Remedies for Intangible Intrusions: The Distinction Between Trespass and Nuisance Actions Against Lawfully Zoned Businesses in California

A California factory expands its operations and increases its work day from eight to twenty-four hours. The resulting noise interferes with the conduct of adjoining businesses and causes the market value of nearby residences to drop. Neighborhood residents bring an action to abate the noise as a nuisance. The injunction is denied. The court reasons that California law imposes a nearly absolute ban against enjoining a business as a nuisance if the business operates in an area zoned for commercial or industrial use. Unwilling to accept defeat, the neighborhood residents bring an action for damages, claiming that the vibrations transmitting the noise constitute a trespass upon their property. The court rejects their argument that noise waves alone can constitute a trespass, adhering to the traditional distinction between the actions of trespass and nuisance.

INTRODUCTION

The above hypothetical, drawn from a recent California Supreme Court decision,[1] highlights the problems facing persons who suffer in-

[1] Wilson v. Interlake Steel Co., 32 Cal. 3d 229, 649 P.2d 922, 185 Cal. Rptr. 280 (1982). In 1974, 22 homeowners and neighborhood residents filed a nuisance action against an adjacent steel fabricating plant located in an area zoned for industrial use. *Id.* at 231-32, 649 P.2d at 923-24, 185 Cal. Rptr. at 281-82. Unlike the above hypothetical, no adjoining businesses complained. The city of Lodi, California, had created the residential and industrial zones next to one another, without providing a buffer zone between them. The steel fabricating plant, owned by the defendants, had expanded to an around-the-clock operation. The plaintiffs sought to enjoin the operation of defendants' plant between the hours of 10:00 p.m. and 7:00 a.m. daily, complaining that the noise made sleep impossible and interfered with the use and enjoyment of their property. *Id.* at 232, 649 P.2d at 924, 185 Cal. Rptr. at 282. The trial court held for the defendants.

The plaintiffs also filed a separate trespass action. The parties stipulated that the

terference with their property rights caused by intangible intrusions.[2] California Code of Civil Procedure section 731a bars injunctive relief for nuisance actions against a business operating in the proper commercial or industrial zone, unless there is proof of "unnecessary or injurious methods of operation."[3] However, the California Supreme Court recently suggested that section 731a would not bar recovery under a nuisance theory for damages caused by intangible intrusions such as noise.[4] At the same time, the court stated that a trespass action could not be brought for noise vibrations that did not cause physical damage.

---

noise had not caused any physical damage to plaintiffs' property. No physical or particulate matter had been deposited on plaintiffs' property, the noise waves were transmitted through the air and not the ground, and the noise substantially interfered with plaintiffs' use and enjoyment of their homes. *Id.* at 231-32, 649 P.2d at 923-24, 185 Cal. Rptr. at 281-82. The plaintiffs contended that the noise waves emitted from the defendants' plant constituted a trespassory invasion of their property, and sought damages for the resulting diminution in the market value of their homes. *Id.* The court in the trespass action also held for defendants. However, on appeal, the California Supreme Court found that although plaintiffs had based their complaint on a theory of trespass, they had pleaded facts sufficient to sustain a recovery of damages under a nuisance theory. *Id.* at 233-34, 649 P.2d at 925, 185 Cal. Rptr. at 283. The court reversed and remanded for further proceedings to determine whether the trial court in the prior nuisance action had held that defendants' operations did not constitute a nuisance, precluding recovery of damages, or had merely held that injunctive relief was barred by California Code of Civil Procedure § 731a. *Id.*

[2] Intangible intrusions upon real property are invasions by elements or forces other than physical or material objects, and include such invasions as noise, odor, and light. Wilson v. Interlake Steel Co., 32 Cal. 3d 229, 233-34, 649 P.2d 922, 925, 185 Cal. Rptr. 280, 283 (1982). "Tangible" is defined by Black's law dictionary as "[h]aving or possessing physical form. Capable of being touched and seen . . . ." BLACK'S LAW DICTIONARY 712 (5th ed. 1979). Thus, "intangible" is that which is incapable of being perceived by the senses of touch and sight. Noises, odors, and light are clear examples of intrusions by intangible elements or forces. Intrusion and deposit of particulate matter are correctly distinguished as invasions of tangible matter. The distinction between tangible and intangible intrusions is relevant primarily because of the different requirements for the availability of the remedies of trespass and nuisance, as analyzed in this Comment. *See infra* notes 8-34 and accompanying text.

