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Injury to Property

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§5.1 I. SCOPE OF CHAPTER

This chapter discusses damages for trespass and nuisance. Damages for related causes of action are briefly discussed in §5.54. Because the right to damages can be defeated by affirmative defenses, various defenses are also discussed in that section.

The focus of this chapter is on damages. However, one of the unique features of nuisance and trespass law is that the remedies cannot be separated from the substantive law. The historical growth of these two torts have produced an unusually tight bond between substantive law and the determination of the remedies available. The remedies and defenses applicable to a particular situation involving nuisance or trespass depend on the classification of the underlying claim as “per se” (see §5.3), “public” or “private” (see §§5.7–5.11), and “temporary/continuing” or “permanent” (see §§5.13–5.16). The result is that remedies, including damages, can be meaningfully discussed only in the context of the substantive law. Therefore, practitioners must review the elements of the causes of action for nuisance and trespass in order to possess sufficient information to evaluate the damage options available in a particular case.

Also, there are devastating traps for the unwary inherent in these classifications (*e.g.*, “public/private,” “continuing/permanent”). The classifications are often artificial and extremely difficult to predict with accuracy. These classifications not only control what remedies are available but also determine whether the plaintiff has any viable claim at all. Practitioners must be aware of the implications of these classifications in their cases. See, *e.g.*, §§5.7–5.12 concerning public and private nuisance and §§5.13–5.16 discussing temporary or continuing versus permanent nuisance.

This chapter does not provide a complete treatment of the substantive law of nuisance and trespass. For a discussion of nuisance, see 11 Witkin, *Summary of California Law, Equity* §§133–173 (10th ed 2005), and of trespass, see 5 Witkin, *Summary, Torts* §§604–609. For a review of insurance issues concerning damage to real property, see *California Liability Insurance Practice: Claims and Litigation* (Cal CEB 1991).

II. NUISANCE

§5.2 A. General Definition

The word “nuisance” is derived from Latin by way of the French and means hurt, annoyance, or inconvenience. Nuisance theory has provided an effective means for redress to a wide range of wrongs. The tort of nuisance, however, is incapable of an exact or comprehensive definition. Most of the uncertainty regarding this term derives from the fact that nuisance law has been used to cover the invasion of many different interests caused by various kinds of conduct that inconveniences someone. For an absorbing history of the development of the law of nuisance, see *McRae, Development of Nuisance in The Early Common Law*, 1 U Fla L Rev 27 (1948).

Nuisance results from conduct or conditions that unreasonably interfere with, or create a condition that interferes with, the use or enjoyment of land. Nuisance is a species of tort liability rather than a type of tortious conduct. Although nuisance is primarily created and defined by the interests invaded and the damage or harm caused, and not by the conduct that has created the condition (see CC §3479), it usually requires proof of negligence, recklessness, or intent. See *Lussier v San Lorenzo Valley Water Dist.* (1988) 206 CA3d 92, 100, 253 CR 470.

Nuisance is a civil wrong based on disturbance of rights in land. The cause of action is based on the idea that owners or possessors of land are entitled to the full use and enjoyment of their land, but they must use their property in a way that does not unreasonably interfere with either the general welfare of the community or others’ right to the full enjoyment of their property. *County of Contra Costa v Cowell Portland Cement Co.* (1932) 126 CA 267, 271, 14 P2d 606; *Wolford v Thomas* (1987) 190 CA3d 347, 358, 235 CR 422. The public policy underlying nuisance law and its purpose is to provide a means of recovery for harm suffered and to facilitate a just and equitable recovery. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 871, 218 CR 293.

PRACTICE TIP► Nuisance law works well when the nuisance creates an immediate, perceptible condition that can be seen, heard, smelled, felt, and so forth. It does not function as well when dealing with “stealth” conditions such as toxic contamination or other hidden conditions affecting the use of property.

The overall policy of providing a remedy for recovery for harm suffered has been eroded in practice by the mechanical, and sometimes convoluted, application of the technical rules based on the classification of the nuisance, such as temporary (or continuing) versus permanent. See §§5.13–5.16. These classifications often result in the denial of recovery to landowners for conduct that is obviously tortious because it interferes with the use of land. See, e.g., *Mangini v Aerojet-General Corp.* (1996) 12 C4th 1087, 51 CR2d 272 (*Mangini II*), discussed in §5.45. Contemporary situations that were not contemplated at the time these classifications and rules were developed are fertile fields for reexamination and reformulation of nuisance law.

§5.3 B. Nuisance Per Se

Nuisance per se arises when a legislative body, in exercising its police power, expressly declares a particular object, substance, activity, or circumstance to be a nuisance. *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1206, 52 CR2d 518. A nuisance per se can be declared by statute or ordinance. See, e.g., *Govt C §38771*; *City of Bakersfield v Miller* (1966) 64 C2d 93, 48 CR 889 (discussing preemption issues and authority of legislature and cities); *Flahive v City of Dana Point* (1999) 72 CA4th 241, 244, 85 CR2d 51; *People ex rel Dep't of Transp. v Outdoor Media Group* (1993) 13 CA4th 1067, 17 CR2d 19; *City of Costa Mesa v Soffer* (1992) 11 CA4th 378, 13 CR2d 735; *Amusing Sandwich, Inc. v City of Palm Springs* (1985) 165 CA3d 1116, 211 CR 911; *City & County of San Francisco v Padilla* (1972) 23 CA3d 388, 401, 100 CR 223 (violation of ordinance). A nuisance per se can also be declared by administrative or judicial procedures taken by a governmental agency. *Beck Dev. Co. v Southern Pac. Transp. Co.*, *supra*.

If an activity is a nuisance per se, the court does not go beyond the legislative determination that the activity is a nuisance. The court does not balance the equities. *City of Costa Mesa v Soffer* (1992) 11 CA4th 378, 382, 13 CR2d 735. Although the plaintiff has the burden of proving the essential factual elements of nuisance (*Beck Dev. Co. v Southern Pac. Transp. Co.*, *supra*), a nuisance per se can be enjoined without proof of injury (*City & County of San Francisco v Padilla*, *supra* (enjoined violation of ordinance)). PAGE 318 Finally, for a nuisance per se to exist, the statute in question must have been in effect at the time the nuisance occurred (these statutes are not applied retroactively), and the statute must apply to the condition on the property. *Beck Dev. Co. v Southern Pac. Transp. Co.*, *supra*.

PRACTICE TIP► There are numerous statutes and ordinances that a plaintiff can use to classify the condition or conduct as a nuisance per se, and plaintiff’s counsel should research them at the outset of the case. See, e.g., *Beck Dev. Co. v Southern Pac. Transp. Co.*, *supra*. In view of the lighter burden a plaintiff must carry on a nuisance per se action, the defendant’s best defense is usually to argue that the statutes are inapplicable. For a comprehensive list of defense arguments, see *Beck Dev. Co. v Southern Pac. Transp. Co.*, *supra*.

§5.4 C. Categories of Nuisance Under CC §3479

If an activity has not been declared to be a nuisance by law (see, e.g., §5.3), a court may find it to be a nuisance under CC §3479 if it meets any of these descriptions:

- Anything injurious to health, including “the illegal sale of controlled substances”;
- Anything “indecent or offensive to the senses”;
- Any obstruction to the free use of property, “so as to interfere with the comfortable enjoyment of life or property”; or
- Anything that “unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway.”

These definitions are broad and may include virtually any type of interference with the enjoyment or use of land. *Tint v Sanborn* (1989) 211 CA3d 1225, 1227, 259 CR 902. Any activity done or maintained under the express authority of a statute, however, cannot be deemed a nuisance. CC §3482. For examples of the interplay between CC §§3479 and 3482, see *Jones v Union Pac. R.R.* (2000) 79 CA4th 1053, 94 CR2d 661; *Paterno v State* (1999) 74 CA4th 68, 87 CR2d 754.

§5.5 1. Objective Standard Under CC §3479

An activity or conduct that merely offends the esthetic senses or produces only personal discomfort will not be enjoined as a nuisance. To be actionable under CC §3479, the interference with the enjoyment of property rights must be “substantial and unreasonable” and affect the sensibilities of a “normal” person. *Oliver v AT&T Wireless Servs.* (1999) 76 CA4th 521, 533, 90 CR2d 491.

EXAMPLE► A 130-foot cellular telephone transmission tower on adjacent property was ruled not a nuisance despite its unpleasant appearance. The height and shape of the tower, even combined with intermittent noises and the requirement that the complaining landowner keep weeds low for fire clearance, did not make it a nuisance. *Oliver v AT&T Wireless Servs., supra.*

See also *City of San Diego v U.S. Gypsum Co.* (1994) 30 CA4th 575, 35 CR2d 876 (installation of defective product (asbestos) not a nuisance); *Hellman v La Cumbre Golf & Country Club* (1992) 6 CA4th 1224, 8 CR2d 293 (operation of golf course with balls landing on plaintiff’s property adjacent to course not a nuisance).

The operation of a mortuary, however, was enjoined because the court found that its presence in the neighborhood would lower property values and affect the happiness of residents by causing people to be depressed and suffer physical disturbances. *Brown v Arbuckle* (1948) 88 CA2d 258, 261, 198 P2d 550. See also *Mangini v Aerojet-General Corp.* (1991) 230 CA3d 1125, 281 CR 827 (*Mangini D*) (owner can sue former owner or lessee of former owner on nuisance theory for damages caused by hazardous waste on property).

§5.6 2. Balancing Equities Required Under CC §3479

If an activity is not a nuisance per se (see §5.3) and was not willfully created (see, e.g., *McIvor v Mercer-Fraser Co.* (1946) 76 CA2d 247, 172 P2d 758), it is difficult to generalize about what is and is not a nuisance under CC §3479 because this determination is a matter of degree. The issue is decided on the facts of each case and requires balancing the harm suffered by the plaintiff against the utility of the defendant’s conduct. See *Hellman v La Cumbre Golf & Country Club* (1992) 6 CA4th 1224, 1231, 8 CR2d 293; Restatement (Second) of Torts §§826–831 (1979). Courts consider PAGE 320 all factors, such as the nature of the activity, the extent and frequency of the harm caused by the activity, the effects of the activity on the owners’ health

and enjoyment of the property, the harm that would be caused by discontinuing the activity, the manner in which the activity is conducted, the location of the activity, and the nature of the surroundings. See, e.g., *Hellman v La Cumbre Golf & Country Club*, *supra*; 11 Witkin, *Summary of California Law, Equity* §169 (10th ed 2005).

For example, the rule that there is no duty to control natural conditions on property (see *Boarts v Imperial Irrig. Dist.* (1947) 80 CA2d 574, 182 P2d 246) was abolished in California (see *Sprecher v Adamson Cos.* (1981) 30 C3d 358, 178 CR 783; *Locklin v City of Lafayette* (1994) 7 C4th 327, 27 CR2d 613). All property owners now have a duty to exercise reasonable care to control all conditions on their property, including natural ones. If a natural condition unreasonably interferes with the use and enjoyment of another's property and causes material injury, the court will balance the equities to decide whether a nuisance exists. *Lussier v San Lorenzo Valley Water Dist.* (1988) 206 CA3d 92, 253 CR 470.

PRACTICE TIP► In a typical case, it is evident that the defendant's activity to some extent meets the definition of nuisance under CC §3479. The initial battle over whether there is an *actionable* nuisance is won or lost in the balancing process. As a result, despite the general rules, the reported cases often appear contradictory and irreconcilable because a court decides the equitable issues in each case under the particular facts. Both sides of a dispute can usually find authority to support almost any reasonable position, at least by analogy. From there, it is up to the judge to "balance the equities." This lack of predictability is of little comfort to an attorney who is trying to explain the chances of success to a client, who should be advised that decisions dealing with nuisance can be highly subjective.

D. Public Nuisance

§5.7 1. Definition

A public nuisance is defined as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage PAGE 321 inflicted upon individuals may be unequal." CC §3480. See *Wade v Campbell* (1962) 200 CA2d 54, 19 CR 173 (nuisance need not affect every member of community before it can be deemed a public nuisance); *Restatement (Second) of Torts* §§821B, 821D (1979). Some acts are specifically declared by law to be a public nuisance. See, e.g., Pen C §370 (obstructing a highway); Pub Res C §§4170

(uncontrolled fire), 4171 (fire hazard); Govt C §39561 (weeds); Health & S C §17980.6 (violation of building codes). Some local jurisdictions use public nuisance ordinances to enjoin gang-related activity. See, e.g., *People ex rel Gallo v Acuna* (1997) 14 C4th 1090, 60 CR2d 277; *In re Englebrecht* (1998) 67 CA4th 486, 79 CR2d 89. The purpose of public nuisance law is to protect public order. *People ex rel Gallo v Acuna, supra*.

PRACTICE TIP► If no specific legislation declares an act to be a public nuisance, the courts focus on the number of persons that are specifically affected by the factors that make the activity or condition a nuisance in order to determine whether it is a public nuisance.

EXAMPLES► Emissions from a factory that caused allergies and respiratory problems for neighbors were found to constitute a public nuisance in *Venuto v Owens-Corning Fiberglas Corp.* (1971) 22 CA3d 116, 99 CR 350. Obstruction of traffic, even if not done for the purpose of obstructing traffic, was held to be a public nuisance in *People v Jones* (1988) 205 CA3d Supp 1, 252 CR 216. Loss of development fees by the public entity is not sufficient to render the condition a public nuisance. A private nuisance does not become a public nuisance merely because the public is tangentially affected. See *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1209, 52 CR2d 518.

What constitutes a “considerable number of persons” is another fact-specific issue. A dairy farm was held to be a public nuisance when it affected 11 persons owning property near the farm. *Wade v Campbell* (1962) 200 CA2d 54, 59, 19 CR 173. A bar and restaurant that played loud amplified music, disturbing a rural neighborhood of about 33 homes, was found to be a public nuisance. *People v Mason* (1981) 124 CA3d 348, 354, 177 CR 284.

Ordinances declaring activities to be a nuisance must, however, **PAGE 322** meet due process standards. For instance, a city ordinance obliging landlords to undertake eviction proceedings against all occupants of a rental unit when the chief of police suspects the tenant is engaged in or permits illegal drug activity, gang-related crime, or drug-related nuisance in or near the rental property violates procedural due process by requiring a landlord to prevail in an unlawful detainer action. *Cook v City of Buena Park* (2005) 126 CA4th 1, 9, 23 CR3d 700. The *Cook* court pointed out that whether the rental property is a nuisance is precisely the question to be determined in the unlawful detainer proceeding required by the ordinance. The ordinance, in effect, required the landlord to prevail in

the unlawful detainer action or face fines, misdemeanor punishment, a lien against the property, and/or a civil penalty.

