaintiff cannot have it both ways: “[P]laintiffs cannot secure both a damages judgment for reduced market value due to permanent injury to property and an injunction abating the cause of the depreciation.”²⁴⁵

The plaintiff who elects to treat the nuisance as temporary usually must convince both judge and jury. In general, the court will not consider the equitable issues of injunctive relief unless and until the jury resolves the legal issues in the plaintiff’s favor.²⁴⁶ A plaintiff who convinces the jury that a nuisance exists and receives an award of damages for injuries as of the trial date will not be made whole unless the court issues an injunction ordering the defendant to end the nuisance promptly.

Is the successful plaintiff automatically entitled to injunctive relief? Or does the court have the discretion to employ the so-called “balancing of conveniences test” whereby the benefits to the plaintiff of injunctive relief are weighed against the costs to the defendant of being subjected to an injunction?

In the renowned case of *Boomer v. Atlantic Cement Co.*,²⁴⁷ the Court of Appeals of New York struggled with these questions and concluded that the defendant’s \$45 million plant with 300 employees constituted a nuisance that could avoid being shut down by paying the plaintiffs damages for their total loss, present and future (which the trial judge had determined to be \$185,000).²⁴⁸ Judge Jasen lodged a strong dissent:

I see grave dangers in overruling our long-established rule of granting an injunction where a nuisance results in substantial continuing damage. 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

that a plaintiff seeking an injunction may introduce evidence on the issue of damages only up to the date the complaint was filed. *Id.* at 344-45, 80 S.E. at 616. This rule seems unfair today when crowded court dockets mean that considerable time elapses between the commencement of a suit and the actual trial.

245. 1 RODGERS, *supra* note 3, § 2.13, at 108 (footnote omitted).

246. *See* Kennerty v. Etiwan Phosphate Co., 17 S.C. 411, 417 (1882) (“[T]he general rule undoubtedly is that equity will not grant an injunction until the legal rights of the parties are determined and the fact that a nuisance exists is established in a law court, which is the proper tribunal to decide such questions and measure the damages.”); *cf.* Standard Warehouse Co. v. Atlantic Coast Line R. Co., 222 S.C. 93, 103, 71 S.E.2d 893, 895 (1952) (“Where a case contains both legal and equity issues, it is discretionary with the trial judge as to which shall be tried first, and ordinarily that one is tried first which is more likely to aid in deciding the entire controversy. In the present case, it seems clear that the logical course would be to try the legal question first, since if the facts do not show the existence of a nuisance and warrant a verdict for damages in favor of the plaintiff, it would not be entitled to an injunction in equity.”).

The plaintiff is entitled to a jury trial on the issue of damages in a nuisance case. *E.g.*, *Baughman v. American Tel. & Tel. Co.*, 298 S.C. 127, 378 S.E.2d 599 (1989).

247. 257 N.E.2d 870 (N.Y. 1970).

248. *Id.* at 875.

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.²⁴⁹

In South Carolina, the matter is not entirely clear. It appears that, at least in cases involving "substantial continuing damage," the plaintiff who proves the existence of a nuisance is entitled to injunctive relief. The leading case is *Williams v. Haile Gold Mining Co.*,²⁵⁰ in which the jury found that the discharge of tailings from the defendant's gold-mining operation created a nuisance that rendered the plaintiff's downstream property unfit for cultivation. The supreme court quickly disposed of the defendant's argument that injunctive relief was not warranted: "It has been too frequently held by this court to require further discussion that, when the existence of a nuisance has been established by the verdict of a jury, the party injured is entitled, as a matter of right, to an injunction to prevent its continuance."²⁵¹ The court explained that this rule is rooted in the South Carolina Constitution:

Whatever may be the doctrine in other states, under the provisions of the Constitution of this state, that private property shall not be taken for private use without the consent of the owner, the court could not have considered, in deciding whether to grant or refuse the injunction, the question raised by the defendant as to the balance of convenience, or of advantage or disadvantage to the plaintiff and defendant and the public at large, for the defendant's use of the stream.²⁵²

During the same year it decided *Haile*, the court considered an action to remove, as a public nuisance, a structure across the Columbia Canal that was used to support public water lines for the City of Columbia.²⁵³ The structure was built only a few inches above the water line and thus obstructed navigation on the canal by all but the smallest creatures. Emphasizing the state's obligation, as trustee for the people, "to protect the valuable right of free navigation,"²⁵⁴ the court refused to apply a balancing test:

The right of the State and the proposed violation by the defendants of

249. *Id.* at 876 (Jasen, J., dissenting).