[3] CAL. CIV. PROC. CODE § 731a (West 1980).

[4] In dictum in *Wilson v. Interlake Steel Co.*, the court suggested that § 731a would not bar recovery of damages in a nuisance action:

> For the further guidance of the trial court [on remand], we note an earlier but related conclusion that the purpose of section 731a is "to eliminate *injunctive relief* where the business is operated in its appropriate zone . . . ." One court, considering a nuisance action, has observed that "[s]ection 731a does not operate to bar a recovery for damages."

32 Cal. 3d 229, 234, 649 P.2d 922, 925, 185 Cal. Rptr. 280, 283 (1982) (citation omitted) (emphasis in original); *see infra* notes 51-53 and accompanying text.

Although the court's reasoning was not explicit, by implication plaintiffs had failed to prove actual interference with possession.[5]

This Comment examines the legal actions and remedies available in California to the private plaintiff seeking redress for intangible intrusions caused by a business operating in an area zoned for commercial or industrial use. First, it analyzes the California Supreme Court's holding in *Wilson v. Interlake Steel Company*[6] that a trespass action may not be brought for nondamaging intangible intrusions. Next, it examines the effect of section 731a on private nuisance actions. Finally, the Comment proposes an amendment to section 731a which would incorporate the balancing of equities doctrine to reach more equitable results than section 731a currently permits.

I. THE ACTIONS OF TRESPASS AND NUISANCE IN CALIFORNIA

The remedies available in California for relief from interference with property by intangible intrusions are limited. The actions of trespass and nuisance are normally the only legal remedies available to private plaintiffs for intangible intrusions caused by a private party.[7]

---

[5] In Wilson v. Interlake Steel Co., 32 Cal. 3d 229, 232-33, 649 P.2d 922, 924, 185 Cal. Rptr. 280, 282 (1982), the California Supreme Court held that noise-caused vibrations alone would not support an action for trespass. Intangible intrusions such as noise, odor, and light, absent physical damage to plaintiffs' property, must be brought as nuisance actions. *Id.* The court's holding indicates, however, that under the appropriate circumstances a recovery would be allowed under a trespass action for intangible intrusions. *See infra* note 23 and accompanying text.

[6] 32 Cal. 3d 229, 649 P.2d 922, 185 Cal. Rptr. 280 (1982).

[7] The nonjudicial remedy of self-help is, of course, available as well, so long as it does not result in a breach of the peace or unnecessary injury. California Civil Code §§ 3495 and 3502 protect this nonjudicial remedy for the abatement of nuisances. CAL. CIV. CODE §§ 3495, 3502 (West 1970). Although a government official may bring a criminal action to abate a public nuisance, CAL. CIV. CODE § 3491 (West 1970) and CAL. PEN. CODE §§ 370, 372 (West 1970), this remedy is not available to the private plaintiff. California Civil Code § 3493 provides that a private person may bring a civil action to abate a public nuisance, but does not list a criminal action as a remedy available to the private plaintiff. CAL. CIV. CODE § 3493 (West 1980). *Cf.* CAL. CIV. CODE § 3491 (West 1970) (lists indictment or information as a remedy available to public officials in abating a public nuisance). When the government is the actor, the fourteenth amendment of the United States Constitution protects private citizens from deprivation of property rights. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . . "). However, the fourteenth amendment does not provide one private citizen protection from the conduct of another private citizen. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (warehouseman's proposed sale of goods entrusted to him for storage, pursuant to judicial process, not state action; therefore, no violation of the fourteenth

