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A GUIDE TO KANSAS COMMON LAW ACTIONS AGAINST INDUSTRIAL POLLUTION SOURCES*

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Several kinds of industrial operations in Kansas generate waste materials that may pose a threat to the health and property of the state's residents. In some instances, these operations may be merely "a right thing in the wrong place, — like a pig in the parlor instead of the barnyard." In others, it may be more accurate to characterize these activities as the "right thing" managed in the "wrong" way. Few would deny, for example, the validity of a chemical producer's familiar advertisement that "without chemicals, life itself would be impossible." Yet, the wastes produced in the manufacture and use of certain hazardous chemical substances, if not properly handled and disposed of, may present substantial dangers of harm to health and property. The decision by Kansas public officials to shut down the state's only permitted commercial hazardous waste disposal facility in Furley may reflect an attempt to avoid these harms. The state's residents may face similar problems in other locations. The federal Environmental Protection Agency (EPA) already has included or recommended six Kansas hazardous waste disposal sites in addition to the Furley site on its national priorities list of sites qualifying for federal

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clean-up assistance from the Superfund.  

Similarly, the state's oil and gas and salt producing industries generate and dispose of waste materials that may have adverse environmental effects.  

A federal district court in Kansas, which was asked by neighboring property owners to enjoin the operations of a salt producer, recently remarked that "salt is beneficial to man and, in fact, is necessary for his survival." Yet, the court added, "it becomes a deleterious substance when it invades the fresh water supplies of the people. Fresh water contaminated with salt becomes a poison to man, beast, and plant alike." The use of fertilizers, pesticides, and animal waste storage facilities associated with agricultural activities also may threaten the state's underground sources of drinking water with contamination.  

A fundamental question raised by these and similar examples is how to allocate the risk that pollution-generating activities will cause injury to those exposed to the pollution. One method of assigning that risk to the pollution-generating activity is to require that it compensate persons for the injuries it causes. Individuals injured by polluting activities have few forums in which to seek compensation for their injuries. Congress has enacted a series of pollution control statutes designed to reduce or eliminate the discharge of pollutants in a manner that threaten the public health or welfare. While these federal statutes authorize private citizens to sue persons who allegedly discharge pollutants in violation of the statutes, the courts can issue only injunctive relief or civil penalties payable to the government. The federal acts do not include a mechanism for the payment of compensatory damages to persons who suffer from pollutants that are discharged in violation of the statutes. Furthermore, the courts have refused to imply any private remedies other than the remedies that the statutes explicitly authorize.  

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The EPA is authorized by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9657 (1982), to use money from a Hazardous Substance Response Trust Fund, commonly known as the Superfund, to assist in the clean-up of releases or threatened releases of hazardous substances from waste disposal sites on the national priorities list. See id. §§ 9604(a), 9605(b)(B), 9631.  


* Id.  


10 The federal district courts, which have jurisdiction over citizen suits seeking injunctive relief, retain broad equitable discretion in deciding whether such relief is appropriate. See Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).  

law actions were available to remedy pollution-induced injuries, at least in interstate controversies initiated by a state or other governmental authority. In 1981, however, the United States Supreme Court ruled that the federal Clean Water Act preempted the federal common law of nuisance as applied to water pollution. The Court's analysis also probably will apply to preempt federal common law remedies for other environmental media.

The Supreme Court's recent interpretations of the scope and effect of the federal pollution control statutes leave only state law remedies available to private persons seeking compensation for injuries caused by the discharge of pollutants. Unless Congress amends the federal statutes to authorize a federal statutory or common law damage remedy, the state mechanisms will, if they have not already done so, necessarily assume primary importance in any attempts by injured individuals to seek recompense for past harms.

Individuals may derive remedies from state statutes or common law. This Article summarizes the principal common law theories of relief for pollution-induced injury. The Article emphasizes nuisance law, which recently has been described as "the heart and soul of what is called today environmental law." Several other theories of relief — trespass, negligence, and strict liability — are available to the private plaintiff who has suffered from pollutant discharges. The Article addresses these other theories more briefly, primarily by way of

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13 See Illinois v. Milwaukee, 406 U.S. 91 (1972). The parameters of the federal common law of nuisance were not clearly defined. Compare Ancarrow v. Richmond, 600 F.2d 443, 445 (4th Cir.) (federal common law of nuisance only applies to interstate controversies), cert. denied, 444 U.S. 992 (1979) and United States v. Lindsay, 357 F. Supp. 784, 794 (E.D.N.Y. 1973) (only a state or one of its municipalities may invoke federal common law of nuisance) with Illinois v. Outboard Marine Corp., 619 F.2d 623, 626-27 (7th Cir. 1980) (federal common law of nuisance applies to the pollution of all navigable waters, whether the harm is extraterritorial or not), vacated and remanded mem., 452 U.S. 917 (1981) and National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1233 (3d Cir. 1980) (private persons can bring federal common law nuisance actions), rev'd on other grounds sub nom. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).


contrast to the various elements of a nuisance cause of action. The discussion identifies those elements of each of the causes of action that are likely to prove most troublesome to a plaintiff suing a pollution source, and suggests ways to overcome these difficulties. The Article also indicates how to avoid difficult issues by using one theory of relief rather than another.

Although this Article is meant to provide a guide to common law theories available to injured Kansas plaintiffs, in many areas the Kansas courts have adopted positions consistent with the doctrines to which the majority of other jurisdictions adhere. In these areas, the Article describes the generally applicable common law rules, usually as reflected in the Restatement of Torts. For the most part the Article does not attempt to provide an in-depth analysis of the merits of these rules. The article instead summarizes them, referring not only to treatises and articles containing more comprehensive discussions, but also to Kansas judicial decisions that have adopted these rules.

In a few areas, however, the Kansas courts have departed from generally accepted principles. In still others, Kansas law is unsettled or confused. For years, for example, the Kansas decisions failed to draw the well-accepted distinction between a public and a private nuisance. The decisions still fail to articulate clear principles to guide Kansas courts in determining whether to provide a prevailing plaintiff with injunctive relief or to confine him to damages. In treating such areas, the discussion in this Article departs from the generally-accepted common law principles to analyze at greater length the Kansas cases and the anomalous or confusing positions adopted by the state's courts.

The Article's primary area of analytical criticism concerns a set of issues that has plagued the Kansas courts for more than a century — issues involving the application of the statute of limitations to a continuing trespass or continuing


19 Restatement (Second) of Torts (1965) [hereinafter cited as Restatement].


21 See infra notes 166-88 and accompanying text.
nuisance. Although the Kansas Supreme Court frequently has recognized the disarray in its own decisions in this area, it has not been able to dispel altogether the confusion that has resulted from more than one hundred years of inconsistent precedents. The court has failed to clarify, for example, whether a person injured by a polluter whose continuing discharge of pollutants is practically unattainable has the opportunity to bring a series of suits for past, temporary damages or must seek compensation for all harm, past and prospective, in one lawsuit. Nor is it clear at what point the plaintiff's cause of action in the latter type of action accrues and the statute of limitations begins to run. In these and related areas, the Article suggests how the Kansas courts can clarify "a rather muddled state of affairs."

I. PROOF OF CAUSATION IN COMMON LAW ACTIONS AGAINST POLLUTION SOURCES

Regardless of the theory invoked in a tort-based action against a source of pollution, the plaintiff must demonstrate that the polluter caused the plaintiff's injury. In some cases the plaintiff will have little difficulty providing such proof. If the plaintiff's underground well is contaminated by salt, for example, and a salt mining company's operations are located over the aquifer into which the well is drilled, the plaintiff should find it relatively easy to show that the company's practices resulted in contamination of the aquifer.

In other cases, the plaintiff will have much more difficulty tracing his harm to the defendant's conduct. Suppose, for example, that the plaintiff has lived next to a chemical manufacturing plant for more than thirty years. For the first ten years, the plant disposed of its chemical wastes, some of which are suspected carcinogens, by transferring them to an open landfill adjoining the plaintiff's property. Twenty years ago, the plant stopped disposing of its wastes in this manner and cleaned up the landfill. The plaintiff, who has recently dis-

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22 See infra notes 215-97 and accompanying text.
24 See, e.g., W. PROSSER & W. KEETON, THE LAW OF TORTS § 43 (5th ed. 1984) (concerning causation in negligence actions); RESTATEMENT, supra note 19, §§ 279-80 (concerning "legal cause" of intentional harms); id. §§ 430-53 (concerning "legal cause" in negligence actions). The plaintiff must prove that the defendant's conduct was both a factual and legal cause of the harm suffered by the plaintiff. In many cases, to demonstrate cause in fact the plaintiff must prove that he would not have been injured but for the defendant's conduct. See W. PROSSER & W. KEETON, supra, § 41 (concerning negligence). Cf. Cherry v. Board of Comm'rs, 202 Kan. 121, 125, 446 P.2d 734, 737 (1968) (in public nuisance case, the plaintiff must demonstrate a "causal connection between the things complained of — the nuisance — and the injury or damage, that is a showing that the nuisance caused the damage."). The Kansas courts also require proof that a nuisance be the "proximate cause" of the injury for which recovery is sought. See, e.g., Baldwin v. City of Overland Park, 205 Kan. 1, 6, 468 P.2d 168, 172 (1978). See also RESTATEMENT, supra note 19, § 822 comment e. The concept of "legal" or "proximate" cause encompasses the issue of the extent to which the defendant could have foreseen the severity and magnitude of damage its action would cause. See W. PROSSER & W. KEETON, supra, § 43 (concerning causation in negligence actions).
25 See, e.g., Miller v. Cudahy Co., 592 F. Supp. 976, 984 (D. Kan. 1984) ("There is no credible evidence that indicates that any of the sal[t] presently polluting the aquifer came from any source other than American Salt.").
26 For a collection of some of the literature concerning causation problems in environmental litigation, including literature suggesting solutions to those problems, see F. ANDERSON, D. MANDELMAN & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 656 n.6 (1984).
covered that he has cancer, sues the plant in a negligence action, alleging that the plant’s improper disposal practices exposed the plaintiff to carcinogenic substances and caused his disease. Although a long latency period (i.e., the period between exposure to a disease-producing substance and the physical manifestation of the disease) is commonly associated with exposure to carcinogenic substances, the plaintiff may have difficulty proving that the exposure to the defendant’s wastes was the actual cause of his disease. The defendant may assert that during the preceding thirty years, the plaintiff was also exposed to a variety of other carcinogenic substances which singly or in combination could have caused the cancer.

Alternatively, suppose that the plaintiff’s drinking water source is an underground well. The aquifer into which the well is drilled has been contaminated by hazardous wastes that have leaked from a nearby dump site. If, as is often the case, many companies disposed of wastes at the site and the various wastes mixed together prior to leakage, the plaintiff may find it impossible to prove that any particular company’s conduct caused all or even an identifiable portion of the contamination. These difficulties will confront the plaintiff regardless of which tort cause of action he chooses.

To overcome some of these difficulties, the plaintiff can argue that the court should apply one of several doctrines first developed in product liability cases involving multiple defendants. These doctrines either lessen the plaintiff’s burden of proof of causation or shift that burden to the defendants. Under the

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88 Proof of causation may also be difficult if the time between the defendant’s conduct and the plaintiff’s exposure to the harmful substance is lengthy. For example, it may take years for toxic chemical wastes disposed of by the defendant on land or in a surface body of water to contaminate an underground source of drinking water. See TULSA Note, supra note 18, at 453.

89 The process of tracing the environmental contaminant to the dump site may itself be difficult. See Note, An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries, 12 RUTGERS L.J. 117, 139 (1980) [hereinafter cited as Note, Remedies for Hazardous Waste Injuries].


91 Similar difficulties in identifying the responsible polluter have arisen in cases seeking recovery for damage caused by acid rain. See, e.g., Crawford, The Problems of Causation in Private Legal Remedies for Damage from Acid Rain, 17 NAT. RESOURCES L. 413, 422-25 (1984); Note, Causation in Acid Rain Litigation, supra note 30, at 659.

92 See McLaren, supra note 18, at 541; Note, Causation in Acid Rain Litigation, supra note 30, at 660; Note, Judicial Attitudes Towards Legal and Scientific Proof of Cancer Causation, 3 COLUM. J. ENVTL. L. 344, 379-80 (1977). See also Note, Remedies for Hazardous Waste Injuries, supra note 29, at 142-43 (discussing Japanese courts’ use of rebuttable presumptions to shift the burden of proof in environmental exposure cases to defendants).
first of these doctrines, the concert of action theory, when the tortious acts of multiple defendants constitute a joint enterprise, each defendant is jointly and severally liable for the entire amount of the damages.  

A joint enterprise, or concert of action, may be based on express or implicit understanding between the defendants, the rendering of substantial assistance or encouragement to the activity despite knowledge that the actor is breaching a duty, or adoption of one defendant’s acts by other defendants.  

Proof of a concert of action demonstrates a joint control of the risk of harm to the plaintiff. “Where courts perceive a clear joint control of risk . . . the issue of who ‘caused’ the injury is distinctly secondary to the fact that the group engaged in joint hazardous conduct.”

A variant of the concert of action theory is industry-wide or enterprise liability. This theory, which also imposes joint and several liability on a group of

If the plaintiff is unable to provide direct evidence that the defendant caused the plaintiff’s harm and the court is unwilling to shift the burden of proof to the defendant, the plaintiff may be able to use circumstantial evidence (e.g., the relationship between the commencement of defendants’ activities and the appearance of contamination). See id. at 143 (citing Rusch v. Phillips Petroleum Co., 163 Kan. 11, 16, 180 P.2d 270, 274 (1947); Donley v. Amerada Petroleum Corp., 152 Kan. 518, 523, 106 P.2d 652, 655 (1940); Sunray Mid-Continent Oil Co. v. Tisdale, 366 P.2d 614 (Okla. 1961)).

See, e.g., Hall v. E.I. Du Pont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972); Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982). The Kansas courts imposed joint and several liability in several pollution cases involving causes of action that accrued before July 1, 1974. See, e.g., Atkinson v. Herington Cattle Co., 200 Kan. 298, 313, 436 P.2d 816, 827 (1968) (“When two or more persons, by their concerted action, pollute a stream, to the injury of another through whose land the stream flows, they are jointly and severally liable for the wrongdoing, and the injured party may, at his option, institute an action, and recover against one or all of those contributing to his injury.”); Polzin v. National Coop. Refinery Ass’n, 175 Kan. 531, 537, 266 P.2d 293, 298 (1954); McDaniel v. City of Cherryvale, 91 Kan. 40, 42, 136 P. 899, 899-900 (1913). See also City of Kansas City v. Slangstrom, 53 Kan. 431, 437, 36 P. 706, 709 (1894) (joint and several liability appropriate when two or more parties, by their concurrent wrongdoing, cause injury to the plaintiff); W. PROSSER & W. KEETON, supra note 24, § 88B, at 634 (when damage caused by more than one defendant is incapable of any practical division, those defendants will be jointly and severally liable for the entire loss in a nuisance action). These Kansas cases, however, involved situations in which the Court apparently was convinced that each defendant contributed in part to the plaintiff’s injury. When a party’s causal connection to the injury cannot be established, the Kansas courts may be more reluctant to impose joint and several liability.

Moreover, the Kansas legislature abolished joint and several liability in negligence causes of action arising after July 1, 1974, replacing such liability with a system of individual judgments based upon proportional fault. See KAN. STAT. ANN. § 60-258a(d) (1983). See also Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978); Miles v. West, 224 Kan. 284, 580 P.2d 876 (1978). The statute also has been applied in other nonintentional tort cases. See Westerbeke, Survey of Kansas Law: Torts, 33 Kan. L. Rev. 1, 28 (1984). The effect of the Kansas statute on joint and several liability is discussed infra at notes 43-57 and accompanying text. Cf. RESTATEMENT, supra note 19, § 840E, comment b (if one defendant can demonstrate that an identifiable portion of the harm was caused by that defendant, liability should be apportioned on the basis of the contribution of that party).


defendants, has been applied in product liability cases in which several companies producing the same product embrace an inadequate standard of care in product safety. Since each company adheres to that standard, each perpetuates the production of unsafe goods. If one of those goods injures the plaintiff, each defendant has contributed to the injury by embracing the tortious standard. To prevail, the plaintiff must prove that he has suffered an injury resulting from a business-generated risk, and that the risk can be best ascertained and avoided by the members of the industry working together or through industry trade associations. A court might be willing to apply this theory in a suit in which the plaintiff has been injured as a result of exposure to environmental pollutants generated by several dischargers, where all the dischargers adhered to the same inadequate standard of care in controlling their emissions. The principal case adopting this theory, however, involved defendants who were members of a trade association. Absent such a clear relationship among the defendants, a court might be more reluctant to impose enterprise liability.

If the plaintiff cannot produce evidence that a group of companies whose discharges contributed to his injury reached an agreement or adopted a common level of emissions, he still might be able to demonstrate causation under a theory of alternative liability. This theory, which also originated in product liability cases, has been applied in cases in which, while the plaintiff's injury may have resulted from the conduct of only one of several defendants, the court finds it impossible to identify which defendant was responsible. In these circumstances, the courts have shifted the burden of proof of causation to the group of defendants, any one of whom could have caused the injury, rather than forcing the innocent plaintiff to bear that burden. Any defendant that is unable to identify the cause of the harm, or to prove that its conduct did not have caused the plaintiff's injury, will be liable jointly and severally. A similar theory of liability has been applied in nuisance cases involving injury resulting from pollution.

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88 See id.; Note, Pollution Share Liability, supra note 34, at 310.
87 See Hall, 345 F. Supp. at 353; Note, Causation in Acid Rain Litigation, supra note 30, at 673.
86 But see Note, Pollution Share Liability, supra note 34, at 311 (suggesting that it is unlikely that all of the defendants will have agreed to a common level of emissions, that the courts might refuse to apply the theory when numerous defendants are involved, and that the theory could be unfair to those defendants whose probable contribution to the plaintiff's injury was minimal).
85 See Hall, 345 F. Supp. at 353.
82 See Michie v. Great Lakes Steel Div., 495 F.2d 213 (6th Cir.) (under Michigan law, three corporate defendants, whose independent actions in operating seven plants resulted in the emission of air pollutants constituting a nuisance, were held jointly and severally liable for plaintiffs' injuries, even though the pollutants mixed in the air so that the separate effects of each defendant in creating the individual injuries were impossible to determine), cert. denied, 419 U.S. 997 (1974); Velsicol Chemical Corp. v. Rowe, 543 S.W.2d 337 (Tenn. 1976); St. Helen's Smelting Co. v. Tip-
Each of the preceding theories results in joint and several liability among a group of defendants. The availability of these theories to Kansas plaintiffs may depend upon the application of the Kansas comparative negligence statute.43 The Kansas judiciary has ruled that one of the statute’s provisions44 abolished joint and several liability in negligence actions.45 The statute creates instead an individual judgment system under which each defendant is liable only for its proportionate fault share of liability.46 The Kansas courts have also interpreted the statute to abolish joint and several liability in other tort causes of action, such as strict products liability.47 In actions that the statute covers, then, the plaintiff may be unable to overcome causation obstacles by relying upon theories of recovery involving joint and several liability.