§5.8 **2. Standing**

Any public body, through the Attorney General, District Attorney, or city attorney can bring an action to abate a public nuisance. [CC §3494](#); [Pen C §11226](#). A private citizen may seek to enjoin a public nuisance if it is specifically injurious to him or her. [CC §3493](#). See *Frost v City of Los Angeles* (1919) 181 C 22, 183 P 342; *Brown v Petrolane, Inc.* (1980) 102 CA3d 720, 726, 162 CR 551; *Wilson v Edwards* (1927) 82 CA 564, 567, 256 P 239. However, a private party who brings an action for a public nuisance cannot recover damages on that theory; the only remedy is an injunction. *Jordan v City of Santa Barbara* (1996) 46 CA4th 1245, 54 CR2d 340. Some statutes specifically provide that any resident citizen can bring an action to abate certain public nuisances. In these instances, no showing of specific injury is required. [Health & S C §11571](#); [Pen C §§11201, 11226](#).

NOTE► If a public entity declares a use to be a nuisance without obtaining a judicial determination of this status, and then proceeds to physically take the property, the property owner may sue for damages even if he or she did not fulfill the usual common law requirement of first filing an administrative mandamus action. See, e.g., *Hurwitz v City of Orange* (2004) 122 CA4th 835, 19 CR3d 213 (owner obtained injunction preventing city from blocking parking space, but city ignored injunction, built a permanent curb blocking the space, and brought condemnation action against owner); *Leppo v City of Petaluma* (1971) 20 PAGE 323CA3d 711, 97 CR 840 (city knocked down one wall of property owner's building, then declared building a nuisance and knocked the entire building down). See also *Hensler v City of Glendale* (1994) 8 C4th 1, 13, 32 CR2d 244 (when property is damaged or physical invasion has taken place, property owner may bring inverse condemnation action immediately).

E. Private Nuisance

§5.9 **1. Definition**

Every nuisance not included in the definition of a public nuisance under [CC §3480](#) is a private nuisance. [CC §3481](#); *Koll-Irvine Ctr. Prop. Owners Ass'n v County of Orange* (1994) 24 CA4th 1036, 1040,

29 CR2d 664. For example, soil contamination was held to be a private nuisance because it interfered with the free use of the property in a manner the owner wished (residential development). This condition was held to be a nuisance even though it did not pose a risk to health and was not indecent or offensive to the senses and even though the trial court had concluded that the site had not been adequately tested by either side to establish that it was hazardous. Interference with the use of the property for residential development was sufficient to render the condition a private nuisance. See *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 52 CR2d 518. Violation of CC&Rs may also be a private nuisance if the CC&Rs declare violations to be a nuisance. *Woodridge Escondido Prop. Owners Ass'n v Nielsen* (2005) 130 CA4th 559, 570, 30 CR3d 15.

§5.10 2. Threat of Future Injury

California courts have stated a general rule that a private nuisance action cannot be maintained for interference with the use and enjoyment of land caused solely by fear of future injury. See, e.g., authorities cited in *Jordan v City of Santa Barbara* (1996) 46 CA4th 1245, 54 CR2d 340.

Other California courts have allowed actions for nuisance when the plaintiff established an actual and unnecessary harmful condition even though there was no physical damage. See, e.g., *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 55 CR2d 724; *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th PAGE 3241160, 1213, 52 CR2d 518. These cases established elaborate tests that should be examined carefully. In general, the plaintiff has the burden of showing the likelihood and magnitude of the potential for future injury and that the apprehension of future injury is well founded and based on an objective standard.

For cases dealing with the threat of future illness, see *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 997, 25 CR2d 550 (exposure to toxic emissions); *Macy's Cal., Inc. v Superior Court* (1995) 41 CA4th 744, 48 CR2d 496 (scratch from hypodermic needle possibly contaminated with AIDS virus); *Koll-Irvine Ctr. Prop. Owners Ass'n v County of Orange* (1994) 24 CA4th 1036, 1041, 29 CR2d 664; *Akins v Sacramento Mun. Util. Dist.* (1992) 18 CA4th 208, 8 CR2d 785 (damages for exposure to radioactive materials discharged into air) (CAVEAT: This case was depublished and is not citable).

For cases dealing with the threat of property damage as a nuisance, see *County of San Diego v Carlstrom* (1961) 196 CA2d 485, 16 CR

667 (dilapidated housing unit structure temporarily stored with and surrounded by combustible debris); *People v Oliver* (1948) 86 CA2d 885, 195 P2d 926 (uncompleted skeleton wooden building surrounded by flammable debris in built-up residential area). In *City of Malibu v California Coastal Comm'n* (2005) 128 CA4th 897, 27 CR3d 501, the trial court did not abuse its discretion in denying a beachfront property owner leave to intervene in an adjacent owner's action challenging a proposed opening of a public access easement to the beach. Intervener could only speculate that the public would trespass and litter on its property. "But the possibility of what some ill-mannered citizens might do cannot create an entitlement for landowners up and down the Malibu Coast to interject themselves into every dispute regarding the right of public access to the beach." 128 CA4th at 905.

PRACTICE TIP► In *Aas v Superior Court* (2000) 24 C4th 627, 101 CR2d 718, the California Supreme Court decided that homeowners cannot recover in tort for negligent construction when the condition has not yet resulted in damage. The court held that such negligence claims are limited to damages for physical injuries, and there is no recovery for economic loss alone. Although *Aas* dealt with construction defects, the rationale of this case appears to apply to economic loss caused by nuisance or trespass as well. See also *Braun v Agri-Systems* (ED Cal, May 16, 2006, No. CV-F-02-6482) 2006 US Dist Lexis 29947 (confirming rule of *Aas* and noting that purely economic damages can be recovered under breach of warranty theory).

§5.11 3. Blockage of Air, Light, or View

California does not recognize an easement for air, light, or view. As a result, the blockage of light to a neighbor's property, unless malice is the motive, does not constitute an actionable nuisance, even if a showing is made of material injury. *Sher v Leiderman* (1986) 181 CA3d 867, 876, 226 CR 698. For example, a penthouse apartment on adjacent property, blocking the plaintiffs' light, air, and view, and infringing on their privacy, was held not a nuisance. *Wolford v Thomas* (1987) 190 CA3d 347, 235 CR 422.

§5.12 F. Nuisance That Is Both Public and Private

An activity can be a public nuisance, a private nuisance, or both. Unless a public nuisance also constitutes a private nuisance as to the plaintiff, the plaintiff cannot bring a private nuisance action. CC

§3493. When a public nuisance does exist and a private party wishes to proceed on a private nuisance theory, the plaintiff must plead and prove an injury, specifically related to the use and enjoyment of its land, that is different from the injury suffered by the public in general. *Buchanan v Los Angeles County Flood Control Dist.* (1976) 56 CA3d 757, 768, 128 CR 770. Merely showing that the injury is of a different degree or intensity is not sufficient. For example, the court denied recovery for emotional distress damages based on a private nuisance theory to owners whose property was subjected to airport-generated noise levels that were higher than the noise level to which the general public was exposed because their injury did not differ in kind but only in degree. *Institoris v City of Los Angeles* (1989) 210 CA3d 10, 258 CR 418; *Venuto v Owens-Corning Fiberglas Corp.* (1971) 22 CA3d 116, 99 CR 350 (allegation of special health injury is not sufficient in emission of air pollutants); *Roark v State* (1971) 20 CA3d 155, 158, 97 CR 552; *Kitzman v Newman* (1964) 230 CA2d 715, 726, 41 CR 182; *Wilson v Edwards* (1927) 82 CA 564, 567, 256 P 239.

In *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 342, 23 CR2d 377, however, the court held that if there is actual, specific damage to the plaintiff's private property rights, the plaintiff need not show that it suffered damage of a different kind. In *Newhall*, the plaintiff alleged that it was unable to sell the property because of the pollution of soil and groundwater and that it spent money on investigation of the pollution. See *Mangini v Aerojet-General Corp.* (1991) 230 CA3d 1125, 1138, 281 CR 827 (*Mangini I*) (toxic testing costs are sufficient to constitute a "special injury").

PRACTICE TIP► Defendants should consider whether they can successfully contend that the nuisance claimed by the plaintiff is solely a public nuisance. If the court agrees that the nuisance is public and further finds that it is not specifically injurious to the plaintiff, the plaintiff generally lacks standing to bring either a public or private action, and the action should be dismissed. See CC §3493, cited in §5.9.

When the plaintiff alleges that an activity is a nuisance solely because it violates a statute, ordinance, or regulation and the determination of whether the activity constitutes a nuisance turns on an interpretation of the statute, ordinance, or regulation, the courts may properly defer to an interpretation of the governmental entity charged with enforcing the enactment. *Pallco Enters., Inc. v Beam* (2005) 132 CA4th 1482, 1499, 34 CR3d 490. This deference to the determination by an agency is appropriate only when the plaintiff does not claim that the activity is unsafe or otherwise threatens adjacent property or the public. 132 CA4th at 1490. Courts will ordinarily give great weight to the interpretation of a statute by an administrative agency empowered to promulgate regulations to advance its purpose, however, unless the interpretation is clearly erroneous. *Norman v Unemployment Ins. Appeals Bd.* (1983) 34 C3d 1, 8, 192 CR 134.

If the court finds that the nuisance is public and that it is specifically injurious to the plaintiff, but also finds that the plaintiff has failed to plead or prove harm to its specific property rights that is different in kind from that suffered by the general public, the defendant can contend that the plaintiff cannot recover damages and is limited to the remedy of injunction. See *Koll-Irvine Ctr. Prop. Owners Ass'n v County of Orange* (1994) 24 CA4th 1036, 29 CR2d 664.

G. Distinction Between Temporary or Continuing Nuisances and Permanent Nuisances

§5.13 1. Importance of Classification for Selection of Remedies

The classification of a nuisance or trespass as temporary or continuing versus permanent is the most difficult and probably the most frequently contested issue in this area of the law. The resolution of this issue is crucial and often determines the outcome of the case because it controls both the remedy available and the application of the defense of the statute of limitations.

If the nuisance or trespass is permanent:

- The plaintiff must bring one action for all past, present, and future damage within three years after the permanent nuisance arises; if the plaintiff does not, the claim is barred by the statute of limitations;
- An injunction is not available; and
- The plaintiff can recover damages for diminution in value and stigma but not for loss of use.

See, e.g., authorities cited in *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 868, 218 CR 293. See also *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1216, 52 CR2d 518.

If the nuisance or trespass is considered temporary or continuing:

- The person harmed may bring successive actions for damages until the nuisance is abated but recover only actual damages suffered in the three years before commencement of the action;
- An injunction is usually available; and
- The plaintiff can recover for loss of use, but prospective damages (such as diminution in value and stigma) are not recoverable.

Each repetition of a continuing nuisance or trespass is considered a separate wrong that commences a new period in which to bring an action for recovery based on the new injury. See *Baker v Burbank-Glendale-Pasadena Airport Auth.*, *supra*; *Capogeannis v Superior Court* (1993) 12 CA4th 668, 676, 15 CR2d 796.

§5.14 2. Factors

The factors the court considers in determining whether a nuisance or trespass is permanent or continuing are whether:

- It can be substantially abated in a reasonably feasible manner and at a reasonable cost (*Mangini v Aerojet-General Corp.* (1996) 12 CA4th 1087, 1097, 51 CR2d 272 (*Mangini II*); *Wilshire Westwood Assocs. v Atlantic Richfield Co.* (1993) 20 CA4th 732, 744, 24 CR2d 562);
- It is the result of continuing activity (*Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1218, 52 CR2d 518); and
- The impact of the condition varies over time (*Mangini v Aerojet-General Corp.* (1991) 230 CA3d 1125, 1147, 281 CR 827 (*Mangini I*); *Field-Escandon v DeMann* (1988) 204 CA3d 228, 234, 251 CR 49).

The most important test is whether the nuisance or trespass can be substantially and feasibly abated without unreasonable burden. The question of whether a nuisance is abatable is a question of fact. *Mangini v Aerojet-General Corp.* (*Mangini II*), *supra*; *Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 C2d 265, 288 P2d 507; *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 343, 23 CR2d 377; *Mangini v Aerojet-General Corp.* (*Mangini I*), *supra*. The requirement of “substantial” abatement means that, even if a nuisance cannot be totally abated, partial abatement may be sufficient to classify the nuisance as temporary.

Abatement does not require proof that the condition can be entirely eradicated. Even if the abatement will take considerable time and may never be wholly successful, the nuisance may not be permanent as long as it can be reduced to acceptable levels. If there is no legitimate interest in permitting the condition to persist, the policy of the law should be to encourage discontinuance of the nuisance or trespass promptly and as thoroughly as possible. The court should not require absolutes. *Capogeannis v Superior Court* (1993) 12 CA4th 668, 680, 15 CR2d 796.

The “feasibility” and “without unreasonable burden” tests overlap and are often blended. These tests deal with two different concepts: (1) whether the means exist to abate, and (2) whether abatement is possible without unreasonable hardship or cost. *Mangini v Aerojet-*
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General Corp. (*Mangini II*), *supra*; *Beck Dev. Co. v Southern Pac. Transp. Co.*, *supra*. “Abatable” depends on whether the

contamination can be cleaned up to sufficient levels at a reasonable cost by reasonable means. The factors that should be considered in that determination are (1) feasibility of the means, (2) the alternatives to abatement, (3) the time and expense involved, (4) the legitimate competing interest, and (5) the benefits to be gained by abatement versus the detriments to be suffered if abatement is denied. This determination must be made on the facts and circumstances of each case. The burden of proof is on the plaintiff to prove that all these conditions are present. *Beck Dev. Co. v Southern Pac. Transp. Co., supra.*

§5.15 3. Election by Plaintiff

The seminal case dealing with continuing and permanent nuisance is *Spaulding v Cameron* (1952) 38 C2d 265, 267, 239 P2d 625. The rationale behind the establishment of permanent nuisance is to allow one action to recover for all damages inflicted when it would be unfair to the defendant to be subjected to successive suits and unfair to the plaintiff if they were not allowed to recover all damages in one action. *Spaulding v Cameron, supra.*

The clearest example of a permanent nuisance is the operation of a public utility, which is privileged and will continue for indefinite duration because the utility is entitled to continue its operation. A more difficult situation exists when a nuisance or trespass is not privileged, but abandonment is impracticable or the plaintiff is willing to allow it to continue if he or she can be compensated for it. In that event, the plaintiff may elect to treat the nuisance as either permanent or continuing. A defendant who is not privileged to continue the nuisance and is able to abate it cannot complain about the classification selected by the plaintiff. 38 C2d at 268. This rule has been universally acknowledged since the *Spaulding* decision. *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 52 CR2d 518; *Wilshire Westwood Assocs. v Atlantic Richfield Co.* (1993) 20 CA4th 732, 24 CR2d 562; *Capogeannis v Superior Court* (1993) 12 CA4th 668, 15 CR2d 796.

