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THE USE OF PRIVATE ACTIONS TO CONTROL ENVIRONMENTAL POLLUTION IN PENNSYLVANIA

I. INTRODUCTION

A reasonable man cannot deny that the pollution of the air or water presents one of the greatest problems facing Society. If the environment is to be preserved, action must be taken by all parties. The primary emphasis for control of the problem is presently directed toward action by the federal and state governments. However, because of a lack of funds and manpower, a great deal of pollution must go uncontrolled, with the private citizen left to suffer the consequences. It is the premise of this Comment that an effective means to counteract this problem may be found in the area of private litigation initiated by the very citizens who suffer the harm.

When a landowner suffers injury resulting from the pollution of air or water, he may institute suit to seek redress for such injury under various common law doctrines. The most common of these doctrines is nuisance. A nuisance is a non-trespassory interference with the interest in the use and enjoyment of the land of another. Since the ownership of property has never been recognized as conferring upon an owner an absolute right to use his property in any way he pleases, the use of property in a manner which will unreasonably injure others may be a nuisance notwithstanding the fact that the activity is lawful and performed solely

1. Air and water pollution, since the earliest decisions, have been considered nuisances. Although early water pollution litigation developed within the context of the riparian doctrine, the more recent decisions have concentrated on the nuisance theory. Unlike water pollution, air pollution has developed strictly within the context of nuisance, with only occasional actions brought for trespass. The earliest decisions in the area consistently recognized that each individual had a right to pure and wholesome air, see Rhodes v. Dunbar, 57 Pa. 274 (1868), and an injured party could institute an action to abate the problem if the defendant's use of the land was unreasonable. See Hannum v. Gruber, 346 Pa. 417, 31 A.2d 99 (1943); Ebur v. Alloy Metal Wire Co., 304 Pa. 177, 155 A. 280 (1931).

2. Kramer v. Pittsburgh Coal Co., 341 Pa. 379, 19 A.2d 362 (1941). The court, citing 46 C.J.S. Nuisances § 1 (1928), defined the general term "nuisance" in the following manner:

The term [nuisance] signifies in law such a use of property or such a course of conduct as, irrespective of actual trespass against others or of malicious or actual criminal intent, transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom. In legal phraseology, the term "nuisance" is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage.


on the actor's land. The doctrine operates, therefore, as a limitation upon a landowner's use and enjoyment of his land since it protects another person when that person's rights are infringed by the landowner. However, only those who have property rights or privileges in the land have standing to sue, since they are the only parties whose interests have been invaded.

Fundamentally the conflict which is at the heart of a nuisance action focuses upon two legal concepts: (1) the basic rule that one must use his own land so as not to injure that of another, and (2) the exception to this basic rule, that injury resulting to another's enjoyment of his land is without legal remedy, if the injury results from a reasonable use of the land. Assuming that the use to which the land is put is unreasonable, the interference which results to other landowners may give rise to two types of liability: Public and private nuisance. A public nuisance affects the welfare and comfort of the general community, while the private nuisance interferes with a landowner's or a group of landowners', peaceful use and enjoyment of their land. From the foregoing, it can be ascertained that nuisance is not a specific type of conduct, but rather is classified as an invasion of interest by many types of conduct which give rise to harm. Thus, it is the interest, not the type of conduct, which is fundamental to the action and which gives unity to the field of nuisance law.

Consideration, therefore, will be given to the interests presented when a landowner pollutes a watercourse or the atmosphere and to both types of

4. See Kohr v. Weber, 57 Lanc. L. Rev. 57 (Lancaster County Pa. C.P. 1939), aff'd, 402 Pa. 63, 166 A.2d 871 (1960). In Kohr, the lower court recognized that it could find no fault with the manner in which the defendant carried on the activity on his land, and noted that everything possible was done to protect the spectators and the participants in the activity. However, the court found that a nuisance existed because the residents in the immediate area were annoyed and deprived of the peaceful enjoyment of their homes to which they were entitled. See also Bedminster v. Vargo Dragway, Inc., 434 Pa. 100, 253 A.2d 659 (1969).

5. See Kohr v. Weber, 402 Pa. 63, 166 A.2d 871 (1960). Mr. Justice Musmanno, writing for the majority, stated:

The appellants are certainly entitled to use their property in such manner as will bring to them the greatest profit consistent with the law, but even with that consistency the profit is limited to the extent that their neighbors must not be deprived of the same privilege of profit, the profit not necessarily being computable in dollars.

Id. at 69, 166 A.2d at 875. He further stated, citing Edmunds v. Dutt, 280 Pa. 355, 364, 124 A. 489, 491 (1924): No man has a right to take from another the enjoyment of the reasonable and essential comforts of life and, consequently, cannot commit acts on his own premises calculated to interfere with the reasonable enjoyment by others of their homes.

Id. at 69, 166 A.2d at 875. See also Strauss v. Allentown, 215 Pa. 96, 63 A. 1073 (1906).

6. See Restatement of Torts, Introductory Note, ch. 40, at 215 (1939). See also Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3d Cir.), cert. denied, 334 U.S. 846 (1948). The court recognized that nuisance has reference to a type of interest invaded and not to any particular type of conduct from which the invasion results. The court stated that a "nuisance . . . may be created by conduct which is intended to inflict harm, by negligence or, in many cases by an extra-hazardous activity." 166 F.2d at 913 n.14.

7. A watercourse was defined in Kislinski v. Gilboy, 19 Pa. Super. 453 (1902), wherein the court stated:

A commonly accepted definition of a water course is a stream of water usually flowing in a definite channel having a bed and sides, or banks, and discharging
nuisance actions which may be employed as means of controlling destruction of the environment, with primary emphasis being placed upon the use of these theories in Pennsylvania by the private litigant.

II. PRIVATE NUISANCE

A. The Application of the Private Nuisance Doctrine to Air and Water Pollution

A private nuisance is an interference with the use and enjoyment of an individual's land which involves his personal interest in that land.8 This invasion does not deal with the interests the party shares or has in common with the general public, but rather is strictly an invasion of his personal interests.9 In determining which acts constitute a private nuisance, Pennsylvania had adopted section 822 of the Restatement of Torts,10 which delineates the elements of liability necessary to establish that a landowner's activities constitute a private nuisance. The basic element underlying the Restatement definition is intentional invasion which causes a substantial and unreasonable interference with another

itself into some other stream or body of water. . . . In general the channel and banks formed by the flowing of the water must present to the eye on a casual glance, the unmistakable evidence of the frequent action of running water . . . but the water need not flow continually, and there are many watercourses which are sometimes dry.

Id. at 454–55. See also Kunkle v. Ford City, 305 Pa. 416, 158 A. 159 (1931); Wolf v. Crothers, 21 Pa. County 627 (Washington County C.P. 1898); Garvin v. Miller, 20 Beaver Co. L.J. 95 (Beaver County Pa. C.P. 1958); RESTATEMENT OF TORTS § 841 (1939).

8. See RESTATEMENT OF TORTS § 822 (1939).


There is a distinction between a public nuisance, common to all members of the public alike, and a private nuisance or acts affecting a member of the public. A public nuisance is an inconvenience or troublesome offense that annoys the whole community in general, and not merely some particular person, and produces no greater injury to one person than to another — acts that are against the well-being of the particular community. . . . The difference between a public and a private nuisance does not depend upon the nature of the thing done, but upon the question whether it affects the general public or merely some private individual or individuals. . . .

269 Pa. at 246, 112 A. at 237–38. Thus, the injury in private nuisance runs directly to an individual, or a definable group of individuals, and this group is distinguished from the public generally.

party's interest in his land. From this it can be seen that the concept of nuisance as applied in Pennsylvania focuses on the effect of the condition, i.e., there must be an invasion which affects the interest of another in his land. Although many types of conduct may result in a private nuisance, it is clear that the pollution of a watercourse, or of the atmosphere, which interferes with a landowner's use of his land can constitute a private nuisance. While section 832 of the Restatement applies the general rules of nuisance to the pollution of a watercourse, the Pennsylvania Superior Court in Reinhart v. Lancaster Area Refuse Authority applied this section to find that the pollution of a watercourse constituted a private nuisance. Moreover, since air pollution has traditionally been challenged under the nuisance doctrine, the terms of section 822 apply directly to the pollution of the atmosphere when the result of such pollution causes interference with another's enjoyment of his land. Having thus established generally that the Restatement applies the rules of nuisance to pollution cases and that the Pennsylvania courts have followed the Restatement, it therefore seems appropriate to particularize the elements that are necessary to establish a private nuisance cause of action against a polluter.

B. Elements of Private Nuisance

1. Property Rights and Privileges

To qualify for relief under section 822 of the Restatement, the injured party must first establish that he has property rights and privileges in the land which is being invaded. The protection of section 822

11. See Restatement of Torts § 822 (1939).
14. Restatement of Torts § 832 (1939), which states:
Non-trespassory invasions of a person's interest in the use and enjoyment of land resulting from another's pollution of surface waters, subterranean waters or water in watercourses and lakes are governed by the rules stated in §§ 822-31 of this Chapter.

17. See Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954), where the Pennsylvania Supreme Court in adopting the Restatement applied its language to pollution of the air.
18. See Restatement of Torts § 822 (1939). Since the Restatement is limited in scope to the protection of a party's rights in an interest in land, before a plaintiff has standing to allege that a nuisance results from another's conduct, he must show that he has the requisite interest protected by the Restatement. See Restatement of
extends to the infringement of a party's present possessory interest rights including ownership of an interest in land, 19 a present possessory interest in the form of a tenancy, 20 an easement or a profit. 21 Moreover, the Restatement also extends protection to those parties holding a non-possessory future interest in the land where that interest is in danger of injury from a permanent and detrimental interference with the use of the land. 22

2. Substantial Harm

Once it is established that the plaintiff possesses the necessary property interest, the next question to be determined is whether the defend-
Ant's conduct has caused a substantial invasion or interference with the plaintiff's use and enjoyment of his land.\textsuperscript{3} The Pennsylvania courts in determining what activities constitute a substantial invasion have required a material or actual injury or annoyance.\textsuperscript{24} The courts have looked to: (1) the degree of loss of use and enjoyment of the property resulting from a physical change in the condition of the land;\textsuperscript{25} (2) the amount of monetary damage to the property;\textsuperscript{26} and (3) the expense which will be incurred by restoring the property to its former condition.\textsuperscript{27} The standard that is employed to determine whether an interference is substantial enough to constitute a private nuisance is a local standard, \textit{i.e.}, those acts which normal persons in the locality would consider to be substantial\textsuperscript{28} rather than those alleged by parties who are "abnormally sensitive to deleterious influences."\textsuperscript{29} Thus, the personal standards of the parties using the land are in no way controlling on this question.