The Kansas courts have stated, however, that the comparative negligence statute, including its abolition of joint and several liability, does not apply to intentional tort cases like private nuisance.48 Moreover, plaintiffs can argue that in certain instances the statutory prohibition of joint and several liability should also not apply in nonintentional tort cases. Suppose, for example, that in the hypothetical case discussed above,49 the plaintiff identifies all of the companies that disposed of waste at the leaking dump site. The plaintiff names as a defendant, however, only the one company that is solvent. The defendant is entitled under the Kansas statute to join as additional defendants the insolvent entities if their “causal negligence . . . contributed to” the plaintiff’s injury.50 The Kansas Supreme Court has held that under the individual judgment provision of the Kansas statute, a court can deem immune, unavailable, and unknown tortfeasors as “parties against whom recovery is allowed” for the ping, 11 Eng. Rep. 1483 (H.L. 1865) (discussed in Coquillette, Mosses From an Old Manse: Another Look at Some Historic Property Cases About the Environment, 64 Cornell L. Rev. 761, 787 n.139 (1979)).


44 Subsection (d) of the statute provides:
Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of his or her causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

Id. § 60-258a(d). The statute also permits the defendant in a negligence action to join as additional defendants “any other person whose causal negligence is claimed to have contributed” to the plaintiff’s injury. See id. § 60-258a(c). The statute does not apply to causes of action that accrued prior to July 5, 1974. See id. § 60-258b.


47 See id. at 28 and cases cited therein.


49 See supra notes 29-31 and accompanying text.

limited purpose of determining the proportional fault of an actual defendant. If this rationale also applies to insolvent tortfeasors, the burden of insolvency shifts from the one solvent tortfeasor to the innocent plaintiff. This result seems inconsistent with the purpose of the comparative negligence statute, which is to apportion losses on the basis of the proportionate fault of all parties to the injury-causing occurrence, not to burden an innocent plaintiff with the responsibility for the tortious conduct of an insolvent defendant. The plaintiff could argue that the legislature did not intend to remove the unfairness of requiring one tortfeasor to compensate fully for a harm that it only partially caused, if the application of the individual judgment rule would impose at least as great an undeserved hardship on the blameless plaintiff. Such a narrow construction of the statute would preserve the common law theory of joint and several liability in this limited situation.

Finally, a narrow interpretation of the individual judgment provision also may be appropriate where the individual defendants are related to one another and share a common legal obligation to the plaintiff. It may be perfectly appropriate to force one defendant, acting in concert with another, to bear the consequences of the latter's tortious conduct. The policy of the individual judgment provision is to avoid the harsh result of making one tortfeasor responsible for more than his proportionate share of fault. This policy arguably does not apply to a case in which, because of concerted action or other similar conduct, each defendant fairly can be deemed responsible for the entire harm. This argument would support the preservation of joint and several liability in both concert of action and enterprise liability cases.

Even if the Kansas individual judgment rule bars joint and several liability, the plaintiff may be able to overcome causation obstacles that multiple defendant cases pose. One final theory for shifting the burden of proof of causation to a group of multiple defendants, the market share liability theory, stems from the California Supreme Court's decision in Sindell v. Abbott Laboratories. That case involved a group of pharmaceutical companies that together

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83 See id. at 29.
85 See id.
86 See supra note 53 and accompanying text.
87 The latter theory arguably involves defendants who should be held responsible for the tortious conduct of others, since it requires that the plaintiff prove that the risk of harm could have been avoided by the various defendants working together, perhaps through a trade association. See supra note 37 and accompanying text.
88 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980). For a partial bibliography of the literature concerning Sindell, see F. Anderson, D. Mandelker & A. Tarlock, supra note 26, at 646 n.6. See also W. Prosser & W. Keeton, supra note 24, § 103, at 714. For a discussion of the potential for applying Sindell in the context of suits arising from pollution-causing activities, see Note, Causation in Acid Rain Litigation, supra note 30, at 675-76; Note, Pollution Share Liability, supra note 34, at 312-14.
had manufactured ninety percent of a drug, diethylstilbestrol (DES), designed to prevent miscarriages. The plaintiff, who had developed cancer as a result of exposure to DES in utero, proved that her disease was attributable to her exposure to the drug and to the negligent failure of all the defendant companies to test the drug adequately and warn of its potential ill effects. She could not establish, however, which company produced the particular product to which she had been exposed. The court did not impose joint and several liability on the defendants. Rather, it made each company liable for the proportion of the plaintiff’s damages equal to that defendant’s share of the DES market, unless the defendant could prove that its product could not have caused the plaintiff’s injury. Application of the market share liability concept to pollution control cases might be difficult, since it would be harder to demonstrate a particular defendant’s share of the pollution “market” than to establish the market share of a particular product. If such shares could be established, however, the imposition of liability based on market shares would be consistent with the individual judgment provision of the Kansas statute because each defendant would be responsible only for its proportionate share of the harm. By shifting the burden of proving nonculpability to the defendants, this theory would alleviate the harshness to the plaintiff caused by the traditional requirement that he attribute an identifiable portion of his injury to each defendant.

II. NUISANCE AND TRESPASS

A. Nuisance

Courts and legal scholars have agreed that the term “nuisance” is incapable of any exact or comprehensive definition. The confusion that the term has

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generated stems in part from its use in three different senses: to denote an activity or physical condition that is harmful or annoying to others; to denote the harm caused by that activity or condition; or to denote both the activity or condition and the resulting harm, along with the legal liability that arises from the combination of the two. The Kansas courts, following the Restatement position, use the term nuisance to refer to a particular kind of harm rather than to any particular kind of conduct that produces that harm. Nuisance is a field of tort liability and refers to the invasion of a legally protected interest. That invasion, however, does not result in liability unless the conduct causing it falls within one of the traditional categories of tort liability (intentional tort, negligence, or strict liability).

Because the plaintiff in a nuisance action can prevail only if he demonstrates culpable conduct by the defendant under one of the traditional bases of tort liability, the Restatement treats intentional and unintentional nuisances separately. Some have suggested, however, that the distinction does little to facilitate the analysis in a nuisance case. Both kinds of nuisance cases require the plaintiff to prove some of the same elements, such as significant harm resulting from the defendant’s conduct. The Restatement itself acknowledges that liability for both intentional and negligent nuisances is premised upon a similar balancing process. The purpose of this balancing process is to determine, in the former instance, whether the intentional invasion of the plaintiff’s interest is unreasonable, and in the latter instance, whether the defendant’s conduct created an unreasonable risk of harm. This Article, therefore, places less em-


71 See RESTATEMENT, supra note 19, § 822.

72 See, e.g., F. ANDERSON, D. MANDELKER & A. TARLOCK, supra note 26, at 632.

73 See RESTATEMENT, supra note 19, § 821F. See also infra notes 97-102, 145 and accompanying text.

74 See RESTATEMENT, supra note 19, § 822 comment k, at 114. The Restatement indicates that although strict liability resulting from an abnormally dangerous activity does not focus on whether the defendant’s conduct was “unreasonable,” liability for nuisances based on both negligence and strict liability involves a similar balancing of conflicting factors. See id. at 115.

75 See id. at 114.
phasis than the *Restatement* on the distinction between intentional and unintentional nuisances. It focuses instead on the rules governing intentional nuisances, but identifies those areas in which the analysis of an unintentional nuisance case differs.\(^78\) Finally, the Article briefly explores in a separate section the requirements for liability in a traditional negligence suit or action based on principles of strict liability.\(^77\)

Even where the courts agree that the term "nuisance" refers to a particular kind of harm, which creates liability only if the defendant's conduct is otherwise tortious, they have had difficulty in defining the types of harms or invasions that can create nuisance liability. This difficulty is in part attributable to the fact-sensitive nature of nuisance cases. Since "the precise application of fixed rules is seldom appropriate,"\(^78\) the precedential value of nuisance cases is not high.\(^79\) The precedential value of Kansas nuisance cases is especially difficult to assess because the Kansas courts often have failed to recognize that nuisance encompasses two fields of tort liability, each of which involves the invasion of a different kind of interest. A private nuisance involves the invasion of a person's interest in the private use and enjoyment of land.\(^80\) Since this invasion must result from conduct on the defendant's land, private nuisance is concerned with competing land uses. A public nuisance, by contrast, is the unreasonable interference with a right common to the general public (such as the public health, safety, peace, comfort, or convenience).\(^81\) Although the early Kansas decisions distinguished between public and private nuisances,\(^82\) the courts soon began to blur the distinction.\(^83\) It was not until 1973 that the Kansas Supreme Court finally took note of the "intermingling of these con-

\(^78\) One area where the distinction may be significant already has been discussed. The Kansas individual judgment statute, Kan. Stat. Ann. § 60-258a(d) (1983), has been interpreted to abolish joint and several liability for unintentional but not for intentional torts. See *supra* notes 43-47 and accompanying text.

\(^77\) See *infra* Part III.


\(^80\) *Restatement,* *supra* note 19, § 821D.

\(^81\) *Id.* § 821B.

\(^82\) See, e.g., Venard v. Cross, 8 Kan. 172, 176 (1871) (recognizing, however, that an injury can create both a public and a private nuisance at the same time); City of Burlington v. Stockwell, 5 Kan. App. 569, 573-74, 47 P. 988, 989-90 (1897).

\(^83\) For example, in City of Kansas City v. Sihler Hog Cholera Serum Co., 87 Kan. 786, 125 P. 70 (1912), the court stated in a public nuisance action that "[t]he underlying doctrine of the law of nuisance is that one shall not be permitted to use his own property so as to injure another." *Id.* at 789, 125 P. at 71. See also State v. Stillwell, 114 Kan. 808, 809, 220 P. 1058, 1059 (1923). In Dryden v. Purdy, 97 Kan. 59, 154 P. 221 (1916), the court relied on a series of public nuisance cases to resolve the issue of whether the plaintiff in a private nuisance action had shown a sufficient "special damage or inconvenience," beyond that suffered by the general public, to prevail in an abatement action. *Id.* at 59, 154 P. at 221-22. The requirement that the plaintiff allege such a "special injury" is normally associated with public nuisance actions. See *infra* notes 151-58 and accompanying text. In Hofstetter v. Myers, Inc., 170 Kan. 564, 228 P.2d 522 (1951), in what appears to be a private nuisance action, the court failed to indicate whether it was employing public or private nuisance doctrine. As recently as 1970, the court cited a series of public nuisance cases in holding that the plaintiffs should not prevail in a private nuisance action. See Baldwin v. City of Overland Park, 205 Kan. 1, 4-6, 468 P.2d 168, 170-72 (1970).
cepts in our cases down through the years” and attempted to draw a clear distinction between the two categories of nuisances. As a result, the jungle of Kansas nuisance law is unusually impenetrable.

1. Private Nuisance

a. Invasion of an interest in real property

A private nuisance is an invasion of a person’s interest in the private use and enjoyment of land resulting from the defendant’s use of his land. The private nuisance cause of action is based on the notion that a property owner is obligated to use his land in a manner that will not unreasonably interfere with his neighbor’s right to use his land. A plaintiff in a private nuisance action must therefore demonstrate a legally protected interest in real property. A defendant can interfere with a person’s interest in the use and enjoyment of land through the imposition of physical harm to the land itself or to tangible things (such as crops) on the land. If one person, for example, discharges pollutants on his own property, causing the contamination of the surface or ground water of his neighbor, he has invaded his neighbor’s interest in the use and enjoyment of his land. If a defendant’s emissions of smoke, dust, or gas into the air interfere with the occupant’s comfort and convenience in using the land, a nuisance may exist. In certain situations, a plaintiff can base a private nuisance action on personal injuries suffered during his attempt to use and enjoy his land, such as a disturbance of his health. Although the Restatement dis-

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“There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’” W. Prosser & W. Keeton, supra note 24, § 86, at 616.


See Restatement, supra note 19, § 821E. Those entitled to sue in a private nuisance suit include not only the owner of the land, but the possessor, and the holder of an easement or profit.

Id.

W. Prosser & W. Keeton, supra note 24, § 87, at 619. Cf. McLaren, supra note 18, at 529 (“it is well established in Anglo-Canadian jurisprudence that if the plaintiff has suffered tangible physical damage to his property then liability follows more or less automatically.”).

See Miller v. Cudahy Co., 592 F. Supp. 976, 1004 (D. Kan. 1984); Restatement, supra note 19, § 832 & comment e, illustrations 1-3.


See W. Prosser & W. Keeton, supra note 24, § 87, at 619.

Miller v. Cudahy Co., 592 F. Supp. 976, 1004 (D. Kan. 1984); Culwell v. Abbott Constr. Co., 211 Kan. 359, 362, 506 P.2d 1191, 1196 (1973) (stating, however, that a plaintiff who has suffered personal injury but does not have any interest in land will not prevail in a private nuisance action); W. Prosser & W. Keeton, supra note 24, § 87, at 620. The fact that the defendant’s activity causes harm to many people in the use of
agrees, many courts, including the Kansas Supreme Court, have concluded that a nuisance may even result from the disturbance of a property holder's peace of mind. Under this view, a hazardous waste disposal site might constitute a nuisance to neighboring landowners who fear that living near the dump will cause them to develop cancer.

b. Substantial harm

To prevail in a private nuisance action, the plaintiff must demonstrate not only that the defendant caused an interference with his protected property interest, but also that the interference resulted in significant or substantial harm. This requirement distinguishes a nuisance from a trespass action, since the latter requires no proof of any actual harm. A measurable economic loss, such as a decline in market or rental value of the land, caused by physical damage to the plaintiff's land will probably constitute substantial harm. In a jurisdiction like Kansas that acknowledges that the imposition of physical discomfort or mental annoyance may constitute a sufficient invasion of property rights, the plaintiff would have to prove in addition that the harm was substantial. An activity that impairs the physical health of nearby residents, however, such as the operation of a leaking hazardous waste disposal site, will

their property does not force the injured persons to sue in public rather than private nuisance. See Buckmaster v. Bourbon County Fair Ass'n, 174 Kan. 515, 519, 256 P.2d 878, 881 (1953).

See Restatement, supra note 19, § 821D comment b (the interest in freedom from emotional distress is purely an interest of personality and is not protected under the law of nuisance).


See, e.g., W. Prosser & W. Keeton, supra note 24, § 87, at 620, and cases cited id. at nn.17-19.


Traditionally, the courts have required that the interference must continue or recur over some period of time to give rise to a nuisance. See Restatement, supra note 19, § 821F comment g. The Kansas courts purport to adhere to this requirement. See Culwell v. Abbott Constr. Co., 211 Kan. 359, 365, 506 P.2d 1191, 1196-97 (1973). Cf. Slay v. Board of Educ., 213 Kan. 415, 419, 516 P.2d 895, 899 (1973) (public nuisance case); Keese v. Board of County Comm'rs, 177 Kan. 706, 708, 281 P.2d 1089, 1091 (1955) (public nuisance case). The Restatement suggests, however, that this requirement is not a categorical one, and that if the defendant's interference with the plaintiff's property rights causes significant harm and his conduct is otherwise actionable, "liability will result, however brief in duration the interference or harm may be." Restatement, supra note 19, § 821F comment g.

See infra note 203 and accompanying text.

W. Prosser & W. Keeton, supra note 24, § 88, at 627.

See supra notes 95-96 and accompanying text.

Restatement, supra note 19, at § 821F comment d; W. Prosser & W. Keeton, supra note 24, § 88, at 627. The standard for determining whether an invasion is significant is whether persons of normal sensibilities would regard the invasion as seriously offensive or annoying. See McMullen v. Jennings, 141 Kan. 420, 425, 41 P.2d 753, 755 (1935); Restatement, supra note 19, § 821F comment d, at 105-06.
almost certainly constitute a significant intrusion.\textsuperscript{102}

\textbf{c. Standard of care}

A plaintiff seeking to establish an intentionally caused private nuisance need not prove that the defendant’s polluting activities were motivated by malice or ill will toward the plaintiff to demonstrate intent.\textsuperscript{103} The Kansas courts have adopted the Restatement position, which holds that an invasion is intentional if the actor either acts for the purpose of causing it or knows that it is resulting or is substantially certain to result from his conduct.\textsuperscript{104} A company discharging pollutants will rarely act with the purpose of harming nearby residents. If the defendant’s operations produce continuous discharges, however, an injured plaintiff will often be able to prove that the defendant knew that its discharges were causing harm, especially if the plaintiff informed the defendant of the injury and the defendant continued to discharge.\textsuperscript{105} Where the defendant acts in the absence of such knowledge, it becomes harder to label the defendant’s conduct intentional. Consider for example, a case in which the plaintiff’s injury results from exposure to a single, nonrecurring act by the defendant. The defendant disposed of liquid chemical wastes at a landfill only once. Years later, the landfill containing the defendant’s wastes begins to leak. The wastes leach into an underground water source and contaminate a drinking water well on the plaintiff’s property. The plaintiff may find it difficult to establish that the defendant knew that its disposal was substantially certain to cause this contamination.\textsuperscript{106} Even if the plaintiff can prove such knowledge, however, he has proven merely that the defendant knew its activities would create a risk of harm. The traditional cause of action involving a defendant’s failure to avoid a foreseeable risk of harm to others is negligence. It may be appropriate, therefore, to treat this situation as a nuisance based on negligent rather than inten-

\textsuperscript{102} See Ginsberg & Weiss, supra note 18, at 884.


\textsuperscript{104} Sandifer, 6 Kan. App. 2d at 316-17, 628 P.2d at 247 (quoting \textit{Restatement}, supra note 19, § 825).

\textsuperscript{105} See W. Prosser & W. Keeton, supra note 24, § 87, at 625; McLaren, supra note 18, at 521-22; Prosser, \textit{Nuisance Without Fault}, 20 Tex. L. Rev. 399, 416 (1942); \textit{Restatement}, supra note 19, § 825 comment d (in cases involving continuing or recurring invasions, “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”); id. illustrations 2-4; id. § 832 comment f; id. § 839 comment f, illustration 2.