250. 85 S.C. 1, 66 S.E. 117 (1909).

251. *Id.* at 6, 66 S.E. at 118 (citing *Mason v. Apalache Mills*, 81 S.C. 554, 62 S.E. 399 (1908); *Threath v. Brewer Mining Co.*, 42 S.C. 92, 19 S.E. 1009 (1894)).

252. *Id.* at 7, 66 S.E. at 118. The constitutional provision referred to by the court is the "takings clause" in S.C. CONST. art. I, § 13; see *supra* notes 194-229 and accompanying text.

253. *State ex rel. Lyon v. Columbia Water Power Co.*, 82 S.C. 181, 63 S.E. 884 (1909).

254. *Id.* at 193, 63 S.E. at 890.

that right, being perfectly clear, the Court cannot refuse to enforce the State's right by enjoining the defendant's proposed obstruction on the ground that the right of navigation of the Columbia Canal may be of small value in comparison with the great value to the city of Columbia of the obstruction it proposes to erect.²⁵⁵

The court, however, delayed issuance of the injunction pending assurance from the master that such a remedy would not interfere with the city's water supplies. Presumably, this assurance was forthcoming since the court later ordered that the structure be removed.²⁵⁶

Many years later, in *Davis v. Palmetto Quarries Co.*,²⁵⁷ the defendant argued that the trial judge erred in striking from its answer the allegation that the quarry in question represented a "large investment" that was beneficial to the community. Citing *Haile*, the supreme court upheld the ruling:

The court was influenced to strike the quoted allegations because of their apparent purpose to raise the irrelevant question of balance of convenience and advantage, and we agree.²⁵⁸

The court was directly asked to overrule *Haile* in *Dill v. Dance Freight Lines*,²⁵⁹ in which the lower court, following a jury verdict in favor of the plaintiff, issued an injunction prohibiting continuation of the nuisance. The defendant contended that economic and social changes that had taken place since *Haile* required a judicial cost-benefit analysis before an injunction could be issued. The supreme court disagreed:

The existence of a nuisance in the instant case was clearly established, not only by the verdict of the jury, but by the evidence in the case. The plaintiff sought and was granted only a prohibitory injunction and we see absolutely nothing in the facts of the instant case, or the argument of the appellant, which would warrant this court in either modifying or overruling the authorities hereinabove cited.²⁶⁰

At least two other cases, discussed previously, do not cite *Haile*, but support the proposition that the successful plaintiff is entitled to injunctive

255. *Id.* at 194, 63 S.E. at 890.

256. *State ex rel. Lyon v. City of Columbia*, 85 S.C. 113, 68 S.E. 1119 (1910) (per curiam).

257. 212 S.C. 496, 48 S.E.2d 329 (1948).

258. *Id.* at 500, 48 S.E.2d at 331 (citing *Williams v. Haile Gold Mining Co.*, 85 S.C. 1, 66 S.E. 117 (1909)).

259. 247 S.C. 159, 146 S.E.2d 574 (1966).

260. *Id.* at 163-64, 146 S.E.2d at 576.

relief—*Fraser v. Fred Parker Funeral Home*²⁶¹ and *Carter v. Lake City Baseball Club, Inc.*²⁶²

But believers in the *Boomer* doctrine will find several glimmers of hope in the South Carolina case law. In *Forest Land Co. v. Black*,²⁶³ the court stated in dictum that “the general rule in this country . . . is that the court will balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction or award damages as seem most consistent with justice and equity under the circumstances of the case.”²⁶⁴ In *Johnson v. Williams*,²⁶⁵ the court indicated its general agreement with this statement from *Black*.²⁶⁶