The rule allowing a plaintiff to elect to treat the nuisance as either permanent or continuing applies when the nuisance cannot be abated or is operated by a public entity that has the discretion **PAGE 330** to terminate a nuisance at any time. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 871, 218 CR 293; *Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 C2d 265, 268, 288 P2d 507; *Phillips v City of Pasadena* (1945) 27 C2d 104, 162 P2d 625 (barricade of public street cutting off access to a resort). See also *Bartleson v U.S.* (9th Cir 1996) 96 F3d 1270; *Reynolds Metals Co. v*

Wand (9th Cir 1962) 308 F2d 504 (fumes from plant that could not be abated can be treated as permanent nuisance).

PRACTICE TIP► Some courts have not permitted the plaintiff to elect in doubtful cases, using the rubric of *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1217, 52 CR2d 518. The *Beck* court recognized the plaintiffs' right to elect to treat a nuisance as permanent or continuing in doubtful cases, but it stated that the choice must be supported by evidence that would reasonably support either classification and concluded that the court should uphold the plaintiff's characterization only "if it is reasonable to do so under a given formulation." *Beck Dev. Co. v Southern Pac. Transp. Co.*, *supra*. See also *Spar v Pacific Bell* (1991) 235 CA3d 1480, 1 CR2d 480 (court denied plaintiff right to elect by ruling that there was no reasonable doubt that nuisance was permanent).

§5.16 4. Courts' Preference for Continuing Nuisance

Courts have expressed, as a matter of policy, a preference for finding a continuing nuisance to (1) protect the plaintiff from contingencies, such as unforeseen future injuries, (2) prevent the plaintiff's claim from being barred by the statute of limitations, and (3) encourage termination of the condition causing the nuisance. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 870, 218 CR 293; *Mangini v Aerojet-General Corp.* (1991) 230 CA3d 1125, 1148, 281 CR 827 (*Mangini I*); *Starrh & Starrh Cotton Growers v AERA Energy LLC* (2007) 153 CA4th 583, 596, 63 CR3d 165 (following *Mangini I* and refusing to enlarge category of permanent trespass to include ongoing ground water contamination caused by neighboring landowner's oil production activities).

A continuing nuisance may exist even if the offensive conduct that has caused it has ended. A nuisance is defined by the condition created and the damage or harm inflicted, not by the conduct that created it. Therefore, the court will find a continuing nuisance if **PAGE 331** the harm continues or if there is a continuing threat of future injury. *Arcade Water Dist. v U.S.* (9th Cir 1991) 940 F2d 1265; *Capogeannis v Superior Court* (1993) 12 CA4th 668, 681, 15 CR2d 796 (continuing nature of nuisance refers to continuing (but abatable) damage caused by offensive condition, not to acts causing offensive conditions to occur); *Starrh & Starrh Cotton Growers*, 153 CA4th at 593.

In *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 52 CR2d 518, the court applied a restricted view of the

continuing damage rule in a case involving groundwater contamination. The court held that the contamination must continue to migrate through land or water and cause new and additional damages on a continuous basis before it will be considered a continuing nuisance or trespass. The continuing location of the contamination under the property without continuing migration or leaching “indicates a permanent rather than continuing nuisance.” The court considered this condition to be more like a permanent encroachment that a court, after balancing the equities, will not abate. *Beck Dev. Co.*, 44 CA4th at 1218.

NOTE► The *Beck* court seemed to confuse the conduct that created the condition with the continuing invasion of property interests and continuing damage caused by the condition after it was created. Arguably, the fact that the activity creating the nuisance has stopped is not relevant and certainly should not be determinative. As long as the condition exists and is abatable, the crucial factor should be the continuing nature of the interference compared with the plaintiff’s full use and enjoyment of the property, regardless of whether the contamination is moving or not. See *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 345, 23 CR2d 377; *Capogeannis v Superior Court* (1993) 12 CA4th 668, 682, 15 CR2d 796. In cases involving toxic contamination, the policy of the law ought to be to get the contamination cleaned up. This policy would be supported by a finding of continuing nuisance, which encourages and facilitates cleanup and payments by the responsible parties.

In *Starrh & Starrh Cotton Growers*, 153 CA4th at 597, the court came to the opposite result in a case involving contamination of ground water caused by a neighboring landowner’s oil production **PAGE 332** activities. The court followed *Mangini I* and held that the case presented a “classic continuing trespass situation” because defendant’s oil producing activities were ongoing and would contribute to deteriorating water quality condition as long as they continued. Although the court cited *Beck*, it did not directly address the factual similarities of the case, and based its analysis on *Mangini I*.

III. TRESPASS

§5.17 A. Definition

Trespass to property is defined as an unlawful interference with possession. *Staples v Hoefke* (1987) 189 CA3d 1397, 235 CR 165; *Restatement (Second) of Torts §158* (1965). In general, every unwarranted entry onto the land of another, sometimes called

“breaking the close,” is a trespass. Trespass may result from an act that is intentional, reckless, or negligent or that is the result of ultrahazardous activity. The only intent required is the intent to enter the property, regardless of the actor’s motivation. *Miller v National Broad. Co.* (1986) 187 CA3d 1463, 1480, 232 CR 668. Trespass does not require personal entry onto the property; it can occur by causing the entry of material objects or inanimate substances. *Wilson v Interlake Steel Co.* (1982) 32 C3d 229, 185 CR 280 (damage from noise, vibrations, and deposit of particulates; see §5.18); *Roberts v Permanente Corp.* (1961) 188 CA2d 526, 10 CR 519 (dust).

A party is generally liable for the entry of instrumentalities under his control on the land of another, regardless of whether the land is enclosed or unenclosed. *Blevins v Mullally* (1913) 22 CA 519, 523, 135 P 307. However, California has unique rules that apply to trespass by cattle. Throughout most of California the common law “fencing in” rule applies. Under this rule “the cattle owner builds a fence to keep his cattle in,” and the owner of the cattle is responsible if they stray onto the property of others. In some of California’s northernmost counties, however, the “fencing out” rule applies. Under this rule, the neighboring land owners must build the fences to keep the cattle out. Even under this rule, the owner of the cattle is still liable for deliberate incursions onto another’s property. *Herzberg v County of Plumas* (2005) 133 CA4th 1, 8, 34 CR3d 588.

The performance of an act, without negligence or intent to harm, **PAGE 332.1** that will result with substantial certainty in the entry of foreign matter on another’s land is sufficient for an intentional trespass. *Roberts v Permanente Corp., supra*. Trespass must cause actual damage to the property. *Elton v Anheuser-Busch Beverage Group* (1996) 50 CA4th 1301, 58 CR2d 303.

Trespass may result from physical intrusion, failure to leave, or failure to remove foreign material. It can also occur when a party exceeds the scope of the permission or purpose of consent to enter the property. *Mangini v Aerojet-General Corp.* (1991) 230 CA3d 1125, 1141, 281 CR 827 (*Mangini I*). The scope of permitted uses under a public right-of-way, particularly one located in an urban area, may not be limited to the express language of the right-of-way, but may be subject to a wide range of uses that go beyond the express grant of the right-of-way. *Bello v ABA Energy Corp.* (2004) 121 CA4th 301, 16 CR3d 818. It may result from the entry of foreign matter or causing the entry of other persons. **Restatement PAGE 333 §§158–159**. Trespass may result in an invasion on the surface of the land, over the land, or below the land. **5 Witkin, Summary of California Law, Torts §§693–698 (10th ed 2005)**. One court held that contamination left on the property by a previous owner was not a trespass against the

interests of the present owner but was, however, a nuisance. *Capogeannis v Superior Court* (1993) 12 CA4th 668, 674, 15 CR2d 796.

§5.18 B. Distinction Between Nuisance and Trespass

The line between trespass and nuisance is wavering and uncertain. An action may be a trespass, a nuisance, or both. The primary distinctions between a claim for trespass and one for nuisance are found in the rights invaded and the proof of damages. Trespass requires physical invasion of the land and interference with the plaintiff's exclusive possession. See *Elton v Anheuser-Busch Beverage Group* (1996) 50 CA4th 1301, 58 CR2d 303 (fire spreading from defendant's property to plaintiff's constituted trespass); *Posey v Leavitt* (1991) 229 CA3d 1236, 1243, 280 CR 568. A nuisance is an interference with the plaintiff's use and enjoyment of property. *Lussier v San Lorenzo Valley Water Dist.* (1988) 206 CA3d 92, 253 CR 470.

Wilson v Interlake Steel Co. (1982) 32 C3d 229, 185 CR 280, illustrates the difference between the two torts. In *Wilson*, the court held that loud noise from a 24-hour steel mill could not be abated on the theory of trespass. The court distinguished between noise that caused vibrations resulting in damage or injury to the property (trespass) and noise waves that are merely bothersome and not physically damaging (nuisance). Intangible intrusion, such as noise, odor, or light with physical damage, is a nuisance and not a trespass. *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 935, 55 CR2d 724; *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 345, 23 CR2d 377; *Capogeannis v Superior Court* (1993) 12 CA4th 668, 674, 15 CR2d 796. Many types of conduct and conditions will interfere with both of these interests.

The second distinction between these two torts is that a cause of action for trespass requires proof of the deposit of particulate matter on the plaintiffs' property or of actual physical damage to the property; nuisance does not. *San Diego Gas & Elec. Co. v Superior Court, supra*. Proof of interference with the beneficial use and enjoyment of property is sufficient for nuisance. Liability for **PAGE 334**a private nuisance, however, requires proof that the invasion of the plaintiff's interest in the use and enjoyment of the land is substantial and that the substantial interference is unreasonable. 13 C4th at 937. Note that a continuing trespass creates a continuing cause of action that is virtually the same as a continuing nuisance claim. *Newhall Land & Farming Co. v Superior Court, supra*.

§5.19 IV. ENCROACHMENT

An encroachment (*i.e.*, an unconsented intrusion by a building or other structure onto adjacent property) is usually treated as a nuisance or a trespass in California, depending on the nature of the encroachment. An encroachment may be both a nuisance and a trespass. An encroachment such as a building that rests on adjoining land is a permanent trespass (see *Rankin v DeBare* (1928) 205 C 639, 271 P 1050) and may be remedied by an action for damages (see §5.31) or for an injunction (see §5.26). If an encroachment substantially interferes with the adjoining owner's use and enjoyment of the land, it is a nuisance under CC §3479. *Kafka v Bozio* (1923) 191 C 746, 218 P 753.

When a structure encroaches only into the airspace of the adjacent land, it is not a trespass, but it may be a nuisance if it affects the adjacent owner's use and enjoyment. *Case v Sisich* (1929) 97 CA 106, 275 P 492. If it does, remedies applicable to nuisance apply. See §§5.25–5.29.

A court will not usually order the removal of an encroachment if there is no direct evidence of actual damage and the encroachment is minor (see, *e.g.*, *McKean v Alliance Land Co.* (1927) 200 C 396, 253 P 134) or if the expense of removal will far exceed the damage caused (see *Case v Sisich, supra*); the court will instead award damages.

§5.20 V. REMEDIES AND DAMAGES FOR PUBLIC NUISANCE

The remedies against a public nuisance are (1) criminal indictment or information, (2) a civil action for abatement, or (3) summary abatement. CC §§3491–3496; *People ex rel Gallo v Acuna* (1997) 14 C4th 1090, 60 CR2d 277. Cities and counties can establish procedures for abatement, but an offending property owner must be given a choice of repairing or demolishing a condemned building and **PAGE 335** must be given a reasonable time to do so. The owner is liable for all costs of abatement and, if the county ordinance requires it, attorney fees as well. Ordinances may also provide that entry of a second or subsequent civil or criminal judgment within two years will put the owner at risk of being ordered to pay treble the costs of the abatement. Govt C §§25845, 38773.1–38773.7; Health & S C §17980(b); *Hawthorne Sav. & Loan Ass'n v City of Signal Hill* (1993) 19 CA4th 148, 23 CR2d 272.

Damages are not recoverable for a public nuisance unless they are specifically provided for by statute. *People ex rel Gow v Mitchell Bros. Santa Ana Theatre* (1981) 114 CA3d 923, 930, 171 CR 85, *rev'd on other grounds in 454 US at 94*. Some statutes specifically

authorize damages for public nuisances. See [Pen C §11225\(b\)](#). Note, however, that if a public entity has a property interest that is injuriously affected by the nuisance, it can recover the same type of damages available to private property holders. *Selma Pressure Treating Co. v Osmose Wood Preserving Co.* (1990) 221 CA3d 1601, 1614, 271 CR 596.

§5.21 VI. DAMAGES AND OTHER REMEDIES FOR PRIVATE NUISANCE AND TRESPASS

Private nuisance and trespass give rise to alternative and concurrent remedies at law and in equity. 11 [Witkin, Summary of California Law, Equity §71 \(10th ed 2005\)](#). The remedies available for a private nuisance are self-help abatement at the party's own risk or a civil action for injunction, damages, or both. [CC §§3501–3503](#). See [§§5.25–5.29](#).

§5.22 A. Equitable or Legal Action?

Counsel evaluating a claim for nuisance or trespass must initially consider whether or not to classify the action as legal, equitable, or both legal and equitable (hybrid action). This characterization will determine whether or not the party is entitled to a jury. Whether an action is legal or equitable depends on the “gist of the action,” as formed by the pleadings and facts, and the type of relief sought. *Paularena v Superior Court* (1965) 231 CA2d 906, 911, 42 CR 366. In general, if the action seeks only equitable relief, there is no right to a jury. See *Baugh v Garl* (2006) 137 CA4th 737, 740, 40 CR3d 539 (defendant properly denied jury trial when “gist” of **PAGE 336** action was specific performance of settlement agreement and to prevent interference with easement rights). On the other hand, if the action seeks only damages, there is a right to a jury. [Cal Const art I, §16](#); [CCP §592](#). There are, however, numerous qualifications and exceptions to this rule. For a more detailed discussion of the matter, see [California Civil Procedure Before Trial §§41.3–41.6 \(4th ed Cal CEB 2004\)](#); [Witkin, California Procedure, Trial §§89–107](#).

The most common relief sought in nuisance and trespass actions are damages and/or injunctions. Actions for damages for injuries to property are legal actions. [CCP §592](#); [Witkin, California Procedure, Trial §92\(2\)\(e\)](#). Actions for an injunction are equitable. *Baugh v Garl* (2006) 137 CA4th 737, 740, 40 CR3d 539; *Arciero Ranches v Meza* (1993) 17 CA4th 114, 125, 21 CR2d 127.