\textsuperscript{106} See Ginsberg & Weiss, supra note 18, at 885; \textit{Restatement}, supra note 19, § 832 comment f (“[i]nvasions resulting from the pollution of subterranean waters . . . are ordinarily not intentional in the first instance since the course of the waters is usually unknown and the actor can thus foresee no more than a risk of harm in most cases.”) \textit{But see} Miller v. Cudahy Co., 592 F. Supp. 976, 994-98, 1006-1007 (D. Kan. 1984) (salt manufacturing company and its president knew that the company’s activities would result in subsurface contamination of water beneath surrounding properties); Comment, \textit{Private Nuisance Approach}, supra note 66, at 105 (citing increasing evidence that some chemical manufacturers did know at the time of disposal that an invasion of surrounding property would result and that the invasion would threaten the health of nearby residents). As experience with various methods of hazardous waste disposal increases, the foreseeability of an invasion of surrounding property may also increase, thereby facilitating the plaintiff’s attempt to prove the defendant’s knowledge of harm.
tional conduct. As long as the Kansas courts adhere to the Restatement definition of intent, however, the plaintiff in this type of case should probably plead in the alternative, and allege liability for both intentional and negligent nuisance. In the first cause of action the plaintiff will assert that the inter-

107 See supra note 104 and accompanying text.


A nuisance may also be based upon the application of rules governing strict liability. See Culwell v. Abbott Constr. Co., 211 Kan. 359, 364, 506 P.2d 1191, 1196 (1973) ("[A] nuisance may result from conduct which is intentional or negligent or conduct which falls within the principle of strict liability without fault."); Sandifer Motors, Inc. v. City of Roeland Park, 6 Kan. App. 2d 308, 315, 628 P.2d 239, 245 (1981); Restatement, supra note 19, § 822(b) & comments b-k. The Kansas cases have also referred to absolute nuisances, or nuisances per se, as opposed to a nuisance in fact, or a nuisance per accidens. A nuisance per se is "an act, instrument, or structure in [sic] which is a nuisance at all times and under any circumstances. A nuisance per accidens or nuisance in fact is an act, instrument, or a structure which becomes a nuisance by reason of surrounding circumstances." Vickridge Homeowners Ass'n v. Catholic Diocese, 212 Kan. 348, 355, 510 P.2d 1296, 1302 (1973). This distinction is a confusing and virtually useless one. First, in those jurisdictions, including Kansas, that use the term "nuisance" to describe a kind of harm, see supra notes 67-70 and accompanying text, the mere fact that a nuisance exists does not mean that the defendant who caused it is liable. See Restatement, supra note 19, § 821A comments b-c. The defendant responsible for causing the nuisance is liable only if the interference is intentional and unreasonable, or unintentional and actionable under negligence or strict liability principles. So labelling a particular harm a "nuisance per se" indicates nothing about the liability of the person causing it. Second, various jurisdictions have used the term "nuisance per se" (sometimes called an absolute nuisance) in several different ways. An "absolute" nuisance may mean that any intentional interference with certain property rights is actionable. See W. Prosser & W. Keeton, supra note 24, § 88C, at 636. If the Kansas courts are using the term nuisance per se in this sense, then they have failed to explain what property rights are entitled to such absolute protection. Other courts use the term absolute nuisance to refer to an activity which will inevitably result in an unreasonable and therefore actionable interference with property rights under any circumstance. Id. at 636-37. The Kansas courts should not use the term nuisance per se in this sense, since a nuisance per se would refer to the defendant's conduct, whereas Kansas generally purports to define a nuisance as a type of harm. This indiscriminate use of the term nuisance is part of the reason for the confusion that has grown up around the term. Restatement, supra note 19, § 821A comments b-c. A third use of the term absolute nuisance refers to an activity engaged in at such a place that it must be deemed unreasonable, regardless of the care exercised by the defendant engaged in that activity. W. Prosser & W. Keeton, supra note 24, § 88C, at 637. A fourth meaning of absolute nuisance is abnormally dangerous conduct resulting in liability without fault for the harm caused. Id. The last two uses of the term are subject to the same criticism applicable to the second use. See id. ("the use of the term 'nuisance' to describe the tort liability that sometimes results from accidental invasions produces too much confusion."). The third reason that the distinction between a nuisance per se and a nuisance per accidens should be abandoned in Kansas is that the Kansas courts always conclude (at least when the defendant is engaged in a lawful business) that the defendant's activity is not a nuisance per se. The courts then proceed to analyze the surrounding circumstances under the balancing test, discussed infra at notes 113-126 and accompanying text, to determine if the invasion caused by the defendant's conduct is reasonable. See, e.g., Hazlett v. Maryland Refining Co., 30 F.2d 808, 809 (1929); Miller v. Cudahy Co., 592 F. Supp. 976, 1004 (D. Kan. 1984); Adama v. City of Arkansas City, 188 Kan. 391, 400, 362 P.2d 829, 837 (1961); Dill v. Excel Packing Co., 183 Kan. 513, 519-21, 331 P.2d 639, 545 (1958); Basham v. Eureka Locker & Cold Storage, Inc., 164 Kan. 119, 121-22, 187 P.2d 500, 502 (1947). The courts would do better to eliminate the notion of a nuisance per se and simply determine whether the invasion is intentional (and if so unreasonable)
ference with the use and enjoyment of his property was unreasonable. In the second, he will assert that the defendant's conduct created an unreasonable risk of harm.109 Although the court will employ a similar balancing analysis to resolve both causes of action,110 the available defenses and the allocation of responsibility among multiple defendants may turn on which basis for nuisance liability is chosen.111

d. Unreasonable interference

A person who intentionally invades another's interest in the private use and enjoyment of land is liable in damages in a private nuisance action if that invasion is unreasonable.112 The finder of fact assesses the reasonableness of the invasion on a case by case basis.113 This inquiry is similar to the assignment in a negligence action of the obligation to protect against the risk that the defendant's conduct will harm the plaintiff.114 The requirement that the plaintiff demonstrate substantial harm appears to reflect the courts' desire to discourage the initiation of trivial lawsuits. The additional requirement that the interference be unreasonable reflects the need to decide whether the plaintiff or the defendant should bear the loss. According to the Restatement, an intentional invasion is unreasonable if either the gravity of the harm to the plaintiff outweighs the utility of the defendant's conduct, or the harm that the conduct causes is serious and the financial burden of compensating for this and similar harm to others would not render it infeasible for the defendant to continue the activity.115

The Kansas cases apply both parts of the Restatement test for reasonableness. Certain types of harm are so serious that an intentional invasion which produces those harms is unreasonable regardless of the utility of the defen-

109 See Restatement, supra note 19, § 822 comment k, at 115 (“for conduct to be found negligent and therefore to constitute a private nuisance it must involve an unreasonable risk of an unreasonable invasion of another's interest in the use and enjoyment of land. Reckless conduct is subject to similar analysis.”); F. Anderson, D. Mandelker & A. Tarlock, supra note 26, at 632. See also supra note 75 and accompanying text.

110 See supra note 74 and accompanying text.

111 See, e.g., supra notes 43-48 and accompanying text.

112 See Sandifer Motors, Inc. v. City of Roeland Park, 6 Kan. App. 2d 308, 312, 628 P.2d 239, 243 (1981); W. Prosser & W. Keeton, supra note 24, § 87, at 623, § 88, at 626, 629-30; Restatement, supra note 19, § 822(a). Cf. Dill v. Excel Packing Co., 183 Kan. 513, 520, 331 P.2d 539, 545 (1958) (nuisance doctrine operates as a restriction on the rights of property owners engaged in “the unreasonable, unwarrantable, or unlawful use” of their property); Helms v. Eastern Kansas Oil Co., 102 Kan. 164, 167, 169 P. 208, 209 (1917) (person must use his property so as not to unreasonably interfere with the health or comfort of his neighbors in their use of property). In a nuisance action based on the defendant's negligent conduct, the plaintiff must show that the defendant breached an obligation to protect the plaintiff against an unreasonable risk of harm. The meaning of “reasonableness” in this context is discussed infra at notes 301-313 and accompanying text.


114 But cf. W. Prosser & W. Keeton, supra note 24, § 88, at 629 (in intentional nuisance action, the invasion may be unreasonable even if the defendant's conduct is reasonable).

115 See Restatement, supra note 19, § 826.
dant’s conduct. Normally, however, the court determines reasonableness by balancing the gravity of the harm that the plaintiff suffered against the utility of the defendant’s conduct. The gravity of the harm depends upon the extent and character of the harm involved, the social value of the use invaded, the suitability of the plaintiff’s use to the character of the locality.

116 See id. § 829A and comment b. A court is particularly likely to reach this conclusion when the plaintiff’s harm is physical in character. Id. The Restatement provides the following example: “A’s smelter produces sulphurous fumes that waft over B’s adjoining farm, killing some of his crops and severely damaging others. A’s invasion is unreasonable.” Id., illustration 2. This result may be justified on the ground that A’s activity involved the continuous emission of pollutants which A knew would cause or was substantially certain to harm B. See supra note 105 and accompanying text. It is not clear, however, why the defendant should always bear the loss of this foreseeable harm to the plaintiff’s interests, unless the defendant’s conduct is of the kind for which strict liability is appropriate. The principles governing strict liability are discussed infra at notes 319-339 and accompanying text. Cf. Kansas Zinc Mining & Smelting Co. v. Brown, 8 Kan. App. 802, 57 P. 304 (1899) (the court appears to have assessed damages against a zinc smelter whose gaseous and particulate emissions partially destroyed the plaintiff’s land and crops, without regard to the utility of the smelter’s operations); Phillips v. Empire Oil & Refining Co., 131 Kan. 516, 517, 292 P. 782, 783 (1930) (“There is and can be no controversy over the proposition that anyone sustaining substantial injury to his live stock by the pollution of a stream flowing through his pasture from which the live stock drank the polluted water may maintain an action against the party causing the pollution and recover any actual damages thereby sustained.”); Note, Internalizing Externalities: Nuisance Law and Economic Efficiency, 53 N.Y.U.L. Rev. 219, 236 (1978).

117 See, e.g., McMullen v. Jennings, 141 Kan. 420, 425, 41 P.2d 753, 755 (1935) (“If, in view of all the circumstances of the case, including the character of the community, the location, the social interest in the activities complained of, the extent and nature of the harm to the plaintiff, the pollution of air is not unreasonable, there is no nuisance although there may be some casual damage to adjoining property holders.”); Berry v. Shell Petroleum Co., 140 Kan. 94, 102, 33 P.2d 953, 958 (1934) (“We consider that the water supply of the people is of greater importance than the operation of a business at reduced cost.”). See also Gilbert v. Davidson Constr. Co., 110 Kan. 298, 301, 203 P. 1113, 1115 (1922); Phillips v. Lawrence Vitrified Brick & Tile Co., 72 Kan. 643, 82 P. 787 (1905); Sandifer Motors, Inc. v. City of Roeland Park, 6 Kan. App. 2d 308, 310, 628 P.2d 239, 242 (1981).

118 Although the Restatement lists the five factors referred to in the text as important components of the gravity of the harm, see RESTATEMENT, supra note 19, § 827, the Restatement’s list does not purport to be exhaustive. Id. comment b.

119 See Vickridge Homeowners Ass’n v. Catholic Diocese, 212 Kan. 348, 355, 510 P.2d 1296, 1302 (1973); Dill v. Excel Packing Co., 183 Kan. 513, 520, 331 P.2d 539, 545 (1958); McMullen v. Jennings, 141 Kan. 420, 424, 41 P.2d 753, 755 (1935); Helms v. Eastern Kansas Oil Co., 102 Kan. 164, 167, 169 P. 208, 209 (1917); Sandifer Motors, Inc. v. City of Roeland Park, 6 Kan. App. 2d 308, 310, 628 P.2d 239, 242 (1981). The extent of the harm depends both on its degree of interference with the plaintiff’s use and enjoyment of land and on its duration. See RESTATEMENT, supra note 24, § 827 comment c. The court can consider not only harm suffered by the plaintiff, but also harm suffered by or threatened against other persons. Id. Physical damage is likely to be considered a more serious harm than personal discomfort in the use and enjoyment of land. See id. comment d; W. Prosser & W. Keeton, supra note 24, § 88, at 627. Cf. Miller v. Cudahy Co., 592 F. Supp. 976, 1006 (D. Kan. 1984) (plaintiffs failed to prove entitlement to damages for stress, aggravation, and mental anguish). Damage to health, however, will probably be considered a very serious harm. See Comment, Private Nuisance Approach, supra note 66, at 106.

120 See McMullen v. Jennings, 141 Kan. 420, 424, 41 P.2d 753, 755 (1935); Berry v. Shell Petroleum Co., 140 Kan. 94, 98, 33 P.2d 953, 958 (1934). One of the components of the utility of the defendant’s conduct is the social value of the primary purpose of the defendant’s activity. See RESTATEMENT, supra note 19, § 828(a). Accordingly, the balancing process involved in determining the reasonableness of the interference will tend to reflect the values society places on the conflicting uses of the parties to a nuisance action at the time the suit is decided. Many courts and com-
and the burden on the plaintiff of avoiding the harm.182 The utility of the defendant's conduct depends on the social value of the primary purpose of that conduct,183 the suitability of the conduct to the character of the locality,184 and the impracticality of preventing or avoiding the invasion.185 The order in which the conflicting uses commenced is also relevant in determining the reasonableness of the interference.186 The use of this ad hoc balancing of factors obviously

mentators have recognized that the courts resolve nuisance cases "according to the wisdom of the day, . . . [recognizing] that the contemporary view of public policy shifts from generation to generation." Antonik v. Chamberlain, 81 Ohio App. 465, 475, 78 N.E.2d 752, 759 (1947). It has been argued that the American courts' desire to promote industry in the nineteenth and early twentieth centuries prompted them to alter the English nuisance doctrine to the benefit of defendants, for example, by incorporating notions of fault. See, e.g., M. Horowitz, The Transformation of American Law 1780-1860 (1977); Coquellite, supra note 42, at 779, 793; Furrow, supra note 27, at 1441 n.171; Comment, Private Nuisance Approach, supra note 66, at 103; Buff. Note, supra note 27, at 551 n.101; Carpenter v. Double R Cattle Co., 105 Idaho 320, 669 P.2d 643, 646-48, 653-54 (Ct. App. 1983). Some of the early Kansas nuisance cases appear to reflect this pro-development bias. See, e.g., Phillips v. Lawrence Vitrified Brick & Tile Co., 72 Kan. 643, 82 P. 787 (1905); Atchison, T. & S.F. Ry. v. Armstrong, 71 Kan. 366, 80 P. 978 (1904). See also Hazlett v. Maryland Refining Co., 30 F.2d 808 (8th Cir. 1929). More recently, with the growing recognition of the dangers to health caused by environmental pollution, the courts in some cases have placed a greater emphasis upon the plaintiffs' (and society's) right to an unpolluted environment. See, e.g., Miller v. Cudahy Co., 592 F. Supp. 976, 1001 (D. Kan. 1984). See also Miller v. Cudahy Co., 567 F. Supp. 892, 906 (D. Kan. 1983) (discussing the significance of "the dynamic and evolving nature of tort law"); Juergensmeyer, Control of Air Pollution through the Assertion of Private Rights, 1967 Duke L.J. 1126, 1147.


182 The Restatement asserts that this factor is rarely decisive. See Restatement, supra note 19, § 827 comment i.

183 See, e.g., Atchison, T. & S.F. Ry. v. Armstrong, 71 Kan. 366, 372, 80 P. 978, 980 (1905) (recognizing that railroads are a public necessity). Cf. State v. City of Concordia, 78 Kan. 250, 96 P. 487 (1908) (in public nuisance case, the court noted that city sewage disposal was a serious problem which might require the imposition of inconvenience and discomfort on some persons).

184 See supra note 121.

185 See Restatement, supra note 19, § 828. The defendant's conduct may be deemed unreasonable if the defendant is more capable than the plaintiff of absorbing the loss required to avoid the harm. See W. Prosser & W. Keeton, supra note 24, § 88, at 630. The fact that the defendant operated in accordance with the ordinary methods employed in that business does not preclude a finding that the interference is unreasonable. See Helms v. Eastern Kansas Oil Co., 102 Kan. 164, 168, 169 P. 208, 209 (1917); Stephens v. Gardner Creamery Co., 57 P. 1058, 1059 (Kan. Ct. App. 1899). But cf. Culwell v. Abbott Constr. Co., 211 Kan. 359, 366, 506 P.2d 1191, 1197 (1973) (in public nuisance action, court found no nuisance where defendant's excavation work was performed using customary methods in the construction industry).

186 The interference is less likely to be deemed unreasonable if the plaintiff "came to the nuisance." see Dill v. Excel Packing Co., 183 Kan. 513, 526, 331 P.2d 539, 549 (1958); Phillips v. Lawrence Vitrified Brick & Tile Co., 72 Kan. 643, 82 P. 787 (1905), although a finding of reasonableness is not dictated simply because the defendant was there first. See W. Prosser & W. Keeton, supra note 24, § 88B, at 635. The courts consider this factor because of the possibility that a victorious plaintiff who came to the nuisance may receive an undeserved windfall capital gain at
reduces the precedential value of previous nuisance decisions and makes the outcome in a particular case a matter of speculation.

Even if the utility of the defendant's conduct outweighs the gravity of the plaintiff's harm, the interference with the use and enjoyment of the plaintiff's harm may be unreasonable. The Restatement provides that an intentional invasion is unreasonable if the harm that the defendant's conduct causes is serious, and the financial burden of compensating for it would not render it infeasible to continue conducting the activity.\textsuperscript{127} If a court finds the invasion unreasonable under this part of the Restatement's test, it concludes that the continued operation of the defendant's important activity is reasonable if and only if the defendant compensates individuals injured by its conduct.\textsuperscript{128} The court essentially grants the defendant a license to continue polluting, provided it pays compensation.

If the defendant is violating a federal pollution control statute, or a federal or state regulation or permit issued pursuant to that statute, courts should normally hold that the interference with the plaintiff's interests caused by the violation is unreasonable. The federal pollution control statutes reflect two basic approaches. First, some statutory programs reflect an environmental quality approach,\textsuperscript{129} setting emission limitations to insure that ambient concentrations of a particular pollutant in the air, water, or land are low enough to provide adequate protection of the public health or welfare.\textsuperscript{130} If the defendant in a private nuisance action has violated applicable emission limitations promulgated under an environmental quality-type statute, the court should conclude that the defendant's activity has caused a significant and unreasonable harm to the public health or welfare.\textsuperscript{131} The statutory violation reflects a congressional judgment that the gravity of the harm (or at least the risk of harm) from the

the expense of the defendant. See id.