More recently, the South Carolina Court of Appeals has expressed a decided preference for the balancing test. In *Wynock v. Carroll*,²⁶⁷ the court, in affirming the trial judge’s issuance of an injunction requiring the removal of a portion of the defendant’s building, stated:

[I]n determining the appropriateness of injunctive relief, the courts balance the equities between the parties and are committed to the relative hardship or a balance of convenience standard. So, ordinarily, on application for injunctive relief, the court will, in the exercise of the wide discretion with which it is vested, take into consideration the relative inconvenience, hardship, or injury, which the parties will sustain by the granting or refusal of an injunction.²⁶⁸

In *Ravan v. Greenville County*,²⁶⁹ the court of appeals stated that in nuisance litigation “[t]here must be a balancing of the equities.”²⁷⁰ For this proposition, the court cited an Arizona case that used a balancing test to decide whether injunctive relief was appropriate.²⁷¹

Finally, in *Johnson v. Phillips*,²⁷² the court of appeals held that a jury

261. 201 S.C. 88, 21 S.E.2d 577 (1942).

262. 218 S.C. 255, 62 S.E.2d 470 (1950); *see also* *Cooley v. Clifton Power Corp.*, 747 F.2d 258, 263 (4th Cir. 1984) (ordering defendant dam owner to lower level of lake to eliminate flooding of plaintiff’s upstream property); *Mack v. Edens*, 306 S.C. 433, 437, 412 S.E.2d 431, 434 (Ct. App. 1991) (“Injunction is a proper remedy for a continuous trespass to land.”) (citing *McClellan v. Taylor*, 54 S.C. 430, 32 S.E. 527 (1899)), *cert. denied*, May 6, 1992.

263. 216 S.C. 255, 57 S.E.2d 420 (1950).

264. *Id.* at 266-67, 57 S.E.2d at 426 (citation omitted).

265. 238 S.C. 623, 121 S.E.2d 223 (1961).

266. *Id.* at 639, 121 S.E.2d at 231-32.

267. 289 S.C. 338, 345 S.E.2d 503 (Ct. App. 1986).

268. *Id.* at 340, 345 S.E.2d at 504 (citation omitted).

269. ___ S.C. ___, 434 S.E.2d 296 (Ct. App. 1993).

270. *Id.* at ___, 434 S.E.2d at 307.

271. *McQuade v. Tucson Tiller Apartments, Ltd.*, 543 P.2d 150, 152 (Ariz. Ct. App. 1975).

272. ___ S.C. ___, 433 S.E.2d 895 (Ct. App. 1993).

verdict for the plaintiff of “no dollars” on a nuisance claim was either an inconsistent or a legally incomplete verdict, and thus remanded the case for a new trial.²⁷³ Because the issue could arise on retrial, the court also addressed whether the trial court acted properly in granting a mandatory injunction in favor of the plaintiff:

An injunction, like all equitable remedies, is granted as a matter of sound judicial discretion, not as a matter of legal right. A mandatory injunction is an especially drastic remedy and is rarely granted. In most cases, if the damage suffered by the party seeking a mandatory injunction is very small, a mandatory injunction is unduly oppressive and not in accordance with the principles upon which equitable relief is usually granted. Thus, in an action for private nuisance where the damage is nominal, the granting of a mandatory injunction, except in highly unusual circumstances, is an abuse of discretion.

The principle is well illustrated by this case. If, in fact, the Phillipses created a private nuisance, but it resulted in no actual damage to Smith, it would be inequitable to require them to spend thousands of dollars to return their land to its pre-1988 condition when Smith had suffered no appreciable loss. In such circumstances, the balance of equities would clearly weigh against issuing a mandatory injunction, because the economic detriment to the plaintiff [sic] would substantially exceed the economic benefit to the defendant [sic]. Equity would be better served by leaving the parties in the status quo.²⁷⁴

This statement is certainly a ringing endorsement of the balancing test. However, it is dictum, it is not the pronouncement of the state’s highest court, and it does not discuss *Haile*,²⁷⁵ the state’s leading case. Thus, until we hear more on this issue from the supreme court, *Haile* and its progeny appear to remain alive and well.