3. \textit{Legal Cause}

After an injured party has established that he is a member of the class entitled to relief and that the invasion of his property has been substantial, he must then bring forth evidence which shows that the defendant's acts of pollution\textsuperscript{30} were the "legal cause"\textsuperscript{31} of the alleged inter-

\textsuperscript{23} \textit{See} Restatement of Torts § 822 (1939). A substantial invasion must be something more than a mere inconvenience; there must be some form of appreciable interference with the plaintiff's use of the land. If the harm that the defendant's pollution has caused to plaintiff's use and enjoyment of a watercourse or the air is not substantial, the defendant's conduct cannot be unreasonable. \textit{See} W. Prosser, Torts § 88, at 598–601 (3d ed. 1964); Restatement of Torts § 822, comment g (1939).


\textsuperscript{25} \textit{See} Muehlhausen v. Delaware Valley Holding Co., 9 Bucks Co. L. Rptr. 188, 201 (Bucks County Pa. C.P. 1939), wherein the court stated that the large accumulation of silt on the bottom of a watercourse is a substantial invasion because it deprives the injured riparian of his full enjoyment of the land and water.

\textsuperscript{26} \textit{See} Burr v. Adam Eidemiller, Inc., 386 Pa. 416, 126 A.2d 403 (1956). The plaintiffs brought suit for the contamination of their water supply. As a result of the contamination from acidic water, plaintiffs' heating and plumbing system was totally destroyed. The court accepted this as substantial injury and awarded damages.

\textsuperscript{27} \textit{See} Muehlhausen v. Delaware Valley Holding Co., 9 Bucks Co. L. Rptr. 188, 201 (Bucks County Pa. C.P. 1939), wherein the court focused on the expense incurred in restoring the property to its former state.

\textsuperscript{28} \textit{See} Restatement of Torts § 822, comment g (1939).


\textsuperscript{30} \textit{See} Restatement of Torts § 824 (1939). Section 824 defines conduct as "acts," \textit{i.e.}, action which directly or indirectly causes an invasion, or as "failure to act" where the defendant has a duty to take positive steps to prevent an invasion. In connection with liability for failure to act, \textit{see} Restatement of Torts § 839 (1939).

\textsuperscript{31} \textit{See} Restatement of Torts § 822 (1939). The Restatement simply defines legal cause as the relationship between the act and its consequences which the law
ference with the use and enjoyment of his land. A legal cause of an injury is defined as the cause-effect relationship between an intentional act and its consequence, where the defendant does not have a privilege to inflict the injury and his acts are a substantial factor in causing the injury.\textsuperscript{22} In the case of alleged pollutants, the cause-effect relationship need not be established by direct evidence. In this instance it is probably sufficient to show that the polluter's action took place immediately prior to the injury with substantiation by some type of scientific evidence.\textsuperscript{33}

### 4. Intentional Invasions

Even though the injured landowner may successfully establish all of the aforementioned elements, he still must establish that the defendant's acts were intentional.\textsuperscript{34} An act of pollution is considered to be intentional under the Restatement when the defendant either: (1) acts for the purpose of causing the invasion; or (2) knows that injury is resulting; or (3) substantially certain that injury will result.\textsuperscript{35} Thus, so long as one of the enumerated criteria is shown, the invasion may be intentional even if the defendant is carefully engaged in a legitimate business enterprise.\textsuperscript{36} The criteria established in the Restatement which require the defendant's acts to be intentional rest upon the general principle that fault should be a prerequisite to liability since a loss should not be shifted from the one who has suffered it to another whose activity has caused the invasion, unless the latter intended the invasion of the legally protected interest.\textsuperscript{37} The plaintiff, therefore, has the burden of establishing that the defendant's conduct fits within one of the three enumerated standards.

The first criterion set out in the Restatement does not seem to apply to pollution litigation since it seems fairly safe to assume that no one will pollute the environment with the intended purpose of causing harm to others. However, the second standard — that the defendant actually knew that injury was resulting to another from his actions — does seem to apply in many cases. If the defendant has actual knowledge that an

\begin{itemize}
  \item \textsuperscript{32} See \textit{Restatement of Torts-§ 822, comment b} (1939).
  \item \textsuperscript{33} See \textit{Reinhart v. Lancaster Area Refuse Authority}, 201 Pa. Super. 614, 193 A.2d 670 (1963); \textit{Meuhlhausen v. Delaware Valley Holding Co.}, 9 Bucks Co. L. Rptr. 188, 202 (Bucks County Pa. C.P. 1959). In \textit{Reinhart}, the court found that the defendant's actions were the legal cause of the invasion of plaintiff's interest, notwithstanding the lack of direct proof. The court focused on the proximity of the defendant's activities to the injury, the nature of the pollutant, and the fact that defendant's activities occurred immediately prior to the injury, as well as the results of chemical tests which eliminated other pollutants. See also \textit{Jackson v. United States Pipe Line Co.}, 325 Pa. 436, 191 A. 165 (1937).
  \item \textsuperscript{34} See \textit{Restatement of Torts § 822} (1939).
  \item \textsuperscript{35} See \textit{Restatement of Torts § 823} (1939).
  \item \textsuperscript{36} See \textit{III B. Gindler, Waters and Water Rights § 210.4(C)} (1967).
\end{itemize}
injury to another landowner will occur as a result of his activity, and he proceeds or continues with the activity, his acts will be deemed to be intentional. The acts will be considered intentional notwithstanding the fact that the defendant was acting without malice or ill will toward the injured party, and he is embarking on an entirely lawful activity. Moreover, if the pollution of the air or water is a continuous or recurring process, it can normally be shown that the defendant's acts were intentional. Even though the defendant's initial acts are unintentional, they become intentional if he continues them after he becomes aware that injury is resulting. Some courts have required that actual notice be given to the defendant before his acts will be deemed to be intentional. In the case of continuous or recurring pollution, however, the defendant will normally be aware that injury is resulting because of the nature of his activity. In this instance the courts have had little difficulty finding an intentional wrongdoing.

The Restatement's third criterion — that the defendant is substantially certain that injury will result — has now been generally accepted in Pennsylvania. Under this criterion, even if the defendant is not actually aware that injury will result from his acts, and the acts are not of the continuous or recurring type, the defendant will still be liable if he

38. See Dussell v. Kaufman Const. Co., 398 Pa. 369, 157 A.2d 740 (1960). The Dussell case did not involve pollution of the air or water. However, it is useful for an analysis of what is meant by knowledge. The court stated:

A person may be so devoid of care in his actions, so destitute of concern for the rights of others, and so headstrong in proceeding in the face of known danger to those in his path, that the law is justified in assuming that his conduct, in the wording of the Restatement, is "intentional and unreasonable."

Id. at 375, 157 A.2d at 743. Thus, when a party consciously disregards another's property interest, his acts will make him liable. Accordingly, in the pollution area, if a landowner knows that he will injure other landowners by his acts, he will be liable. See also Kehl v. Weber, 57 L. Rev. 57, 68 (Lancaster County Pa. C.P. 1959); aff'd, 402 Pa. 63, 166 A.2d 871 (1960); Eisenbrown v. Bowers, 48 Berks Co. L.J. 248 (Berks County Pa. C.P. 1956).

39. See RESTATEMENT OF TORTS § 825 (1939).

40. See Dussell v. Kaufman Const. Co., 398 Pa. 369, 375, 157 A.2d 740, 743 (1960). The court stated that the defendant's activity may be completely laudable, and not in any way malicious, but still be intentional within the meaning of the Restatement. See also RESTATEMENT OF TORTS § 825 (1939).

41. Section 825 of the Restatement covers the area of intentional invasion. Comment b states:

Continuing or recurrent invasions. Most of the litigation over non-trespassory invasions of interests in the use and enjoyment of land involves situations in which there are continuing or recurrent invasions resulting from continuing or recurrent conduct. In such cases the first invasion resulting from the actor's conduct may be either intentional or unintentional, but when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional.

42. See Burr v. Adam Eidemiller, Inc., 386 Pa. 416, 126 A.2d 403 (1956). The court was confronted with a fact situation where the pollution was of a continuing nature. The court stated that once the defendants knew that injury was resulting from their acts, and, notwithstanding this fact, continued to carry on the injurious activities, there was no question that their acts were "intentional" under section 825 of the Restatement. See also Curry Coal Co. v. M.C. Antoni Co., 439 Pa. 114, 266 A.2d 678 (1970); Kohr v. Weber, 402 Pa. 63, 166 A.2d 871 (1960).

43. See Gonzalez v. Esso Std. Oil Co., 23 Camb. Co. L.J. 172 (Cambria County Pa. C.P. 1960), wherein the court required the party to have actual notice of the pollution before his acts would be deemed to be intentional.
is substantially certain\textsuperscript{44} that his acts will result in injury to the complaining landowner.\textsuperscript{45} While this criterion attempts to establish an objective standard, its application to a particular factual setting seems difficult. In water pollution cases, however, the difficulty of establishing substantial certainty seems minimized by the recent expressions of Mr. Justice O'Brien of the Pennsylvania Supreme Court in which he recognized that:

In cases involving injury to water rights, it is easier to prove that the actor's conduct was intentional under the definition of intent which includes conduct where the actor knows that the harm "is resulting or is substantially certain to result from what he is doing," [Section 825 (b), Restatement of Torts] because it is common knowledge that flowing water flows downhill and, therefore, that the actor's water today will be his downstream neighbor's water tomorrow.\textsuperscript{46}

This position could have a significant effect on the meaning of substantial certainty in future nuisance litigation, since up until this time the case law had not espoused a concrete point of departure for the analysis of what actually constitutes substantial certainty.\textsuperscript{47} This language seems to indicate that if a landowner knows of the toxic nature of the substance he is introducing into a watercourse, he will be held to be substantially certain that injury will result. This requirement is certainly less than requiring that the defendant have actual knowledge that injury will result from his acts or was in fact occurring, either from drawing on his own knowledge,\textsuperscript{48} or by notice from the injured parties.\textsuperscript{49} Moreover, the argument can be made that if one is deemed to be substantially certain that injury to a downstream landowner will result when waste is discharged into a watercourse because he is aware that the pollutant will be carried downstream, then a party discharging particulate into the atmosphere should also be deemed to be substantially certain that injury to another's property will result from the particulate descending upon nearby properties. This approach, however, would only be valid if the defendant were aware that the particulate is detrimental or deleterious to the land.\textsuperscript{50} The use of this analytical approach to determine the intention

\textsuperscript{45} See \textit{Restatement of Torts} § 825 (1930).
\textsuperscript{47} It is arguable that the case of Evans v. Moffat, 192 Pa. Super. 204, 160 A.2d 465 (1960), was relying on the term substantial certainty. However, an analysis of the case indicates that the court relied on the fact that the defendant had actual knowledge that injury was resulting to adjoining landowners. \textit{See also} Gonzales v. Esso Std. Oil Co., 23 Camb. Co. L.J. 172 (Cambria County Pa. C.P. 1960), wherein the court failed to apply the substantially certain standard, by requiring the plaintiff to establish the defendant had actual knowledge.
\textsuperscript{50} See Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954), where the court refused to find that the defendant's acts were intentional, since "[d]efendants did not know, and had no reason to be aware, that this particular gas would be so emitted and would have the effect upon the painted house." \textit{Id.} at 452, 109 A.2d at 316. Thus, it would seem that before the defendant's acts are considered intentional, he
of the defendant, although apparently less restrictive than that proposed by the Restatement, is nevertheless necessary to protect our environment by making it feasible for a private citizen to meet his burden of proof in establishing a private nuisance action.