\textsuperscript{127} See Restatement, supra note 19, § 826(b) & comment f. The ability of the defendant to compensate those harmed by its activities could be the basis for allocating to it the obligation to protect against the risk that its conduct will cause harm to others in a nuisance suit based on negligence. A similar concept is embodied in section 830, which provides that an intentional invasion is unreasonable if the harm is significant and it would be practicable for the actor to avoid the harm in whole or in part without undue hardship. Id. § 830. Section 826(b) focuses on the defendant's ability to compensate injured individuals for the harm its activity causes, whereas section 830 is concerned with the economic feasibility of taking measures, such as the installation of emission controls, to avoid the harm. See id. comment c, illustrations 1-3. Thus, an intentional invasion is apparently unreasonable under the Restatement analysis if the defendant is capable of either avoiding serious harm before the fact or of compensating for it after the fact.

\textsuperscript{128} See, e.g., Helms v. Eastern Kansas Oil Co., 102 Kan. 164, 169, 169 P. 208, 210 (1917). In these cases, the court requires the defendant to internalize the cost of the damage imposed on surrounding individuals as a condition of continuing its operation. See W. Prosser & W. Keeton, supra note 24, § 88, at 627.


\textsuperscript{130} See, e.g., 42 U.S.C. § 7409(b) (1982) (national primary and secondary ambient air quality standards).

\textsuperscript{131} Under the Clean Air Act, the public welfare includes effects on soils and crops and damage to and deterioration of property. Id. § 7002(h). Thus, conduct which threatens the public welfare may pose a risk to private property interests.
defendant's conduct outweighs the utility of that conduct. If the plaintiff can satisfy the threshold requirement of a significant interference with his use and enjoyment of property (thereby proving that the risk of harm in fact has materialized),\textsuperscript{132} that interference should be deemed unreasonable and the plaintiff should be awarded damages.

This approach, while convincing in an intentional nuisance case, would be particularly appropriate in a nuisance based on negligent conduct. A defendant who violates a statute designed to protect persons or property is often deemed to be negligent per se and liable for harm resulting from the violation.\textsuperscript{133}

Compliance with an environmental quality-based statute, on the other hand, would not necessarily exonerate a defendant. A common defense in intentional nuisance cases involving pollution is compliance with statutory or regulatory emission standards, often incorporated into a permit. Although the Kansas courts have not addressed this issue,\textsuperscript{134} other jurisdiction have held that compliance with a regulatory scheme is not a defense.\textsuperscript{135} In enacting federal pollution control legislation, Congress indicated that compliance with the emission standards would not be a defense in common law nuisance actions.\textsuperscript{136} The federal statutes thus merely set minimum standards, which do not necessarily protect against an unreasonable interference with the interests of an individual plaintiff. The injured person should be able to redress that interference in a private nuisance action.

The second approach reflected in the federal pollution control statutes is the technological feasibility approach.\textsuperscript{137} Under this approach, emission limitations are established based on the degree of emission reduction that a particular industry is technologically or economically capable of achieving.\textsuperscript{138} If the de-

\textsuperscript{132} The plaintiff in a public nuisance action would not even have to demonstrate interference with the use and enjoyment of land, provided he could satisfy the special injury requirement (for example, by proving personal injury unrelated to plaintiff's land use). See infra notes 141-42 and accompanying text.

\textsuperscript{133} See, e.g., Springer v. Joseph Schlitz Brewing Co., 510 F.2d 468 (4th Cir. 1975).

\textsuperscript{134} The Kansas Supreme Court has ruled that the defendant's operation of a lawful business in the usual manner does not preclude liability in cases involving intentional invasions. See, e.g., Atkinson v. Herington Cattle Co., 200 Kan. 298, 308, 496 P.2d 816, 823 (1968); Helms v. Eastern Kansas Oil Co., 102 Kan. 164, 168, 169 P. 208, 209 (1917); Stephens v. Gardner Creamery Co., 57 P. 1058, 1059 (Kan. Ct. App. 1899). But see Atchison, T. & S.F. Ry. v. Armstrong, 71 Kan. 366, 369-70, 80 P. 978, 979 (1904) ("That which is done under authority of law at a place and in a manner authorized cannot be a nuisance."). If negligence is the basis for liability, the defendant's exercise of due care may negate the plaintiff's attempt to show a breach of duty. Similarly, contributory negligence and comparative fault principles only affect the defendant's liability in a nuisance suit grounded in negligence principles. Sandifer Motors, Inc., 6 Kan. App. 2d at 316-17, 628 P.2d at 246-47.

\textsuperscript{135} See cases cited in Note, Hazardous Wastes: Preserving the Nuisance Remedy, 33 Stan. L. Rev. 675, 679 (1981). Compliance with statutory and regulatory standards should not preclude liability even in a nuisance action based on negligence, since such compliance is not conclusive evidence that the defendant exercised due care. See W. PROSSER & W. KEeton, supra note 24, § 96, at 233.


\textsuperscript{137} See J. Bonine & T. Mcgarffy, supra note 129, at 264-75.

fendant’s violation of a technology-based standard interferes with the plaintiff’s property interests, the courts should deem the interference unreasonable because the promulgation of the standard reflects a congressional judgment that it would be practicable to avoid the harm without undue hardship.\footnote{See Restatement, supra note 19, § 830; supra note 127.} Compliance with the statute should not necessarily exonerate the defendant, however, if it feasibly could have avoided the harm by installing even more stringent controls before the fact or by compensating the plaintiff after the fact.\footnote{See supra note 127.}

2. Public Nuisance

a. General requirements

A public nuisance is based upon an infringement of the rights of the community, must affect an interest common to the general public, and unlike a private nuisance, does not necessarily involve ownership or use of land by either party.\footnote{See Culwell v. Abbott Constr. Co., 211 Kan. 359, 362-63, 506 P.2d 1191, 1195 (1973). See also id. (“Stated in another way, a public nuisance is one which annoys a substantial portion of the community.”); Miller v. Cudahy Co., 592 F. Supp. 976, 1004 (D. Kan. 1984); Restatement, supra note 19, § 821B(1) (“A public nuisance is an unreasonable interference with a right common to the general public.”). See also supra note 86; infra note 144.} An interference with the public health, safety, or comfort can give rise to a public nuisance.\footnote{See Culwell v. Abbott Constr. Co., 211 Kan. 359, 363, 506 P.2d 1191, 1195; Restatement, supra note 19, § 821B(2)(a).} Kansas cases often have held that pollution of the land, air, or water may constitute a public nuisance.\footnote{See e.g., Lehmkuhl v. Junction City, 179 Kan. 389, 392, 295 P.2d 621, 624 (1956) and cases cited therein; Steifer v. City of Kansas City, 175 Kan. 794, 798, 267 P.2d 474, 478 (1954) (“Nuisance means annoyance, and any use of property by one which gives offense to or endangers life or health, . . . unreasonably pollutes the air with foul, noxious, offensive odors or smoke . . .”). A Kansas federal district court recently stated that substantial damage to a precious natural resource, such as an underground aquifer, can constitute a public nuisance, since that damage “infringe[s] the public interest in maintaining the states water resources in a pure and unpolluted condition.” Miller v. Cudahy Co., 592 F. Supp. 976, 1004 (D. Kan. 1984).} Aside from the difference between the nature of the interest invaded in a public versus a private nuisance action,\footnote{A public nuisance does not necessarily involve interference with the use and enjoyment of land. Restatement, supra note 19, § 821B comment h.} most of the elements of a private nuisance action also apply to a public nuisance action. The interference with the public’s rights must be substantial.\footnote{See Restatement, supra note 19, § 821F comment a; Culwell v. Abbott Constr. Co., 211 Kan. 359, 365, 506 P.2d 1191, 1197 (1973).} The Kansas courts again have adopted the Restatement position that the interference must be either intentional and unreasonable,\footnote{Culwell, 211 Kan. at 362, 506 P.2d at 1195 (citing Allen v. City of Ogden, 210 Kan. 136, 499 P.2d 527 (1972)); Kansas City v. Sihler Hog Cholera Serum Co., 87 Kan. 786, 790, 125 P. 70, 72 (1912).} or unintentional and actionable under negligence or...
strict liability principles. The court judges the reasonableness of an intentional invasion by balancing the gravity of the harm against the utility of the defendant's conduct. Even if the utility of the defendant's conduct outweighs the gravity of the harm to the plaintiff, it may be unreasonable for the defendant to continue to inflict that harm without compensating the injured plaintiff. In such a case the court should award damages to the plaintiff. In a nonintentional nuisance case, the plaintiff is proceeding essentially under theories of negligence or strict liability and must prove each of the elements traditionally associated with those causes of action.

b. The special injury requirement

An individual who brings a public nuisance action also must show that his injury is distinguishable from that sustained by other members of the general public. This special injury requirement, which is similar in effect to the concept of standing to sue in federal courts, protects the defendant from the multiplicity of suits to which it would be exposed if any member of the general public were free to sue to redress the common harm. The plaintiff's injury must differ in kind, not merely in degree, from that suffered by other members of the general public. An allegation that the defendant's pollution of the air reduces the plaintiff's ability to enjoy the sunset, for example, would probably

147 See Restatement, supra note 19, § 821B comment e.
149 See Restatement, supra note 19, at § 821B comment l. Injunctive relief is appropriate if the defendant's activity itself is so unreasonable, even though the defendant is able to compensate those harmed by the activity, that it must be stopped. Id. In these circumstances, the plaintiff's legal remedy is inadequate and equitable relief is appropriate. See State ex rel. Adams v. Barron, 136 Kan. 324, 328, 15 P.2d 456, 458 (1932).
150 See infra Part III.
153 See Dryden v. Purdy, 97 Kan. 59, 60, 154 P. 221, 222 (1916); School District No. 1 v. Neil, 36 Kan. 617, 620, 14 P. 253, 255 (1887); W. Prosser & W. Keeton, supra note 24, § 90, at 646. The Restatement contends that this rationale does not apply to a suit to enjoin a nuisance and that the special injury rule should be limited to actions for damages. See Restatement, supra note 19, § 821C comment j, at 99. Certainly, a polluter would not be subject to a multiplicity of suits if it loses on the merits of the first public nuisance action brought against it and the court enjoining it from all further operations. If the court simply enjoins the defendant from operating in a manner that harms the first plaintiff, however, additional plaintiffs could sue in separate actions, contending that more stringent controls on the polluter's activities are necessary to avoid harm to them. This possibility seems to undercut the cogency of the Restatement's distinction. The Kansas courts have not yet adopted the Restatement position.
not constitute a special injury, even if the plaintiff painted sunsets for recreational purposes. An individual who has suffered personal injuries, harm to health, and perhaps even mental distress, however, probably will be able to demonstrate special injury.\textsuperscript{156} An interference with the plaintiff’s business may also suffice. Courts in several jurisdictions have granted commercial fishermen standing to sue polluters whose discharges have reduced the fish population.\textsuperscript{156} A person who has suffered physical damage to his land or impairment of his ability to use and enjoy his property also can sue in a public nuisance action.\textsuperscript{157} In such cases the plaintiff may have a cause of action in both public and private nuisance.\textsuperscript{158}

c. The limited scope of defenses

Certain defenses available to a defendant in a private nuisance action are not available in a public nuisance suit. A person cannot gain a prescriptive right to maintain a public nuisance.\textsuperscript{159} Similarly, a statute of limitations or laches defense normally will not bar the plaintiff’s public nuisance action.\textsuperscript{160} In a situation in which the plaintiff has causes of action in both public and private nuisance based upon an interference with his property interests,\textsuperscript{161} the plaintiff may be able to proceed with a public nuisance suit even if one of these


\textsuperscript{157} See cases cited in W. PROSSER & W. KEETON, supra note 24, § 90, at 650 n.78.


\textsuperscript{159} See Winbigler v. Clift, 102 Kan. 858, 860, 172 P. 537, 538 (1918).

\textsuperscript{160} Prosser and Keeton have suggested that the special injury requirement is satisfied only if the defendant’s conduct has resulted in the commission of an independent tort to the plaintiff. W. PROSSER & W. KEETON, supra note 24, § 90, at 650-51. In a public nuisance action involving pollution, for example, they assert that the pollution must affect the plaintiff’s land use in a substantial way and for that reason constitute a private nuisance. \textit{Id.} at 651. This test seems to focus too narrowly on harm to the plaintiff’s use and enjoyment of property. A public nuisance encompasses a broader range of harms, including harm to the public health. An individual whose health has been significantly impaired, even in a context unrelated to that person’s private property interests, should be afforded the right to seek damages or injunctive relief in a public nuisance action. It is possible that such an individual could demonstrate the “independent tort” required by Prosser and Keeton, for example, by showing that the polluter negligently caused personal injury to the plaintiff. The requirement of an “independent tort,” however, seems to undercut if not eliminate the need for and usefulness of a public nuisance action. A desire to avoid burdening a polluter with a multiplicity of suits does not appear to justify elimination of the public nuisance action. Moreover, it is not clear that other tort causes of action such as negligence and strict liability provide the same degree of protection for the public health and safety as does a public nuisance action.


\textsuperscript{158} See W. PROSSER & W. KEETON, supra note 24, § 90, at 648; RESTATEMENT, supra note 19, § 821C comment c. \textit{But see} Jenkins v. City of El Dorado, 143 Kan. 206, 211, 53 P.2d 798, 801 (1936) (plaintiff’s claim for temporary damages against municipality in public nuisance action partially barred by three-month limitation period applicable to suits against city, R.S. 12-105 (repealed, L. 1979, ch. 186, § 33)).

\textsuperscript{161} See supra notes 157-58 and accompanying text.
defenses bars the private action.

As in a private nuisance case, compliance with applicable pollution control statutes or regulations will not necessarily defeat a public nuisance action. See, e.g., State v. City of Concordia, 78 Kan. 250, 256-57, 96 P. 487, 489-90 (1908). See also notes 134-36 and accompanying text.

The courts, however, may defer to the legislative or administrative judgment in such a situation by declining to declare the interference unreasonable. See, e.g., State v. City of Concordia, 78 Kan. 250, 256-57, 96 P. 487, 489-90 (1908).

3. Damages and Injunctive Relief in Nuisance Actions

If a court finds that the defendant’s interference with the plaintiff’s interests (in the case of an unintentional nuisance), or that the defendant’s conduct (in the case of a negligent nuisance) is unreasonable, the plaintiff is entitled to relief, and the court may award him damages. A decision limiting the plaintiff to compensation for past or future harms reflects the court’s belief that the defendant’s activity (such as the operation of a factory that provides significant local employment opportunities) is socially desirable and should be permitted to continue. Since the defendant has caused significant harm to the plaintiff, however, the defendant will be permitted to continue its polluting activity only if it compensates the plaintiff for that harm. See, e.g., Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

The court can further force the defendant to change its method of operation or install more stringent pollution control devices to eliminate or reduce future injury. The court can even enjoin the defendant’s activities completely. The issuance of injunctive relief reflects the court’s belief that it should not permit the defendant to continue harming the plaintiff regardless of compensation.

The Kansas courts have not enunciated clearly when it is appropriate to limit the plaintiff in a nuisance action to damages and when to award him injunctive relief. See, e.g., State v. City of Concordia, 78 Kan. 250, 256-57, 96 P. 487, 489-90 (1908). While the courts have required a plaintiff seeking injunctive relief to show the absence of an adequate remedy at law and the presen...
ence of irreparable injury, they have provided very little explicit guidance to indicate what evidence the plaintiff must introduce to prove those criteria.

At one time, many courts adhered to the view that if the plaintiff proves the existence of a nuisance and the inadequacy of a damage remedy, he is entitled to injunctive relief. The Restatement, however, rejects this “extreme view,” and the trend in the cases in other American jurisdictions is consistent with the Restatement view.

According to the Restatement, once a court determines that the interference with the plaintiff’s interests is unreasonable, the court must engage in a second balancing of factors to determine whether to limit the plaintiff to a damage remedy or also to grant him injunctive relief. This second balancing process

and safety).


Injunctive relief may be appropriate when the nuisance is merely threatened, provided the threatened injury would be irreparable if it occurred. See Stotler v. Rochelle, 83 Kan. 96, 109 P. 788 (1910); W. PROSSER & W. KEETON, supra note 24, § 85, at 627; RESTATEMENT, supra note 19, § 821F comment b; id. § 822 comment d; de Funikl, Equitable Relief Against Nuisances, 38 Ky. L.J. 223, 226-27 (1950). The fear of disease, for example, may justify a nuisance action. See Prosser, Nuisance Without Fault, 20 Tex. L. Rev. 399, 418 (1942). The Kansas Supreme Court, however, has expressed its reluctance to enjoin an anticipated nuisance. See, e.g., Vickridge Homeowners Ass’n v. Catholic Diocese, 212 Kan. 348, 360, 510 P.2d 1296, 1306 (1973); City of Hutchinson v. Delano, 46 Kan. 345, 347, 26 P. 740, 742 (1891). See also Hazlett v. Marland Refining Co., 30 F.2d 808, 809 (8th Cir. 1929).

169 See W. PROSSER & W. KEETON, supra note 24, § 88A, at 631-32. In the context of a private nuisance action, damages were not normally deemed adequate. The equity courts viewed every tract of land as unique. Therefore, damages were not adequate compensation for a harm that seriously impaired the usefulness of the plaintiff’s land. Id. at 640. Some courts apparently still adhere to a rule of per se inadequacy in certain categories of cases, such as cases involving continuous injury to the plaintiff. See Comment, Equity and the Eco-System, supra note 167, at 1280. In these circumstances, limiting the plaintiff to damage relief might impose on the plaintiff the necessity of bringing a series of suits to redress harms suffered up to the time of suit. The Kansas courts have recognized the propriety of awarding injunctive relief to avoid the need for such “a ruinous multiplicity of suits.” Walker v. Armstrong, 2 Kan. 198, 220 (1863).

170 See supra note 19, § 936 comment c; id. § 941 comment a.

171 See supra note 19, § 936(1) (the appropriateness of an injunction depends upon a comparative appraisal of a list of factors, balanced against each other and considered together). The first balancing of factors occurs in the process of assessing the reasonableness of the interference; the interference is unreasonable if the gravity of the harm outweighs the utility of the defendant’s conduct. See supra notes 112-40 and accompanying text.