A. Trespass

As the California Supreme Court stated in *Wilson v. Interlake Steel Company*, intangible intrusions such as noise, odor, and light have traditionally been treated as nuisances, not as trespasses.[8] However, this distinction does not mean that the trespass action[9] is inapplicable to

---

amendment). Nor would the sole fact that the local government had authorized the conduct by statute, as is the case when an area is zoned for a certain use, make the actions of the private defendant subject to fourteenth amendment restrictions. *Id.* at 164 ("This Court . . . has never held that a State's mere acquiescence in a private action converts that action into that of the State.").

[8] 32 Cal. 3d 229, 649 P.2d 922, 185 Cal. Rptr. 280 (1982); *see also* Harrison, *Use and Enjoyment of Land — Compensation for Noise Damage*, 4 NAT. RESOURCES LAW. 429, 430 (1971); Lloyd, *Noise as a Nuisance*, 82 U. PA. L. REV. 567 (1934); Mathis, *Urban Noise: An Insidious but Escalating Pollutant*, 46 L.A.B. BULL. 438, 441 (1971); Yamada, *Urban Noise: Abatement, Not Adaptation*, 6 ENVTL. L. 61, 63 (1975); Comment, *Highway Noise: To Compensate or Not to Compensate*, 30 DRAKE L. REV. 145, 152 (1981).

[9] A trespass is an invasion of the plaintiff's interest in the exclusive possession of land. Wilson v. Interlake Steel Co., 32 Cal. 3d 229, 233, 649 P.2d 922, 925, 185 Cal. Rptr. 280, 283 (1982); Brenner v. Haley, 185 Cal. App. 2d 183, 8 Cal. Rptr. 224 (1st Dist. 1960) (intentional trespass by painting over advertising sign); RESTATEMENT (SECOND) OF TORTS § 821D comment d (1979); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 89, at 594-95 (4th ed. 1971). At common law, the plaintiff must prove a direct invasion of the property to sustain an action in trespass. Gallin v. Poulou, 140 Cal. App. 2d 638, 641, 295 P.2d 958, 959-60 (1st Dist. 1956) (vibrations from construction work); W. PROSSER, *supra*, § 13, at 65-66. California courts, however, early rejected the distinction between direct and indirect invasions as arbitrary, holding that the action of trespass was available for either. In Robinson v. Black Diamond Coal Co., 57 Cal. 412 (1881) (trespass by mining debris carried by river and deposited on plaintiff's land downstream), the court said, "we know of no principle upon which it could be held that a person may escape liability by doing that indirectly which would render him liable if done directly." *Id.* at 414. By the time Coley v. Hecker, 206 Cal. 22, 272 P. 1045 (1928) (action to remove cloud upon title to real property) was decided, the rule was firmly rooted and the court could say: "The trend of the decisions of this court is generally in accord with the doctrine . . . that trespasses may be committed by consequential and indirect injuries as well as by direct and forcible injuries." *Id.* at 28, 272 P. at 1048.

California also rejected the common law rule that the trespasser was strictly liable. Gallin v. Poulou, 140 Cal. App. 2d 638, 641-45, 295 P.2d 958, 959-61 (1st Dist. 1956); W. PROSSER, *supra*, § 13, at 63-65. Instead, the trespass must be intentional, the result of recklessness or negligence, or the result of extra-hazardous activity. Wilson v. Interlake Steel Co., 32 Cal. 3d 229, 233, 649 P.2d 922, 924, 185 Cal. Rptr. 280, 282; Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 784, 56 Cal. Rptr. 128, 136 (4th Dist. 1967) (vibrations from test of rocket engine caused damage to water well); Dufour v. Henry J. Kaiser Co., 215 Cal. App. 2d 26, 30, 29 Cal. Rptr. 871, 874 (1st Dist. 1963) (action for damage to trout farm from sand washed from defendant's lands after vegetation had been cleared); Gallin v. Poulou, 140 Cal. App. 2d 638, 645,

intangible intrusions. A significant line of cases has held that vibrations, a form of intangible intrusion, may be a trespass.[10]