5. Unreasonable Invasion

Although many of the private nuisance elements under the Restatement may be difficult to prove in any given pollution case, the major obstacle that a private litigant must face when instituting a suit under the nuisance doctrine is the requirement of reasonableness. Not every intentional and substantial interference with another's property rights and privileges is actionable. The courts have reasoned that because of the nature of society, clashes between parties, both using their own land for their own benefit, are inevitable. All members of a society must learn to tolerate a certain amount of interference with the use and enjoyment of their own land. The law, therefore, imposes liability on a party for an intentional non-trespassory invasion of another's land only when the invasion is unreasonable. An intentional invasion of another's interest in land is unreasonable when the gravity of the harm to the injured party outweighs the utility of the actor's conduct.

Ultimately, the determination of the reasonableness of an intentional non-trespassory invasion is the end product of a judicial balancing process. The court must balance the interests of the parties, with objective consideration being given to the rights of both parties to use their land so that each may enjoy or receive the most utility from his property. As would be expected, the implementation of such a balancing test has been made on a case-by-case basis, without the crystallization of any guidelines for the

must first be aware that the substance he is discharging is of a dangerous nature, and that it would be emitted as a result of his activity.

51. The Restatement places a limitation on the interpretation of the word certainty. It states that "[i]t is not enough to make an invasion intentional that the actor realizes or should realize that his conduct involves a serious risk or likelihood of causing such an invasion." Restatement of Torts § 825, comment a (1939). Thus, there must be something more than mere speculation. However, the line distinguishing "should realize" and "substantially certain" is a tenuous one and could prove exceptionally elusive. If this is the case, it is suggested that the benefit of the doubt should always be cast to the injured party, because if the pollution of our environment is to be controlled and there is to be reclamation of the lands that have been destroyed, it is necessary that measures such as this be taken.


53. See Restatement of Torts § 822 (1939).


55. See Restatement of Torts § 886 (1939).

56. Id. at comment b. The activity is viewed in terms of what reasonable persons generally, looking at the whole situation impartially, would consider reasonable and not a person in the same position as one of the parties. When making this determination, regard must be paid to the interests of both parties and the community. See Burr v. Adam Eidemiller, Inc., 386 Pa. 416, 126 A.2d 403 (1956).
determination of when the pollution of the air or water is unreasonable. The Restatement, however, has set out a number of factors which may be employed by a court to assist it in determining the gravity of the harm to the injured party and the utility of the injuring party’s conduct. In determining the gravity of the harm, the first factor which may be considered is the extent of the harm to the injured party. Such harm is usually measured in terms of degree and duration. If the defendant’s conduct operates to come within both criteria concurrently, it seems fairly clear that the harm will be considered extensive. This would seem to be the case with air and water pollution, since it is normally a continuous or recurring process and is both great in degree and duration. If, however, the injury is not of a continuous nature, i.e., if it only occurs at unpredictable intervals, the injured party could establish that the harm is extensive by concentrating on the degree of injury resulting from each discharge. Alternatively, it seems, the plaintiff could meet the duration criterion, notwithstanding the fact that the pollution is small in degree, if he can show that the pollution is continuous and is thereby slowly degrading the property.

The second factor enumerated in the Restatement for determining the gravity of the harm is the character of the harm which is divided into two categories: (1) physical damage to the property; and (2) personal injury or discomfort to the plaintiff or his family. The courts have placed considerable weight on both factors, and have found that when: (1) physical damage is done to the property; or (2) there is a diminution of the use

57. The Restatement sets out the following guidelines:
In determining the gravity of the harm from an intentional invasion of another’s interests in the use and enjoyment of land, the following factors are to be considered:
(a) the extent of the harm involved;
(b) the character of the harm involved;
(c) the social value which the law attaches to the type of use or enjoyment involved;
(d) the suitability of the particular use or enjoyment invaded to the character of the locality;
(e) the burden on the person harmed of avoiding the harm.

58. See RESTATEMENT OF TORTS § 827 (1939).
60. See RESTATEMENT OF TORTS § 827, comment b (1939). For example, if a landowner along a stream discharges a large amount of material into a watercourse which flows downstream and destroys the value of the water to plaintiff, and at the same time destroys his property, the injury would seemingly be extensive, although it could occur within a one day period.
61. Id. A case of this nature could arise in the air pollution area where a defendant emits a small amount of noxious fumes over a long period of time, with the end result being that plaintiff’s property is degraded.
62. Id.
63. Id. at comments e & d.
of the plaintiff’s property, or (3) the injured party has suffered personal discomfort or illness, the use of defendant’s land is unreasonable.

Two other factors employed to evaluate the gravity of the harm to the plaintiff are the social value of the type of use and enjoyment for which he employs his land, and the suitability of the use to the locality. The application of the social value criterion is especially germane and should be stressed by a plaintiff who alleges injury to the use and enjoyment of residential, agricultural or recreational land. Similarly, a plaintiff emphasizing that his property is situated within one of these areas — residential, agricultural, or recreational — is in a better position to prevail than one whose


67. One type of nuisance that has for the most part been ignored or rejected by the courts is an aesthetic nuisance. The Pennsylvania courts have rejected aesthetic considerations as a valid basis for a nuisance action, and have constantly required some form of physical or economic foundation for this cause of action. See Young v. St. Martin’s Church, 361 Pa. 505, 64 A.2d 814 (1949); Steskal v. Operacz, 8 Bucks Co. L. Rptr. 191 (Bucks County Pa. C.P. 1958). Although the concept of aesthetic nuisance has been traditionally restricted to usual annoyances, see Comment, Aesthetic Nuisance: An Emerging Cause of Action, 45 N.Y.U.L. Rev. 1074 (1970), there is no reason why the visible consequences from air or water pollution to the surrounding area should not be an element in the balancing process in favor of the plaintiff. If the pollution of a watercourse destroys the aesthetic beauty of a stream, this result is as grave an injury to the landowner as the fact that it may give off a noxious odor. The same consideration is valid in the area of air pollution where trees are destroyed and the natural beauty of the area is destroyed. When a person buys a house in an area where he may enjoy a river or the natural beauty of a forest, he should be allowed to have this element weigh in his favor, since this can be just as great an invasion to him as physical damage to the property. There is a marked tendency in some courts to recognize that aesthetic factors are of real importance in environmental litigation. In Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), noted in 16 Vill. L. Rev. 766 (1971), the Court of Appeals for the Fifth Circuit determined that the Army Corps of Engineers could consider ecological and conservation factors in refusing to grant a permit for the use of land in a navigable waterway. Furthermore, in the area of standing to challenge the government’s control over the environment through administrative agencies, there has been a trend to recognize the significance of aesthetic value. See Association of Data Processing Serv. Org’s v. Camp, 397 U.S. 150, 154 (1970) (dictum); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966). See generally 16 Vill. L. Rev. 729 (1971). The approach taken by these courts shows an enlightened view of the subject, which is in accord with the general trend to recognize society’s need for a clean environment. There seems to be no apparent reason why the courts should not consider aesthetic factors in private nuisance litigation. Certainly, there is little doubt that a private landowner, when instituting a suit for private nuisance, has a substantial interest in preserving the aesthetic quality of his land as well as the ecological balance. It is submitted that these factors should weigh heavily in his favor. See generally Noel, Unaesthetic Sights as Nuisances, 25 Cornell L.Q. 1 (1939); Note, Aesthetic Nuisances in Florida, 14 U. Fla. L. Rev. 54 (1961); Note, Nuisance Based on Aesthetic Considerations, 17 Md. L. Rev. 345 (1957).

68. See Restatement of Torts § 827, comments e & f.

69. See Evans v. Moffat, 192 Pa. Super. 204, 160 A.2d 465 (1960), wherein the court specifically noted that the law attaches a great social value to the ownership and occupancy of homes.
land is near an industrial district, since the courts have reasoned that the
latter cannot reasonably expect to be free from pollution.\textsuperscript{70}

A final criterion suggested by the Restatement to weigh the harm to
the plaintiff is the extent to which he has made any effort to avoid the con-
sequence caused by the defendant’s activity.\textsuperscript{71} This standard, however, does
not seem to be particularly appropriate in the pollution area, since there
is very little that a landowner can do to avoid pollution while remaining on
his land.\textsuperscript{72}

In addition to deciding the gravity of the harm to the plaintiff, the
court must determine the utility or merit of the defendant’s conduct,\textsuperscript{73} to
ascertain whether the invasion is unreasonable. The Restatement\textsuperscript{74} has set
out a number of factors to aid the court in this determination. However,
in contrast to the factors which may be used to determine the gravity of the
harm present, all of the factors advanced in section 828 must be met before
the conduct is deemed to have utility. Thus, if the defendant fails to prove
one of the factors, he cannot succeed in the balancing test.\textsuperscript{75} Moreover,
even if all the factors are present, the defendant may still lose the balancing
of equities test if the gravity of the harm is greater in degree than the utility
of the conduct.\textsuperscript{76}

The first factor that must be shown to establish the utility of the con-
duct is the social value of the primary purpose of the conduct.\textsuperscript{77} The social
value of conduct normally rests upon whether the public good is advanced.\textsuperscript{78}
Social value can arise from operating a purely private enterprise, since the
public will indirectly benefit because members of the community will be
employed and provided with essential goods.\textsuperscript{79} When air or water pollu-

\textsuperscript{70} See Kohr v. Weber, 402 Pa. 63, 166 A.2d 871 (1960); Hannum v. Gruber,
(1960). In Hannum, the property owners lived in the industrial section of the
community, and the court considered this fact in relation to what the plaintiffs could
reasonably expect to be the standard for the amount of allowable pollution in the air.
See also Yakovac v. Heppenstall Co., 105 Pitts. L.J. 165 (Allegheny County Pa. C.P.
1957); Versailles v. McKeesport Coal & Coke Co., 63 Pitts. L.J. 379 (Allegheny
County Pa. C.P. 1935).

\textsuperscript{71} See \textquotedblleft Rebatement of Torts \textsection{} 827, comment g (1939).