172 See supra note 19, § 936(1) (the appropriateness of an injunction depends upon a comparative appraisal of a list of factors, balanced against each other and considered together). The first balancing of factors occurs in the process of assessing the reasonableness of the interference; the interference is unreasonable if the gravity of the harm outweighs the utility of the defendant’s conduct, or if there is a feasible way, both economically and scientifically, to avoid a substantial amount of the harm without material impairment to the benefits served by the conduct. Id. § 88A, at 630-31. Cf. Dill v. Excel Packing Co., 183 Kan. 513, 524, 331 P.2d 539, 548 (1958) (issue was whether
does not duplicate the first because “[i]t may be reasonable to continue an important activity if payment is made for the harm it is causing but unreasonable to initiate or continue it without paying.” The factors considered in the process of determining whether the nuisance should be enjoined accordingly differ from those analyzed in deciding whether an intentional invasion is unreasonable. The adequacy of the plaintiff’s legal remedy, one of the two principal criteria relied upon by the Kansas courts, is only one of the factors considered in deciding whether to enjoin the nuisance. Other factors include the nature of the interest to be protected, any unreasonable delay by the plaintiff in bringing suit, any related misconduct on the part of the plaintiff, the interests of third parties and of the public, and the practicability of

defendant’s activities constituted an “unreasonable use of [the] property amounting to a nuisance subject to abatement”).

174 Restatement, supra note 19, § 822 comment d, at 111. For example, an invasion may be unreasonable even if the utility of the defendant’s conduct outweighs the gravity of the plaintiff’s harm, provided that harm is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct infeasible. See id. § 826(b) & comment f. In these circumstances, defendant’s compensation of the plaintiff makes the invasion reasonable, and injunctive relief should be denied. Id. § 822 comment d, at 111. The Restatement also asserts that “what may be a tolerable adjustment when the result is only to award damages for the injury done may lead to extortion if the injunction seriously curtails the defendant’s enjoyment of his land.” Id. § 941 comment c, at 583.

175 Compare id. § 936(1) (factors in determining appropriateness of injunction) with id. §§ 827-28 (factors involved in assessing gravity of harm and utility of conduct). See also id. § 822 comment d, at 111 (“[f]or the purpose of determining whether the conduct producing the invasion should be enjoined, additional factors must be considered”). Under the Prosser and Keeton analysis, see supra note 173, the analysis of whether injunctive relief is appropriate would apparently involve the same inquiry as whether there is an actionable unintentional nuisance. The plaintiff asserting a nuisance based on negligence, for example, must show that the defendant acted unreasonably in failing to protect the plaintiff against a risk of harm. Prosser and Keeton’s test for injunctive relief also involves the question of whether the defendant’s conduct is reasonable. See supra note 173.

176 See Restatement, supra note 19, § 936(1)(b).

177 See id. § 936(1)(a). Professors Prosser and Keeton contend that injunctive relief is especially likely in soil and water pollution cases due to “the enormous weight that is given to the preservation of our natural resources and the protection of the environment from physical impairment.” W. Prosser & W. Keeton, supra note 24, § 88, at 627. See, e.g., Miller v. Cudahy Co., 592 F. Supp. 976, 1009-09 (D. Kan. 1984) (court fashioned injunctive relief against defendant’s “deplorable” conduct in operating salt business in an effort “to restore the [polluted] aquifer and prevent the spread of the pollution”). Damage or the threat of severe damage to the plaintiff’s health should also weigh heavily in favor of an injunction. See supra note 167; Carpenter v. Double R Cattle Co., 105 Idaho 320, 669 P.2d 643, 654 (1983) (injunctive relief might be appropriate even if utility of defendant’s conduct outweighs gravity of harm under the Restatement test for reasonableness of the interference where the harm in question relates to personal health and safety). Mere depreciation in the value of the plaintiff’s property, on the other hand, has not been deemed sufficient by itself to warrant injunctive relief in Kansas. See Vickridge Homeowners Ass’n v. Catholic Diocese, 212 Kan. 348, 360, 510 P.2d 1296, 1306 (1973); Dill v. Excel Packing Co., 183 Kan. 513, 523, 331 P.2d 539, 546-47 (1958). See also Hazlett v. Marland Refining Co., 30 F.2d 808, 810 (8th Cir. 1929).

178 Restatement, supra note 19, § 936(1)(c). The application of the statute of limitations to nuisance actions is considered infra at notes 215-97 and accompanying text.

179 Restatement, supra note 19, § 936(1)(d).

180 Id. § 936(1)(f).
framing and enforcing the order or judgment.181 Finally, the court should consider the degree and nature of harm that the plaintiff suffered. Often the court will compare the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied.183

A court may be inclined to enjoin a defendant’s conduct if it violates a statute.183 The statutory prohibition may reflect a legislative judgment that the persons injured by the prohibited conduct have suffered harm that is sufficiently serious to merit injunctive relief, especially if the statute itself authorizes courts to enjoin statutory violations.184 In other cases the courts place more emphasis on the hardship the defendant would suffer from an injunction.185

The Kansas courts have long engaged in a balancing of the equities in suits for injunctive relief.186 The courts sometimes focus on whether the plaintiff’s harm is serious or irreparable. The duration of the interference with the plaintiff’s interest, for example, is important; a court is more likely to enjoin an activity that will probably continue to impose harm on the plaintiff in the future than one which will cause no or only sporadic future harm.187 The Kansas

181 Id. § 936(1)(g). A court considering the issuance of an injunction has broad powers to devise a remedy that works substantial justice between the parties and prevents further litigation. See Miller v. Cudaboy Co., 592 F. Supp. 976, 1007 (D. Kan. 1984). See also Restatement, supra note 19, § 941 comment e (in appropriate cases, experiments should be undertaken to determine whether pollution can be prevented or reduced through the application of modern technical skill). In one recent case involving extensive salt pollution of an underground aquifer, the trial court ordered the defendant to cease using certain pipelines encroaching on the plaintiff’s property, to install monitor wells to determine the nature and extent of the pollution, and to remove the salt from the aquifer. See Miller v. Cudaboy Co., 592 F. Supp. 976, 1007-09 (D. Kan. 1984).

182 Restatement, supra note 19, § 936(1)(e). This comparison is sometimes referred to as a balancing of the equities or conveniences, or as the doctrine of comparative hardships. See id. § 941 & comment a; W. Prosser & W. Keeton, supra note 24, § 88A, at 631; Note, Nuances of Nuisance, supra note 65, at 72-73. The term “balancing the equities” may also be used to refer to an analysis of all of the factors in Section 936(1) of the Restatement, including the interests of third parties and the public. See Restatement, supra note 19, § 941 comment a, at 581. In balancing the hardship to the plaintiff if injunctive relief is denied against the hardship to the defendant if such relief is granted, the courts sometimes consider the impact of closing the defendant’s business on the community (e.g., loss of employment opportunities or reduction of the local tax base). See, e.g., Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). The courts sometimes fail to consider, however, the beneficial impact on the health of the surrounding community of enjoining the defendant’s activity. “With increased public awareness of the importance of environmental protection, the individual plaintiff seeking to enjoin a nuisance created by an industrial operation that extensively pollutes the atmosphere or waterways may rely upon the factor of community interest so as to tip the balance in favor of injunctive relief.” Restatement, supra note 19, § 942 comment c, at 587.


184 Cf. Environmental Defense Fund, Inc. v. Lampfier, 714 F.2d 331, 338 (4th Cir. 1983). The statute may also reflect a legislative judgment that the public interest favors an injunction preventing further statutory violations.


186 The doctrine of balancing the hardships of the parties has been applied for over 100 years in Kansas. See, e.g., Thomas, 23 Kan. at 158 (refusing to enjoin the defendant from maintaining a dam that caused the formation of offensive pools of water, on the ground that the injunction would “cause loss and expense” to the defendant and “be greatly inequitable”).

cases indicate that the character of the location where the dispute arises also bears upon the hardship the plaintiff will suffer if the court denies injunctive relief. If the defendant conducts its manufacturing operation, for example, in an area devoted primarily to industrial uses, the court may find that the plaintiff must continue to bear certain intrusions that it would deem more serious in a residential neighborhood.\footnote{Compare Dill v. Excel Packing Co., 183 Kan. 513, 523-26, 331 P.2d 539, 547-49 (1958) (Kansas Supreme Court reversed trial court's order enjoining cattle feed lot in primarily agricultural area with Stotler v. Rochelle, 83 Kan. 86, 87-89, 109 P. 788, 789-90 (1908) (Kansas Supreme Court affirmed order permanently enjoining use of house in residential neighborhood as treatment center for cancer patients). Prosser and Keeton assert, however, that a defendant's polluting activities may be unreasonable, and therefore enjoizable, even if others in the vicinity are also fouling the air, water, or land. See W. Prosser & W. Keeton, supra note 24, § 88B, at 633-34.}

In short, the courts in nuisance cases often engage in two different balancing processes, one to determine if a nuisance exists and, if so, a second to determine the appropriate relief. These ad hoc balancing processes make it very difficult to predict the prospects for success in a nuisance action involving industrial pollution.

B. Trespass

A private nuisance cause of action protects against the defendant's interference with the plaintiff's use and enjoyment of land. Trespass involves a physical invasion of the plaintiff's interest in the exclusive possession of the land.\footnote{See Restatement, supra note 19, §§ 158 comment c; W. Prosser & W. Keeton, supra note 24, § 13, at 70; id. § 87, at 622.} Although a trespass cause of action is often available to a person whose land has been invaded by pollutants, plaintiffs in Kansas have used it far less frequently than nuisance law to redress environmental harms.

Some of the distinctions between trespass and nuisance law are not as clear today as they were historically. Initially, trespass provided the remedy for direct physical invasions of the plaintiff's land, while nuisance dealt with indirect invasions.\footnote{See Kansas Pac. Ry. v. Mihlman, 17 Kan. 224, 231-32 (1876); W. Prosser & W. Keeton, supra note 24, § 88A, at 630-31; Miller v. Cudahy Co., 592 F. Supp. 976, 1007-09 (D. Kan. 1984).} Today most jurisdictions do not require that the defendant di-

\footnote{Walker v. Armstrong, 2 Kan. 192, 214 (1863). If the harm to the plaintiff will continue indefinitely, the legal remedy may also be inadequate. It may be too burdensome for the plaintiff to bring a series of damage actions each time new injury occurs. Some courts avoid that problem, however, by awarding permanent damages (measured by the permanent decline in the market value of the land caused by the nuisance) to the plaintiff in one lump sum, rather than enjoining the nuisance. See W. Prosser & W. Keeton, supra note 24, § 88B, at 633. The issuance of injunctive relief is preferable when it would be feasible for the defendant to avoid imposing further harm on the plaintiff without seriously impairing the defendant's use of its land. See id. § 88A, at 630-31; Miller v. Cudahy Co., 592 F. Supp. 976, 1007-09 (D. Kan. 1984).}
rectly and immediately throw any foreign matter onto the plaintiff's land.\textsuperscript{191} Any physical invasion that interferes with the plaintiff's right to exclusive possession is a trespass.\textsuperscript{193} The defendant can cause such an invasion by personal entry or by causing something tangible to be projected onto the plaintiff's land.\textsuperscript{198} Although any invasion of the surface gives rise to a trespass cause of action,\textsuperscript{193} there is some doubt whether a subsurface invasion of liquids caused by the defendant's activity on his own property is trespassory.\textsuperscript{199} This uncertainty might make a nuisance action more attractive when the plaintiff's water supply is contaminated by leakage from a hazardous waste disposal site on the defendant's property.\textsuperscript{200}

A second historical distinction between trespass and nuisance concerns the degree of the defendant's culpability. Nuisance required intentional, negligent, or reckless conduct by the defendant, whereas the defendant was strictly liable for a trespassory intrusion.\textsuperscript{202} This distinction, which once made trespass a more attractive theory of recovery for an injured plaintiff, has now been largely, if not entirely, abandoned.\textsuperscript{203} The plaintiff must demonstrate that the defendant's conduct was intentional even in a trespass action.\textsuperscript{204}

\textsuperscript{191} See Restatement, supra note 19, § 158 comment i, at 278-79. But cf. W. Prosser & W. Keeton, supra note 24, § 13, at 70-71 (although most courts have abandoned distinction between direct and indirect invasions when there is an actual physical entry by a person or thing, some courts still distinguish between a direct infringement or invasion (a trespass) and the result of an act that is not wrongful in itself, but becomes so only because of its consequences (a nuisance)); Keeton, Trespass, Nuisance, and Strict Liability, 59 Colum. L. Rev. 458, 469 (1959) (distinction between direct and indirect results "may not be as dead as has often been assumed").

\textsuperscript{192} Restatement, supra note 19, § 158 & comment c.

\textsuperscript{193} See id. § 158(a) & comment i. Kansas adheres to the Restatement definition of trespass. See Riddle Quarries, Inc. v. Thompson, 177 Kan. 307, 311, 279 P.2d 266, 269 (1955). See also W. Prosser & W. Keeton, supra note 24, § 13, at 70-71. Absent the invasion of tangible matter, there would be no interference with the plaintiff's exclusive right to possession. Id. at 71. Some jurisdictions have held that invisible gaseous and microscopic particulate matter can give rise to a trespass. See cases cited id. at 71-72 nn.37-38. But cf. Wilson v. Parent, 228 Or. 354, 361, 365 P.2d 72, 75 (1961) (ether and sound waves not sufficient to give rise to a trespass).


\textsuperscript{195} This doubt may be attributable to a residual notion that a trespassory invasion must directly result from the defendant's activity, whereas seepage or leakage of liquids from the defendant's property onto the plaintiff's is an indirect invasion. See W. Prosser & W. Keeton, supra note 24, § 13, at 72. The plaintiff might prevail if he can prove some damage to the surface or some interference with a use that can be made of the property. See id. at 82. If the latter showing is made, however, the invasion seems better characterized as a nuisance. But see Restatement, supra note 19, § 158 comment g ("A trespass on land may be committed by an intrusion . . . beneath . . . the surface."); id. § 159(1).

\textsuperscript{196} See Tulsa Note, supra note 18, at 458.

\textsuperscript{197} See W. Prosser & W. Keeton, supra note 24, § 7, at 30; id. § 13, at 68; id. § 87, at 622.

\textsuperscript{198} See id. § 13, at 68-69.

\textsuperscript{199} See Keeton, supra note 191, at 465. There is some dispute whether a defendant who acted negligently should be liable only in negligence or also in trespass. Compare id. (trespassory invasion may be either intentional or negligently caused) with W. Prosser & W. Keeton, supra note 24, § 13, at 73 ("Accidental entries are often actionable when produced negligently or as a consequence of abnormally dangerous activities, but not as trespasses.").
dant, however, need not intend to invade the plaintiff's interest in the exclusive possession of land. In the case of a personal entry, he need only intend to be upon the land where the trespass occurs. The defendant thus will be liable for an entry onto the plaintiff's land in the mistaken belief that the land belongs to the defendant, a result which approaches the imposition of strict liability. If the defendant acts with knowledge that his actions are substantially certain to result in the entry of foreign matter onto the plaintiff's land, he possesses sufficient intent to commit trespass.

A third historical distinction between trespass and nuisance relates to the quantum of harm suffered by the plaintiff. In a nuisance action, the plaintiff must make a threshold showing of substantial harm. Trespass, on the other hand, traditionally required no proof of any actual damage. The invasion of the plaintiff's right to exclusive possession was itself a sufficient harm, entitling the plaintiff to nominal damages for an unauthorized intrusion even if no actual damage occurred. The Kansas courts continue to apply this rule. Although the absence of a substantial harm requirement makes recovery in trespass easier than in nuisance, a plaintiff who cannot demonstrate any actual harm may have little motivation to sue in the first place. On the other hand, a plaintiff who has suffered some actual harm will not have his trespass action dismissed on the ground that the harm is not substantial.

Of potentially more value to a plaintiff is the tendency of some courts to impose liability on the defendant for a trespassory intrusion regardless of the reasonableness of the intrusion or the utility of the defendant's conduct. A court adhering to this approach might be more willing in a trespass than a nuisance action to discount a polluter's value as an important local employer. Some courts, however, have begun to blur this distinction by engaging in a balancing of factors even in trespass suits.

A prevailing plaintiff in a trespass action is entitled to compensation for any visible and tangible damage inflicted upon the land itself. This damage normally is measured by the difference in fair market value of the property immediately before and after the trespass. The cost of repairing the property may

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201 See Restatement, supra note 19, § 158 comment i; id. § 163 comment c.
202 See supra notes 97-102 and accompanying text.
203 See W. Prosser & W. Keeton, supra note 24, § 7, at 31.
204 See id.; id. § 13, at 70, 75; Restatement, supra note 19, § 163 comment d.
205 See W. Prosser & W. Keeton, supra note 24, § 13, at 75.
207 See W. Prosser & W. Keeton, supra note 24, § 13, at 70.
208 See, e.g., Martin v. Reynolds Metal Co., 221 Or. 86, 342 P.2d 790, 796, cert. denied, 366 U.S. 918 (1960) ("the tort of trespass involves a weighing process, similar to that involved in the law of nuisance, although to a more limited extent than in nuisance and for a different purpose. . .").
209 See W. Prosser & W. Keeton, supra note 24, § 13, at 76; Restatement, supra note 19, § 162.
furnish evidence of the decline in market value, or may be recoverable as a foreseeable consequence of the defendant's conduct.\textsuperscript{211} A defendant who has caused a trespassory intrusion may be liable for consequential damages, including harm to the person of the possessor or of members of his family, or to their chattels.\textsuperscript{212} In some jurisdictions, a trespass action may be preferable to a negligence action because recovery in trespass is not limited to damages that were foreseeable to the defendant.\textsuperscript{213} This distinction might be significant in a jurisdiction permitting recovery in trespass for subsurface invasions, since the path of chemical contamination of underground water may be difficult to determine in advance. In Kansas, however, the plaintiff may recover in trespass only for injuries that are the immediate, consequential, and foreseeable result of the defendant's acts.\textsuperscript{214}

C. Continuing Nuisance and Trespass: Statutes of Limitations Issues

The issues that have presented the most difficulty to the Kansas courts in nuisance and trespass actions involve the statute of limitations.\textsuperscript{215} In some jurisdictions, the limitations period applicable to trespass actions is different from that applicable to nuisance suits, making one cause of action preferable to the other.\textsuperscript{216} In Kansas, however, a two-year limitations period applies to both kinds of actions.\textsuperscript{217} The choice of nuisance or trespass, and the manner in which the plaintiff frames his causes of action, nevertheless can have significant implications for the timeliness of the plaintiff's action.

Two issues related to the statute of limitations recur in the Kansas trespass and nuisance cases. The troublesome cases involve plaintiffs whose property interests are invaded continuously or repeatedly over a period of years.\textsuperscript{218} Before the court may determine whether the statute of limitations bars in whole or in part the plaintiff's nuisance or trespass cause of action, it must

(1891) (real property).

\textsuperscript{211} See W. Prosser & W. Keeton, supra note 24, § 89, at 639.

\textsuperscript{212} See id. § 13, at 76; RESTATEMENT, supra note 19, § 162 & comment b. Some courts have even permitted recovery for mental distress resulting from the trespass. See W. Prosser & W. Keeton, supra note 24, § 13, at 77.