In early cases, courts recognized the artificial quality of a distinction between damage caused by the force of an explosion and that caused by rocks hurled onto the land by the blast, and allowed trespass actions based upon vibrations.[11] In many of these cases, tangible matter did not invade the property, and thus there was no entry that would support

---

295 P.2d 958, 962 (1st Dist. 1956).

At common law, the action of trespass did not require proof of damages. *See* W. PROSSER, *supra*, § 13, at 66. In contrast, the action of nuisance required proof of actual damages. *Id.* Nominal damages were awarded for the mere act of entry. *Id.* As Blackstone wrote, "every such entry . . . carries necessarily along with it some damage or other; for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, *viz.*, the treading down and bruising of herbage." 3 W. BLACKSTONE, COMMENTARIES *210. Nominal damages were awarded because the original purpose of the trespass action was the vindication of property rights; if relief were denied, a repeated trespass would eventually create a prescriptive right. *See generally* W. PROSSER, *supra*, § 13, at 66. With this purpose in mind, California courts have granted damages in trespass actions when the act of the defendant caused no harm or was beneficial to the plaintiff. *E.g.*, Sefton v. Prentice, 103 Cal. 670, 674, 37 P. 641, 643 (1894) (mandatory injunction sought to allow plaintiff to attach pipe to water pipe of defendant's water company; "a man has no right to commit a trespass upon the property of another because . . . it would do the owner of the property no harm"); *see also* Atwood v. Fricot, 17 Cal. 37, 43-44 (1860) (damages and injunction against entering and working mining claims of plaintiffs; "[t]he law presumes damages from a trespass"); Cornell v. Sennes, 18 Cal. App. 3d 126, 136, 95 Cal. Rptr. 728, 734 (2d Dist. 1971) (action for cost of air conditioner and counterclaim of trespass by plaintiff's act of removing air conditioner without permission; "[a] trespass without injury will justify only nominal damages").

[10] *See, e.g.*, Colton v. Onderdonk, 69 Cal. 155, 10 P. 395 (1886) (vibrations from blasting); Tuebner v. California St. R.R., 66 Cal. 171, 4 P. 1162 (1884) (vibrations from heavy equipment); Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (4th Dist. 1967) (vibrations from test of rocket engine); Meyer v. Pacific Employers Ins. Co., 233 Cal. App. 2d 321, 43 Cal. Rptr. 542 (2d Dist. 1965) (vibrations from drilling a well); Gallin v. Poulou, 140 Cal. App. 2d 638, 295 P.2d 958 (1st Dist. 1956) (vibrations from construction work); Alonso v. Hills, 95 Cal. App. 2d 778, 214 P.2d 50 (1st Dist. 1950) (vibrations from blasting); McNeill v. Redington, 67 Cal. App. 2d 315, 154 P.2d 428 (2d Dist. 1944) (vibrations from drop forge); McGrath v. Basich Bros. Constr. Co., 7 Cal. App. 2d 573, 46 P.2d 981 (1st Dist. 1935) (vibrations from blasting); McKenna v. Pacific Elec. Ry., 104 Cal. App. 538, 286 P. 445 (2d Dist. 1930) (vibrations from blasting).