\textsuperscript{73} See \textquotedblleft Rebatement of Torts \textsection{} 826 (1939). The courts must initially deter-
mine if the conduct has utility. Then they must look to the degree of utility. Since
it is a balancing of equities that is the ultimate goal of the process, this degree of
utility is of the most significance.

\textsuperscript{74} See \textquotedblleft Rebatement of Torts \textsection{} 828 (1939).

\textsuperscript{75} Id. at comment b.

\textsuperscript{76} Id. at comment a.

\textsuperscript{77} Id. The Restatement restricts the social value test to the primary purpose or
main objective of the conduct. Some types of conduct are undertaken to advance many
goals concurrently. However, when determining the utility of the conduct, the primary
purpose is the only objective considered.

\textsuperscript{78} See Lightcap v. Sands, 14 Bucks Co. L. Rptr. 387 (Bucks County Pa. C.P.
1964), wherein the court in discussing the injury to the plaintiff and the utility of the
conduct, stated that “[i]f arose out of uses of these trucks by defendant Sands
which had little or no utility, purpose or practical objective. . . .” Id. at 394. Once
the court determined that the activity had no social utility, it immediately found that
it was unreasonable.

\textsuperscript{79} See Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954); Hannum v.
tion results, it can normally be assumed that the pollution will be a by-product of some socially valuable activity. Thus, the question of utility will normally revolve around the remaining two factors.

The second factor to determine utility is the suitability of the conduct to the character of the locality. If a locality is primarily residential, the operation of an industrial plant which emits air pollution or discharges pollutants into a watercourse would not be compatible with the predominant use of the area. However, if the industrial plant were located in an industrial area, the element of compatibility would be present.

The last factor that must be established is the impracticality of preventing or avoiding the invasion. An injury is considered avoidable if the injuring party could substantially reduce the effect of his conduct without a prohibitive reaction on his ability to carry on his business. Thus,

80. See Restatement of Torts § 831 (1939); Restatement of Torts § 828, comment f (1939).


82. See Hannum v. Gruber, 346 Pa. 417, 31 A.2d 99 (1943). If a party resides in an industrial section, he must expect that he will get air or water of a lesser quality. In Hannum, it is stated:

That a certain amount of smoke, fumes, gases, and noises will necessarily be produced and emitted by manufacturing plants is inevitable, but that persons who dwell near manufacturing plants, like persons who dwell near railroads or on busy city streets, must put up with a certain amount of resulting annoyance and discomfort is self-evident. The prosperity of an industrial community depends on its industrial activities, and it would be inconsistent with sound public policy to prohibit these activities at the behest of a comparatively few who are annoyed thereby.

Id. at 424, 31 A.2d at 102.

83. See Restatement of Torts § 830 (1939). See also Restatement of Torts § 828, comment g (1939). The principle of this section was applied in the case of Burr v. Adam Eidemiller, Inc., 386 Pa. 416, 126 A.2d 403 (1956), wherein the court recognized that if the harm could have been avoided by reasonable care and expense, the conduct would be considered unreasonable. See also Pfeiffer v. Brown, 165 Pa. 267, 30 A. 844 (1895); Muehlhausen v. Delaware Valley Holding Co., 9 Bucks Co. L. Rptr. 188, 204-05 (Bucks County Pa. C.P. 1959).

The defendant has the burden of going forward with the evidence to prove that there will be an unreasonable burden placed upon him to avoid the harm done to the plaintiff. See Beecher v. Dull, 210 Pa. 17, 143 A. 498 (1929); McCune v. Pittsburgh & Baltimore Coal Co., 238 Pa. 83, 85 A. 1102 (1913); Pfeiffer v. Brown, 165 Pa. 267, 30 A. 844 (1895); Clouse v. Crow, 68 Pa. Super. 248 (1917); Campbell v. Bessemer Coke Co., 23 Pa. Super. 374 (1903).


If the defendant's plant is emitting more of these annoying things than other plants in the same business and of equal output are emitting, there is something wrong with the equipment and management of the defendant's plant and the
if there exist air or water pollution abatement devices that can be installed to curtail the injurious effect of the defendant's conduct, the failure to install these devices could indicate that the defendant's activity is unreasonable.

In applying these principles, the courts have tended to balance the equities in favor of the polluter, giving the greatest consideration to the social utility of the polluter's activities and the expense of abating the problem. This is especially true where the plaintiff has requested injunctive relief, rather than compensatory damages. The major criticism with the reasoning of the courts in this area focuses upon the fact that they have normally balanced the "public interest" element in favor of the polluter by viewing the problem in economic terms and placing the emphasis on the continuation of industrial progress. If, however, the nuisance action is to play a role in the effective control of the environment the public interest must be re-evaluated. It must be examined in terms of the public's desire to have clean air and water, as opposed to their interest in having increased industrial production. Furthermore, it is submitted that the courts' practice of considering the probability of substantial abatement expense being incurred by the defendant as a factor which relieves him of liability should also be re-evaluated in light of the fact that industrial funds will have to be channeled into abatement devices if environmental pollution is ever to be

smoke, odors, gases, smudge, and noise are unnecessary and unreasonable. If devices or more efficient management which would reduce the smoke, odors, gases, smudge and noises and vibrations issuing from its plant are available to the defendant at a reasonable expense, it is the duty of the defendant to secure such devices or management, and, if it fails to do so, the smoke, noises, etc., emitting from its plant may be regarded as unnecessary and unreasonable.

Id. at 424, 31 A.2d at 102-03.

85. See Kenworthy, supra note 10, at 112.

86. The approach can be seen in the leading case of Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886). In Sanderson, a private landowner brought an action in nuisance against a coal company which was admittedly discharging large quantities of acid into a watercourse from a mining operation. The plaintiff was denied recovery, with the court focusing on the fact that the defendant's activity was beneficial to the Commonwealth. The court stated:

The plaintiff's grievance is for a mere personal inconvenience; and we are of opinion that mere private personal inconveniences, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest.

To encourage the development of the great natural resources of a country trivial inconveniences to particular persons must sometimes give way to the necessities of a great community.

Id. at 149, 6 A. at 459. If the courts place the public interest in terms of economic development, it is almost impossible for a private party to succeed. See generally Note, Statutory Treatment of Industrial Stream Pollution, 24 Geo. Wash. L. Rev. 302 (1956); Note, Riparian Rights and the "Necessary Industry Doctrine." Stream Pollution — Injunction Against — Damages For, 18 Notre Dame Law. 69 (1943); Note, Statutory Stream Pollution Control, 100 U. Pa. L. Rev. 225 (1951).

87. One author has stated:

The public has an interest in pure air water equal to if not greater than its concern for employment and tax revenues. Unless this additional consideration is added to the scale there can be no true balancing of the equities. The social utility of the polluter's conduct must be weighed against the harm to society as a whole, not merely the individual harm shown in the lawsuit.

controlled. If the nuisance action is to be effective, the courts must examine the realities of the pollution problem and place the burden of abatement upon the parties creating the pollution source.

6. Unintentional Invasions Otherwise Actionable

A landowner's interest in the use of his land is also protected from certain unintentional invasions. Since the doctrine of nuisance focuses on the protection of an interest and not on a particular type of conduct, a private nuisance may be created by an unintentional invasion of an interest in land resulting from negligent or ultrahazardous conduct. The landowner, however, is not protected from all such invasions. In the case of an invasion resulting from negligent conduct, the plaintiff must establish that: (1) the defendant's conduct which caused the pollution was negligent; (2) it was the legal cause of the invasion; and (3) the invasion was foreseeable. Furthermore, the negligent conduct must involve an unreasonable risk of harm to the other party's interest in the use and enjoyment of his land. Thus, the court must balance the interests between the parties in the same manner as if this was an intentional and unreasonable invasion. To evaluate the element of negligence, the court

89. See Restatement of Torts § 822(d)(ii) (1939).
91. See Reinhart v. Lancaster Area Refuse Authority, 201 Pa. Super. 614, 193 A.2d 670 (1963); Guessner v. Ditzler, 37 Northumberland L.J. 119 (Northumberland County Pa. C.P. 1965); Gonzalez v. Esso Std. Oil Co., 23 Camb. Co. L.J. 172 (Cambria County Pa. C.P. 1962). In Reinhart, a case involving the pollution of a well, the court found that the defendant was liable under the Restatement stating:

We conclude that these defendants, in bringing polluted material, particularly items such as garbage, red paint, white foamy material, etc., which might permeate the earth and resist filtration, failed to use due care in handling such material when they placed it in close proximity to plaintiff's land and wells, of which they were aware, and in excavations they had made below the surface of the land, even below the water level of a stream running through same, and compressing it into the ground by running trucks over it. Since they had received general warnings about the results of this operation in this area, and had taken a "string" measurement of the distance from the wells but had nevertheless encroached on that distance, the effect on the percolating waters of this general area was reasonably foreseeable.

92. One author has expressed the view that there is a great deal of difficulty in trying to prove negligence in environmental litigation because there is no recognized "standard of care" against which the conduct of the polluter can be measured. See Comment, supra note 87, at 1121. However, it seems that as technology develops, the standard could be formulated in terms of: (1) the probability of harm; (2) the extent of harm; and (3) the cost of installing devices to abate such harm. It is submitted that the most important aspect of the three elements is the expense of installing abatement devices. If a party fails to install something that will abate pollution merely to avoid the cost, he is causing others to suffer when they have no feasible way to control the harm. Thus, if a party can avoid polluting the air or water and fails to do so, this should be an indication that he has acted negligently.
93. See Restatement of Torts § 282 (1934).
94. See discussion supra pp. 929-35.
must look to the magnitude of the risk\textsuperscript{95} and balance this against the utility of the conduct.\textsuperscript{96} Generally, if the latter element is greater than the former, the injury from the conduct will not result in liability to the actor. If, however, all of these elements can be successfully established, the injured party could secure redress for injury from pollution.

A landowner may also be able to institute a suit if his interest is invaded as a result of an ultrahazardous condition that exists on the defendant's land.\textsuperscript{97} Although this principle would seemingly have a limited applicability in the pollution area, it is nevertheless useful to be aware of its existence since it is conceivable that courts may in the future consider some forms of pollution-producing activity as ultrahazardous. Under the ultrahazardous doctrine, the defendant will be liable to the injured party if the landowner creates an ultrahazardous condition on his land in reckless disregard of the rights of others, knowing that there is a high degree of probability that substantial harm will result.\textsuperscript{98}

7. Adopting State Standards To Determine Reasonableness

It should seem obvious from the above analysis that the nuisance action is at best of marginal value to a private party in its present form because it is impossible to predict with any certainty whether the plaintiff will prevail. It is suggested that the easiest and quickest way to correct this uncertainty is to provide a private right of action under the present legislation in the Commonwealth which seeks to control pollution through the public sector.\textsuperscript{99} However, if the legislature fails to enact this type of

\textsuperscript{95} See \textit{Restatement of Torts} § 293 (1934).
\textsuperscript{96} See \textit{Restatement of Torts} § 292 (1934).
\textsuperscript{97} See \textit{Restatement of Torts} § 822 (1939). See also Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954). This is not to say that the strict liability rule of Rylands v. Fletcher, L.R. 3 H.L. 330 (1868), is applicable. This case was rejected in Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886), and has never been applied by the Pennsylvania courts. See \textit{generally} Waschak v. Moffat, 379 Pa. 441, 446, 109 A.2d 310, 313 (1954).
\textsuperscript{99} See Comment, \textit{Statutory Pollution Control in Pennsylvania}, 16 \textit{VILL. L. REV.} 851 (1971). The courts in Pennsylvania have been confronted with situations where a private landowner has attempted to employ the Commonwealth's Clean Streams Law, \textit{Pa. STAT. tit. 35, § 691.1 et seq.} (Supp. 1971), to show a private nuisance, however, the assertions of the plaintiffs' in the cases that will be discussed were clearly different from those advanced here.