\textsuperscript{213} See W. Prosser & W. Keeton, supra 24, § 13, at 77.

\textsuperscript{214} See Mackey v. Board of County Comm'rs, 185 Kan. 139, 146-47, 341 P.2d 1050, 1056-57 (1959).

\textsuperscript{215} For a discussion of the difficulties raised in applying statutes of limitations to nuisance and trespass actions, see generally Goodrich, Permanent Structures and Continuing Injuries, 4 IOWA L. BULL. 67 (1918); McCormick, Damages for Anticipated Injury to Land, 37 HARV. L. REV. 574 (1924).

\textsuperscript{216} See, e.g., WASH. REV. CODE ANN. § 4.16.080(1) (1962) (2 years for trespass actions); id. § 4.16.130 (3 years for "relief not hereinbefore provided for"). See also Zimmer v. Stephenson, 66 Wash. 2d 477, 403 P.2d 343 (1965) (§ 4.16.130 includes nuisance actions).

\textsuperscript{217} See KAN. STAT. ANN. § 60-513(a)(1) (1983) (actions for trespass upon real property); id. § 60-513(a)(4) (actions "for injury to the rights of another, not arising on contract, and not herein enumerated," including nuisance actions). For discussions of the various statutes of limitations in Kansas, see generally Student Symposium on Statutes of Limitation in Kansas, 9 KAN. L. REV. 179 (1960); Note, Survey of Kansas Law: Statutes of Limitations, 18 KAN. L. REV. 441 (1970).

\textsuperscript{218} An example of a continuing trespassory intrusion arising from conduct on the defendant's land is the contamination of the plaintiff's surface water by hazardous wastes leaking from a neighboring dump site. See BUFF. Note, supra note 27, at 545 n.66.
decide when the cause of action accrued. The Kansas Supreme Court has described this first issue as "one beset with difficulties, on which the authorities are in great conflict and exhibit considerable confusion. This is true even in our own jurisdiction where it must be admitted there is some contrariety in our decisions."

A second and related issue is whether a plaintiff whose property interests have been harmed on a continuous basis by the defendant's conduct on adjoining land must seek full compensation in one action for all injury, past and future, or whether the plaintiff may bring a series of actions, each time seeking compensation for the injury suffered since the judgment in the previous suit. If the law limits the plaintiff to one action and the statute of limitations has run out on that action, he would be barred from any recovery. The Kansas decisions also have been inconsistent in resolving this second issue. The courts' failure to clarify these two issues has also generated confusion concerning the appropriate measure of damages in nuisance and trespass actions involving continuous or repeated harm.

The Kansas Supreme Court has tried to resolve some of these uncertainties. In a 1954 decision, *Henderson v. Talbott,* the court acknowledged the chaotic state of the law on limitations issues in cases of continuing or repeated intrusions onto land. The court tried to dissipate the confusion by setting forth a comprehensive set of guidelines for determining when a cause of action accrues, whether the plaintiff may file a series of suits or only one action, and the appropriate measure of damages in various situations. The court explic-
itly overruled prior cases inconsistent with the new guidelines. In fact, it is possible to derive from the pre-1954 cases a fairly coherent set of principles on the various limitations issues. The court’s decision in Henderson, far from clarifying the law, actually generated new confusion. Despite the supreme court’s efforts over the past thirty years to dispel that confusion, the law in this area has remained “muddled.”

1. Kansas Cases Before 1954

The cases decided before 1954 begin with the proposition that if the defendant’s wrongful conduct takes place on the plaintiff’s land (for example, if the defendant builds a structure that encroaches onto the plaintiff’s land), the plaintiff suffers actionable harm at the moment of the initial trespassory intrusion. In these circumstances, the plaintiff experiences only one legal wrong. If the plaintiff does not sue within the limitations period following that entry, he is forever barred from bringing an action. This result is based upon the theory that the defendant has no legal right, and therefore no duty, to engage in a subsequent trespass onto the plaintiff’s land to remove the encroaching structure. The defendant’s only wrongful act occurs at the time of the initial trespass and the statute of limitations begins running on the plaintiff’s only cause of action at that time. The plaintiff’s damages are measured by the

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See id. at 624, 266 P.2d at 281 (“[I]f there is language in any of [the prior] decisions indicating views contrary to those herein expressed under prevailing conditions and circumstances it is no longer entitled to weight and should be disregarded.”).


See, e.g., Fulmer v. Skelly Oil Co., 143 Kan. 55, 59, 53 P.2d 825, 828 (1936); McMullen v. Jennings, 141 Kan. 420, 424, 41 P.2d 753, 756 (1935); Kansas Pac. Ry. v. Mihlman, 17 Kan. 224, 227-28, 231 (1876). See also McCormick, supra note 215, at 581 (“Where the defendant’s act is a technical trespass, whether continuing, that is creating a damaging situation which the defendant owes a duty to remedy, or completed, as where the defendant has trampled the plaintiff’s crops, the plaintiff has some cause of action as soon as the act of invasion occurs.”); Goodrich, supra note 215, at 70; W. Prosser & W. Keeton, supra note 24, § 13, at 83.

See cases cited at supra note 227. But see Missouri Pac. Ry. v. Houseman, 41 Kan. 304, 307 (1889) (plaintiff in ejectment action can recover for rents and profits received and for the value of timber destroyed by trespassing defendant within the period of limitations preceding suit). Compare Restatement, supra note 19, § 161 comment b (the actor’s failure to remove from the plaintiff’s land an encroaching structure constitutes a continuing trespass, conferring upon the plaintiff an option to maintain a succession of actions on the theory of continuing trespass or to treat the continuing encroachment as an aggravation of the original trespass) with id. § 162 comment e (a trespass that permanently changes the physical condition of the plaintiff’s land gives the possessor the right to full redress in a single action for the trespass).

See Kansas Pac. Ry. v. Mihlman, 17 Kan. 224, 231 (1876); McCormick, supra note 215, at 582. Under this rule, once the defendant compensates the plaintiff for the permanent harm done to the plaintiff’s right to exclusive possession, the defendant is relieved of any obligation to remove the offending structure. See id. at 578. But see Restatement, supra note 19, § 160 comment e (the intentional violation of a duty to remove an encroaching structure “constitutes a continuing trespass for the entire time during which the actor is under a duty to remove the thing, and gives to the possessor of the land a series of independent causes of action for trespass unless and until the actor dispossesses the possessor”); id. § 930(1) (if defendant causes continuing or recurrent invasions on plaintiff’s land by the maintenance of a structure and it appears that the acts will continue indefinitely, the plaintiff may at his election recover damages for the future invasions in the same action as that for past invasions).
difference in reasonable market value of the property before and after the trespass. 230

If the defendant acts on its own land, however, resulting in injury to the plaintiff's property (the normal situation giving rise to a nuisance action), the building or operation of the defendant's structure is not of itself a wrongful activity. The plaintiff is not legally harmed until the defendant's pollution actually causes him injury, at which point the plaintiff's cause of action accrues and the statute of limitations begins to run. 231

In cases in which activities on the defendant's land imposed continuous harm on the plaintiff's property, the pre-1954 cases sometimes gave the plaintiff a choice of remedies. Because the defendant has both the right and the obligation to stop operations on its own land that continue to harm the plaintiff's property, the defendant's failure to abate the conduct causing the harm constitutes a continuing wrong. 232 A series of successive causes of action accrues to the plaintiff when each new injury occurs. 233 The plaintiff therefore could bring a series of lawsuits (based in trespass or nuisance) seeking compensation for the value of the use of the property lost as a result of the defendant's polluting activities. In each suit the plaintiff could recover "temporary damages," measured by the decline in rental value or loss of use of the land caused


by injuries\(^ {234} \) suffered within the two-year period (assuming a two-year statute of limitations) preceding initiation of the suit.\(^ {235} \) The injured landowner apparently also could seek to abate the activity, provided he brought the suit to enjoin within the limitations period, measured from the date of his last injury.\(^ {236} \)

The plaintiff subjected to a continuing nuisance or trespassory intrusion alternatively could seek compensation in one action for all injury, past and future, that the defendant’s activity had caused and would cause.\(^ {237} \) This cause of action for permanent damages accrued, and the statute of limitations began running, when the defendant’s pollution first injured the plaintiff.\(^ {238} \) Recovery of permanent damages, which were measured by the amount that the nuisance decreased the market value of the land,\(^ {239} \) prevented further recoveries in sub-

\(^{234} \) Temporary damages have been measured the same way both in pre- and post-1954 cases. See Alexander v. Arkansas City, 193 Kan. 575, 579, 396 P.2d 311, 315 (1964); Adams v. Arkansas City, 188 Kan. 391, 398, 362 P.2d 829, 836 (1961); Kiser v. Phillips Pipe Line Co., 141 Kan. 333, 335, 41 P.2d 1010, 1012 (1935). See also Restatement, supra note 19, § 929(1)(b); W. Prosser & W. Keeton, supra note 24, § 89, at 638; Goodrich, supra note 215, at 82. In addition, various kinds of special and consequential damages, such as damages for personal discomfort or illness resulting from the defendant’s activity, loss of business profits, and crop losses may also be recovered. See id.; Miller v. Cudahy Co., 592 F. Supp. 976, 1005-06 (D. Kan. 1984); W. Prosser & W. Keeton, supra note 24, § 89, at 639; Restatement, supra note 19, § 929(1)(c) & comment c; Porter, supra note 65, at 116; Note, Private Remedies for Water Pollution, 70 Colum. L. Rev. 734, 746 (1970); Note, Nuisances of Nuisance, supra note 65, at 68 & n.148. In some cases, the courts permit recovery of the plaintiff’s reasonable costs of restoring the property to its former status, or of abating the nuisance. See Miller v. Cudahy Co., 592 F. Supp. 976, 1006 (D. Kan. 1984) (restoration costs disallowed as unreasonable); Chicago, K. & W. Ry. v. Willets, 45 Kan. 110, 111, 25 P. 576, 577 (1891); Restatement, supra note 19, § 930(3)(b); W. Prosser & W. Keeton, supra note 24, § 89, at 640.


sequent suits or the issuance of an injunction against further pollution of the plaintiff's land. 240

The Kansas Supreme Court recognized the possibility that dating the accrual of a cause of action for permanent damages from the first injury caused by pollution could lead to harsh results. 241 If the injured landowner did not bring an action for permanent damages within the limitations period that commenced with the first injury, either because he was not aware of the injury until several years after it first occurred, or because it was impossible to ascertain the extent of the future harm, the landowner would be barred forever from bringing the action. The landowner would be relegated to a series of suits for temporary damages, which could be costly and time-consuming to pursue. 242 To temper this potential for harsh results, the court modified the rule governing the time when a cause of action for permanent damages accrued. The cause of action would accrue only when the pollution injuries that the plaintiff suffered were known and observable, 243 and the extent of the future

Keeton, supra note 24, § 89, at 638; McCormick, supra note 215, at 582-83; Goodrich, supra note 215, at 81. Alternatively, the plaintiff's permanent damages might be measured by the reasonable cost of restoration, provided that cost is not disproportionate to the diminution in value of the land. See Restatement, supra note 19, § 929(1)(a) & comment b. The same kinds of special damages available in an action for temporary damages are also available in an action for permanent damages. See Adams v. Arkansas City, 188 Kan. 391, 402-03, 362 P.2d 829, 836 (1961). See also supra note 234.

240 See Restatement, supra note 19, § 930 comment b (payment of permanent damages confers on defendant an easement or privilege to continue the invasions thus paid for in advance); Note, Nuances of Nuisance, supra note 65, at 67.


242 The landowner could seek abatement, but the courts' practice of balancing the equities in suits seeking injunctive relief made such relief far from automatic even if the plaintiff could prove an actionable nuisance.


Today this "discovery rule" is codified in Kan. Stat. Ann. § 60-513(b) (1983), which states:

[A cause of action for trespass or nuisance] shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall the period be extended more than ten (10) years beyond the time of the act giving rise to the cause of action.


The Kansas Supreme Court has held that the ten-year restriction in section 60-513(b) on the extension of the limitations period applies only in cases in which the plaintiff has suffered substantial injury but the fact of that injury is not reasonably ascertainable until some time after it occurs. The restriction does not apply when substantial injury occurs for the first time many years after the defendant's allegedly tortious conduct, but when the substantial injury is immediately apparent when it does occur. See Rutherfurd v. Kensinger, 214 Kan. 185, 519 P.2d 661 (1974). The defendants in Rutherfurd built a house and installed gas pipes in 1959. The pipes exploded, killing one of the residents in 1972. Since the decedent suffered no injury at all until 1972 (at which point the injury was all too ascertainable to the decedent's administratrix), the court held that the ten-year restriction did not apply. The fact that the house was built more than ten years before the explosion did not bar the plaintiff's suit. The application of section 60-513(b) to a toxic exposure case would be more troublesome. It is not at all clear, for example, when "substantial injury" first occurs (and the ten-year period therefore begins to run) to a person who has been exposed to a carcinogenic substance but does not manifest symptoms of cancer until twenty or thirty years later. See generally Note, Accrual Dilemma: Statutes of Limitations in Hazardous Waste Cases,
harm could be ascertained with reasonable certainty.\textsuperscript{244}

2. \textit{Henderson v. Talbott}

In 1954 the supreme court decided \textit{Henderson v. Talbott},\textsuperscript{246} a case in which the defendant had constructed a dam on its own land in June, 1949, causing water to back up and flood the plaintiff's property the next month.\textsuperscript{246} In October, 1951, the plaintiff brought a nuisance action for temporary damages incurred during the previous two years, including loss in value of cattle raised on his land and the value of labor he had expended due to the flooding.\textsuperscript{247} The defendant alleged that the statute of limitations barred the suit. The Kansas Supreme Court, reviewing the trial court's damage award, addressed the issue of when the plaintiff's cause of action accrued.\textsuperscript{248}

The court could have resolved this issue easily by applying the rules derived from its previous decisions. Since the plaintiff sought past temporary damages for harm generated by activities conducted on the defendant's land, the plaintiff should have recovered for any damages that occurred within two years prior to commencement of the suit.\textsuperscript{249} The plaintiff would be free to bring similar actions for subsequent harms for which the first action did not compensate.\textsuperscript{250} The court's holding is in fact consistent with these principles.\textsuperscript{251}

The court's analysis, however, is anything but straightforward, and the confusion which it generates continues to affect Kansas law in this area. The court began by describing past cases as confusing and inconsistent.\textsuperscript{252} The court then attempted to set forth a set of coherent rules on the various limitations issues and overruled any previous decisions inconsistent with those rules.\textsuperscript{253}

According to the court, the injured landowner's remedies depend on whether his injury is permanent or continuing. If the injury is permanent, the landowner has one cause of action for both past and future damages. That cause of action accrues, for purposes of the statute of limitations, at the time of the first injury.\textsuperscript{254} If the injury is temporary, the plaintiff may recover for past injuries

\begin{footnotesize}

\textsuperscript{244} See McMullen v. Jennings, 141 Kan. 420, 429, 41 P.2d 753, 758 (1935) (quoting McDaniel v. City of Cherryvale, 91 Kan. 40, 43, 136 P. 899, 900 (1913)).

\textsuperscript{246} 175 Kan. 615, 266 P.2d 273 (1954).

\textsuperscript{247} Id. at 619, 266 P.2d at 277.

\textsuperscript{248} Id. at 617, 266 P.2d at 276.

\textsuperscript{249} Id. at 620, 266 P.2d at 278.

\textsuperscript{250} See supra note 235 and accompanying text.

\textsuperscript{251} See supra notes 233-34 and accompanying text.

\textsuperscript{252} The Kansas Supreme Court affirmed the trial court's damage award, holding that since the plaintiff's damages were temporary, each injury sustained by him caused a new cause of action to accrue. The plaintiff could recover damages suffered during the two years prior to suit. See 175 Kan. at 623-24, 266 P.2d at 281.

\textsuperscript{253} Id. at 620, 266 P.2d at 278.

\textsuperscript{254} Id. at 624, 266 P.2d at 281.

\textsuperscript{254} The first signs of confusion in the court's analysis occur at this point. The court states that the plaintiff's cause of action accrues at "the completion of the [structure causing the injury], or at least from the time of the first injury." \textit{Id.} at 621, 266 P.2d at 279 (quoting 56 Am. Jur. \textit{Waters} § 45). The first of these two alternatives will always favor the defendant making the limitations argument, while the second will favor the plaintiff. The court does not indicate which of the two
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in a series of successive suits. The statute of limitations begins running with respect to each injury when it occurs.\footnote{175 Kan. at 621, 266 P.2d at 279.}

It the court’s use of the terms temporary and permanent injury refers to the plaintiff’s choice of remedy in a particular suit, these statements accurately reflect the rules enunciated in previous Kansas cases. If the plaintiff confines his damage request to harms he has already suffered (temporary injury), he thus can bring additional suits when he incurs future harm. If, however, the plaintiff chooses in the first action to recover not only for past harms but also for the decline in value of the property that defendant’s conduct will cause in the future (permanent injury), his recovery in the first suit fully compensates him and he may not recover again in subsequent suits.

The \textit{Henderson} opinion, however, does not necessarily treat the plaintiff’s choice of remedy as determinative in characterizing the injury as permanent or temporary. The opinion states that whether the injury gives rise to a single suit or a series of actions depends on whether “the \textit{injury or the causative condition} is permanent or temporary.”\footnote{\textit{Id.} (emphasis added) (quoting \textit{56 Am. Jur. Waters} \S 443).} This statement presents serious difficulties. Suppose that a permanent structure periodically generates pollution (smoke, for example), and each time it emits smoke, it interferes with the use of a neighbor’s land. Does \textit{Henderson} confine the injured neighbor in this situation to a single action for permanent damages, which accrues at the time the smoke first bothers him? The court does not explain why the plaintiff cannot choose to recover temporary damages in a series of suits simply because the pollution emanates from a permanent structure. Alternatively, suppose that a temporary structure discharges toxic chemical wastes only once, contaminating a neighboring landowner’s groundwater for thousands of years and thereafter continuously depriving him of the use of that water. The \textit{Henderson} opinion does not indicate clearly whether, and if so why, the neighboring landowner may initiate a series of damage actions in this situation.\footnote{\textit{Cf.} Miller v. Cudahy Co., 567 F. Supp. 892, 899-900 (D. Kan. 1983) (noting that the terms “temporary” and “permanent” have been indiscriminately applied in the Kansas cases to describe the following: (1) the pollution itself, the causal chemistry to the land; (2) the damage or loss caused by the pollution; and (3) the source or origin of the pollution. “The possibilities for inconsistencies are, of course, multiplied when different labels are applied to these facets. . . . Some of the Kansas cases focus on one of these facets, and some focus on another.” \textit{Id.} at 900. See also Miller v. Cudahy Co., 592 F. Supp. 976, 1000 (D. Kan. 1984).}

The court’s emphasis on the nature of the emitting structure in characterizing the plaintiff’s injury as temporary or permanent derives from earlier cases. In several decisions the court had indicated that the permanence of a structure may indicate that pollution, and therefore harm to the plaintiff, will necessarily continue into the indefinite future.\footnote{\textit{See}, e.g., \textit{Jeakins v. City of El Dorado}, 143 Kan. 206, 210, 53 P.2d 798, 800-01 (1936); \textit{Lackey v. Prairie Oil & Gas Co.}, 132 Kan. 754, 757, 297 P. 679, 680 (1931); \textit{McDaniel v. City of Cherryvale}, 91 Kan. 40, 44, 136 P. 899, 900 (1913). \textit{See also} \textit{Wichita & W.R. Co. v. Fechheimer}, 36 Kan. 45, 12 P. 362 (1886).} The \textit{Henderson} decision thus appears to say that if the nuisance is not abatable, the plaintiff has a single cause
of action for permanent damages, both past and future. If the source of the pollution is not permanent or the nuisance is otherwise abatable, the defendant has a continuing duty to abate, and its failure to do so constitutes a continuing, actionable wrong. Each new injury caused by the defendant's breach of its duty to abate gives the plaintiff a new cause of action.