[11] *See, e.g.*, McKenna v. Pacific Elec. Ry., 104 Cal. App. 538, 543, 286 P. 445, 447 (2d Dist. 1930) (vibrations from blasting; "[w]e see no reason for differentiating between responsibility for damage done by physical projectiles or missiles and responsibility for damage done by vibration or concussion"); *see also* Colton v. Onderdonk, 69 Cal. 155, 10 P. 395 (1886) (vibrations from blasting); McGrath v. Basich Bros. Constr. Co., 7 Cal. App. 2d 573, 46 P.2d 981 (1st Dist. 1935) (vibrations from blasting).

the traditional trespass action.[12] The holding of the California Supreme Court in *Colton v. Onderdonk* [13] is representative of the rationale in the early cases: it makes no material difference whether the home of plaintiff was destroyed by rocks thrown against it or by vibrations caused by the blast.[14]

Noise is defined as unwanted sound,[15] and sound consists of vibrations or pulsations transmitted by the air.[16] The California Supreme Court in *Wilson* treated vibrations transmitting noise the same as vibrations caused by an explosion or by heavy equipment, but did not find a trespass.[17] The court reached this result by emphasizing the lack of physical damage to plaintiffs' property.[18] The *Wilson* court adopted the court of appeals' ruling, which seems to require proof of damage as an element of trespass by intangible intrusions.[19] If the appellate court's ruling is interpreted this way, the requirement is confusing because the court did not state *why* it required a showing of damage. Further, the ruling seems to reject the ancient common law rule that damage need not be shown in a trespass action,[20] yet the court stated that it "pre-

---

[12] *See supra* note 9.

[13] 69 Cal. 155, 10 P. 395 (1886).

[14] *Id.* at 159, 10 P. at 397. The cases finding trespass from vibrations have not been confined to extrahazardous activities or blasting. A trespass has been found when the vibrations were caused by heavy machinery (Tuebner v. California St. R.R., 66 Cal. 171, 4 P. 1162 (1884)), and in activities such as drilling a well (Meyer v. Pacific Employers Ins. Co., 233 Cal. App. 2d 321, 43 Cal. Rptr. 542 (2d Dist. 1965)).

[15] U.S. ENVIRONMENTAL PROTECTION AGENCY, REPORT TO THE PRESIDENT AND CONGRESS ON NOISE, S. DOC. NO. 63, 92d Cong., 2d Sess. G-4 at xxi (1972); Findley & Plager, *State Regulation of Nontransportation Noise: Law and Technology*, 48 S. CAL. L. REV. 209, 214 (1974); Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research*, 70 COLUM. L. REV. 652 (1970).

[16] *See, e.g.*, I. CRANDALL, THEORY OF VIBRATING SYSTEMS AND SOUND 1 (1926) ("sound waves are produced whenever a vibrating body is placed in contact with an elastic substance"); H. LAMB, THE DYNAMIC THEORY OF SOUND 1 (2d ed. 1925) (in analyzing the "phenomenon of sound we are concerned . . . with the transmission of the vibrations through the aerial medium . . . [and] with the sensations which the impact of the waves on the drum of the ear somehow and indirectly produces . . . "). The theory of trespass by noise advanced by the plaintiffs in *Wilson* finds some support in the trespass by vibration cases.

[17] 32 Cal. 3d at 232, 649 P.2d at 924, 185 Cal. Rptr. at 282.

[18] *Id.* Cases prior to *Wilson* that dealt with trespass by vibrations did not consider the issue of whether damages must be shown. Physical damage to the property was present in each of the prior cases finding trespass by vibration, although the courts did not emphasize this factor. *See supra* cases cited in note 10.

[19] 32 Cal. 3d at 232, 649 P.2d at 924, 185 Cal. Rptr. at 282.

[20] Until *Wilson*, California courts had consistently followed the common law rule that damage need not be shown in a trespass action. *E.g.*, Empire Gold Mining Co. v.

serve[s] that historical conceptual distinction between nuisance, whether public or private, and trespass."[21]

The key to the required showing of damage is contained in the nature of *intangible* intrusions. Intangible intrusions, by definition, make difficult the determination of the extent of the interference. For the interference to constitute a trespass, it must be so extensive as to interfere with actual possession.[22] The *Wilson* court's test for determining interference with actual possession by intangible intrusions is the presence or absence of physical damage to the property.[23] As applied in *Wilson*,