§5.23 B. Jurisdiction

In a pure action for damages, subject matter jurisdiction is governed by the amount in controversy exclusive of attorney fees, interest, and costs. If the amount in controversy does not exceed \$25,000, the action is considered a limited civil case subject to certain rules intended to reduce litigation expenses. [CCP §§85–86.1, 90–100](#). If the amount in controversy is higher than \$25,000, the case is an unlimited civil case. [CCP §88](#). Both such cases are filed in superior court. [CCP §§85–89](#). Matters below \$5000 are filed as limited civil cases in the small claims division of the superior court. [CCP §116.220](#). Equitable actions for injunction can be filed as limited or unlimited civil cases. [CCP §86](#). For a comprehensive discussion of this matter, see [California Civil Procedure Before Trial §§6.4–6.57](#) (4th ed Cal CEB 2004).

§5.24 C. Venue

Venue in trespass and nuisance actions is based on a classification of the action as transitory or local. These classifications are generally based on the plaintiffs' theory of the action set forth in the complaint and the scope of the judgment that might be entered on default. [Brown v Superior Court](#) (1984) 37 C3d 477, 482, 208 CR 724. See [California Civil Procedure Before Trial §§8.4–8.9](#) (4th ed Cal CEB 2004).

The actions for injury to real property are local actions and must **PAGE 337** be tried in the particular locality of the property regardless of the defendant's county of residence. [CCP §392\(a\)\(1\)](#); [Civ Proc Before Trial §§15.30–15.34](#). An action for injunctive relief is ordinarily personal or transitory. It is usually triable in the defendant's county of residence unless otherwise provided by law. [CCP §395\(a\)](#); [Civ Proc Before Trial §39.12](#). In a mixed action involving a demand for relief that is local and another that is transitory, the court determines the venue by determining the main relief sought or the "principal object" of the action. [Civ Proc Before Trial §§8.48–8.51](#).

§5.25 D. Right to Self-Help

Anyone injured by a private nuisance may abate it by removing, or, if necessary, destroying, whatever constitutes the nuisance, if this is done without committing a breach of the peace or doing unnecessary injury. [CC §3502](#). If the nuisance results from a mere omission of the wrongdoer and cannot be abated without entering onto the land of another, reasonable notice must be given before the entry can be made. [CC §3503](#). A person who has the right to self-help may forgo this option and elect to resort to judicial remedies, such as an

abatement order. See *Parsons v Luhr* (1928) 205 C 193, 270 P 443; *Bonde v Bishop* (1952) 112 CA2d 1, 6, 245 P2d 617.

§5.26 E. Injunction

The most common remedies used against a private nuisance are an injunction, damages, or both. CC §3501; CCP §731. The plaintiff can elect to prosecute separate actions concurrently or combine an action for injunction and damages. *Katenkamp v Union Realty Co.* (1936) 6 C2d 765, 776, 59 P2d 473.

Civil Code §3533 states that “[t]he law disregards trifles.” In deciding whether to grant an injunction, the court must balance the hardships and the equities by measuring the harm that will result to the plaintiff by a continuance of a nuisance against the harm that would be caused to the defendant if it is abated. This is a different balancing from that done by the court to decide whether a nuisance exists (see §5.6). The court may find that a condition or an activity is a nuisance and still deny an injunction if damages are an adequate remedy. Also, if the injury to the plaintiff is trivial or the damage to the defendant is greater than the damage to the **PAGE 338** plaintiff, the court may refuse an injunction and limit the plaintiff’s relief to damages. See *Remmer v Glens Falls Indem. Co.* (1956) 140 CA2d 84, 87, 295 P2d 19 (in underlying nuisance action, court limited award to diminution in value because cost of abating nuisance exceeded diminution caused by nuisance). However, an injunction will not be refused merely because the offending activity or condition is highly beneficial to the defendant. CC §3533; *Rothaermel v Amerige* (1921) 55 CA 273, 203 P 833. The public interest may also justify denying an injunction. *Mountain Copper Co. v U.S.* (9th Cir 1906) 142 F 625, 638. The courts will, however, refuse to balance a hardship if a nuisance is created willfully. *Morgan v Veach* (1943) 59 CA2d 682, 689, 139 P2d 976.

As a practical matter, in the absence of extreme circumstances, the courts usually grant injunctive relief when a nuisance or trespass invades a substantial property right or unreasonably interferes with the plaintiff’s use and enjoyment of its property. See *Sierra Screw Prods. v Azusa Greens, Inc.* (1979) 88 CA3d 358, 151 CR 799. Most courts require a showing of proof of irreparable injury to the defendant before they will deny an injunction based on a balancing test, because a refusal to grant the injunction (allowing instead damages for a permanent nuisance) may effectively result in a condemnation award to a private party. *Fairington v Dyke Water Co.* (1958) 50 C2d 198, 323 P2d 1001.

§5.27 F. Tort Measure of Damages

The general tort measure of damages for trespass and nuisance is prescribed by CC §3333, which allows the plaintiff to recover the amount that will compensate the plaintiff for all detriment proximately caused by the tort, whether or not it could have been anticipated. *Coats v Atchison, T. & S. F. Ry.* (1905) 1 CA 441, 444, 82 P 640. But see *Bailey v Outdoor Media Group* (2007) 155 CA4th 778, 789, 66 CR3d 322 (real property owner not entitled to recover proceeds from sale by owner's lessee where no causal connection was established between lessee's wrongful occupation of property and purchaser's willingness to buy property).

A plaintiff, in a suit for damage to real property, may recover either the cost to repair or the diminution in value, but not both. The plaintiff can recover the costs of repair even if that amount exceeds the diminution in value. The plaintiff cannot recover diminution in value if that amount exceeds the cost of repair. *Safeco Ins. Co. v J & D Painting* (1993) 17 CA4th 1199, 21 CR2d 903. Also, the plaintiff cannot recover diminution in market value that occurred while the repairs were taking place. *Safeco Ins. Co. v J & D Painting, supra*.

Civil Code §3334 sets out the measure of damages of a trespass resulting in wrongful occupation of real property. The detriment includes the value of the use of the property during the wrongful occupation, the reasonable cost of repair or restoration of the property to its original condition, and the reasonable costs of recovering possession of the property. CC §3334(a). Two decisions interpreting and applying this measure of recovery are *Bailey v Outdoor Media Group, supra* and *Starrh & Starrh Cotton Growers v AERA Energy LLC* (2007) 153 CA4th 583, 63 CR3d 165. In *Bailey*, the court held that the net benefit obtained by a defendant wrongfully occupying plaintiff's advertising billboards was the net profit obtained by the defendant in operating the billboards. 155 CA4th 789. In *Starrh & Starrh Cotton Growers*, the court found that damages for ground water contamination could be measured by the reasonable restoration cost, but if the restoration costs are not reasonable, then the diminution in value is the alternative measure of recovery. 153 CA4th at 601.

Nominal damages may be recovered for a nuisance even if the plaintiff suffers no appreciable detriment. CC §3360; *Davidson v Devine* (1886) 70 C 519, 11 P 664. As long as the plaintiff has incurred some actual damages, an action for trespass can support an award of nominal damages. Nominal damages must be awarded if the matter decides a question of permanent right or entitles the plaintiff to costs. *Staples v Hoefke* (1987) 189 CA3d 1397, 235 CR 165.

It is not necessary that a nuisance have its origin on neighboring property. A property owner can sue for damages caused by a nuisance created on its own property by a former owner or others. The party claiming a nuisance need not have a possessory or ownership interest in the property at the time the nuisance was created, and the defendant need not have a possessory or ownership interest in the property at the time the action is brought. See *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 343, 23 CR2d 377; *Mangini v Aerojet-General Corp.* (1991) 230 CA3d 1125, 281 CR 827 (*Mangini J.*). A nuisance that obstructs the free use of the property **PAGE 340** is actionable. *Wilshire Westwood Assocs. v Atlantic Richfield Co.* (1993) 20 CA4th 732, 746, 24 CR2d 562 (allowed subsequent owner to recover for nuisance created by former lessee). Any party who creates, assists, or maintains a nuisance is liable for it. *Newhall Land & Farming Co. v Superior Court, supra.*

A person who was the owner of real property at the time an injury to the property occurred and is discovered does not lose the right to recover damages when the property is sold to a third party. *Vaughn v Dame Constr. Co.* (1990) 223 CA3d 144, 147, 272 CR 261. The subsequent owner, however, will not have standing to sue for the injury to the property if possession was taken after the damage to the property occurred and with full knowledge of the damage. *Keru Invs., Inc. v Cube Co.* (1998) 63 CA4th 1412, 1423, 74 CR2d 744. A subsequent owner will only have standing to sue if either an assignment is secured from the person in possession when the injury to the property occurred (*Krusi v S.J. Amoroso Constr. Co.* (2000) 81 CA4th 995, 1005, 97 CR2d 294) or possession was taken after damage to the property occurred but was, as of the time of the sale, undiscovered (*Siegel v Anderson Homes, Inc.* (2004) 118 CA4th 994, 1000, 13 CR3d 462). See also *Standard Fire Ins. Co. v Spectrum Community Ass'n* (2006) 141 CA4th 1117, 1144, 46 CR3d 804 (condominium homeowners association had standing to sue developer even though damage to common areas occurred before association's creation).

§5.28 **1. Continuing Nuisance**

If the nuisance is continuing (see §§5.13–5.16), the remedy is either abatement and damages for past injury or successive actions for damages as new injuries occur until the nuisance is abated. *Spaulding v Cameron* (1952) 38 C2d 265, 239 P2d 625; *Rhodes v San Mateo Inv. Co.* (1955) 130 CA2d 116, 278 P2d 447. Prospective damages are not recoverable. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 869, 218 CR 293. Nonetheless, damages suffered

between commencement and conclusion of a continuing nuisance action are recoverable in that action. *Renz v 33rd Dist. Agric. Ass'n* (1995) 39 CA4th 61, 46 CR2d 67. Language in *Baker v Burbank-Glendale-Pasadena Airport Auth.*, 39 C3d at 869, suggesting that damages incurred after commencement of the action were not recoverable in that action, was dismissed as dicta. **PAGE 340.1** 39 CA4th at 67. A person who obtains an injunction against a nuisance cannot recover damages for diminution in value but can bring a subsequent action for the damage that resulted during the period of the nuisance prior to abatement or for damages if the abatement is inadequate. *Alexander v McKnight* (1992) 7 CA4th 973, 9 CR2d 453; *Guttinger v Calaveras Cement Co.* (1958) 160 CA2d 460, 325 P2d 145.

Diminution of value damages and stigma damages are not recoverable in continuing trespass or continuing nuisance cases; damages are limited to abatement and to damages for loss of use. *Santa Fe Partnership v ARCO Prods. Co.* (1996) 46 CA4th 967, 977, 54 CR2d 214; *FDIC v Jackson-Shaw Partners No. 46, Ltd.* (ND Cal 1994) 850 F Supp 839, 844. Damages for diminution in value caused by a nuisance are inappropriate when equitable relief is granted requiring abatement of the nuisance because the defendant is presumed to comply with the order. But see *Rhodes v San Mateo Inv. Co.*, *supra* (although plaintiff obtained injunction requiring defendant to stabilize hill to prevent slides, plaintiff was also entitled to damages for fear and worry caused by future threatened damage).

If dirt, gravel, or other physical substances are deposited on the **PAGE 341** property, however, the injured party may recover the cost of removal and restoration or loss of market value, whichever is more appropriate to compensate the injured party, usually the lesser of the two amounts. After a plaintiff establishes decreased market value, the defendant has the burden of proving that restoration costs would be less. *Armitage v Decker* (1990) 218 CA3d 887, 904, 267 CR 399. The cost of testing property allegedly polluted with hazardous waste by a former tenant is a compensable injury for a continuing nuisance to the owners under CC §3493. *Mangini v Aerojet-General Corp.* (1991) 230 CA3d 1125, 1138, 281 CR 827 (*Mangini I*).

The mechanical rule that diminution in value and stigma damages are not recoverable under any circumstances in a continuing nuisance or trespass action is arguably unnecessary and in certain circumstances results in injustice. See, e.g., *FDIC v Jackson-Shaw Partners No. 46, Ltd.*, *supra* (court refused to grant damages for loss of use or diminution in value of property). The purpose of the rule is to avoid a double recovery (*i.e.*, if a nuisance is continuing, an owner or a series of owners should not be able to recover more than once for the same

diminution in value). The rule incorrectly assumes that diminution in value will never occur when an injunction against the offending activity is granted. See, e.g., *Alexander v McKnight* (1992) 7 CA4th 973, 978, 9 CR2d 453 (suggested that damaged party might be able to recover actual diminution in value caused by unabated continuing nuisance, but reversed award of diminution damages because trial court had granted injunctive relief). See also *Santa Fe Partnership v ARCO Prods. Co.*, *supra*. Arguably, this rule is not necessary to prevent double recovery and should be reexamined.

For example, if a party sells a parcel of real property that contains or is affected by a continuing nuisance and receives less than the fair market value for the property because of that nuisance, that party should be able to recover damages for lost value. This result would not constitute a double recovery. First, these damages, once incurred, belong to the owner at the time the damages were inflicted and are not being passed on to future owners. *Vaughn v Dame Constr. Co.* (1990) 223 CA3d 144, 272 CR 261. Second, the owner/seller is legally obligated to disclose this condition to the buyer. As a result, the buyer will presumably pay less for the property than it would have without the disclosure of the nuisance. This is the difference the seller would be entitled to recover as diminution in **PAGE 342**value. A buyer who pays a reduced price based on the disclosure will not suffer the same damages during its ownership and would have no basis on which to recover them. See extended discussion of seller's duty to disclose known property conditions in *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 23 CR2d 377.

Finally, even if the nuisance is abated by compliance with a court order or statutory mandate, a seller must disclose some types of neighborhood problems even if they occurred in the past, such as noise and other nuisances. See, e.g., *Alexander v McKnight* (1992) 7 CA4th 973, 977, 9 CR2d 453, in which the court characterized the noise as primarily psychological, with "no guaranteed physical solution" to prevent the offending neighbors from reverting to their illegal behavior. 7 CA4th at 980. See also *Santa Fe Partnership v ARCO Prods. Co.*, *supra*, in which the court acknowledged that the nature of the nuisance was contaminated soil that might take a long time to clean up, and during that time the owner would suffer stigma damages. Arguably, the reality of the marketplace is that often, even after remediation, the property will remain stigmatized. If a buyer offers less than the market value for the property because of the seller's disclosure of a prior nuisance, arguably that is damage the seller should be able to recover. For further discussion of the seller's and broker's duties to disclose, see *California Real Property Sales Transactions* §§5.7–5.29B (3d ed Cal CEB 1998); *Handling Real*

Property Sales Transactions, steps 4–16 (Cal CEB Action Guide April 2007).