In Gessner v. Ditzler, 37 Northumberland L.J. 119 (Northumberland County Pa. C.P. 1965), the court was presented with a situation where the plaintiff alleged that the defendant's discharge of sewage would be negligence \textit{per se} since it was a violation of the Commonwealth's statutory mandate to stop discharging all sewage pollution. The court summarily dismissed this position stating:

A careful reading of the Pure Streams Law leads to the conclusion that the Act was passed to protect the public by seeking to clean and keep the waters of the Commonwealth and prevent the contamination of public water supplies. It was not meant to prevent the discharge of sewage on the private lands of an individual under any circumstances, but was meant to prohibit the discharge of sewage in such a manner as would cause the pollution of water [of the Commonwealth], whether it be in a spring or lake or any other body of water.

\textit{Id.} at 127. In \textit{Gessner}, the plaintiff was attempting to allege that a violation of the statute was negligence and therefore a nuisance. It is clear, however, that the court
right, it is submitted that the courts may reach the same result by utilizing
the standards promulgated in the provisions of the air\textsuperscript{100} or water\textsuperscript{101} legislation or the regulations\textsuperscript{102} promulgated thereunder.\textsuperscript{103} This would alleviate the present uncertainty by introducing objective criteria into the determination of reasonableness.\textsuperscript{104} This is not to suggest, however, that if the defendant was not meeting the statutory standard his activities would be conclusively presumed to be unreasonable. Rather, the standards would act as a foundation upon which the courts could shift the focal point of their balancing from the social and economic utility of the polluter's activity to the correlative rights of the landowners. Once the injured party had successfully established that the defendant's activities were not

rejected this suggestion, interpreting the statute as a means of protecting the "public" and not the rights of a private landowner.

A similar approach was taken by the Supreme Court of Pennsylvania in the case of Daniels v. Bethlehem Mines Corp., 391 Pa. 195, 137 A.2d 304 (1958), wherein the defendant was discharging large quantities of mine drainage into a stream that passed over plaintiff's land. The plaintiff instituted an action in trespass to recover damages for the injury resulting to his property. In response to the allegation, defendant denied liability relying principally on a written agreement, which was entered into by the plaintiff's predecessor in title, that purportedly relieved defendant of all liability for damages to the land resulting from the mine drainage. (For a discussion of agreements of this nature, see p. 947 infra.) To buttress his argument, plaintiff alleged that the defendant's acts were in violation of the Clean Streams Law; thus defendant should be liable to plaintiff as a result of the statutory violation. The court rejected this contention stating that nothing in the Act made the defendant responsible to the plaintiff for private injury.

It is submitted that the approach of these courts is proper since the Clean Streams Law sets out acts of pollution which are a public nuisance and the private party's claim revolves around a private nuisance. However, this is not to say that the courts could not apply the precepts of the Clean Streams Law to the facts of each case merely using the guidelines set forth therein as a touchstone from which to initiate an analysis of whether the pollution is a private nuisance. The guidelines of the Act establish the appropriate objective criteria that has been consistently lacking in the area of nuisance. It is clear that the two cases hereinafter mentioned in no way preclude this approach, since under the suggested approach the court would merely be using the Act as a guideline to determine if the criteria set forth in the Restatement were violated, whereas in these cases the plaintiffs alleged that a violation of the Act gave rise to private liability. Thus, the two approaches are clearly distinguished.


102. Regulation IV, To Control Local Air Pollution from Sources of Particulate or Gaseous Matter Emissions, Air Pollution Commission, March 15, 1966; Rules and Regulations of the Sanitary Water Board, Department of Health, Art. 301, § 1 et seq. (1970).

103. See Comment, Water Quality Standards in Private Nuisance Actions, 79 YALE L.J. 102 (1969). The author made the suggestion that the standards of the Federal Water Quality Act, 33 U.S.C. § 466 et seq. (Supp. IV, 1969), be adopted by the courts in private nuisance actions. It is suggested, however, that the Pennsylvania courts adopt the standard of the state legislation, since these are geared to the needs of particular areas or watercourses. Furthermore, by employing the state standards, which the courts would employ in suits brought by an official of the Commonwealth, the courts would gain the requisite expertise in analyzing the criteria of the statute and how the facts of each case, fit within the criteria.

104. The Regulations of both the Air Pollution Commission and the Sanitary Water Board (Environmental Quality Board), establish general criteria for statewide application which are also specifically tailored to local areas and watercourses. In this way, the court would have an appropriate measuring stick to determine what amount of discharge, if any, is permissible.
meeting the standards of legislation, the burden of going forward would shift, thus requiring the defendant to produce evidence establishing that his acts were not unreasonable although they were in clear violation of the public policy considerations that are espoused in the legislation. The defendant would then have to rely almost exclusively on showing a high degree of social utility in his conduct.

If the courts accept this approach, they would be effectively overcoming the inherent shortcomings of the present nuisance actions. Furthermore, if the nuisance theory operates completely without regard to the standards of the state or federal legislation, a landowner could find himself operating under different, and at times inconsistent, rules. Since legislation is normally enacted to protect all parties and contains its own balancing test within the standards set for maximum levels of allowable pollution, by accepting legislative standards, the courts would not only be protecting the private individual bringing the suit, but also the general public which unquestionably have an interest in all environmental litigation. Thus, there would be unity in the pursuit of the common goal.

C. Remedies

Once the injured landowner has established that a nuisance exists as a result of the defendant's conduct, he must then proceed to seek the proper form of redress. The remedy which the plaintiff seeks must always be considered in light of the type of harm that is being inflicted upon his interest in the use and enjoyment of land. The discharge of foreign substance into the air or water may cause the plaintiff personal annoyance, physical injury to his property, or prevent him from using his land. 105

Thus, if plaintiff is to successfully protect his right, he must characterize the proper form of relief to coincide with his injury. The plaintiff normally has two alternatives when seeking redress for the pollution of the air or water. He may seek compensatory damages — to recoup the monetary loss suffered as a result of the pollution — or he may seek injunctive relief to enjoin the continuation of the injury to or interference with his land.

1. Money Damages

In order to recover compensatory damages for harm resulting from the pollution of the air or water which adversely affects plaintiff's per-
sonal or property rights, he must establish two factors. First, he must show that the defendant's acts were the cause of the pollution and secondly, he must characterize the damage as permanent or temporary, in order to determine the proper measure of recovery.

a. Joint and Several Liability

One of the greatest obstacles to recovery of money damages in a cause of action under the nuisance doctrine is the requirement that the defendant's conduct be the direct cause of the injury to, or invasion of, plaintiff's interest. When air or water is polluted from a number of sources concurrently and each source adversely affects the plaintiff's interest, he must fix liability upon the proper party or parties. A polluter who acts independently of other polluters is only liable for the injury which results from his acts. If the pollution is caused by a number of sources which are independent of each other, the plaintiff has the burden of segregating the damages. However, because of the nature of the conduct, it is almost impossible to segregate the harm. It is only in cases where there is a single polluter in an area or on a watercourse that this approach is effective. Therefore, if the air or water is polluted from any sources, the plaintiff may be denied relief simply because he cannot establish to what extent he is being injured by any particular party's conduct.

One possible method of avoiding the problem of segregation of damages is to allege joint and several liability. If the injured landowner can establish that the acts of the defendants were joint, each polluter will be answerable for all of the damage caused since it cannot be apportioned. However, the Pennsylvania approach to joint and several liability has its limitations because the courts adhere to the aforementioned theory that a party is liable only for the injury resulting from his conduct, and, the plaintiff has the burden of proof as to whose conduct caused the injury. To establish joint and several liability, therefore, it must be shown that the polluters were acting in concert in discharging the pollutants. There will be no joint liability if the initial acts were independent. This is

true in Pennsylvania even if the consequence of the several acts cannot be apportioned. This reasoning is based upon the premise that joint liability could create an injustice to the polluter who acts independently of others, and has added relatively less pollution, since his liability would be much greater than the actual damage resulting from his pollution. Thus, even the allegation of joint and several liability may not aid the injured party in securing relief.

The weakness of the "in concert" requirement is that the courts focus exclusively on the initial acts and do not consider the injury which is caused *cumulatively*. In an attempt to fairly attribute fault to the parties causing the harm, the courts are indirectly depriving the plaintiff of his right to damages. However, a minority of states have developed an exception to the general rule and have held that if a polluter is aware that the consequences of his independent acts are contributing to an indivisible injury he has the burden of apportioning the damages. If the damages cannot be apportioned, all the polluters will be jointly and severally liable.\textsuperscript{111} In determining whether this exception applies, the courts have placed emphasis upon the indivisibility of the consequences of the conduct, rather than the separate and independent initial acts, which is the primary consideration in Pennsylvania. Those courts applying this exception have attributed significance to the fact that the wrongdoer is the party better able to bear the burden of segregating damages, once it is established that he has contributed to the cause of the injury.\textsuperscript{112} Furthermore, if it is impossible to segregate damages, it seems more equitable to place the entire loss on the wrongdoer than to allow the injured parties to suffer injury without compensation.\textsuperscript{113}

If the Pennsylvania courts accept this approach and limit it to situations where the parties are aware that their separate acts are resulting in an indivisible injury to a landowner, the rule would not work the harsh injustice which they are attempting to avoid.

\paragraph{b. Permanent and Temporary Damages to Property}

Once the plaintiff has established either separate or joint liability, he then must proceed to characterize the injury as either permanent or temporary. Depending on the classification, alternative measures of damages are applied.