Proponents of *Boomer* seek, at a minimum, heightened judicial sensitivity to the defendant’s position. In this state, there is evidence, even in the leading injunction cases, of the court’s concern for the impact of the injunction on the

273. *Id.* at ___, 433 S.E.2d at 900-01.

274. *Id.* at ___, 433 S.E.2d at 901-02 (citations omitted). The parties are reversed in the next-to-last sentence of the quoted section of the opinion: The balance of equities would weigh against the issuance of a mandatory injunction where the economic detriment to the *defendant* substantially exceeds the economic benefit to the *plaintiff*.

275. 85 S.C. 1, 66 S.E. 117 (1909). As this article was going to press, the South Carolina Court of Appeals handed down its decision in *LeFurgy v. Long Cove Club Owners Ass’n.*, Op. No. 2168 (Ct. App. April 18, 1994) which holds that the balancing test applies in determining whether injunctive relief should be granted in private nuisance cases. After applying this test, the court reversed the master-in-equity’s order that had permanently enjoined the operation of a golf tee box near the plaintiff’s home.

defendant. In *Haile*, for example, the court on rehearing pointed out that the injunction “must be construed as enjoining only the discharge from the chlorination mill;”²⁷⁶ there is no indication that this kind of restriction meant a shutdown of the defendant’s operation.²⁷⁷ In *Dill*, the Court stressed the limited scope of the trial judge’s injunction:

While the language of the injunctive order is rather broad and general, as we construe the same, it only enjoins the defendant from operating its terminal in such a manner as to continually and frequently cause the dust complained of to be cast upon the property of the plaintiff. The defendant is perfectly free to operate its terminal and is, of course, free to devise its own means to prevent damaging the plaintiff in the future.²⁷⁸

The public interest was uppermost in the court’s mind in *Columbia Water*, where the court delayed issuance of an injunction until it was assured that obstructing the canal was not the only feasible alternative for satisfying the water needs of the city.²⁷⁹

Thus, we see the court in these cases at least acknowledging, if not actually balancing, the parties’ interests and issuing or construing injunctions in ways that do not result in the defendant’s economic ruin. Indeed, the only reported cases in South Carolina in which a complete shutdown of the defendant’s enterprise was ordered are *Neal v. Darby*²⁸⁰ and *Fraser v. Fred Parker Funeral Home*.²⁸¹ The former involved a hazardous waste landfill that constituted a public nuisance, while the latter involved an exemplary business where no change in operation could have abated the nuisance. In the typical suit, however, the nuisance can be abated by changing the way the defendant’s facility or activity is conducted. Such changes, of course, will usually be expensive, and the defendant will resist making them. But the *Boomer* dilemma, where the change is deemed technologically impossible and a shutdown is the only option for abating the nuisance,²⁸² rarely occurs in nuisance cases.²⁸³ Moreover, the *Boomer* situation is less likely to occur as

276. *Id.* at 9, 66 S.E. at 1058.

277. *Id.*

278. 247 S.C. 159, 164, 146 S.E.2d 574, 576 (1966).

279. 82 S.C. 181, 195, 63 S.E. 884, 890 (1909).

280. 282 S.C. 277, 318 S.E.2d 18 (Ct. App. 1984). Even in this case, the injunction applied only to the defendant’s landfill; the reclamation operation in the adjoining county was unaffected.

281. 201 S.C. 88, 21 S.E.2d 577 (1942).

282. In *Boomer*, dissenting Judge Jasen did not believe this was the only option in *Boomer*. He was convinced that the defendant, if given a period of 18 months, could develop a dust control device that would abate the pollution. *Boomer v. Atlantic Cement Co.*, 597 N.E.2d 870, 876 (N.Y. 1970). In fact, Judge Jasen was correct. Technology was already available (of which the court was unaware) that could have controlled the emissions. PLATER, *supra* note 145, at 66.