Moreover, even when the damages were not incurred, the courts should not apply a mechanical rule. There are better ways to prevent double recovery and, at the same time, compensate injured parties. Rather than using a mechanical rule that all prospective damages are not recoverable under any circumstances when the nuisance or trespass is continuing, the courts should adopt a more flexible test such as the six-prong test used by the California Supreme Court in *Biakanja v Irving* (1958) 49 C2d 647, 320 P2d 16. This type of approach was discussed in *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 52 CR2d 518.

PRACTICE TIP► In furtherance of equity to all parties, the California Supreme Court could unbundle the concept of damages from the classification of the nuisance as permanent or continuing. These classifications could still be used for determining the statute of limitations. As the dissent in *Mangini v Aerojet-General Corp.* (1996) 12 C4th 1087, 51 CR2d 272 (*Mangini II*), pointed out, it may be appropriate for the court to use a different rule for damages from that used to calculate the statute of limitations. The dissent suggested that the unabated nuisance in *Mangini* could be treated as continuing for purposes of the statute of limitations and permanent or continuing for purposes of damages at the option of the plaintiff.

§5.29 2. Permanent Nuisance

In an action for permanent nuisance, the plaintiff can recover for both past and future damages. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 869, 218 CR 293; *Razzano v Kent* (1947) 78 CA2d 254, 177 P2d 612; *Williams v Southern Pac. R.R.* (1907) 150 C 624, 89 P 599.

The damage for a permanent nuisance is measured by the loss of the market value caused by the nuisance. CC §3333; *Spaulding v Cameron* (1954) 127 CA2d 698, 704, 274 P2d 177; *Guttinger v Calaveras Cement Co.* (1951) 105 CA2d 382, 233 P2d 914. Although there are no California cases on point, it appears that the valuation is set on the date that the nuisance became permanent. *Bartleson v U.S.* (9th Cir 1996) 96 F3d 1270; Restatement (Second) of Torts §930(3)(b) (1979).

A plaintiff may recover for diminution in property value due to a stigma caused by a permanent nuisance. *Bartleson v U.S.* (9th Cir 1996) 96 F3d 1270 (applying California law, court upheld damages to plaintiffs due to stigma caused by past shelling of their properties

adjacent to artillery range). Stigma damages are not allowed in a continuing nuisance action. *Santa Fe Partnership v ARCO Prods. Co.* (1996) 46 CA4th 967, 977, 54 CR2d 214. See also *FDIC v Jackson-Shaw Partners No. 46, Ltd.* (ND Cal 1994) 850 F Supp 839, 844 (diminution of value damages are not compensable in continuing trespass or continuing nuisance cases; damages are limited to abatement and loss of use).

For a discussion of the evidence a jury may consider in arriving at the property's value, see *Los Angeles County Flood Control Dist. v Abbot* (1938) 24 CA2d 728, 76 P2d 188. The court held that, in determining value for eminent domain purposes, the jury could consider the condition of the property, the use to which it had been put, advantages of making practical use of the property, and the reasonable expectation of such advantages. *Los Angeles County Flood Control Dist. v Abbot, supra.*

§5.30 3. Continuing Trespass

If a trespass can be enjoined or if it causes only temporary injury, the injured party can recover damages resulting from the original wrong. It can bring separate and successive actions for continuing damages caused by the trespass. *Kafka v Bozio* (1923) 191 C 746, 218 P 753; *Bertram v Orlando* (1951) 102 CA2d 506, 227 P2d 894.

Civil Code §3334 allows the plaintiff to recover the value of the loss of use of the property resulting from the trespass. The value is defined as the greater of the reasonable rental value or the benefit obtained by the trespasser (CC §3334(b)(1)), as well as the reasonable cost of restoration or repair and the cost of recovering possession (CC §3334(a)).

In order to meet the “benefits obtained” tests, the trespass must **PAGE 344** result in something advantageous for the trespasser. That is, the trespass itself must provide the trespasser with a financial or business advantage. *Watson Land Co. v Shell Oil Co.* (2005) 130 CA4th 69, 77, 29 CR3d 343. In *Watson* the court held that a gas line leak from a pipeline on the plaintiff's property did not constitute “benefits” within the meaning of CC §3334. The court rejected the plaintiff's contention that “benefits” included the avoidance of remediation costs. In dicta, the court stated that a polluter who dumped toxic waste in the desert instead of paying to properly dispose of toxic waste does gain the financial advantage of getting either free disposal or cheaper disposal. The court found no such financial advantage accruing to the owner of a leaking pipeline. 130 CA4th at 78.

The owner of land can recover damages for the value of the use of the property by a trespasser, even if the owner suffered no actual loss of rents. [CC §3334](#); *Don v Trojan Constr. Co.* (1960) 178 CA2d 135, 2 CR 626. If the wrongful occupation of the real property is the result of mistake of fact by the wrongful occupier, the value of the use of the property is the reasonable rental value. [CC §3334\(b\)\(2\)](#).

§5.31 4. Permanent Trespass

When the trespass is of a permanent nature, all damages past and prospective are recoverable in one action. *Kafka v Bozio* (1923) 191 C 746, 750, 218 P 753; *Bertram v Orlando* (1951) 102 CA2d 506, 227 P2d 894. When injury to real property from trespass is permanent, the measure of damages is the difference between the market value of the property before and after the injury. *Perkins v Blauth* (1912) 163 C 782, 127 P 50; *Revis v I. S. Chapman & Co.* (1933) 130 CA 109, 19 P2d 511; *Hancock v George R. Curtis Paving Co.* (1931) 114 CA 624, 300 P 65. On permanent injury, see *Guttinger v Calaveras Cement Co.* (1951) 105 CA2d 382, 233 P2d 914. For a description of various kinds of permanent injuries and applicable cases, see 6 Witkin, *Summary of California Law, Torts* §1727 (10th ed 2005).

§5.32 G. Injury to Products of Real Property

The measure of damages for injury to or removal of mature, non-fruit-bearing trees, *i.e.*, timber, without injury to the real property, **PAGE 345** is the value of the trees without consideration of the value of the real property. *Doak v Mammoth Copper Mining Co.* (ND Cal 1911) 192 F 748. The destruction of growing forest trees is treated as an injury to the land, and the measure of damages is the difference between the value of the land before destruction of the trees and its value after such destruction. *Doak v Mammoth Copper Mining Co.*, *supra*. This is also the measure of damages in the case of injury to or destruction of fruit trees. *Montgomery v Locke* (1887) 72 C 75, 13 P 401. See *Hill v Morrison* (1928) 88 CA 405, 263 P 573.

On the possibility of recovery of damages in the amount of twice or three times the actual detriment from injury to or removal of timber, trees, or underwood, see [CC §3346](#); *Drewry v Welch* (1965) 236 CA2d 159, 46 CR 65; *Caldwell v Walker* (1963) 211 CA2d 758, 27 CR 675. For a detailed discussion of [CC §3346](#), see 6 Witkin, *Summary of California Law, Torts* §§1732–1734 (10th ed 2005).

The measure of damages for injury to or destruction of a growing crop is the value of the crop on the date of and at the place of destruction, *i.e.*, the market value of the estimated crop, less the

harvesting, production, and marketing costs. *Teller v Bay & River Dredging Co.* (1907) 151 C 209, 90 P 942. These costs are not deducted if the crop was fully matured at the time of injury and the plaintiff has paid them. If the crop has been completely destroyed, however, harvesting costs are deductible from market value. See *Dutra v Cabral* (1947) 80 CA2d 114, 181 P2d 26. For a more detailed discussion of measure of damages in a pollution situation, see §5.54.

If nursery stock is proved to have been diseased when purchased, the injured purchaser is not limited to damages specified under *Posz v Burchell* (1962) 209 CA2d 324, 25 CR 896, *i.e.*, the difference between the value of the land as planted with the trees or nursery stock as delivered and the value the land would have had if it had been planted with nursery stock of the kind warranted. Rather, the grower may also seek to recover lost profits as well as other incidental and consequential damages. *Serian Bros., Inc. v Agri-Sun Nursery* (1994) 25 CA4th 306, 30 CR2d 382. See also *Santa Barbara Pistachio Ranch v Chowchilla Water Dist.* (2001) 88 CA4th 439, 105 CR2d 856 (discussing *Posz* and *Serian Bros.*).

On the various measures of damages for destruction of a crop **PAGE 346** without market value, see *Murphy v Nielsen* (1955) 132 CA2d 396, 282 P2d 126; *Zuolanek v Bodger Seeds* (1935) 5 CA2d 106, 42 P2d 92; *Miller & Lux v Pinelli* (1927) 84 CA 42, 257 P 573.

The measure of damages for destruction of a perennial crop, such as grazing land or alfalfa, is the difference between rental value of the real property with and without the crop. If the crop is not totally destroyed, the measure is the local market value of the crop less production and marketing costs. *Staub v Muller* (1936) 7 C2d 221, 60 P2d 283. But see *Lowe v Yolo County Consol. Water Co.* (1910) 157 C 503, 108 P 297 (measure for total destruction was cost of reseeded plus loss of profits).

When a trespass due to inadvertence or honest mistake results in the severance and appropriation of raw materials, such as coal, oil, or gas, the measure of damages is the value of the removed product at the time of taking less the cost of extraction. *Maye v Yappen* (1863) 23 C 306. See *Whittaker v Otto* (1967) 248 CA2d 666, 56 CR 836; *Daly v Smith* (1963) 220 CA2d 592, 33 CR 920; *Union Oil Co. v Mutual Oil Co.* (1937) 19 CA2d 409, 65 P2d 896. On the measure of damages for an honest mistake leading to the extraction of oil or gas, see CC §§3493–3494. For a discussion of the test of innocent trespass, see 6 Witkin, Summary, Torts §§1122–1123.

If the trespass is intentional, the measure of damages is the value of the product after removal without deduction for the expense of removal. *Lightner Mining Co. v Lane* (1911) 161 C 689, 120 P 771;

Dolch v Ramsey (1943) 57 CA2d 99, 134 P2d 19; *Union Oil Co. v Reconstruction Oil Co.* (1937) 20 CA2d 170, 66 P2d 1215.

If a demand is made for the extracted product and an action is later brought for its conversion, the measure of damages is its value at the time of the conversion, without deduction of extraction expenses. *Maye v Yappen, supra.*

§5.33 H. Damage, Destruction, or Removal of Fixtures or Personal Property

If a fixture is removed or destroyed, the measure of damages is the difference between the value of the real property before and after removal or destruction of the fixture. *Rhoda v Alameda County* (1881) 58 C 357; *Wilmerton v Morton* (1946) 74 CA2d 891, 169 P2d 992; *Givens v Markall* (1942) 51 CA2d 374, 124 P2d 839. **PAGE 347** In addition, CC §1013.5, allowing removal of improvements erroneously placed on another's land in good faith, may apply if its conditions are met.

For the total destruction of a building or other structures on real property, the measure of damages is the difference between fair market value of the property immediately before destruction and the value immediately after. Loss of use is not recoverable. *Ferraro v Southern Cal. Gas Co.* (1980) 102 CA3d 33, 162 CR 238. Conversely, the measure of damages that may be used for injury to a building is the reasonable cost of repair plus loss of rent if the building was leased. *Linforth v San Francisco Gas & Elec. Co.* (1909) 156 C 58, 103 P 320.

If the property removed or damaged is not affixed and remains personal property, the measure of damages for harm to the real property is the difference in the real property's value immediately before the injury and immediately after, unless the cost of restoration is less than the difference, in which event the proper measure of damages is the cost of repair. *Cornell v Sennes* (1971) 18 CA3d 126, 136, 95 CR 728. See also remedies for conversion in §4.46.

Under CC §987, an artist may recover damages for injury to his or her reputation as the result of the destruction or physical alteration of the artist's work of art. In *Lubner v City of Los Angeles* (1996) 45 CA4th 525, 53 CR2d 24, the court held that CC §987 does not authorize the recovery of damages for the *negligent* destruction or alteration of art. In addition, the court held that the enactment of the federal Visual Artists Rights Act of 1990 (Pub L 101-650 §§601-610, 104 Stat 5128) preempts the creation of a common law right of recovery for such injury. The court also rejected the plaintiffs' attempts to recover damages for emotional distress suffered as a result

of the destruction to their artwork, citing *Cooper v Superior Court* (1984) 153 CA3d 1008, 1012, 200 CR 746, which held that recovery for emotional distress caused by injury to property is permitted only when there is a preexisting relationship between the parties or an intentional tort.

The *value to the owner* might be the measure of damages if the property has little value as compared with special value to the owner. See *Willard v Valley Gas & Fuel Co.* (1915) 171 C 9, 151 P 286. For example, this measure of damages might be applied to a painting, and the time it took to produce it might be evidence of the amount of special value.

§5.34 I. Injury to Persons

Damages may be recovered for annoyance and discomfort and for mental suffering, without physical injury, resulting from a nuisance or trespass. *Acadia, Cal., Ltd. v Herbert* (1960) 54 C2d 328, 337, 5 CR 686 (plaintiff could recover for loss of wife's services when she received extensive medical treatment and hospitalization because of defendant's willful conduct); *Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 C2d 265, 272, 288 P2d 507; *Lew v Superior Court* (1993) 20 CA4th 866, 873, 25 CR2d 42.

The plaintiff need not prove impairment of health. *Bartleson v U.S.* (9th Cir 1996) 96 F3d 1270; *Judson v Los Angeles Suburban Gas Co.* (1910) 157 C 168, 106 P 581. In some instances, an owner may recover damages for mental suffering caused by fear for his or her safety or that of family members and guests. *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 997, 25 CR2d 550 (exposure to toxic emissions); *Herzog v Grosso* (1953) 41 C2d 219, 259 P2d 429; *Macy's Cal., Inc. v Superior Court* (1995) 41 CA4th 744, 48 CR2d 496 (scratch from hypodermic needle possibly contaminated with AIDS virus); *Koll-Irvine Ctr. Prop. Owners Ass'n v County of Orange* (1994) 24 CA4th 1036, 1041, 29 CR2d 664; *Alexander v McKnight* (1992) 7 CA4th 973, 9 CR2d 453 (negligently and intentionally caused emotional distress by problem neighbors).

Damages for mental suffering can be recovered even if the nuisance does not injure or decrease the value of the property. *Coats v Atchison, T. & S. F. Ry.* (1905) 1 CA 441, 82 P 640. Damages for discomfort flowing from a nuisance are recoverable in addition to damages for injury to real property caused by the nuisance. *Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 C2d 265, 288 P2d 507; *Spaulding v Cameron* (1954) 127 CA2d 698, 274 P2d 177; *Ingram v City of Gridley* (1950) 100 CA2d 815, 224 P2d 798; *Bartleson v U.S.*, *supra*.

For discussion of the independent tort of intentional infliction of emotional distress, see *California Tort Damages*, chap 6 (2d ed Cal CEB 2002).