If the injury to the land is considered "permanent" in character, the measure of damages is the cost of remedying the *effect* of the pollution upon the land, unless the expense of removing the refuse exceeds the value of the entire property. In the latter instance, the value of the entire prop-


\textsuperscript{113} See Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952).
property is the extent of the recoverable damages.\textsuperscript{114} Alternatively, the measure of damages for a permanent injury may be the difference between the value of the property before and after the injury,\textsuperscript{115} but in no event can there be recovery in excess of the value of the entire property.\textsuperscript{116} The court, in determining the proper amount of damages will apply the test which results in the lower recovery. The reasoning of the cases awarding permanent damages focuses upon the fact that the consequences of the tort are without remedy and the acts will normally continue for an indefinite period of time. Hence, the net effect is analogous to the taking of an interest in land by condemnation.\textsuperscript{117} Furthermore, by awarding permanent damages, or the full compensation for the injury, the court avoids a multiplicity of suits\textsuperscript{118} since compensation for past, present, and anticipated injuries is awarded in a single suit. However, it should be noted that permanent damages are not limited to cases where there is an actual taking of land, but is also extended to situations where the plaintiff is permanently deprived of the use and enjoyment of his land.\textsuperscript{119}

If there is a temporary injury to the property, the measure of damages is normally the cost of restoring the property, but the cost cannot exceed the total value of the property.\textsuperscript{120} Since the action for temporary damages is limited to past and present damages, the injured landowner may institute successive suits each time he is injured.\textsuperscript{121} Thus, the importance of distinguishing between permanent and temporary injury becomes extremely significant.

c. Types of Special Injury

In addition to damages measured in terms of the value of the property lost or the cost of removing the refuse from the property, the injured
landowner may also seek redress for certain special damages in cases of permanent or temporary injury. If he can establish special damages, his recovery is not limited to the value of the property, but can be in excess of that amount. For example, a riparian owner can recover for discomfort and annoyance which arise from foul odors originating in the water or air, as well as for any resulting sickness. Moreover, a landowner may be awarded damages for the deprivation of the use of his water supply, for harm resulting to his crops, or for business losses sustained as a result of the pollution.

2. Injunctions

a. Irreparable Harm

Since pollution of air or water is normally a continuing process, damage actions are inadequate to the extent that they fail to stop the injury from recurring. Injunctive relief, therefore, is also an appropriate remedy because of its prospective application. Traditionally, one basis upon which an injunction has been granted is the inadequacy of a remedy at law. Thus, if the plaintiff’s remedy at law, i.e., compensatory damages, is adequate, he will not be able to obtain an injunction. Normally, the damage action will be deemed inadequate where: (1) the actual damages and money needed to compensate for the injury cannot be accurately calculated; or (2) the defendant is unable to pay the money damages; or (3) it would be necessary to bring many successive suits.

The second prerequisite to a granting of an injunction is a showing that the injury resulting from the defendant’s conduct will be irreparable. If the plaintiff can characterize the injury as a continuous or

123. See Evans v. Moffat, 192 Pa. Super. 204, 160 A.2d 465 (1960), wherein the court citing the Restatement of Torts § 929 (1939) noted that it was within the province of a court to award damages for personal annoyance and discomfort in addition to damages for injury to the land.
127. See Comment, supra note 125, at 1279; Comment, Injunctions, 78 Harv. L. Rev. 994, 1001-04 (1965). See also Horack, Insolvency and Specific Performance, 31 Harv. L. Rev. 702 (1918); McClintock, Adequacy of Ineffective Remedy at Law, 16 Miss. L. Rev. 233 (1932).
recurring act which causes the loss of use and enjoyment of property, as well as damage to his health, he should establish that the harm is irreparable. Thus, it would seem that almost every case involving a measurable amount of pollution can meet the technical requirements for injunctive relief.

b. Balancing of The Equities

Once the court determines that the injured party does not have an adequate remedy at law and that some irreparable injury is occurring, it will endeavor, as it did in determining whether the interference with the plaintiff’s interest in land was a nuisance, to “balance the equities” between the parties. This aspect of injunctive relief has created the greatest obstacle to a private litigant since the courts in balancing the equities have favored polluters.

To establish the equities on his side, the injured party must present evidence showing that his lands and health are endangered, as well as the welfare of the entire community, and that injunctive relief is the only reasonable way to solve the problem. The defendant will then normally try to show that equity will not be served by granting the injunction because of the substantial expense involved in procuring pollution control devices. This latter consideration has acted as a barrier to securing

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131. See Comment, supra note 125, at 1284. The author notes that the balancing test rests with the discretion of the judge, thus the personal values of the judge may be dispositive of the case. This adds an unnecessary element of uncertainty. However, the Restatement of Torts sets forth the following guidelines for a court to employ in balancing the equities:

(1) The appropriateness of injunction against tort depends upon the comparative appraisal of all of the factors in the case, including the following primary factors:

(a) the character of the interest to be protected (§ 937),
(b) the relative adequacy to the plaintiff of injunction and of the remedies listed in §§ 944-51 (§ 938),
(c) plaintiff’s delay in bringing suit (§ 939),
(d) plaintiff’s misconduct (§ 940),
(e) the relative hardship likely to result to defendant if injunction is granted and to plaintiff if it is denied (§ 941),
(f) the interests of third persons and of the public (§ 942), and
(g) the practicability of framing and enforcing the order or judgment (§ 943).

132. One author, commenting on the element of expense stated:

There are three cost arguments that a defendant may advance. First, he may argue as a matter of policy that the increased cost of production and the increased price of the commodity which will follow probably are not justified by the marginal benefits of pollution abatement. Second, he may show that the cost of complying with an injunction would be so great that the imposition of that cost would require him either to shut down his operation entirely or to move his business to another location. Such action would arguably lead to unemployment, a reduced tax base, and general economic decline in the area in which the company is operating. Finally, he may contend that although the company might not
injunctive relief in many cases.\textsuperscript{133} In essence, what the courts have done is to focus on the economic and social burdens the injunction would place upon the defendant and the community and balance these factors against the personal inconvenience to the complaining injured landowner. This approach is evidenced in the recent New York case of \textit{Boomer v. Atlantic Cement Co.},\textsuperscript{134} wherein the court, by focusing on the large disparity of economic consequences, refused to issue an injunction.\textsuperscript{135} Realizing that the defendant's investment in the plant in question amounted to more than $45,000,000 with an employment of more than three hundred people, the court considered an injunction enjoining further operations to be too drastic a remedy and awarded permanent damages.\textsuperscript{136} Although it is arguable that the plaintiffs had been fully compensated for their injury, the case overlooks the fact that the plaintiffs may be forced to leave their homes or continue to live on the deteriorating land in unhealthy conditions. This result indicates there has been a total failure on the part of the court to adequately solve the problem. If this traditional formula is adhered to, it is almost impossible for a landowner to secure an injunction under a strict application of this approach. One of the basic problems that bars relief in many injunction suits is judicial reluctance to consider the public interest "in clean air" as a factor in favor of the plaintiff. Rather, the court insists on balancing other public interests in favor of the polluter, which makes the plaintiff's burden clearly insurmountable.\textsuperscript{137} The current rapid development of technology would seem to weaken the economic hardship argument of the industrial polluter and tend to shift the balance toward the injured plaintiff. The alternatives before the courts are no longer limited to either closing the plant or allowing the pollution to continue, since new technological breakthroughs can serve as a feasible means to curtail pollution. If the plaintiff simply seeks the defendant's
compliance with existing technology within a reasonable amount of time, the courts should be more willing to grant at least temporary injunctions, since they would no longer be in the unfortunate position of forcing the firm out of business. Moreover, the defendant's substantial expense argument will not serve as a valid defense to the requirement that he comply with the applicable standards of state and federal legislation. If this approach is taken, the injured landowner could continue to live on his land without the unpleasant effects of pollution, rather than being forced to leave with the only relief taking the form of compensatory damages for the "taking" of his land. Furthermore, this approach would place the burden and expense of abating the pollution squarely upon its source—the polluter.

c. Procedural Advantages of Injunctive Relief

Because of the difficulties inherent in instituting a suit for damages, an action in equity offers distinct advantages to an injured party, since he is not forced to clearly distinguish which injuries result from the acts of a single defendant. Moreover, in an action in equity the plaintiff can also join all of the polluters in one cause of action, thereby avoiding a multiplicity of suits and the related expenses. In order for the plaintiff to be successful in joining the defendants in a single cause of action in equity, the injured landowner must establish that there was some "community of interest" among the defendants with respect to the consequence or subject matter of the controversy. However, there is no necessity of demonstrating that the actions of the defendants were undertaken jointly; all that is necessary is a general interest in the litigation. This general interest is usually established by showing that there is cooperation in fact among the parties, because they are all contributing to the nuisance by adding to the singular result. One further, and perhaps the most significant, advantage of an injunction is that it can be obtained where there is a threat of injury from pollution, thus making it possible


139. This is not to say that a plaintiff cannot seek relief in the form of damages at the same time he is seeking an injunction. Once equity takes jurisdiction, it will confront all of the issues in the suit. See Gray v. Philadelphia & Reading Coal & Iron Co., 286 Pa. 11, 132 A. 820 (1926); Epstein v. Ratkosky, 283 Pa. 168, 129 A. 53 (1925); State Hospital for The Criminal Insane v. Consolidated Water Supply Co., 257 Pa. 29, 110 A. 281 (1920); Keppel v. Lehigh Coal & Navigation Co., 200 Pa. 649, 50 A. 302 (1901).

140. See Gray v. Philadelphia & Reading Coal & Iron Co., 286 Pa. 11, 132 A. 820 (1926). Unlike an action at law, in equity an agreement for a concert of action is not essential to jurisdiction. A single result brought about by the acts of many defendants, even though "having no connections with each other," is sufficient to maintain the jurisdiction, and to defeat the claim of multipariously. Id. at 15, 132 A. 821. See also Wortex Mills v. Textile Workers Union of Am., 369 Pa. 359, 85 A.2d 851 (1954); Pittsburgh v. Pittsburgh & Lake Erie R.R. Co., 263 Pa. 294, 106 A. 724 (1919).


142. Id. at 636. See also Annot., 45 A.L.R.2d 1284 (1956).
to abate the potential harm before it actually causes injury. However, the requirement that the acts complained of result in a nuisance per se or that a nuisance will necessarily result from the activity imposes a limitation upon granting injunctive relief for a threatened nuisance.