---

Bonanza Gold Mining Co., 67 Cal. 406, 409, 7 P. 810, 812 (1885) (damages and injunction restraining defendant from trespassing upon mining claims; "[f]or every trespass upon real property the law presumes nominal damages"); Atwood v. Fricot, 17 Cal. 37, 43-44 (1860) (damages and injunction against entering upon and working mining claims of plaintiffs; "[t]he law presumes damages from a trespass"); Civic Western Corp. v. Zila Indus., Inc., 66 Cal. App. 3d 1, 18, 135 Cal. Rptr. 915, 926 (2d Dist. 1977) (action for debt secured by defendant's business property, counterclaim of trespass by plaintiff's act of entering and removing property without permission or judicial authority; "[trespass] has always given rise to nominal damages even [absent] proof of actual damage"); Cornell v. Sennes, 18 Cal. App. 3d 126, 136, 95 Cal. Rptr. 728, 734 (2d Dist. 1971) (action for cost of air conditioner, counterclaim of trespass by plaintiff's act of removing air conditioner without permission; "[a] trespass without injury will justify only nominal damages"); Daly v. Smith, 220 Cal. App. 2d 592, 602, 33 Cal. Rptr. 920, 925 (5th Dist. 1963) (action for trespass to mining claims; "[f]or every trespass upon real property the law presumes nominal damages"). Cases before *Wilson* which concerned trespass by vibrations did not deal with the issue of whether damage must be shown. *See supra* note 18.

[21] 32 Cal. 3d at 234, 649 P.2d at 925, 185 Cal. Rptr. at 283. The court does not seem to require a showing of damage to the property as a means of determining the amount of recovery. The opinion in *Wilson* included the stipulated fact that, if allowed, plaintiffs would offer evidence of the diminution in the market value of their homes due to the noise. *Id.* at 231-32, 649 P.2d at 924, 185 Cal. Rptr. at 282. Nor does the court deny the fact that the noise vibrations entered plaintiffs' property, for the parties stipulated that the noise substantially disrupted the use and enjoyment of plaintiffs' property. *Id.* at 231, 649 P.2d at 923-24, 185 Cal. Rptr. at 281-82.

[22] *See supra* note 9.

[23] Requiring proof of interference with possession is consistent with the traditional trespass action. When there is an ordinary trespass by entry onto plaintiff's property of a person or tangible object, the interference with plaintiff's exclusive possession is readily apparent. When the intrusion is by an intangible force such as vibrations, the interference with possession is harder to demonstrate. But if the property suffers damage, such as structural damage to a building, the interference with possession can be shown, and California courts have allowed recovery under a trespass theory. *See, e.g.*, Colton v. Onderdonk, 69 Cal. 155, 10 P. 395 (1886) (vibrations from blasting); Alonso v. Hills, 95 Cal. App. 2d 778, 214 P.2d 50 (1st Dist. 1950) (vibrations from blasting); McNeill v. Redington, 67 Cal. App. 2d 315, 154 P.2d 428 (2d Dist. 1944) (vibrations from drop forge); McGrath v. Basich Bros Const. Co., 7 Cal. App. 2d 573, 46 P.2d

noise without physical damage does not interfere with plaintiffs' exclusive possession of their property, and is not a trespass. Noise that merely interferes with the use and enjoyment of the property should be treated as a nuisance.[24]

B. Nuisance

Noise and other intangible intrusions are normally treated as nuisances.[25] Although it would seem to make little difference whether plaintiff recovered under a nuisance or trespass theory, eliminating the distinction would destroy the substantive protections of the nuisance action which protect defendants from frivolous suits.[26] The two actions differ also in the matter of proof.

The plaintiff must clear several hurdles in maintaining a nuisance action, which may be especially difficult to surmount when the action is based upon an intangible intrusion such as noise.[27] For example, if the

---

981 (1st Dist. 1935) (vibrations from blasting); McKenna v. Pacific Elec. Ry., 104 Cal. App. 538, 286 P. 445 (2d Dist. 1930) (vibrations from blasting).