The confusion generated by the Henderson decision extends to a related point. In previous cases, the court apparently had granted the plaintiff the option to seek temporary, past damages in a series of successive suits, even where a single suit for permanent damages would have been appropriate. In Henderson, however, the court stated that if the injury is permanent, or the type of causative structure or condition ensures that "injury will inevitably result and the amount of the damage can be determined or estimated, a single action may and should be brought for the entire damages, both past and prospective." It is not clear whether the court meant that in any case in which the trial court deems a single suit for all past and prospective damages appropriate, the plaintiff must recover, if at all, in a single action. This holding would mean that if a plaintiff seeks temporary damages in a suit commenced more than two years after the defendant's pollution first caused injury, and the court decides that the plaintiff should have sued initially for permanent damages, the only damage remedy available to the plaintiff would be barred forever.

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See 175 Kan. at 621, 266 P.2d at 279. If the future harms are not ascertainable, the plaintiff is limited to a series of successive suits for past, temporary damages. Id. See supra note 244 and accompanying text. The difficulty with the court's terminology is that a nuisance may be abatable even though the structure that causes it is permanent. Cf. Goodrich, supra note 215, at 72 (denoting nature of structure as basis for resolving limitations questions).

See 175 Kan. at 622, 266 P.2d at 280 (quoting Union Trust Co. v. Cuppy, 26 Kan. 754, 765-66 (1882)). See also supra notes 232-33 and accompanying text; W. Prosser & W. Keeton, supra note 24, § 13, at 84 (question of whether plaintiff has one suit or a series of actions often turns on likelihood that defendant will terminate the nuisance). Cf. Restatement, supra note 19, § 930 comment b, at 549 (when it appears that the wrong will probably continue indefinitely, the injured person should be able to elect to be compensated in one suit for all past and prospective invasions).


175 Kan. at 621, 266 P.2d at 279 (emphasis added) (quoting 56 Am. Jur. Waters § 443). The court also implied later in the opinion that the court must classify the plaintiff's damages, regardless of the plaintiff's own characterization. Id. at 623-24, 266 P.2d at 281. Thus, the court apparently could decide that the plaintiff suffered permanent damage and should have brought a suit seeking compensation for all past and prospective harm, even though the plaintiff elected to pursue a series of suits for past injuries.

It is not clear whether the plaintiff could nevertheless seek to abate the nuisance. The plaintiff at least should have a new cause of action for damages if the defendant expands the scope of its activity, thereby causing injury greater in scope than that previously suffered. Cf. W. Rodgers, supra note 17, at 28 (Supp. 1984) (prescription and laches defenses unavailable if the polluter is constantly changing operations). But cf. Fulmer v. Skelly Oil Co., 143 Kan. 55, 56-57, 53 P.2d 825, 826 (1936) (fact that pollution may be greater at one time than another does not make the damage to the land temporary, at least when plaintiff asks for permanent damages).
3. Kansas Cases Since 1954

In cases decided since Henderson, the Kansas Supreme Court has discerned certain "trend[s] in the law" on the various statute of limitations issues related to harms from continuing wrongful conduct. The court recently has conceded that its decisions have continued to cause confusion, and it may have abandoned any attempt to set forth a coherent set of guidelines to resolve these issues:

[A] careful review of our prior cases indicates that no hard and fast rule can be adopted as to when the damages are deemed permanent and when they are deemed temporary. In addition, some of our cases refer not only to the permanent or temporary nature of the damages but also the permanent or temporary nature of the causative factor. Each case must be considered on its own factual setting.

Despite the court's warning against the formulation of "hard and fast" rules, the remainder of this section attempts to summarize the principles that post-Henderson cases have established. This summary will indicate that Kansas law remains unsettled on at least two points: first, at what time a cause of action for permanent damages accrues; and second, whether an injured party must ever forego a series of suits for temporary damages and seek compensation for all harm, past and prospective, in a single suit for permanent damages. This section also suggests the most appropriate solution for each of these uncertainties.

The first distinction that the recent Kansas cases draw continues to be based on whether the defendant's activities took place on its own land or on the plaintiff's land. If the defendant's activities encroach onto the plaintiff's land, the plaintiff has one cause of action for the injury to the plaintiff's exclusive right to possession, which accrues at the time of the initial encroachment.

If the defendant's activities take place on its own land, however, causing continuous or repeated injury to the plaintiff, the injured plaintiff has a choice of remedies, at least if the court determines that the defendant can abate the harm. In these circumstances the plaintiff can choose to recover past dam-

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266 See Adams v. Arkansas City, 188 Kan. 391, 401-02, 362 P.2d 829, 837-38 (1961) (quoting McMullen v. Jennings, 141 Kan. 420, 426, 41 P.2d 753, 756 (1935)). Cf. Bowen v. City of Kansas City, 231 Kan. 450, 454-55, 646 P.2d 484, 487-88 (1982) (plaintiff injured by activity on defendant's land caused by continuing nuisance has only one action, which accrued at time of first injury, against contractor, hired by defendant, who no longer has the right to control and abate the harm-causing activity). But cf. RESTATMENT, supra note 19, § 161 comment b (actor's failure to remove structure erected on land of another constitutes a continuing trespass, conferring on the possessor of the land "an option to maintain a succession of actions based on the theory of continuing trespass or to treat the continuance of the structure on the land as an aggravation of the original trespass).
267 The Kansas Supreme Court has recognized that whether the defendant can conduct its business in the future without causing harm to the plaintiff is sometimes a matter of pure speculation. See Adams v. Arkansas City, 188 Kan. 391, 403-04, 362 P.2d 829, 839 (1961). Nevertheless, the Kansas courts have been willing to inquire into the "likelihood of the alteration or abatement of the causative condition." Gowing v. McCandless, 219 Kan. 140, 144, 547 P.2d 338, 342 (1976). In
ages in a series of suits. This option is based on the theory that the defendant's failure to prevent the harm from continuing constitutes a continuing wrong on the defendant's part, giving rise to a series of successive actions, each one accruing at the time the plaintiff suffers new injury. 288 The plaintiff suffers injury when it is both substantial and reasonably ascertainable. 289 In each private nuisance suit for temporary damages, the plaintiff may recover for the injuries sustained, including loss of use of the land and crop losses, within the period of limitations preceding the suit. 270 The plaintiff cannot recover for losses sustained outside the limitations period. 271 The plaintiff, then, must sue within the period of limitations commencing with the most recently suffered injury. 272

Alternatively, a person harmed by an abatable activity on the defendant's property may seek compensation for all injuries, past and prospective, in a single suit. 273 In such an action for permanent damages, the plaintiff may recover the depreciation in the market value of the land attributable to injury that he

Gowing, for example, the court concluded that the obstruction of a drainage ditch, which caused flooding on the plaintiff's land, was temporary and abatable, relying upon the plaintiff's testimony that the ditches "can be cleaned out." Id. at 145-46, 547 P.2d at 343-44. See also Miller v. Cudahy Co., 567 F. Supp. 892, 908 (D. Kan. 1983) (nuisance created by operation of defendant's salt business was abatable "because the defects, if any, causing pollution may be repaired or remedied"); McAlister v. Atlantic Richfield Co., 233 Kan. 252, 262, 662 P.2d 1203, 1211 (1983) (plaintiff recovers permanent damages for harms that are "practically irremediable").


292 The plaintiff can also seek to abate a continuing nuisance within the limitations period of the most recently suffered injury. See Simon v. Neises, 193 Kan. 343, 395 P.2d 308 (1964).

293 See McAlister v. Atlantic Richfield Co., 233 Kan. 252, 262, 662 P.2d 1203, 1211 (1983). Cf. Adams v. City of Arkansas City, 188 Kan. 391, 402-06, 362 P.2d 829, 838-40 (1961) (nonabatable nuisance). If the plaintiff seeks permanent damages, whether for an abatable or nonabatable nuisance, the defendant must be given the opportunity to present evidence that the nuisance can and will be abated. Such a showing refutes the contention that the plaintiff's injury is permanent and confines the plaintiff's recovery to damages already suffered (i.e., loss of use value). See Alexander v. Arkansas City, 193 Kan. 575, 578-79, 396 P.2d 311, 314 (1964); McCormick, supra note 215, at 595-97.
suffered within the limitations period.274

The same choice of remedies apparently is not available, however, in all situations. The Kansas Supreme Court has stated that when the plaintiff seeks recovery of temporary, past damages in a series of suits, “each injury causes a new cause of action to accrue, at least until the injury becomes permanent.”275 “If an injury is permanent in character, all the damages caused thereby, whether past, present, or prospective, must be recovered in a single action.”275 This statement appears to make the nature of the injury determinative of the plaintiff’s right to choose between a series of actions for temporary, past damages, or a single action for past and future damages. In one recent case, for example, the defendant polluted groundwater under the plaintiff’s land, and the plaintiff sought only past, temporary damages. Because the plaintiff alleged that the water would not be fit for drinking for another 150 to 400 years, however, the court deemed the plaintiff’s injury permanent and relegated the plaintiff to a single cause of action.277 In other cases, the decision on whether the plaintiff’s “injury” is permanent and therefore must be redressed in one suit, turned not on the character of the injury itself, but on whether the defendant would be able to abate the condition that gave rise to the plaintiff’s harm.278 The confusion that the decision in Henderson v. Talbott278 generated thus remains firmly entrenched in Kansas law. This confusion is only slightly mitigated by the courts' consistent recognition that the injured individual need not recover all damages in a single suit if the extent of the permanent damage cannot yet be reasonably ascertained.280

The court could eliminate much of the remaining confusion by permitting a

277 See McAlister v. Atlantic Richfield Co., 233 Kan. 252, 263-64, 662 P.2d 1203, 1212 (1983). That cause of action was barred by the statute of limitations because the plaintiff filed suit more than two years after the water was polluted by the defendant’s oil drilling operations. Id.
279 See supra note 256 and accompanying text.
plaintiff to choose between a series of actions and a single suit whenever the
defendant's activity continues to improperly interfere with the plaintiff's
interests, regardless of the defendant's ability to abate the harm or the character of
the plaintiff's injury. Suppose that a court decides that the defendant's inten
tional interference with the plaintiff's interests is substantial and unreasonable
and therefore actionable. Because of the importance to the community of the
defendant's operations, however, the court declines to shut down the opera
tion, but concludes that, even if the defendant takes steps to minimize the
harm to the plaintiff, the plaintiff will continue to suffer some harm in the
future.\footnote{381} The court should not force the plaintiff to recover for all harm, past
and future, in a single suit. Because the defendant will continue to unreasona
bly interfere with the plaintiff's interests, the court should allow the plaintiff
to bring a new action for past injury each time the defendant breaches its con
tinuing duty to avoid such interference.\footnote{382} Requiring the plaintiff to recover
prospective damages in one action forces him "to accept a jury's guess at his
future damage as his only remedy at law, where he would reasonably prefer to
wait and recover his actual loss as it accrues."\footnote{383}

Nor should the plaintiff be confined to a single action simply because the
defendant's continuing activity has injured the plaintiff's resources in a man
ner that either cannot be reversed or will take a long time to reverse. A recent
federal district court in Kansas refused to confine the plaintiff to a single ac
tion simply because of the "permanence" of the injury to an underground aquifer.
That analysis, the court stated, is "a gross oversimplification of the prob
lem."\footnote{384} The court noted that infusion of salt into the aquifer is not harmful in
and of itself. Rather, the plaintiffs suffer injury when they are unable to use
the water to irrigate their crops.\footnote{385} The plaintiffs should be able to recover
those temporary losses periodically, as they occur, rather than being forced to
speculate on the length of time the contamination will last and on the extent
and value of damage that the contamination will cause to their interests.\footnote{386}

\footnote{381} For example, the Kansas courts have recognized that municipal sewage systems must be per
mitted to operate for the general public good, despite the fact that it "may be practically impossi

\footnote{382} See McCormick, supra note 215, at 593. See also Cox v. Cambridge Square Towne House,
Inc., 239 Ga. 127, 236 S.E.2d 73 (1977) (citing Restatement, supra note 19, § 930(1)(a)) (when
defendant's activities will continue to interfere with plaintiff's interests indefinitely, the plaintiff
"has the right to elect to treat the nuisance as temporary and sue for all those damages which have
occurred [within the limitations period], or he may elect to sue for all future damages as well and
put an end to the matter."); Restatement, supra note 19, § 930 comment b (when wrong will
continue indefinitely, persons injured are empowered to elect to be compensated once for all prospec
tive invasions); W. Prosser & W. Keeton, supra note 24, § 13, at 84, and cases cited id. at
n.61. Cf. Heery v. Reed, 80 Kan. 380, 102 P. 846 (1909) (when defendant breaches executory con
tract plaintiff has the right, but is not required to treat the contract as broken and sue for dam
ages. Plaintiff may wait to sue when time for performance has expired.).

\footnote{383} McCormick, supra note 215, at 593.


\footnote{385} Id.

\footnote{386} The Kansas courts could reach the same result as that suggested in the text by concluding in
many cases in which the defendant tries to compel the plaintiff to recover prospective damages
Accordingly, while the plaintiff should always have the option of seeking prospective damages in one suit to avoid the time and expense of bringing a series of suits,287 that single action should "never [be] his sole form of legal relief."288

Assuming that the plaintiff chooses to recover all damages, past and prospective, in a single suit, the courts must determine when that cause of action for permanent damages accrues. Here, too, the Kansas decisions reflect a lack of uniformity.289 Most of the cases appear to indicate that the statute of limitations begins to run when the defendant's pollution first injures the plaintiff.290 In at least one case, however, the court permitted an action for permanent damages since at least some injury occurred within the limitations period, even though the first injury that the plaintiff experienced occurred before that time.291

The Kansas courts should adhere to the latter view. The ability to bring a suit for permanent, prospective damages should continue as long as the defendant's activities continue to impose harm on the plaintiff.292 As long as the defendant continues to cause an actionable nuisance, the defendant continues to breach its obligation as a property owner not to use its land in a manner that interferes with the legally protected interests of another.293 The plaintiff

that such damages are not yet reasonably ascertainable.

The federal district court in the Miller case displayed yet another way to avoid compelling the plaintiff to recover in one action. The plaintiffs in Miller alleged that the defendants' pollution of the aquifer was continuing at the time of suit. The defendant responded that even if it had been responsible for polluting the aquifer in the past, its pollution had ceased nearly 20 years ago. The court concluded that if the defendant had stopped polluting, then the nuisance was clearly an abatable one, for which a series of successive suits for past damages could be brought. If, on the other hand, the defendant tried to label the plaintiffs' injury as permanent because the operation of the salt plant would necessarily be injurious to plaintiff's land, then the defendant would have to concede that the plant is still polluting, and in an uncontrollable manner. See Miller v. Cudahy Co., 567 F. Supp. 892, 906-07 (D. Kan. 1983).

287 If the plaintiff recovers prospective, permanent damages, he in effect grants an easement to the defendant to continue the damaging activity. See McCormick, supra note 215, at 597. The plaintiff should not be required to engage in a "forced sale" of that easement, and to give up his right to seek injunctive relief, by precluding him from bringing successive suits for each injury as it occurs.

288 McCormick, supra note 215, at 594.

289 This issue arises in Kansas cases both when the nuisance caused by the defendant is abatable and when the defendant's operations will be permitted to continue despite the fact that elimination of the adverse impact upon the plaintiff is practically impossible. See, e.g., supra note 281.


292 This is the view supported by at least one leading authority. See McCormick, supra note 215, at 599-600. McCormick's position was adopted in Cox v. Cambridge Square Towne Houses, Inc., 239 Ga. 127, 236 S.E.2d 73, 74-75 (1977). The court in Cox also held that the plaintiff may always seek to enjoin a continuing trespass, provided suit is filed within the limitations period of the last injury. 236 S.E.2d at 75.

293 As long as the interference with the plaintiff's interests is unreasonable, the defendant is subject to this duty whether or not it would be practicable for the defendant to abate the
should be free to sue based on the last breach of duty, rather than be forced to assert his rights upon the first breach or lose them forever. The plaintiff should be able to recover permanent damages if he brings the suit within the limitations period commencing with the most recently suffered injury. The plaintiff should also be able to recover the decline in the market value of his property attributable to injuries within that limitations period. Fixing the commencement of the cause of action for permanent damages at the time of the first injury is a "rigid and mechanical" application of the statute that "has the potential to work substantial injustice."

III. NEGLIGENCE AND STRICT LIABILITY

A. NEGLIGENCE

Liability in a nuisance action may be based on the defendant's negligent conduct. A plaintiff also can seek recovery for environmental harm in a "straight" negligence action. The plaintiff must demonstrate a duty on the defendant's part to conform to a certain standard of conduct, a breach of that duty, a causal connection between the conduct and the resulting injury, and actual loss or damage.

The first two elements of a negligence cause of action involve showing that the defendant had, but failed to comply with, an obligation to conform to a

interference.

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284 See McCormick, supra note 215, at 600. In a similar context, a Kansas federal district court recently stated that starting the statute running on a cause of action for permanent damages as of the time of the first injury "would be the functional equivalent of granting to [the defendant] a license to pollute as appears profitable or expedient to [the defendant] at any particular time. . . ." Miller v. Cudahy Co., 567 F. Supp. 892, 907 (D. Kan. 1983). This result would be inconsistent with the Kansas Legislature's attempt to discourage pollution of the state's water resources. See id.