D. Defenses

1. Prescription

In addition to all of the aforementioned considerations, nuisance actions may be subject to several defenses. One possible defense to a cause of action for pollution is that the defendant has acquired a prescriptive right to pollute. Although this defense is particularly well suited to the pollution of a watercourse, it has only limited application to air pollution. A prescriptive right is established when a landowner continuously, uniformly and with open adversity pollutes the air or water for a period of twenty-one years thereby drawing the owner of the subservient tenant's attention to these acts. If the injuring landowner's use falls within this category, he has a right to continue to pollute the stream or air with the injured party losing his right to challenge the injurious acts or receive compensation for damages. The rationale for this seemingly


145. See Juergensmeyer, Control of Air Pollution Through the Assertion of Private Rights, 167 DUKE L.J. 1126, 1136; Porter, The Role of Private Nuisance Law in The Control of Air Pollution, 10 ARIZ. L. REV. 107, 116 (1968). The use of prescriptive rights is particularly well suited in the pollution of water, see Comment, supra note 111, at 150, however, it has a limited use when a defendant is polluting the air, although there is the possibility that it is a valid defense. See United Verde Copper Co. v. Ralston, 46 F.2d 1 (9th Cir. 1931); Dangelo v. McLean Fire Brick Co., 287 F. 14 (6th Cir. 1923); Anenberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944); Curry v. Farmers Livestock Market, 343 S.W.2d 134 (Ky. 1961). See also Annot., 152 A.L.R. 343 (1944). The problem with asserting a prescriptive right to pollute the air is that it is difficult to establish that the invasion was continuous, notorious and adverse for the twenty-one year period. See United Verde Copper Co. v. Ralston, 46 F.2d 1 (9th Cir. 1931); Curry v. Farmers Livestock Market, 343 S.W.2d 134 (Ky. 1961).

146. See generally Hughesville Water Co. v. Person, 182 Pa. 450, 38 A. 584 (1897), wherein the court required that the activities be notorious to the extent that the lower riparians' attention be brought to the activity. Although this case deals with the diversion of water, the same principles are applicable to pollution. See also Consolidated Water Supply Co. v. State Hospital for the Criminal Insane, 66 Pa. Super. 610 (1917), aff'd, 267 Pa. 29, 110 A. 281 (1920); Lancaster Milling Co. v. Media Heights Golf Club, 59 Lanc. L. Rev. 159 (Lancaster County Pa. C.P. 1964).

147. See generally Messenger's Appeal, 109 Pa. 285, 4 A. 162 (1885), where the court denied an injunction where the upper riparian had obtained a prescriptive right to divert the water. Once the party adversely enjoys the use of the water for twenty-one years the law presumes that he has a right to uninterrupted enjoyment.
inconsistent result is that the law considers the gaining of a prescriptive right to be a grant of an easement. However, a mere occasional exercise of this right is not enough, since no presumption arises when the owner's use is not continuous, notorious and adverse.

Once the landowner has acquired the prescriptive right, he does not have the right to increase the pollution of the stream or air. His prescriptive right is limited to the amount and kind of use he has made of the watercourse or the atmosphere for the twenty-one year period.148 This factor would seemingly have a limiting effect on the availability of the doctrine, since under normal circumstances, the pollution of the stream or air increases as time passes. If this is the case, the injured party can institute a cause of action for the injury resulting from the increased pollution.

2. Agreements

To avoid liability, a landowner may also obtain a grant or release from a neighboring landowner which allows him to pollute the air or water surrounding the grantee's land.149 This grant is not considered contrary to public policy, since it only creates a private nuisance.150 However, if the water or air is polluted to the extent that a public nuisance is created,151 the release is no longer considered to be valid.152 The agreement creates an easement in the land and is also binding upon subsequent owners who take with actual or constructive notice, since agreements of this nature are considered to run with the land.153 The operative question in interpreting these agreements is whether the terms of the document are broad enough to encompass the pollution which is challenged. To make this determination, the courts have adhered to the principles of contract law with the result that if a determination is made that the pollution in question was within the intention of the parties to the agreement, the injured landowner cannot secure relief.154 These agreements, however, are limited to the contracting parties or their successors in title,155 and other landowners in the immediate vicinity are

148. See McCallum v. Germantown Water Co., 54 Pa. 40 (1867). The court stated: If, therefore, an upper riparian proprietor claims the right to pollute the stream by prescription or a user of twenty-one years . . . he cannot pollute the water to any greater extent than it was polluted at the commencement of the twenty-one years. That is to say, if the pollution at that period was slight or not injurious to any extent, he cannot, at any time within that period, increase it five or tenfold, so as entirely to destroy the water for drinking and domestic purposes, the right must be measured by the enjoyment, and it gives no right to use it in a different and more extensive manner.

Id. at 48.


151. See p. 949 infra.


154. Id. at 202-04, 137 A.2d at 308-09.

155. Id. at 205, 137 A.2d at 309. See also Shields v. Pittsburgh, 252 Pa. 74, 97 A. 124 (1916) (successor in title).
not foreclosed from taking legal action because a neighboring proprietor is bound by a valid agreement.

3. Coming To The Nuisance

Another defense that may act as a barrier to a private party’s recovery of damages or the securing of an injunction is the concept of “coming to the nuisance.” This concept was established in Waschak v. Moffat where the Supreme Court of Pennsylvania held that the plaintiffs could not recover damages because they knew that they were moving into an area where they would be subject to some annoyances and, notwithstanding this knowledge, purchased the land anyway. The “coming to the nuisance” doctrine can best be characterized as a specialized form of assumption of risk where the plaintiff is estopped from seeking relief because he was aware of the existence of the nuisance before taking possession.

4. Laches

Although the aforementioned defenses are not particularly effective, a defendant may find protection in the equitable doctrine of laches, or its counterpart at law, the statute of limitations. In equity, if a plaintiff unreasonably delays in instituting suit to secure an injunction, and such delay causes the plaintiff to act to his own benefit, the doctrine of


157. This view was espoused by Justice Musmanno in the case of Versailles v. McKeesport Coal & Coke Co., 83 Pitts. L.J. 379 (Allegheny County Pa. C.P. 1935), wherein he stated:

The plaintiffs are subject to an annoyance. This we accept, but it is an annoyance they have freely assumed. Because they desired and needed a residential proximity to their places of employment, they chose to find their abode here. It is not for them to repine; and it is probable that upon reflection they will, in spite of the annoyance which they suffer, still conclude that, after all, one’s bread is more important than landscape or clear skies.

Id. at 385. See also Harris v. Susquehanna Collieries Co., 304 Pa. 550, 156 A. 159 (1931); Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886).

158. This is not the majority rule and in many other states if a party moves next to a nuisance, he may seek redress. See Comment, supra note 145, at 115. See also Kennedy & Porter, AIR POLLUTION: ITS CONTROL AND ABATEMENT, 8 VAND. L. REV. 854 (1955).

159. PA. STAT. tit. 12, § 31 (1953). An action of trespass to recover damages for the maintenance of a nuisance must be brought within six years from the injury. See Stokes v. Pennsylvania R.R. Co., 214 Pa. 415, 63 A. 1028 (1906); Cass v. Pennsylvania Co., 159 Pa. 273, 28 A. 161 (1893); Coxe v. Lehigh Valley R.R. Co., 46 Luz. L. Reg. Rep. 211 (Luzerne County Pa. C.P. 1956). The only real question that arises under the statute of limitations is where there is a continuing nuisance. If the nuisance is continuous, the injured party may bring an action within six years of an injury. However, if the initial injury to the land is permanent, the consequences of which, in the normal course of things will continue indefinitely, there can be but one cause of action to recover past and future damages, and the statute starts to run when the injury occurred. See Sustrik v. Jones & Laughlin Steel Corp., 413 Pa. 324, 197 A.2d 44 (1964).

160. See generally Coleman v. Estes, 281 Ala. 234, 201 So. 2d 391 (1967); Sprout v. Levinson, 298 Pa. 400, 148 A. 511 (1930); Sablosky v. Grady, 46 Montg. Co. L.
laches will operate to deny injunctive relief to the plaintiff.¹⁶¹ This
doctrine, however, would not seem to have particular application in polli-
cution cases because it only operates where the plaintiff's delay in institu-
ing suit has been unreasonable and caused the defendant harm.¹⁶² The
requirement of unreasonable delay would not seem to exist since the
scientific evidence concerning the adverse effects of pollution is too recent
to have caused the plaintiff to institute suit prior to the present public
awareness, notwithstanding any visible destruction to his property.¹⁶³

III. PUBLIC NUISANCE

A. Nature of the Injury

The pollution of the air or water may also result in another form
of nuisance known as a public nuisance. A public nuisance has been char-
acterized as a “catch all” low grade criminal offense, consisting of an
interference with the rights of the community at large.¹⁶⁴ The concept
of public nuisance has been incorporated into the legislation for the con-
trôle of air¹⁶⁵ and water¹⁶⁶ pollution. These statutes, however, are drawn
in general terms and have been drafted to include anything that would
have been a public nuisance at common law.¹⁶⁷

At common law, the crime of public nuisance encompassed a variety
of petty offenses, all based upon some interference with the comfort, con-
venience, and health of the general public, or some interest of the com-
community.¹⁶⁸ A public nuisance, therefore, is quite different from a private
nuisance since it is grounded upon common law or criminal acts, whereas
the latter sounds in tort as an invasion of a purely private right.¹⁶⁹

¹⁶² See Comment, supra note 125, at 1282–83.
¹⁶³ Id. See generally Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904) (where the doctrine of laches would apply).
¹⁶⁹ See pp. 922–38 supra.
In order for a nuisance to be considered public there must be an interference with a public right.\textsuperscript{170} The fact that it affects a large number of people is not enough to establish public status.\textsuperscript{171} A public nuisance will normally be found where: (1) the public has a right to use the water from a watercourse;\textsuperscript{172} (2) where noxious odors are emanating from an activity;\textsuperscript{173} (3) where the health and safety of the entire community is generally endangered by air or water pollution;\textsuperscript{174} or (4) where there is an interference with a common right to the entire community.\textsuperscript{175} The real significance of an invasion being characterized as public is that its redress be sought only by a public official.\textsuperscript{176}

\textsuperscript{170} See Restatement of Torts § 821B, comment g at 19 (Tent. Draft No. 16, 1970), wherein it is stated: Except as may be provided by statute, a private nuisance 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. Thus the pollution of a stream which merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land, is not for that reason a public nuisance. Where, however, the pollution prevents the use of a public bathing beach, or ... deprives all members of the community of the right to fish, it becomes a public nuisance.

\textsuperscript{171} Id. However, it is not necessary that the whole community be affected, so long as the public nuisance will interfere with those who come in contact with the exercise of a public right. See also Prosser, supra note 164, at 1002.

\textsuperscript{172} See Commonwealth v. Yost, 197 Pa. 171, 46 A. 845 (1900), wherein the court made the following statement to distinguish between private and public nuisance focusing on the public right to use:

If the public, having a right to take from this stream pure and unpolluted water, found in it the germs of disease, coming from the cesspool of the defendant, which he maintained on a tributary to the stream, his offense would be a public one, for which he would be properly indicted. The wrong would be against the whole community, as a community, not simply against an individual or certain individuals, however numerous, and ought to be punished as a crime. If the public have a right to receive pure water through the agency of a corporation legally authorized to take it from a stream, he who pollutes it offends against the public. If, on the other hand, the waters of a stream, in which riparian owners alone have an interest, be polluted, the wrong or injury is a private one, for which the individual or individuals injured may have redress. . . .