If the intangible intrusion merely causes discomfort and annoyance without physical damage to the property, there is no demonstrable deprivation of possession, and, according to *Wilson*, a trespass action will not lie. 32 Cal. 3d at 233, 649 P.2d at 924, 185 Cal. Rptr. at 282. The *Wilson* court's ruling that a trespass action may not be brought for non-damaging intangible intrusions implies that a trespass action could be brought for damage-causing intangible intrusions. Thus, for example, when noise vibrations cause glass or plaster to crack, or possibly when focused light starts a fire, a trespass action could be brought.

[24] *See infra* note 25.

[25] The action of nuisance is defined by the California Supreme Court as an interference with the use and enjoyment of property. Wilson v. Interlake Steel Co., 32 Cal. 3d 229, 233, 649 P.2d 922, 925, 185 Cal. Rptr. 280, 283 (1982). California Civil Code § 3479 defines nuisance as "[a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." CAL. CIV. CODE § 3479 (West 1970); *see also* RESTATEMENT (SECOND) OF TORTS § 821D comment d (1979); W. PROSSER, *supra* note 9, § 89, at 594-95.

[26] Certain defenses available in nuisance actions are not available in trespass actions. For example, defendants would be unable to defend themselves by showing that the noise was not unreasonable, for although this is a defense to nuisance, it is not a defense in an action for trespass. Nor could a defense be based on a showing that the interference was not substantial, for in a trespass action the maxim *de minimis non curat lex* (the law does not concern itself with trifles) does not apply. Green v. General Petroleum Corp., 205 Cal. 328, 335, 270 P. 952, 955 (1928) (trespass action to recover damages to property from "blow-out" of oil well). *See generally* W. PROSSER, *supra* note 9, § 13, at 66. The protection expressly provided by the California legislature in § 731a to businesses located in a properly zoned area would be undermined as well.

[27] To determine whether the interference constitutes a nuisance, the courts weigh the

noise affects an entire community, the plaintiff will have to show special injury, such as damage to her property, or she will lack standing.[28] Moreover, the plaintiff may be unable to convince the court that the noise has actually interfered with her use or enjoyment of the property,[29] or that the interference is unreasonable[30] or substantial.[31] Fi-

---

nature and extent of the interference against the demands of society and modern life. The courts follow a realistic policy that recognizes that the individual must suffer minor aggravation and annoyances as the price of enjoying the benefits offered by modern society. RESTATEMENT (SECOND) OF TORTS § 941 comment c (1979) states: "The law expresses a compromise between the conflicting interests of neighbors, in which many harms must be borne as incidents of communal life. When the harm is an inescapable result of useful activities it is tolerated to some degree, though not without limits . . . ." Thus, every person is free, within reasonable limits, to engage in her own activities without interference by others. It is only when the conduct creates an unreasonable and substantial interference with the rights of another that the law should act to restrain it as a nuisance. Whether the interference is unreasonable is judged by the standard of the reasonable, ordinary person, and does not take into consideration peculiarities of the individual plaintiff. W. PROSSER, *supra* note 9, § 87, at 578. It should be noted that this is a separate analysis than that engaged in under the balancing of equities doctrine. *See infra* note 34 and accompanying text.

[28] To determine whether the plaintiff has standing to sue, it is first necessary to determine whether the nuisance is public, private, or both. A public nuisance is "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 inflicted upon individuals may be unequal." CAL. CIV. CODE § 3480 (West 1970). A private nuisance is defined as "[e]very nuisance not included in the definition of the last section [public nuisances] . . . ." *Id.* § 3481 (West 1970). For an excellent discussion of the judicial interpretation of the distinction between public and private nuisances, see Venuto v. Owens-Corning Fiberglas Corp., 22 Cal. App. 3d 116, 124-25, 99 Cal. Rptr. 350, 354-55 (1st Dist. 1971) (private plaintiffs sought injunction and damages against manufacturer creating public nuisance of air pollution). The private plaintiff has standing to sue if the nuisance is private, but must show a special injury to herself in order to have standing to sue on a public nuisance. CAL. CIV. CODE § 3493 (West 1970) ("[a] private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise"). For a discussion of what constitutes "special injury," see Venuto v. Owens-Corning Fiberglass Corp., 22 Cal. App. 3d at 124-25, 99 Cal. Rptr. at 355.