283. See 1 RODGERS, *supra* note 3, § 2.13, at 119-20 (“Examples of unqualified shutdowns

the technology for controlling the adverse effects of industrialized society continues to develop and improve. The South Carolina courts will continue to enjoin nuisances, but by what means and under what circumstances will be determined only after all the facts and circumstances, including the defendant's situation, are fully considered.²⁸⁴ A balancing of interests at the remedy stage is especially warranted if, as this article recommends, a balancing test is not applied in determining liability.²⁸⁵

VII. THE FUTURE ROLE OF COMMON LAW NUISANCE IN ENVIRONMENTAL LITIGATION

The doctrine of nuisance is rightfully considered "the common law backbone" of environmental law.²⁸⁶ But despite the doctrine's broad definition, it is not without limitations. Perhaps the principal limitation is that only persons with an interest in land are afforded any protection by the doctrine.²⁸⁷ Thus, a toxic tort claimant who seeks damages for personal injuries that are unrelated to any ownership interest in land may not utilize the nuisance doctrine. These claims are typically pursued under the laws of negligence and strict liability.

Even where the plaintiff is a landowner, traditional nuisance principles may not readily apply. In one well known decision, the Third Circuit refused to allow "a purchaser of real property to recover from the seller on a private nuisance theory for conditions existing on the very land transferred, and thereby to circumvent limitations on vendor liability inherent in the rule of *caveat emptor*."²⁸⁸ Several other courts have agreed with this reasoning and dismissed nuisance claims asserted by buyers against sellers or remote vendors.²⁸⁹

of the principal economic activity at a given location remain few and far between." (footnote omitted)).

284. Prosser and Keeton describe the rule that automatically awards an injunction to the successful plaintiff as an "extreme view." "[T]he modern and best approach is to grant the equitable remedy of injunctive relief when the gravity of the harm from the activity exceeds the utility of the conduct." PROSSER AND KEETON ON TORTS, *supra* note 3, § 88A, at 632.

285. See *supra* notes 140-65 and accompanying text.

286. See 1 RODGERS, *supra* note 3, § 1.1, at 1-2.

287. See *supra* notes 73-77 and accompanying text. The discussion here pertains to the private nuisance cause of action. For an assessment of the importance of the public nuisance doctrine in environmental litigation, see James A. Sevinsky, *Public Nuisance: A Common Law Remedy Among the Statutes*, NAT. RESOURCES & ENV'T, Summer 1990, at 29.

288. Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 313 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985).

289. See *Wilson Auto Enters., Inc. v. Mobil Oil Corp.*, 778 F. Supp. 101, 106 (D.R.I. 1991) (mem.) ("A buyer of property cannot assert a private nuisance claim against a seller - or the seller's lessee - for contamination that occurred before the sale."); *Hanlin Group, Inc. v.*

In fact, the New Jersey courts have moved toward strict liability as the favored theory in environmental cases. The reasoning is that it is "more appropriate to employ newly developed absolute liability theories than 'to endeavor to torture old remedies to fit factual patterns not contemplated when those remedies were fashioned.'"²⁹⁰ A leading case is *State v. Ventron Corp.*,²⁹¹ which involved the dumping of massive amounts of mercury into a tidal estuary. Applying the six factor test of section 520 of the Second Restatement of Torts, the New Jersey Supreme Court had little difficulty finding that this dumping was an abnormally dangerous activity for which strict liability was appropriate:

We believe it is time to recognize expressly that the law of liability has evolved so that a landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others.

. . . .
 . . . [W]e conclude that mercury and other toxic wastes are "abnormally dangerous," and the disposal of them, past or present, is an abnormally

International Minerals & Chem. Corp., 759 F. Supp. 925, 935 (D. Me. 1990) (concluding that a court of law would not recognize a cause of action for private nuisance between vendor and vendee); *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F. Supp. 93, 100 (D. Mass. 1990) (mem.); *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*, 737 F. Supp. 1272, 1282-84 (W.D.N.Y. 1990), *aff'd*, 964 F.2d 85 (2d Cir. 1992); *Amland Properties Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784, 808 (D.N.J. 1989).