§5.35 J. Lost Profits

Lost profits may be a proper measure of damages for a trespass and nuisance. CC §3334(b)(1); *Natural Soda Prods. Co. v City of Los Angeles* (1943) 23 C2d 193, 143 P2d 12; *Bailey v Outdoor PAGE 349Media Group* (2007) 155 CA4th 778, 787, 66 CR3d 322. To recover lost profits, the plaintiff must show probable income and

expense of the business as a whole, based on operating experience, sufficient to permit a reasonable estimate to be made. *Guttinger v Calaveras Cement Co.* (1951) 105 CA2d 382, 233 P2d 914; *Bailey*, 155 CA4th at 789 (net profit, not gross revenue, is appropriate measure of damages for wrongful occupation of property under CC §3334 “benefits obtained” measure of damages).

§5.36 K. Attorney Fees

Attorney fees are not recoverable in California unless authorized by statute or contract. CCP §1021. There is no general statutory provision for attorney fees in tort actions (*Falk v Waterman* (1874) 49 C 224), but attorney fees may be awarded in a tort action between contracting parties if their contract so provides (*Xuereb v Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 1342, 5 CR2d 154).

Civil Code §3496 provides for recovery of costs, including costs of investigation, discovery, and attorney fees, in certain public nuisance cases brought by a governmental agency. Under Govt C §38733.5(b), any ordinance that allows recovery of attorney fees in a public nuisance abatement action must allow recovery of attorney fees by the prevailing party and not just the prevailing municipality. See *City of Monte Sereno v Padgett* (2007) 149 CA4th 1530, 1536, 58 CR3d 218 (reversing trial court’s award of attorney fees where local ordinance limited recovery of attorney fees to city). In addition, attorney fees may be awarded under the private attorney general theory codified in CCP §1021.5 or under the nonstatutory substantial benefit rule for litigation that effectuates state environmental policies. See *California Attorney Fee Awards*, chap 3 (2d ed Cal CEB 1994).

Code of Civil Procedure §1021.9 authorizes an award of attorney fees when a trespass occurs on land under cultivation or used for grazing. A back yard or an urban garden does not qualify. *Quarterman v Kefauver* (1997) 55 CA4th 1366, 64 CR2d 741. It is unnecessary, however, that the cultivation or grazing be conducted for commercial purposes. *Haworth v Lira* (1991) 232 CA3d 1362, 284 CR 62.

A prevailing party in environmental litigation may be entitled to an award of attorney fees under federal law. A fee award may be available under the Equal Access to Justice Act (28 USC §2412) **PAGE 350** to an environmental litigant who prevails against the United States or a federal government agency. See, e.g., *Environmental Defense Fund, Inc. v Environmental Protection Agency* (DC Cir 1983) 716 F2d 915 (attorney fees awarded despite agency action in response to suit that rendered petition for review moot). See also *Environmental Defense Fund v Watt* (ED NY 1982) 554 F Supp 36 (unnecessary to prevail on all claims or to secure final judgment in

order to prevail for fee purposes; party who obtains beneficial settlement may be deemed “prevailing party”). Attorney fees may also be awarded under the following federal statutes: the Clean Air Act (42 USC §7607(f)); the Federal Water Pollution Control Act (33 USC §1365(d)); the Marine Protection, Research, and Sanctuaries Act of 1972 (33 USC §1415(g)(4)); the Noise Control Act of 1972 (42 USC §4911(d)); and the Resource Conservation and Recovery Act (42 USC §6972(e)). For a discussion of attorney fees under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 USC §§9601–9675), see *Key Tronic Corp. v U.S.* (1994) 511 US 809, 128 L Ed 2d 797, 114 S Ct 1960. An attorney litigating a case in propria persona may not recover attorney fees because actual attorney fees were not incurred. *Trope v Katz* (1995) 11 C4th 274, 45 CR2d 241.

§5.37 L. Prejudgment Interest

Prejudgment interest from the date of injury is generally not recoverable in nuisance and trespass actions, because the damages are unliquidated. CC §§3287–3288; *Perkins v Blauth* (1912) 163 C 782, 127 P 50. But if the damages sought are liquidated or are sufficiently capable of calculation, they may qualify for an award under CC §3287(a). *Amador Valley Investors v City of Livermore* (1974) 43 CA3d 483, 117 CR 749 (interest allowed on damages for wrongful discharge of sewage onto plaintiff’s property in inverse condemnation action). Prejudgment interest may also be recovered as a cost in contribution actions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 USC §§9601–9675). 42 USC §§9607(a), 9613(f).

§5.38 M. Punitive Damages

Civil Code §3294(a) provides that, in an action for breach of an obligation not arising from contract, exemplary and punitive damages are recoverable when clear and convincing evidence proves that the defendant is guilty of oppression, fraud, or malice. Malice includes not only conduct that the defendant intended to cause injury to the plaintiff, but also “despicable” conduct carried on with a “willful” and conscious disregard of the rights or safety of others. CC §3294(c)(1).

Under older case law, punitive damages were recoverable when a nuisance was willfully created, was dangerous, and substantially impaired the use and enjoyment of the property (*McIvor v Mercer-Fraser Co.* (1946) 76 CA2d 247, 254, 172 P2d 758), but recovery

would be governed by the current standards created under more recent amendments to [CC §3294](#). Punitive damages have also been allowed for encroachment. *Goshgarian v George* (1984) 161 CA3d 1214, 208 CR 321. Punitive damages, however, are not recoverable when the defendant has made a good faith effort to control the nuisance or trespass. See 11 [Witkin, Summary of California Law, Equity §153 \(10th ed 2005\)](#). In addition, punitive damages may not be used to punish a defendant for injuries to nonparties. *Philip Morris USA v Williams* (2007) ___ US ___, 166 L Ed 2d 940, 948, 127 S Ct 1057. On appealing excessive punitive damage awards, see [§1.34](#).

§5.39 N. Statutory Limitations on Recovery

The California legislature has enacted statutes that limit the recovery of damages arising from certain types of activities. Parties must research this subject as it applies to the facts of their case. These limitations apply if the conduct or condition alleged to be a nuisance is expressly authorized or so clearly implied that it is apparent that the legislative body contemplated protection of the acts causing the nuisance. See *Greater Westchester Homeowners Ass'n v City of Los Angeles* (1979) 26 C3d 86, 160 CR 733. Some examples of these statutes are:

- Outdoor shooting ranges ([CC §3482.1](#));
- Preexisting agricultural activities, operations, or facilities ([CC §3482.5](#)); and
- Preexisting agricultural processing activities, operations, and facilities involving dairy products, meat, rendering plants, eggs, **PAGE 352**fruits, grains, beer and wine, and collection centers ([CC §3482.6](#)).

It is the court's decision whether the plaintiff's claim is contrary to the legislative policy in a particular statute or regulation. For example, the California Supreme Court held that property owners may not seek damages against a public utility for diminution in property value caused by fear of electromagnetic fields, because such a recovery would interfere with Public Utilities Commission policies as adopted in public utilities regulations. *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 55 CR2d 724. See also Coon, *Case Comment: San Diego Gas & Electric Co.*, 19 CEB Real Prop L Rep 209 (Oct 1996).

For a case giving a narrower application of statutory limitations, see *Jones v Union Pac. R.R.* (2000) 79 CA4th 1053, 94 CR2d 661.

VII. DEFENSES

§5.40 A. Comparative Fault

Proposition 51 (CC §§1431–1431.5) limits liability for noneconomic damages to the amount allocated to the defendant in direct proportion to that defendant's percentage of fault. Noneconomic damages are defined as subjective, nonmonetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation. CC §1431.2(b)(2). A defendant's liability for noneconomic damages is limited to its proportionate share of fault relative to all those responsible for the injuries, whether or not they are parties to the lawsuit.

Comparative negligence is a defense when the nuisance action seeks personal injury, property, or wrongful death damages resulting from negligent conduct. It is not a defense when the harm is intentional or the result of recklessness. *Tint v Sanborn* (1989) 211 CA3d 1225, 1229, 259 CR 902. When the nuisance is the result of an abnormally dangerous condition or activity, contributory negligence is a defense only if the plaintiff has voluntarily and unreasonably subjected him- or herself to the risk of harm. *Tint v Sanborn, supra*; Restatement (Second) of Torts §840B (1979). Comparative fault is **PAGE 353** not a defense when the plaintiff seeks an injunction as the remedy. *Kafka v Bozio* (1923) 191 C 746, 749, 218 P 753.

B. Statutes of Limitations and Repose

§5.41 1. Public Nuisance and Trespass

There is no statute of limitations for a public nuisance. CC §3490; *People v Mason* (1981) 124 CA3d 348, 353, 177 CR 284. A public nuisance cannot be legalized by lapse of time. CC §3490. Therefore, the statute of limitations and consent are not a defense to public nuisance, and there can be no prescriptive rights to maintain a public nuisance. This rule does not apply to a private nuisance action for damages or a private action to abate an unlawful condition. *Mangini v Aerojet-General Corp.* (1991) 230 CA3d 1125, 1142, 281 CR 827 (*Mangini I*). In spite of the general rule, laches may apply to a public nuisance when the delay results in prejudice and there is no reasonable explanation for the delay. The same result may follow on the theory of estoppel. See *City & County of San Francisco v Pacello* (1978) 85 CA3d 637, 645, 149 CR 705.

§5.42 2. Private Nuisance and Trespass

Applicable statutes of limitations for a private nuisance are three years for property damage and one year for bodily injury. CCP §§338(b), 340(3). In private nuisance and trespass cases, it is necessary to consider both the harm and the discovery of the harm in order to determine when the limitation period commences. See *Camsi IV v Hunter Technology Corp.* (1991) 230 CA3d 1525, 282 CR 80. In actions involving trespass or nuisance, the injury is considered to be to the property itself, not to the owner. 230 CA3d at 1534. Thus, as soon as the defendant's acts cause immediate and permanent injury to the property (unless the discovery rule applies), the statute of limitations begins to run. 230 CA4th at 1535. If the defendant has caused injury by a series of acts, the cause of action can generally be brought within the limitation period running from the last act. 230 CA4th at 1534.

However, there is a distinction between harm to the real property and harm to the owner's interest in the property and the two do not necessarily occur at the same time. 230 CA4th at 1535. Thus, **PAGE 354** an owner who took title to property after an immediate and permanent injury had occurred may be entitled to maintain a tort action based on that injury if the previous owner had not discovered the damage. 230 CA4th at 1536. Under the discovery rule, a cause of action belongs to the owner who first discovered or ought to have discovered the property damage. *Siegel v Anderson Homes, Inc.* (2004) 118 CA4th 994, 1009, 13 CR3d 462.

The *Camsi IV* property had been damaged prior to sale and the prior owner knew or should have known about the damage. Under those facts, the new owner's cause of action most likely would be a claim against the prior owner for failure to disclose. 118 CA4th at 1009. On the other hand, if the property had been damaged prior to sale, but the prior owner sold it in good faith without knowledge of the damage, at a price that did not reflect the damage, then the prior owner would have suffered no damage. The new owner, however, who discovers the damage after purchase has a claim against the person or entity that caused the damage because the new owner is the only party capable of maintaining a legal claim who has also suffered a compensable injury. 118 CA4th at 1009.

An owner who is aware of damage to his property may deliberately transfer the cause of action to another. 118 CA4th at 1005. Without some clear manifestation of such intent, however, the cause of action is not transferred to the subsequent owner. 118 CA4th at 1005. Once the statute of limitations bars a claim, all subsequent owners are also barred unless the damage suffered by the subsequent owner is fundamentally different from the earlier damage. 118 CA4th at 1006.

In the usual case, a subsequent owner will not be personally harmed by the tort until he or she becomes owner of the property.

The statute does not commence to run anew every time ownership of the property changes hands. *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1215, 52 CR2d 518. See also *CAMSI IV v Hunter Technol. Corp.* (1991) 230 CA3d 1525, 1534, 282 CR 80. The expiration of the limitation period bars an action by all successors in interest. *Beck Dev. Co. v Southern Pac. Transport Co., supra*; *Camsi IV v Hunter Technol. Corp., supra*. This rule means that a party can acquire a prescriptive right to maintain a private nuisance.

In a nuisance action, the plaintiff can recover damages that accrue between the commencement and the conclusion of the action. CC §3283; *Renz v 33rd Dist. Agric. Ass'n* (1995) 39 CA4th 61, 68, PAGE 354.146 CR2d 67. (Note, however, that *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 218 CR 293, suggests the contrary in dicta at 39 C3d at 869.)

To calculate when the statute of limitations begins to run in a nuisance action, counsel must ascertain whether the nuisance is permanent or continuing. See §§5.43–5.44.

§5.43 a. Permanent Nuisance and Trespass

The statute of limitations for permanent nuisance commences from the time that (1) the permanent nuisance is created, (2) the property suffers actual and appreciable harm, and (3) the plaintiff discovers or should have discovered the injury and its cause through reasonable diligence. *Wilshire Westwood Assocs. v Atlantic Richfield Co.* (1993) 20 CA4th 732, 739, 24 CR2d 562; *Lyles v State* (2007) 153 CA4th 281, 291, 62 CR3d 696. The cause of action for nuisance accrues when the consequential damages are sufficiently apparent to give a reasonable person notice that he or she has a duty to PAGE 355 pursue legal remedies. In contamination cases, the actual and appreciable harm is the placing of hazardous material in the soil or groundwater and not the order to clean up the property. In contrast, a cause of action for trespass accrues when the land is entered. *CAMSI IV v Hunter Technol. Corp.* (1991) 230 CA3d 1525, 1534, 282 CR 80.

The fact that the plaintiff is not aware of the cause of action or the wrongdoer does not necessarily toll the statute. *Angeles Chem. Co. v Spencer & Jones* (1996) 44 CA4th 112, 51 CR2d 594 (federal environmental cleanup “discovery rule” supersedes state limitation period). California’s late discovery rule postpones the running of the statute of limitations until the plaintiff discovers or should have discovered all facts essential to its cause of action. A plaintiff is charged with presumptive knowledge when it has notice or

information of circumstances to put a reasonable person on inquiry or has the opportunity to obtain knowledge from sources open to its investigation. This is an objective test based on whether the facts would make a reasonably prudent person suspicious. *Wilshire Westwood Assocs. v Atlantic Richfield Co., supra.*

When the complaint demonstrates on its face that the cause of action is barred by the statute of limitations, the plaintiff has the burden to plead the reasons for the late discovery. The plaintiff must specifically plead facts that show the time and manner of discovery and the inability to have made an earlier discovery despite reasonable diligence. *CAMSI IV v Hunter Technol. Corp., supra.* Whether a plaintiff's late discovery is justified is a factual question that may be decided by a jury. See *Smith v County of Los Angeles* (1989) 214 CA3d 266, 281, 262 CR 754 (noting determination of when statute of limitations on cause of action began to run is question of fact).