\textsuperscript{173} Id. at 174, 46 A. at 848. See also Commonwealth v. Emmers, 33 Pa. Super. 151, aff'd, 221 Pa. 298, 70 A. 762 (1908); Scranton Gas & Water Co. v. Hall, 6 Lackawanna Jurist 269 (Lackawanna County Pa. C.P. 1907); Baxter v. Jordon, 70 Montg. Co. L. Rptr. 2 (Montgomery County Pa. C.P. 1953).


\textsuperscript{175} See Commonwealth v. Banholzer, 304 Pa. 578, 156 A. 237 (1931); New Castle v. Keney, 130 Pa. 546, 18 A. 1066 (1890). It should also be noted that there is no necessity that a neighboring landowner be injured before the Commonwealth can bring suit, it is the general public that is being protected. See Commonwealth v. Ashley, 37 Pa. Super. 254 (1908).


B. Rights and Remedies of a Private Party

The general rule that only a public official may bring an action to alleviate a public nuisance is subject to an exception which creates a hybrid form of nuisance that allows a private litigant to seek redress for injury, or to prevent further harm. If the private party is able to show that he has suffered a special or particular injury, distinct from that suffered by the community at large, the act of pollution is then considered tortious as to him, and a private action may be brought to secure relief from nuisance. To be successful, the plaintiff must not only be able to establish that his injury is greater in degree than the injury suffered by the community, but also that it is different in kind. In other words, he must show damages of a special character. The private litigant must segregate his injury from that suffered by the general community, and this requirement is particularly difficult where the pollution is extensive and affects the entire community.

Thus, under this doctrine, if a party pollutes the water or air to such an extent as to result in a public nuisance by endangering the health of the community, while at the same time depriving the plaintiff of the use and enjoyment of his land, the landowner will have suffered an injury which is not only greater in degree than that suffered by the general public, but is also different in kind. Once the plaintiff has established these prerequisites, the action proceeds exactly the same as if the suit was

177. Pennsylvania SPCA v. Bravo Enterprises, Inc., 428 Pa. 350, 237 A.2d 342 (1968), wherein Mr. Justice Eagen, speaking for the court stated:

It is also true that a public nuisance may be enjoined at the behest of a private citizen or group of citizens, if the latter, either in their property or civil rights, are specifically injured by the public nuisance over and above the injury suffered by the public generally. Id. at 360, 237 A.2d at 348. See also Price v. Grantz, 118 Pa. 402, 11 A. 794 (1888); Philadelphia v. Collins, 68 Pa. 106 (1871); Moline v. Hoban, 72 Montg. Co. L. Rptr. 178 (Montgomery County Pa. C.P. 1955). The private citizen must file a separate complaint and may not intervene in an action brought by a public official. See Whitemarsh v. Chemical Concentrates Corp., 62 Montg. Co. L. Rptr. 103 (Montgomery County Pa. C.P. 1946).

178. See Townsend v. Trustees of Academy of Protestant Episcopal Church, 38 Montg. Co. L. Rptr. 125 (Montgomery County Pa. C.P. 1922), wherein the court stated:

Equity, it is true, will not ordinarily interfere by injunction at the instance of private individuals to restrain the commission of a purely public nuisance, and such a suit can be instituted only by the proper public officers in the name of the public . . . but there is an exception to this general rule that is as well established as the rule itself. An individual may bring an action on account of a public nuisance when he can show that he has sustained therefrom damages of a special character, distinct and different from that suffered by the public generally — beyond [that] suffered by him in common with all others affected by the nuisance . . . . Id. at 127. It is not enough that the injured party merely show that he has suffered the same kind of injury with a greater degree, he must establish both kind and degree. See Restatement of Torts § 821C, comment b at 33-34 (Tent. Draft No. 17, 1970).

179. The reason for requiring the showing of the special damages is the fear that the defendant will be harassed; hence the courts have attempted to avoid multiplicity of suits by requiring this particular type of harm. See Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1005 (1966).

180. Id. at 1018-20. See also Restatement of Torts § 821C, comment e at 35-37 (Tent. Draft No. 16, 1970).
brought to abate a private nuisance, with the plaintiff being able to secure relief in the form of damages and/or injunctive relief. 181

IV. TRESPASS

A. Nature of the Action

Thus far, consideration has been limited to the private litigant's use of nuisance law to protect his rights; thus the focus of this article has been on that class of invasions characterized as non-trespassory. 182 There is, however, the possibility that a landowner may seek to protect his right through the use of the trespass doctrine, 183 particularly if it is more difficult to establish a cause of action under the nuisance doctrine.

A trespass is any unauthorized interference with land, where a person intentionally causes an unprivileged entry of an object onto the land possessed by another, thereby depriving the latter of exclusive possession of the land. 184 Under this definition, if a defendant causes a pollutant to be carried onto the land of another, 185 this act constitutes a direct infringement on the latter's right to exclusive possession of his property and constitutes a trespass. 186 The trespass action is distinguishable from


182. See p. 922 supra.


184. The RESTATEMENT OF TORTS § 158 (1934), defines a trespass in the following manner:

Liability for Intentional Intrusions on Land. One who intentionally and without a consensual or other privilege . . . enters land in possession of another or any part thereof or causes a thing or third person so to do . . ., is liable as a trespasser to the other irrespective of whether harm is thereby caused to any of his legally protected interests.

Id. at § 158. See generally RESTATEMENT OF TORTS, Scope & Introductory Note to Ch. 40, at 215-25 (1939).

185. It is as much a trespass to a lower riparian's land when an upper riparian causes sediment to enter a watercourse, which thereafter flows down the same to another's land as if the upper owner had carried the substance onto the land. This is an invasion of a property right and is actionable. See Muehlhausen v. Delaware Valley Holding Co., 9 Bucks Co. L. Rptr. 188 (Bucks County Pa. C.P. 1959). See generally Kramer v. Pittsburgh Coal Co., 341 Pa. 379, 19 A.2d 362 (1941); Matthews v. Bagnik, 157 Pa. Super. 115, 119, 41 A.2d 875 (1945).

186. See Pfeiffer v. Brown, 165 Pa. 267, 30 A.2d 844 (1895). In Pfeiffer, the upper riparian rendered the water of a stream unfit for use by adding salt water to
the nuisance action in that the latter is an interference with use and enjoyment of the plaintiff's land while the former is an interference with the exclusive possession of his land. Although the distinction seems tenuous, it has evolved into the requirement that to establish a trespass, there must be some form of visible and identifiable invasion of the land. This last element can present a difficult problem to the plaintiff since the majority of air and waterway pollutants deposit nothing of measurable size upon the land.

In response to this problem, the Oregon Supreme Court questioned the distinction between trespass and nuisance in the case of Martin v. Reynolds Metals Co. The Martin court determined that it was the existence of an identifiable interference with the right to possession, and not the nature and size of the particles, that was the determinative issue in a trespass action. It is suggested that the Pennsylvania courts adopt this approach to make it easier for the private litigant to succeed in securing damages since the application of the reasonableness standard and the balancing process are immaterial to a trespass action.

However, even with the adoption of the Oregon rationale concerning identifiable interference, the Pennsylvania plaintiff must establish that the trespass and subsequent injury resulted from the defendant's acts. Since a party is only responsible for the injuries which result from his acts, the plaintiff can only recover nominal damages if he is unable to show, with certainty, that the invasion is attributable to the defendant's unprivileged acts. As in the private nuisance action, this requirement the stream. The court stated that the lower riparian has a right to have the stream flow in its natural condition and any interference with the stream by an upper owner, which causes the water to become unwholesome is actionable by the lower riparian as a trespass.

187. The trespass action is also available to a landowner if his exclusive possession of the land has been interfered with through the pollution of the air. The Pennsylvania courts, however, in granting relief from the invasion of property through air pollution have generally relied upon the nuisance theory, rather than trespass. See generally Porter, The Role Of Private Nuisance Law In The Control Of Air Pollution, 10 ARIZ. L. REV. 107, 117-19 (1968).

188. See Buckley Motors, Inc. v. Amp, Inc., 23 Pa. D. & C.2d 324 (Cumberland County C.P. 1960). The Buckley case presents a typical use of the trespass doctrine. Plaintiff's property was injured by particles coming from the adjoining landowners heating plant. The defendant was awarded relief, but the court took pains to make it clear that the plaintiff actually saw the particles falling on the property. See also Conti v. New Castle Lime & Stone Co., 94 Pa. Super. 321 (1928).


190. See Porter, supra note 187, at 118-19. See also Juergensmeyer, supra note 145, at 1138-42.

191. Id. In Pierce, defendants had deposited solid coal waste on the banks of a stream, which was subsequently carried into the stream causing it to become unfit for plaintiff's use. Plaintiff instituted an action in trespass for damages against the defendant. A defense was asserted that other coal companies carried on the same practice, hence it was impossible to determine to what extent plaintiff's injuries were attributable to defendant's acts. The court made it clear that the defendant could not be charged with the injuries resulting from the acts of the other coal companies and a plaintiff has the burden of proof requiring him to establish the injuries which were attributable to the defendant before it could recover damages against the defendant. See also Gallagher v. Kemmerer, 144 Pa. 509, 22 A. 970 (1891).

192. One is only liable for the injuries resulting from his own acts. See Hileman v. Hileman, 172 Pa. 323, 33 A. 575 (1896); Little Schuylkill Nav. Co. v. Richards,
has proven fatal to many trespass actions since the pollution of air and water is occasioned by the acts of many parties. If the injured party cannot establish joint liability or affirmatively show that the injury resulted solely from one party's acts, he will not secure relief.

Notwithstanding its weaknesses, the trespass action offers advantages to a landowner instituting a suit for pollution. In a trespass action, the law infers some injury from every unauthorized entry onto another's land. Thus, in order to secure nominal damages, the plaintiff does not have to establish that he has actually been injured by the defendant's unauthorized invasion, and if he can in fact show actual injury, he can recover compensatory damages. Furthermore, even where the damage is minimal, the plaintiff may secure injunctive relief if the trespass is continual or recurring.

V. CONCLUSION

Given the nature of the environmental crisis, it is highly questionable whether the use of private litigation can have a long range deterrent effect. Furthermore, an analysis of the nuisance law indicates that the basic theories have a number of dangerous pitfalls, that many times may not be avoided. The private citizen's role in environmental litigation, however, can have a significant impact on the preservation of the environment, especially if the Pennsylvania courts adopt the suggestions hereinbefore enumerated.

First and foremost, through the use of the private action, the injured landowner is given an avenue through which he can protect his personal rights. Second, this type of litigation will develop a body of case law from which the relevant issues can clearly be formulated for legislators to draw upon and thereby stimulate government action. While it is clear that the only possible comprehensive scheme to control the environment must come from the government, in the interim, the private citizen has an important role.

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193. For a discussion of joint and several liability, see p. 939 supra.