The buyer, however, may have a claim against the seller (and other parties) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988). CERCLA is the formidable federal law that imposes retroactive, strict, and joint and several liability on four classes of "potentially responsible parties" (PRPs) that are associated with sites contaminated by hazardous substances. The PRPs are (1) generators who arrange for the delivery of hazardous substances to the site, (2) transporters who select the site, (3) prior owners or operators if the disposal occurred during the period of their ownership or operation, and (4) current owners or operators. *Id.* § 9607(a). A current owner can escape CERCLA liability by showing that the contamination predated his acquisition and that prior to acquiring title he conducted an "appropriate inquiry" into prior uses of the property and thus had no reason to believe contamination was present. *Id.* § 9601(35).

CERCLA authorizes not only the government, but any private party to sue PRPs for the recovery of costs incurred in investigating and remediating contamination (known as "response costs") and for declaratory relief as to future response costs. *Id.* §§ 9607(a)(1)-(4). See generally Jane E. Lein & Kevin M. Ward, *Private Party Response Cost Recovery Under CERCLA*, 21 ENVTL. L. REP. (Envtl. L. Inst.) 10322 (June 1991).

The South Carolina Hazardous Waste Management Act incorporates by reference CERCLA's liability section. S.C. CODE ANN. § 44-56-200 (Law. Co-op. Supp. 1993).

290. *Jersey City Redev. Auth. v. PPG Indus.*, 655 F. Supp. 1257, 1264 (D.N.J. 1987) (quoting *Kenney v. Scientific, Inc.*, 497 A.2d 1310, 1325 (N.J. Super. Ct. Law Div. 1985)), *superseded by statute on other grounds as stated in Mayor & Council v. Klockner & Klockner*, 811 F. Supp. 1039, 1051 (D.N.J. 1993).

291. 468 A.2d 150 (N.J. 1983).

dangerous activity.²⁹²

Ventron is part of what has been described as a "clear trend" in the case law toward imposing strict liability on defendants who handle hazardous chemicals and wastes²⁹³—whether it is processing uranium,²⁹⁴ disposing of radium,²⁹⁵ transporting propane gas,²⁹⁶ operating a hazardous waste landfill,²⁹⁷ or spraying a weed killer.²⁹⁸

Not all jurisdictions, however, are following this trend. The New Jersey rule of imposing strict liability on prior owners²⁹⁹ has been rejected by at least three jurisdictions.³⁰⁰ The New Hampshire Supreme Court refused to apply the strict liability doctrine in an environmental contamination case unless it could be demonstrated "that the requirement to prove legal fault acts as a practical barrier to otherwise meritorious claims."³⁰¹ Finding no such barrier, the court affirmed the trial judge's dismissal of the strict liability count.³⁰²

The Virginia Supreme Court did not recognize the handling and disposal of pentaborane as an abnormally dangerous activity.³⁰³ Although pentaborane is 2,000 times as deadly as hydrogen cyanide, the court declined to classify it as ultrahazardous because the risks associated with its handling and disposal could be eliminated with the exercise of reasonable care.³⁰⁴ For the same reason, the California Court of Appeals recently dismissed a strict liability case involving sulfuric acid.³⁰⁵ In Connecticut, where the state

292. *Id.* at 157, 160 (citing RESTATEMENT, *supra* note 22, § 520).

293. SUSAN M. COOKE, THE LAW OF HAZARDOUS WASTE § 17.01(5)(a) at 17-74. See generally Jim C. Chen & Kyle E. McSlarrow, *Application of the Abnormally Dangerous Activities Doctrine to Environmental Cleanups*, 47 BUS. LAW. 1031 (1989).

294. *Crawford v. National Lead Co.*, 784 F. Supp. 439 (S.D. Ohio 1989).

295. *T & E Indus., Inc. v. Safety Light Corp.*, 587 A.2d 1249 (N.J. 1991).

296. *National Steel Serv. Ctr., Inc. v. Gibbons*, 319 N.W.2d 269 (Iowa 1982) (en banc).

297. *Piccolini v. Simon's Wrecking*, 686 F. Supp. 1063 (M.D. Pa. 1988) (mem.).

298. *Young v. Darter*, 363 P.2d 829 (Okla. 1961).

299. See, e.g., *Amland Properties Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784, 801-07 (D.N.J. 1989); *T & E Indus., Inc. v. Safety Light Corp.*, 587 A.2d 1249, 1257-59 (N.J. 1991).