§5.44 b. Continuing Nuisance and Trespass

Because plaintiffs may bring successive actions for damages until the nuisance or trespass is abated, a continuing nuisance or trespass effectively has no statute of limitations. If the nuisance is continuing, every continuation or repetition of the nuisance gives rise to a separate claim for damages caused by the nuisance. If the nuisance is continuing, the person harmed may bring successive actions for damage until the nuisance is abated. *Baker v Burbank-Glendale-Pasadena PAGE 356 Airport Auth.* (1985) 39 C3d 862, 218 CR 293; *Wilshire Westwood Assocs. v Atlantic Richfield Co.* (1993) 20 CA4th 732, 24 CR2d 562.

The continuing nature of the nuisance refers to continuing damage caused by the offensive conduct, not to the acts causing the offensive conditions to occur. *Mangini v Aerojet-General Corp.* (1991) 230 CA3d 1125, 1147, 281 CR 827 (*Mangini I*). When continuing or recurring injury results from a wrongful act or from a condition wrongfully created and maintained, there is not only a cause of action for the original wrong arising when the wrong is committed, but separate and successive causes of action for the consequential damages that arise as and when such damages are sustained. Therefore, as long as the cause of action exists and damage continues, the plaintiff may recover for the damages that have occurred within the statutory period, even if the cause of action based solely on the original wrong is barred. *Phillips v City of Pasadena* (1945) 27 C2d 104, 162 P2d 625; *Kafka v Bozio* (1923) 191 C 746, 751, 218 P 753.

The policy of the law is to construe a nuisance as continuing rather than permanent. See §5.16. Therefore, if the permanency of an injury

caused by a nuisance is in doubt, the courts favor the right to successive actions. See, e.g., *Kafka v Bozio, supra*. The courts should be reluctant to enlarge the category of permanent nuisance. See *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 872, 218 CR 293. Otherwise the effect would be to give the defendant, because of its wrongful act, the right to continue the wrong. *Kafka v Bozio, supra*.

§5.44A c. “Improvement” as Continuing Nuisance

If the construction or operation of a mechanism that constitutes the nuisance is an “improvement” as defined in the 10-year statute of repose (CCP §337.15), the continuing nature of the nuisance does not extend the 10-year limit imposed by that statute. *Gaggero v County of San Diego* (2004) 124 CA4th 609, 618, 21 CR3d 388. In *Gaggero*, plaintiffs purchased a landfill in 1974 that had been operated by the county from 1959 to 1967. In 1998 and 1999, severe subsidence occurred at the landfill, causing major damage to plaintiffs’ improvements on the property. The plaintiffs contended that the subsidence was the result of defective design and operation of **PAGE 357**the landfill. They alleged that decomposition of material placed in the landfill produced methane gas, which in turn created void pockets in areas beneath the landfill covering. Plaintiffs contended that the landfill was a continuing nuisance because it continued to produce the methane gas that in turn created the soil subsidence. The court found that the landfill was an “improvement” within the meaning of CCP §§337.15. The court further found that the continuing nature of the nuisance did not extend the 10-year statute of repose.

The statute has also been interpreted to apply to claims against governmental and public entities. *Magnuson-Hoyt v County of Contra Costa* (1991) 228 CA3d 139, 144, 278 CR 770. In *Magnuson*, a home owner brought an action against the City of Lafayette and Contra Costa County, alleging that landslide damage to her property was caused by the manner in which an adjoining public street was constructed. The street had been constructed in 1968 by Contra Costa County. The City of Lafayette became the owner of the street shortly after the street was completed and had exclusive title to the street since July of 1968. The county provided maintenance services for the street until 1977 and had no involvement in the street after that date. The property was damaged in 1987. The plaintiff brought an action for inverse condemnation. The court held that the action was one involving latent deficiency in the design specification or construction of an improvement to real property. It found that these activities are

covered by the statute. It further held that the provisions of [CCP §337.15](#) are applicable to governmental and public entities.

NOTE► [Code of Civil Procedure §337.15](#) was drafted by, and passed at the behest of, real estate developers and the construction industry. The statute is an economic regulation designed to protect developers, design professionals, consultants, contractors, and land developers and promote the construction business in general. The legislature found that liability for an indefinite period could seriously impinge on the conduct of the construction industry. *Tomko Woll Group Architects, Inc. v Superior Court* (1996) 46 CA4th 1326, 1334, 54 CR2d 300.

Before its enactment, claims for negligence or breach of warranty for defective construction were controlled by a 3-year ([CCP §338\(2\)](#)) or 4-year ([CCP §337](#)) statute of limitations. However, the 3- or 4-year period did not begin to run until consequential damage caused by the construction defect was sufficiently appreciable to a reasonable **PAGE 358** man so that he had a duty to pursue his remedies with reasonable diligence. The legislature intended [§337.15](#) to cap the time to bring a claim. It imposed an absolute requirement that claims arising from defective construction of “improvements” be filed within 10 years of substantial completion of the “development or construction.” The language of [§337.15](#) is broad and susceptible to the interpretation in *Gaggero* and *Magnuson*.

There are exceptions to the application of [CCP §337.15](#). The statute does not apply to personal injury or wrongful death actions. Also, it cannot be used by “any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time the deficiency and improvement constitutes the proximate cause for which it is proposed to bring an action.” This exception renders the statute inapplicable in nearly all nuisance, trespass, and inverse condemnation actions. *Leaf v City of San Mateo* (1980) 104 CA3d 398, 405, 163 CR 711. In *Leaf*, the court held that the city could not assert a defense based on [§337.15](#) because it was the owner in possession of the offending improvements. In *Magnuson*, the plaintiff raised the issue that [CCP §337.15](#) conflicted with the fundamental policy underlying inverse condemnation actions, which is to distribute throughout the relevant community the loss inflicted on the individual by a public improvement. See *McNichols, From Sovereign Immunity to Strict Liability: Using Inverse Condemnation in Water Damage Actions*, 27 CEB Real Prop L Rep 93 (July 2004). The *Magnuson* court held there was no such conflict because one government entity had ceded possession and control of the public improvement to another. If that were not the case, the court may have reached a different result. That

is, the constitutional policy underlying inverse condemnation may have trumped the statutory policy of [CCP §337.15](#).

The holding of *Gaggero* appears to conflict with the long-standing rationale for accrual of a cause of action for continuing nuisance. *Gaggero* relied on an earlier case, *Chevron USA, Inc. v Superior Court* (1994) 44 CA4th 1009, 1017, 54 CR2d 324, which stated that the rule regarding accrual of the statute of limitations for a continuing nuisance and continuing trespass was overridden by the 10-year statute of repose. The *Chevron* court relied on the broad terms “no action” in [CCP §337.15\(a\)](#) and on the legislative goal of setting an outside limit to protect contractors from extended liability. 44 CA4th at 1018. However, it is unclear that the legislature intended, **PAGE 359** or even considered, the effect of [CCP §337.15](#) on the established rule of accrual of a cause of action for continuing nuisance. The result in *Chevron* is that the party that caused the contamination was exempted by the statute of limitations, while an innocent possessor of the property at the time of contamination was held accountable for cleanup costs. The outside limit, which protects contractors, overrides both the public interest in cleaning up the environment and the state policy favoring accountability for those who cause pollution. It is doubtful that the legislature intended this result in enacting [§337.15](#). The *Chevron* court noted, however, that the creation of a pollution exception to the statute of limitations for latent construction defects would be better left to the legislature. 44 CA4th at 1019.

Equitable tolling does not apply to [CCP §337.15](#). *Lantzy v Centex Homes* (2003) 31 C4th 363, 370, 2 CR3d 655. However, equitable estoppel may apply if (1) while the limitations period is still running, the tortfeasor represents that all actionable damage has been or will be repaired, thus making it unnecessary to sue; (2) the plaintiff reasonably relies on this representation to refrain from bringing a timely action; (3) the representation proves false after the limitations period has expired; and (4) the plaintiff proceeds diligently once the truth is discovered. 31 C4th at 383. For further discussion, see *California Construction Contracts and Disputes*, chap 8 (3d ed Cal CEB 1999).

There are exceptions to the application of [CCP §337.15](#). Nuisance actions covered by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 USC §§9601–9675) are not triggered until discovery of the contamination. *Angeles Chem. Co. v Spencer & Jones* (1996) 44 CA4th 112, 51 CR2d 594. CERCLA creates a federally mandated discovery rule that preempts state law. The 10-year California statute of repose applies if the nuisance or trespass is the result of a latent construction defect unless the nuisance or trespass involves CERCLA chemicals (42 USC

§9658) or unless the defendant is in possession and control of the property (*Leaf v City of San Mateo* (1980) 104 CA3d 398, 405, 163 CR 711).

§5.45 c. Special Rules for Pollution Cases

The distinction between continuing and permanent nuisance on **PAGE 360** one hand and trespass on the other presents particularly important and complex issues in cases involving soil and groundwater contamination. The key case on this subject is *Mangini v Aerojet-General Corp.* (1996) 12 C4th 1087, 51 CR2d 272 (*Mangini II*). This case held that, in order to treat soil contamination as a continuing rather than a permanent nuisance, the plaintiff must present substantial evidence that the contaminated condition is subject to remediation or cleanup and that cleanup costs are reasonable. The supreme court also held that the claim for permanent nuisance was barred by the statute of limitations.

Whether regarded from a practical, equitable, public policy, or legal point of view, *Mangini II* presents many problems for innocent owners who discover pollution on their property. The result of the case was that the defendant, which had created severe contamination that would be very expensive to remediate, was not required to compensate the plaintiff for the loss of use of the property and other damages while the property was under remediation. This result can be expected to be duplicated in similar situations.

Before *Mangini II*, the courts had consistently stated that, when there is doubt about whether a nuisance is continuing or permanent, the court should opt for a continuing nuisance to protect the plaintiff from contingencies such as unforeseen future injury, to prevent the plaintiff from being barred by the statute of limitations, and to encourage termination of the condition causing the nuisance. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 870, 218 CR 293; *Capogeannis v Superior Court* (1993) 12 CA4th 668, 678, 15 CR2d 796; *Mangini v Aerojet-General Corp.* (1991) 230 CA3d 1125, 1148, 281 CR 827 (*Mangini I*). See §5.16. *Mangini II* appears to make permanent nuisance a preferred option in doubtful cases—at least for purposes of the statute of limitations in contamination cases. Also, before *Mangini II*, the courts had consistently held that in doubtful cases the plaintiff had the option to elect to treat the nuisance as permanent or continuing. See §5.15. The court in *Mangini II* ignored this rule and denied the plaintiff the option to elect.

Mangini II leaves landowners in a precarious position for many reasons and creates much confusion and uncertainty in the law of

nuisance. First, the court expressly left open the issue of whether a plaintiff who has filed a timely nuisance action must prove that the abatement can be accomplished at a reasonable cost in order **PAGE 361** to be entitled to an injunction or damages. The holding is expressly limited to the statute of limitations. Second, it is unclear whether continuing nuisance will remain the default holding when there is doubt about whether the nuisance is continuing or permanent for purposes of injunction and damages. It is apparently not the rule for purposes of the statute of limitations. It is equally unclear whether plaintiffs can elect to characterize the nuisance as continuing or permanent for purposes of damages and injunction. Again, for the statute of limitations, this rule no longer seems to apply.

Finally, it is uncertain whether characterizing the nuisance as continuing or permanent for statute of limitations purposes will apply on the issue of remedy. If the plaintiff needs to show that the nuisance can be abated at a reasonable cost in order to prove a continuing nuisance for statute of limitations purposes and is not required to make the same showing to prove that a nuisance is continuing for other purposes, such as the remedy, the same situation could be a permanent nuisance for statute of limitations purposes and continuing for damages or injunction purposes.

To extend the statute of limitations, the plaintiff may be able to argue that a nuisance was continuing for a period of time and became permanent at a later time. This argument was accepted by the court in *Bartleson v U.S.* (9th Cir 1996) 96 F3d 1270.

For further analysis and criticism of *Mangini II*, including its effects on future land contamination cases, as well as owner strategies for coping with uncertainty about the feasibility and cost of remediation, see McNichols, *Revisiting Mangini II: Should the Burden of Proof in Contamination-Nuisance Cases Be Re-examined?* 25 CEB Real Prop L Rep (Apr. 2002).

§5.46 C. Laches

A public nuisance cannot be legalized by the passage of time. **CC §3490**. Laches, however, is an available defense in public nuisance actions if the delay results in prejudice and there is no reasonable explanation for the delay. *City & County of San Francisco v Pacello* (1978) 85 CA3d 637, 645, 149 CR 705. Laches may be raised as a defense to a private nuisance or trespass action.

§5.47 D. Coming to Nuisance

The defense of coming to the nuisance does not apply to the **PAGE 362** current law of nuisance. The rule formerly stated that, if a noxious trade were established in a place remote from habitation, those who afterward acquired property in the vicinity were barred from obtaining either damages or an injunction, having assumed the risk of the nuisance by purchasing property with knowledge of the conditions. See *Williams v Blue Bird Laundry Co.* (1927) 85 CA 388, 392, 259 P 484.

This doctrine has generally been repudiated, *i.e.*, the plaintiff may obtain injunctive relief or damages even if the nuisance was in operation when it acquired the property. See, *e.g.*, *Mangini v Aerojet-General Corp.* (1996) 12 C4th 1087, 51 CR2d 272 (*Mangini II*) (proving temporary nuisance and reasonable cleanup costs entitles plaintiff to damages for loss of use). See also 11 Witkin, *Summary of California Law, Equity* §166 (10th ed 2005). In addition, even though a business was entirely unobjectionable when established, it may become objectionable because of the growth in the area or change in the surroundings. *Ex Parte Hadacheck* (1913) 165 C 416, 420, 132 P 584; *Friedman v Pacific Outdoor Advert. Co.* (1946) 74 CA2d 946, 952, 170 P2d 67. That the owner acquired and improved the property with knowledge of the nuisance is a factor to consider. See *Hellman v La Cumbre Golf & Country Club* (1992) 6 CA4th 1224, 8 CR2d 293 (errant golf balls from country club).

§5.48 E. Consent

Although consent is not a defense to a public nuisance (*Friedman v Pacific Outdoor Advert. Co.* (1946) 74 CA2d 946, 170 P2d 67), consent may be a defense to a private nuisance claim (*Mangini v Aerojet-General Corp.* (1991) 230 CA3d 1125, 281 CR 827 (*Mangini I*)). Consent is a factual defense and cannot generally be resolved on the basis of demurrer. 230 CA3d at 1140. For the defense of consent to apply, the activity must have been lawful when it was done. *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 344, 23 CR2d 377. Applying this test, one court found that the activity (fuel storage) was lawful when it was operated and done in an open and notorious manner. Because a former owner was also the operator of the reservoir, the activity was conducted with the owner's consent. The court found that the developer purchased the property with full knowledge of its past use and was barred by the statute of limitations from claiming damages. See **PAGE 363** *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 52 CR2d 518. See also

Mangini v Aerojet-General Corp. (1991) 230 CA3d 1125, 1139, 281 CR 827 (*Mangini I*).