285 See McCormick, supra note 215, at 600. See also Patrick v. Sharon Steel Corp., 549 F. Supp. 1259, 1264-65 (N.D. W. Va. 1982) (quoting Handley v. Town of Skinnspector, 289 S.E.2d 201 (W. Va. 1982)) ("[W]here a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from the date of the last injury, or when the tortious overt acts cease."). The Patrick court also stated: "Where there is a repeated or continuous injury and where the damages do not occur all at once but increase as time progresses the tort is not completed, nor have all the damages been incurred, until the last injury is inflicted or the wrongdoing ceases."


297 Miller v. Cudahy Co., 592 F. Supp. 976, 1000 (D. Kan. 1984). In these circumstances the single cause of action for permanent damages "may often be a Greek gift indeed to the injured landowner, especially where, as would be natural to the man on the street, he thinks his right to sue continues as long as the defendant's wrongful conduct continues, and allows the limitation period to pass, after the injury begins, without suit." McCormick, supra note 215, at 580.


299 It has been asserted that "[s]traight negligence suits are seldom used in environmental law." F. Anderson, D. Mandelker, & A. Tarlock, supra note 26, at 634. But see Note, The Development of a Strict Liability Cause of Action for Personal Injuries Resulting from Hazardous Waste, 16 New Eng. L. Rev. 543, 563 (1981) (citations to cases in which negligence was used in actions involving hazardous wastes). The difference between the two bases of liability may not be significant in this context. A plaintiff relying upon negligent conduct as the basis for nuisance liability apparently must prove all of the elements of a negligence cause of action.

300 See W. Prosser & W. Keeton, supra note 24, § 30, at 164-65.
certain standard of conduct for the protection of others against unreasonable risks.\textsuperscript{301} In certain environmental injury cases, the plaintiff may have difficulty establishing this standard.\textsuperscript{302} The element of risk involves a danger that is or should be apparent to a person in the position of the actor.\textsuperscript{303} In a case involving hazardous wastes leaking from a dump site into underground water sources, the defendant may be able to argue that at the time of disposal, the defendant took all of the precautions that the industry engaged in at that time, and therefore could not foresee subsequent leakage.\textsuperscript{304} The more serious the potential harm is, however, the less likely its occurrence must be before creating a duty on the defendant's part to avoid that harm.\textsuperscript{305} The reasonableness of the risk also requires balancing the probability and gravity of the risk against the utility of the defendant's conduct.\textsuperscript{306} The defendant's failure to use technologically and economically available mechanisms for pollution control may tip the balance against the defendant.\textsuperscript{307}

The applicable standard of conduct may be derived from a statute or agency regulation.\textsuperscript{308} "The plaintiff seeking to rely upon a statutory standard, however, must demonstrate that the legislation was designed to protect a class of persons that includes the plaintiff, and that the harm suffered is of the kind which

\textsuperscript{301} See Union Pac. Ry. v. Rollins, 5 Kan. 98, 105, 107 (1869); W. PROSSER & W. KEETON, supra note 24, § 30, at 164.

\textsuperscript{302} "The industry standard regarding disposal of hazardous wastes is nebulous at best." TULSA Note, supra note 18, at 460.

\textsuperscript{303} See W. PROSSER & W. KEETON, supra note 24, § 30, at 170.

\textsuperscript{304} The potential for the retroactive application of contemporary standards of care to hazardous waste disposal litigation is discussed in Ginsberg & Weiss, supra note 18, at 888-89; TULSA Note, supra note 18, at 460-61; N. Ky. note, supra note 18, at 450. In certain cases, for example, those against current owners and operators of the dump site, the plaintiff may be able to avoid this problem by contending that the defendant's negligence stems from its current failure to stop the leak from occurring. This line of argument may be effective even against former owners of the site, and against companies that generated the wastes and transported them to the site. Cf. United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981), aff'd, 688 F.2d 204 (3d Cir. 1982) (former site owner is proper defendant in action under Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973 (1982), to restrain any person from contributing to the improper disposal of hazardous wastes, because the former site owner "contributed to the leak by failing to stop it"). In cases involving more conventional pollutants and control technologies, this "retroactivity" problem should be far less troublesome.

\textsuperscript{305} See W. PROSSER & W. KEETON, supra note 24, § 30, at 171. Courts sometimes demand a greater degree of care when exposure to chemical or radioactive substances creates a significant danger to human health. See cases cited in Note, Remedies for Hazardous Waste Injuries, supra note 29, at 123 nn.41-42.

\textsuperscript{306} See W. PROSSER & W. KEETON, supra note 24, § 30, at 171; id. at 173 ("the standard of conduct which is the basis of the law of negligence is usually determined upon a risk-benefit form of analysis: by balancing the risk, in light of the social value of the interests threatened, and the probability and extent of the harm, against the value of the interests which the actor is seeking to protect, and the expedience of the course pursued").

\textsuperscript{307} See id. at 172; Juergensmeyer, Control of Air Pollution Through the Assertion of Private Rights, 1967 DUKE L.J. 1126, 1147-48. The promulgation of federal regulations finding certain technologies to be available would support the plaintiff's claim that a defendant who had not installed such controls, or was not operating them properly, had breached the applicable standards of care. Cf. supra notes 137-39 and accompanying text.

the statute was intended to prevent.\textsuperscript{309} A plaintiff alleging harm to his health,\textsuperscript{310} or even his property,\textsuperscript{311} resulting from the defendant’s violation of one of the federal pollution control statutes should not have any trouble fitting within the protected class and intended harm. If the statute is designed to protect a class that includes the plaintiff against a risk of the type of harm that has in fact occurred because of the statutory violation, most courts determine the issue of negligence conclusively against the defendant.\textsuperscript{312} Compliance with statutory or regulatory provisions, on the other hand, does not conclusively establish compliance with the applicable standard of care, since the legislature may have been setting only a minimum standard that might be higher if the risk of harm is sufficiently great.\textsuperscript{313}

The element of causation involves both cause in fact and legal or proximate cause.\textsuperscript{314} As indicated above, the plaintiff may have difficulty proving cause in fact if he was exposed to multiple sources of pollution or if the path of contamination is not evident.\textsuperscript{315} Resort to one of the more novel theories of joint liability may overcome this difficulty.\textsuperscript{316} The notion of proximate cause encompasses, in addition, a requirement that the plaintiff’s harm be foreseeable to the defendant, an issue which also arises in connection with proof of the applicable standard of care.\textsuperscript{317}

The final element of a negligence cause of action is proof of injury. This requirement may pose problems if the plaintiffs have been exposed to toxic substances but, perhaps because of the long latency period, have not yet experienced illness. Some courts refuse to rule in the plaintiff’s favor on the basis of a mere threat of future harm.\textsuperscript{318}

\textsuperscript{309} See W. Prosser & W. Keeton, supra note 24, § 36, at 222-29.
\textsuperscript{310} See, e.g., 42 U.S.C. § 7402(a)(1) (1982) (purposes of the Clean Air Act are “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare . . .”); id. § 6902 (1982) (objective of Solid Waste Disposal Act is “to promote the protection of health and the environment . . .”); 33 U.S.C. § 1251(a)(3) (1982) (reciting Clean Water Act policy “that the discharge of toxic pollutants in toxic amounts be prohibited . . .”).
\textsuperscript{311} See, e.g., 42 U.S.C. §§ 7401(a), 7602(h) (1982) (policy of Clean Air Act is to promote the public welfare, which includes damage to and deterioration of property).
\textsuperscript{312} See W. Prosser & W. Keeton, supra note 24, § 36, at 229-30. The statutory violation is sometimes said to constitute “negligence per se.” Id. at 230. The Kansas courts apparently adhere to this point of view. See, e.g., Reiserer v. Murfin, 183 Kan. 597, 600, 331 P.2d 313, 315 (1958). Other courts hold that a statutory violation is only evidence of negligence, or prima facie evidence of negligence, which the defendant may rebut with other evidence. See W. Prosser & W. Keeton, supra note 24, § 36, at 230.
\textsuperscript{313} See W. Prosser & W. Keeton, supra note 24, § 36, at 233; Restatement, supra note 19, § 288(C).
\textsuperscript{314} See W. Prosser & W. Keeton, supra note 24, § 30, at 165.
\textsuperscript{315} See supra notes 29-31 and accompanying text.
\textsuperscript{316} See supra notes 32-64 and accompanying text.
\textsuperscript{317} See supra notes 304-07 and accompanying text.
\textsuperscript{318} See, e.g., Ayers v. Township of Jackson, No. A-2103-83-T3 (N.J. Super. June 4, 1985) (court may award damages only after the manifestation of an injury arising from exposure to toxic chemicals and not for the cost of lifetime medical surveillance for early clinical signs of cancer). See also W. Prosser & W. Keeton, supra note 24, § 30, at 165; But see Note, Increased Risk of Cancer as an Actionable Injury, 18 Ga. L. Rev. 563 (1984) (contending that courts should permit recovery in tort against defendants whose actions have increased the risk that plaintiffs will develop cancer).

The plaintiff in a negligence action may face limitations problems similar to those raised in a
B. Strict Liability

Liability in a nuisance action may be based upon the ground that the defendant's conduct is actionable under principles of strict liability. The plaintiff may seek to recover on the basis of strict liability, however, without invoking nuisance doctrine.

Strict liability is liability that "is imposed apart from any recovery on a theory that defendant knowingly or purposely interfered with a legally protected interest or was negligent."\(^{119}\) This doctrine imposes liability on the defendant because its behavior exposed others to an abnormal risk of harm.\(^{320}\) While the doctrine permits the defendant to engage in the conduct creating the undue risk of harm, it forces the defendant to bear the loss that its conduct causes, because it can bear the loss more easily than the injured individual.\(^{331}\)

A person injured by another's pollution may base a strict liability claim on the abnormally dangerous nature of the defendant's activities or on the conditions that the defendant created.\(^{322}\) The courts have developed this doctrine from the English decision in *Rylands v. Fletcher*.\(^{323}\) The court found the defendant in that case liable for engaging in a "non-natural use" of the land, as opposed to "any purpose for which it might in the ordinary course of the enjoyment of land be used."\(^{324}\)

The American courts, many of which have accepted the doctrine in *Rylands*, have focused on the magnitude of the risk, measured by both its probability and severity, and the appropriateness of the defendant's activity to the place where it is located.\(^{885}\) One author has described an increasing emphasis on the magnitude of the risk that the defendant's activity creates, regardless of its

nuisance or trespass suit. If the plaintiff is exposed to a hazardous chemical substance but does not develop cancer until years later, when does the statute of limitations begin to run on the plaintiff's cause of action? The Kansas statutory discovery rule, Kan. Stat. Ann. § 60-513(b) (1983), provides only limited relief since the limitations period cannot be extended more than ten years "beyond the time of the act giving rise to the cause of action." If the owner of a hazardous waste disposal site fails to prevent a leak over a period of time, the injured plaintiff may be able to argue that the owner was continuously negligent and that each failure to take action, which exacerbated the degree of exposure to the substance, gave rise to a new cause of action. Cf. W. Prosser & W. Keeton, supra note 24, § 30, at 166.

\(^{119}\) W. Prosser & W. Keeton, supra note 24, § 78, at 554. See also id. § 75, at 534.

\(^{320}\) See id. at 537-38.

\(^{331}\) See id. at 537.

\(^{322}\) For discussions of strict liability in environmental litigation, see generally Ginsberg & Weiss, supra note 18, at 889-920; Prosser, *Nuisance Without Fault*, 20 Tex. L. Rev. 399 (1942); WAYNE Comment, supra note 18, at 1118-20; New Eng. Note, supra note 18.

\(^{323}\) 3 H. & C. 774, 159 Eng. Rep. 737 (1865), rev'd, L.R. 1 Ex. 265 (1866), aff'd, L.R. 3 H.L. 330 (1868). The case involved the construction of a reservoir on the defendant's land, which was located in coal mining country. The water in the reservoir broke through the shaft of an abandoned coal mine and flooded the plaintiff's adjoining mine.

\(^{324}\) L.R. 3 H.L. at 338. In the lower court, the Exchequer Chamber, liability was based upon a broader principle: "[T]he person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape." L.R. 1 Ex. 265, 279-80.

\(^{885}\) See W. Prosser & W. Keeton, supra note 24, § 78, at 551; W. Rodgers, supra note 17, § 2.14, at 159 (1977).
location. Since the owner of a hazardous waste disposal site is in a better position than persons who are exposed to the risk of harm to insure against the risk and to reduce or warn about the danger, the owner should be strictly liable for harm that leakage from the site causes.

The Kansas Supreme Court adopted the strict liability principles of Rylands as early as 1917. The court, in imposing liability without fault, has relied on both the risk of serious injury created by the escape of pollutants from the defendant's activity and the inappropriateness of the activity to the locale.

The Restatement has adopted a related approach to strict liability. A person who carries on an abnormally dangerous activity is strictly liable for harm to the person, land, or chattels of another, if the harm that the plaintiff suffers is the same kind of harm the possibility of which made the activity abnormally dangerous. A court deciding whether an activity is abnormally dangerous should consider the following factors:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;

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See id. at 54-55; authorities cited in id. at 56 n.12; Kenney v. Scientific Inc., No. L-51533-84 (N.J. Super. 1985) (generators of hazardous waste can be held strictly liable for property damage or personal injuries no matter what precautions were undertaken in disposing of the waste). See also McLaren, supra note 18, at 528 (recent cases relying on Rylands support argument that test for strict liability "should be related more to the magnitude of the overall social risk in running industrial operations, than to whether the activity is commonplace in general, or in its particular location."). But cf. Frazier v. Cities Service Oil Co., 159 Kan. 655, 667-68, 157 P.2d 822, 830 (1945) (doctrine of Rylands v. Fletcher was not extended to cover dangerous substances that were not permitted to escape from ponds on defendant's land).


See State Highway Comm'n v. Empire Oil & Refining Co., 141 Kan. 161, 164-65, 40 P.2d 355, 357 (1937) (quoting Bohlen, Aviation Under the Common Law, 48 Harv. L. Rev. 216, 216-17 (1934) (cases following Rylands "recognize that certain activities... involve[e] in their very nature a risk of serious injury to others which cannot be eliminated by any practicable precautions... [W]here some purpose is served peculiar to those in charge rather than common to the great mass of mankind, it is held that these ventures must be carried out at the risk of those interested in them and not at the risk of those without such interest but whose bad luck it is to be or to possess property in the neighborhood of their prosecution."). The court has stated that if the defendant's activity involves "the development of the natural resources of the land," it is not liable for any resulting slight injury. See Helms v. Eastern Kansas Oil Co., 102 Kan. 164, 168, 169 P. 208, 209 (1917). The commentators have rejected this interpretation of the "non-natural use" requirement of Rylands, focusing instead on whether the activity is usual or normal to the area, or whether the activity, regardless of its location, creates an abnormally high risk. See W. Prosser & W. Keeton, supra note 24, § 78, at 545-48; W. Rodgers, supra note 17, § 2.14, at 159 (1977). Moreover, strict liability has been imposed in Kansas for oil and gas drilling operations that have caused substantial harm. See, e.g., Berry v. Shell Petroleum Co., 140 Kan. 94, 33 P.2d 953 (1934); Helms v. Eastern Kansas Oil Co., 102 Kan. 164, 169 P. 208 (1917).

See Restatement, supra note 19, § 519.
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried out; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.333

While balancing all these factors would move the strict liability analysis close to that involved in a nuisance,333 or even a negligence action,334 the courts apparently have not accepted "[t]his open-ended invitation to balancing."335 Courts have imposed strict liability on leaking hazardous waste disposal sites, oil and gas drilling operations, and other enterprises releasing environmental contaminants even when the defendants' activities were an integral part of the local economy.336

The plaintiff in a strict liability action, as in an action relying upon any other theory of recovery for pollution-induced injury, may face difficult questions of factual causation.337 Proximate causation issues also may arise.338 The defendant's duty to insure safety extends only to those consequences that lie within the risk the existence of which invoked the need for liability without fault.339 Many of the pitfalls facing the plaintiff in a nuisance action involving industrial pollution thus may also arise in a strict liability suit.

IV. Conclusion

Despite the enactment of a series of federal statutes designed to control the discharge of pollutants into the environment, state common law remedies to redress pollution harms continue to play a significant role in the field of environmental law. The role of state law is particularly important in the attempts of private individuals to seek compensation for past harms, since the Supreme Court's interpretations of the federal statutes apparently have eliminated all federal compensatory remedies.340 In many cases an injured individual will be able to assert a cause of action in public or private nuisance. Plaintiffs should also consider trespass, negligence, and, especially in cases involving the disposal of hazardous wastes, strict liability as potential theories of liability.

Each of these causes of action has its advantages and disadvantages. A plain-

333 Id. § 520.
335 See W. Prosser & W. Keeton, supra note 24, § 78, at 555.
337 See W. Rodgers, supra note 17, § 2.14, at 57 (Supp. 1984) and cases cited therein at notes 21-26, 28-30. See also New Eng. Note, supra note 18, at 565-66 (contending that hazardous waste management should be deemed an abnormal danger activity).
338 See supra notes 26-31 and accompanying text.
339 See State Highway Comm'n v. Empire Oil & Refining Co., 141 Kan. 161, 164-65, 40 P.2d 355, 357 (1935) (citing Rylands) (liability only extends in this case to "the natural and anticipated consequences of the defendant's activities"). But see Berry v. Shell Petroleum Co., 140 Kan. 94, 102-03, 33 P.2d 955, 958 (1934) (rejecting defendants' contention, derived from negligence cases, that when there is an intervening cause to which the damage can be traced, the person responsible for the remote cause will not be held liable).
338 See W. Prosser & W. Keeton, supra note 24, § 79, at 560.
340 Private persons may, however, seek to recover costs incurred in responding to releases or threatened releases of hazardous substances from inactive hazardous waste disposal sites under CERCLA, provided certain conditions are met. See 42 U.S.C. § 9607(a)(B) (1982).
tiff also should be aware of several areas of uncertainty or difficulty that may arise under each cause of action. Factual causation may be difficult to establish, and the plaintiff may want to consider employing one of the novel theories of liability employed in product liability actions against multiple defendants. The willingness of the court to grant injunctive relief, even if the defendant is liable, will be impossible to predict. Finally, if the plaintiff has suffered harm from a continuing activity by the defendant, or has become aware of harm long after the defendant engaged in the allegedly tortious conduct, the plaintiff should anticipate a statute of limitations defense and should draft a complaint that will minimize the chances of dismissal on that ground. The adoption of a clear and consistent set of principles by the Kansas courts would assist all parties in addressing these limitations issues.