300. See, e.g., *Wilson Auto Enters., Inc. v. Mobil Oil Corp.*, 778 F. Supp. 101, 106 (D.R.I. 1991); *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F. Supp. 93, 100 (D. Mass 199); *Futura Realty v. Lone Star Bldg. Cts. (Eastern), Inc.*, 578 So. 2d 363, 365 (Fla. Dist. Ct. App. 1991) (per curiam).

301. *Bagley v. Controlled Env't Corp.*, 503 A.2d 823, 826 (N.H. 1986).

302. *Id.* at 829.

303. *Phillip Morris, Inc. v. Emerson*, 368 S.E.2d 268 (Va. 1988).

304. *Id.* at 282. Relying on *Emerson*, a Virginia federal court held that the handling, storage, and disposal of products containing PCBs was not an abnormally dangerous activity. *Richmond, F. & P. R.R. v. Davis Indus., Inc.*, 787 F. Supp. 572, 575-76 (E.D. Va. 1992) (mem.).

305. *Edwards v. Post Transp. Co.*, 279 Cal. Rptr. 231 (Ct. App. 1991).

courts have recognized only blasting and pile driving as abnormally dangerous, a federal district court refused to extend the doctrine to a metal finishing operation.³⁰⁶

It is difficult to detect a trend in South Carolina. To date the supreme court has declared only blasting as ultrahazardous,³⁰⁷ whereas the court of appeals has strongly rejected application of the strict liability doctrine in a case involving leaking water.³⁰⁸ But in cases involving leaking hazardous waste, federal and state trial judges in South Carolina have submitted to the jury the question of whether a defendant is strictly liable for engaging in an abnormally dangerous activity.³⁰⁹ In *Shockley v. Hoechst Celanese Corp.*,³¹⁰ the federal district court stated that "strict liability for ultra-hazardous activities as expressed in RESTATEMENT (SECOND) OF TORTS § 519 is firmly established in the common law of South Carolina."³¹¹ On appeal, however, the Fourth Circuit held that this assessment of South Carolina law was erroneous because it "currently does not recognize strict liability for damages caused by hazardous waste disposal or reclamation."³¹²

The South Carolina Supreme Court will have the final word on the scope of the abnormally dangerous activities doctrine. In cases involving an activity found to be abnormally dangerous, the nuisance cause of action will probably be of secondary importance, but relatively few activities will fall into that category even under the broadest definition of the term. For the many other activities of an industrialized society that are not abnormally dangerous, but nonetheless interfere with the use and enjoyment of the plaintiff's property, the common law of nuisance will continue to be the principal cause of action by which relief can be obtained.

306. *Arawana Mills Co. v. United Technologies Corp.*, 795 F. Supp. 1238, 1251 (D. Conn. 1992).

307. *See supra* notes 97-119 and accompanying text. The discussion here pertains only to the common law, but South Carolina has statutorily imposed strict liability on certain activities. *See, e.g.*, S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976) (selling defective products); *id.* § 55-3-60 (operating aircraft); *id.* § 48-1-90 (liability for pollution is strict; *see* *Carolina Chems., Inc. v. South Carolina Dep't of Health & Envtl. Control*, 290 S.C. 498, 351 S.E.2d 575 (Ct. App. 1986)).

308. *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991).

309. *See, e.g.*, *Shockley v. Hoechst Celanese Corp.*, 793 F. Supp. 670 (D.S.C. 1992), *aff'd in part, rev'd in part*, 996 F.2d 1212 (4th Cir. 1993) (per curiam); *Ravan v. Greenville County*, ___ S.C. ___, 434 S.E.2d 296 (Ct. App. 1993). In these cases, the courts have not adhered to the Restatement's position that it is for the court, not the jury, to determine whether the defendant engaged in an abnormally dangerous activity. RESTATEMENT, *supra* note 22, § 520 cmt. 1.

310. 793 F. Supp. 670 (D.S.C. 1992), *aff'd in part, rev'd in part*, 996 F.2d 1212 (4th Cir. 1993) (per curiam).

311. *Id.* at 673.

312. *Shockley*, 996 F.2d 1212 (table disposition), 1993 WL 241179, at *5.