Consent can also be shown by the terms of a lease; *i.e.*, an owner's action against a lessee for nuisance cannot be sustained if the owner contractually consented to the lessee's specific use of the property that caused the nuisance. 230 CA3d at 1138. The defense is not applicable, however, if the current owner sues a prior owner and the condition causing the nuisance was caused but not disclosed by a prior owner. *Newhall Land & Farming Co., supra*. In *Capogeannis v Superior Court* (1993) 12 CA4th 668, 15 CR2d 796, the court allowed a new owner of the property to sue the prior owner and a long-term tenant because the new owner was unaware of the property's contamination at the time of purchase.

Consent can be a valid defense in nuisance actions involving easements over private land for public works. *Sutro Heights Land Co. v Merced Irrig. Dist.* (1931) 211 C 670, 690, 296 P 1088.

§5.49 F. Balancing Equities

When an injunction is sought, the court must first balance the conflicting interests to determine whether a nuisance exists. See §5.6. Then there is a further balancing to decide whether to grant an injunction. See §5.26. See also *California Civil Procedure Before Trial*, chap 32 (4th ed Cal CEB 2004); 11 *Witkin, Summary of California Law, Equity* §§169–173 (10th ed 2005). The defendant can argue that, even if the court found the activity or condition to be a nuisance, it should deny injunctive relief. The courts, however, will refuse to balance a hardship in favor of a defendant who willfully created the nuisance. See *Morgan v Veach* (1943) 59 CA2d 682, 689, 139 P2d 976.

§5.50 G. Due Care

Due care is not a defense to a nuisance or trespass action. It is the effect of the nuisance, not whether the act or omission that causes it is intentional, negligent, or careless in the way it is performed, that determines whether it is a nuisance. *People ex rel Robarts v Russ* (1901) 132 C 102, 64 P 111.

§5.51 H. Use Consistent With Applicable Zoning

Some courts have held that a plaintiff cannot obtain an injunction against a business that is operated in accordance with applicable zoning laws unless the methods used are unnecessary and injurious. [CCP §731a](#); *Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 C2d 265, 271, 288 P2d 507 (holding that ginning mill, lawfully operated in properly zoned location, could not be abated under [§731a](#)); *Sierra Screw Prods. v Azusa Greens, Inc.* (1979) 88 CA3d 358, 366, 151 CR 799.

The plaintiff has the burden of showing unnecessary and injurious methods of operation. *Christopher v Jones* (1964) 231 CA2d 408, 411, 41 CR 828. A person may not use his or her own property, even in and about a business that is itself lawful, in a manner that seriously interferes with a neighbor's enjoyment of its rights and the use of its property. That a business operation is conducted with the government's consent, is legal, and is conducted in a district zoned for industry may not be a defense. *Vowinckel v N. Clark & Sons* (1932) 216 C 156, 13 P2d 733 (court required pipe, tile, and pottery factory adjacent to residential area to abate nuisance by discontinuing use of some areas and erecting firewall).

§5.52 I. Separation of Powers

In rare instances, the separation of powers may provide a defense in a nuisance or trespass action. For example, one court held that it could not provide a remedy for a city's failure to remedy traffic conditions in a neighborhood, because that power is delegated to the city by the legislature. Court interference would violate the separation of powers. *Friends of H St. v City of Sacramento* (1993) 20 CA4th 152, 24 CR2d 607. See [CC §3482](#) (nothing done or maintained under express authority of statute can be deemed a nuisance); *Farmers Ins. Exch. v State* (1985) 175 CA3d 494, 221 CR 225; but see *Varjabedian v City of Madera* (1977) 20 C3d 285, 142 CR 429.

§5.53 J. Scope of Injunction

An injunction (see [§5.26](#)) should not impose burdens beyond the necessities of the case. *Anderson v Souza* (1952) 38 C2d 825, 841, 243 P2d 497; *People v Mason* (1981) 124 CA3d 348, 177 CR 284. The defendant may apply for a modification or dissolution **PAGE 364.1** of an injunction if there is "a material change in the facts" (or a change in the law) on which the injunction was based, or if "the ends

of justice would be served.” CCP §533. See also CCP §532 (modifying or dissolving injunction against water diversion). An injunction will be reversed on appeal if it causes unnecessary hardship or goes beyond what is reasonably necessary. See *Anderson v Souza, supra*. If the injunction is broad in scope, the court may refuse (or adjust) a request for compensatory damages. See *Farmy v College Hous., Inc.* (1975) 48 CA3d 166, 121 CR 658. The court will not enjoin the conduct of the defendant’s entire business when the business is not a nuisance per se, if a lesser restriction will give the plaintiff relief. *Vowinckel v N. Clark & Sons* (1932) 216 C 156, 13 P2d 733.

§5.54 VIII. RELATED ACTIONS

The following are torts and other actions that are related to nuisance and trespass:

- **Violation of seller’s duty to disclose.** Under CC §1102.6, a seller of residential property must disclose any neighborhood noise problems and other nuisances to a potential buyer. Under CC §1102.6(c), the seller must give notice to a prospective buyer of the buyer’s responsibility to pay any supplemental tax bills after closing. A violation subjects the seller to damages. CC §1102.13. See *Alexander v McKnight* (1992) 7 CA4th 973, 9 CR2d 453 (disclosure requirement justified award of diminution in value damages to plaintiff in nuisance action). Under the common law, when a seller knows facts materially affecting the value or desirability of the property, and knows that these facts are not known to or within the reach of the diligent attention and observation by the buyer, the seller has a duty to disclose them to the buyer. *Preston v Goldman* (1986) 42 C3d 108, 227 CR 817. A breach of that duty allows the buyer to obtain either rescission or damages. *Karoutas v HomeFed Bank* (1991) 232 CA3d 767, 771, 283 CR 809. See California Real Property Remedies and Damages, chaps 1, 3–4 (2d ed Cal CEB 2002). For further discussion of disclosure obligations, see California Real Property Sales Transactions §§5.7–5.29B (3d ed Cal CEB 1998) and Handling Real Property Sales Transactions, steps 4–16 (Cal CEB Action Guide April 2007).

- **Violation of federal contamination statutes**

- The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 USC §§9601–9675) provides for recovery of cleanup costs and natural resource damages. 42 USC §9601. Responsible parties may bring an action for contribution under 42 USC §9613(f)(1), which provides that anyone who incurs cleanup costs or is required to reimburse the government for cleanup costs may seek appropriate contribution from other responsible parties. Innocent parties (*i.e.*, federal, state, or local government), can bring cost recovery actions. See 42 USC §9607.
- Under the Resource Conservation and Recovery Act of 1976 (RCRA) (42 USC §§6901–6992k), a private party cannot recover the cost of past cleanup efforts but may bring suit against certain responsible persons, including former owners who contributed to the contamination. See 42 USC §6972(a); *Meghrig v KFC W., Inc.* (1996) 516 US 479, 134 L Ed 2d 121, 116 S Ct 1251.
- Claims can be brought by individuals or groups alleging violations of the federal Clean Water Act (33 USC §§1251–1387) if the person or group has “an interest which is or may be adversely affected.” See 33 USC §1365. The U.S. Supreme Court has allowed Clean Water Act claims by environmental groups even when the group would not directly benefit from a favorable decision and when the defendant had already stopped the claimed pollution. *Friends of the Earth, Inc. v Laidlaw Env’tl Servs. (TOC), Inc.* (2000) 528 US 167, 145 L Ed 2d 610, 120 S Ct 693. See also *Ecological Rights Found. v Pac. Lumber Co.* (9th Cir 2000), 230 F3d 1141.

- **Violation of California contamination statutes**

- California has its own version of CERCLA. The Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA) (Health & S C §§25300–25395.15) is similar to CERCLA in many respects, including the fact that neither act applies to petroleum contamination. See *KFC W., Inc. v Meghrig* (1994) 23 CA4th 1167, 1173, 28 CR2d 676 (cost recovery action barred by statutory petroleum exclusion).

- Other California statutes also provide for private claims against alleged polluters. For example, [Health & S C §§25249.5–25249.13](#), commonly known as [Proposition 65](#), allows claims for injunction and penalties when a business knowingly discharges certain chemicals where they can pass into a source of drinking water or when the business exposes a person to such chemicals without an adequate warning.
- [Water Code §13350\(b\)\(1\)](#) provides for a private right of action for contribution against a person who, with certain exceptions, “causes or permits any hazardous substance to be discharged in or on any of the waters of the state where it creates a condition of pollution or nuisance.” Regulatory statutes may also provide the basis for damage claims under a negligence per se theory.
- While many environmental statutes are of fairly recent vintage, some were enacted several decades ago. See, e.g., [Fish & G C §5650](#) and [Health & S C §§5410–5416](#). Thus, acts done long before environmental concerns came to the forefront may still provide a basis for a damages claim.

PRACTICE TIP► State common law actions, such as nuisance and trespass, are necessary supplements to a landowner dealing with contaminated property. Under federal law, plaintiffs can recover only costs of response, such as the cost of a health assessment study. Also under federal law, plaintiffs cannot recover other damages or economic losses, personal injury, or punitive damages. The plaintiff can generally obtain injunctions more easily under state common law claims.

- **Actions by secured lenders.** In limited situations, a secured lender may bring an action for breach of contract against a borrower for breach of any environmental covenant made by the borrower relating to the real property security, for the recovery of damages, and for enforcement of the covenant; that action or failure to foreclose against collateral does not violate the one-form-of-action rule. [CCP §736\(a\)](#). This remedy does not apply to the parties’ obligations contracted for before January 1, 1992. [CCP §736\(e\)](#). Damages are limited to reimbursement or indemnification of costs relating to a reasonable and good faith cleanup, remediation, or other response action concerning a release, plus attorney fees and costs incurred by the secured lender relating to the breach. See [CCP §736\(b\)–\(c\)](#). See also [California Mortgage and Deed of Trust Practice §§4.54–4.57](#) (3d ed Cal CEB 2000).

PRACTICE TIP► If a landlord is held liable for its tenant’s conduct in an action to enforce contamination statutes or environmental covenants, the landlord can seek indemnity from the tenant. The landlord should look to the express indemnity provisions in the lease and remedies for implied indemnity.

- **Wrongful occupancy.** The measure of damages for the wrongful occupation of real property resulting from a trespass is the value of the use of the property during the time of the occupancy (not to exceed five years before the start of the action for damages), the reasonable cost of repair or restoration of the property, plus costs of recovering possession. CC §3334. The landowner can recover damages under §3334 even if the owner is not using the land. See *Don v Trojan Constr. Co.* (1960) 178 CA2d 135, 2 CR 626. The value under §3334 is reasonable rental value. But if the benefit to the defendant exceeded reasonable rental value, the plaintiff may recover the greater amount. CC §3334(b)(1); *Bourdieu v Seaboard Oil Corp.* (1941) 48 CA2d 429, 438, 119 P2d 973.
- **Wrongful holding over.** The measure of damages for a wrongful holding over of real property “by a person who entered upon the same, as guardian or trustee for an infant, or by right of an estate terminable with any life or lives, after the termination of the trust or particular estate, without the consent of the party immediately entitled after such termination,” is the value of the profits received during the holding over. CC §3335. See §§4.83–4.85.
- **Waste.** A landlord can file an action against a tenant for waste, seeking damages or injunctive relief restraining the tenant from practices that are damaging to the property. See §§4.60–4.61. Generally, the measure of damages for a tenant’s waste is the diminution in value of the estate. Any aggrieved person, presumably including a lender holding a security interest, may bring an action against the tenant for treble damages. CCP §732. See also CC §2929; *Mortgage & Deed of Trust*, chap 6.

- **Tenant's breach of lease.** When a tenant commits a nuisance, the landlord may bring an action for damages for breach of the lease, whether the tenant is in possession of the property or has abandoned it. See *California Landlord-Tenant Practice*, chaps 8–9 (2d ed Cal CEB 1997). The landlord may evict the tenant, using the unlawful detainer procedure, and in a separate action recover the value of the past and future rent that is not paid, plus any other amount necessary to compensate the landlord for all damages caused by the breach. This amount can include a brokerage commission, tenant improvements, and cleanup costs of the premises. The tenant, however, is entitled to a credit for the amount of rent or other damages that the tenant can prove could have been reasonably avoided. Thus, the landlord has a duty to mitigate its damages. CC §1951.2; *Danner v Jarrett* (1983) 144 CA3d 164, 192 CR 535; *Sanders Constr. Co. v San Joaquin First Fed. Sav. & Loan Ass'n* (1982) 136 CA3d 387, 401, 186 CR 218; see Landlord-Tenant §§8.46–8.54.
- **Forcible entry or unlawful detainer.** In an action for forcible entry on, or forcible or unlawful detainer of, real property, on a showing of malice the plaintiff may be awarded statutory damages of up to \$600, in addition to actual damages, including rent found due. CCP §1174(b). See CCP §735 on treble damages for forcible or unlawful entry with regard to a building or cultivated real property. On forcible entry and forcible or unlawful detainer, see CCP §§1159–1161; §§4.22–4.26. For a comprehensive discussion of unlawful detainer procedure, see *California Eviction Defense Manual*, chap 4 (2d ed Cal CEB 1993); Landlord-Tenant, chaps 9–13.
- **Intrusion.** The tort of intrusion requires the invasion, physical or otherwise, of a private place, conversation, or matter with the intent to capture any type of visual image, sound recording, or other physical impression of plaintiff engaging in a personal or familial activity in a manner that is offensive to a reasonable person. See CC §1708.8; *Restatement (Second) of Torts* §652B (1977); *California Tort Damages* §9.6 (2d ed Cal CEB 2002).
- **Breach of the covenant of quiet enjoyment.** In the absence of language to the contrary, every lease contains an implied **PAGE 364.6** covenant of quiet enjoyment, whereby the landlord impliedly covenants that the tenant shall have quiet enjoyment and possession of the premises. If an interference is caused by the landlord or by a neighbor or tenant claiming under the landlord, the tenant has an actionable breach of the covenant of quiet

enjoyment. Activities on neighboring premises not owned or controlled by the aggrieved tenant's landlord may also interfere with the tenant's quiet enjoyment. However, that conduct does not amount to a breach of the covenant of quiet enjoyment as between the tenant and the landlord. *Andrews v Mobile Aire Estates (2005)* 125 CA4th 578, 590, 22 CR3d 832.