[29] The plaintiff must show a present or imminent interference with the use or enjoyment of the property. Venuto v. Owens-Corning Fiberglas Corp., 22 Cal. App. 3d 116, 126, 99 Cal. Rptr. 350, 354 (1st Dist. 1971). Moreover, the plaintiff must prove that the nuisance was caused by the defendant. Portman v. Clementina Co., 147 Cal. App. 2d 651, 305 P.2d 963 (1st Dist. 1957) (action for damages from nuisance created by dumping rock and dirt on street, obstructing drainage and causing flooding of plaintiff's property). In today's urban environment, the plaintiff may not be able to show that defendant's noise is the cause in fact of the interference.

[30] The interference must be unreasonable. Stegner v. Bahr & Ledoyen, Inc., 126 Cal. App. 2d 220, 272 P.2d 106 (1st Dist. 1954) (action to enjoin quarry from further

nally, the plaintiff must show that she is entitled to the relief sought. If damages are sought, plaintiff must show evidence of damages caused by the defendant, for unlike the traditional trespass action, nuisance requires proof of actual damages for recovery.[32] Damages from the noise may be difficult to show. Hence, the plaintiff may be recompensed only partially or not at all. If the plaintiff seeks injunctive relief, she must show that the remedy at law is inadequate and that the relative hardship to her outweighs the social utility of the defendant's conduct.[33] Thus, the determination of whether an injunction should issue normally involves a balancing analysis, called the "balancing of equities."[34]

---

operation); McIntosh v. Brimmer, 68 Cal. App. 770, 230 P. 203 (2d Dist. 1924) (action to enjoin keeping of chickens that caused damage by scratching in dirt, raising clouds of dust that covered plaintiff's vines and grapes).

[31] The interference must be substantial. Baldocchi v. Four Fifty Sutter Corp., 129 Cal. App. 383, 18 P.2d 682 (1st Dist. 1933) (action for damages and mandatory injunction to restore sidewalk easement after its destruction during construction on adjoining property).

[32] "[N]uisances require some substantial interference with the interest involved." W. PROSSER, *supra* note 9, § 87, at 577; *see also* Anderson v. Souza, 38 Cal. 2d 825, 833-34, 243 P.2d 497, 502-03 (1952) (action for damages and injunction restricting operation of airport; only damages supported by evidence may be recovered under a nuisance action).

[33] Middleton v. Franklin, 3 Cal. 238, 241 (1853) (action by tenant occupying ground floor to enjoin tenant occupying cellar from installing dangerous steam boiler; "[i]t is well settled that to entitle a party to an injunction in a case of nuisance, the injury to be sustained must be such as cannot be adequately compensated by damages . . ."); *see also* Thompson v. Kraft Cheese Co., 210 Cal. 171, 291 P. 204 (1930) (action to enjoin defendant from discharging waste liquid into creek); Felsenthal v. Warring, 40 Cal. App. 119, 180 P. 67 (2d Dist. 1919) (action to enjoin defendants from reconstructing water ditch after flood washed out old, but different, ditch for which defendants had easement).

[34] RESTATEMENT (SECOND) OF TORTS § 941 comment a (1979). The balancing of equities is separate from the analysis undertaken to determine whether a nuisance in fact existed. The balancing determines whether the equitable remedy of injunction is justified. RESTATEMENT (SECOND) OF TORTS § 941 comment c (1979) states:

> It may be asked: having first balanced conflicting interests in order to determine whether there is a nuisance, with the conclusion that a nuisance exists, why should the court balance interests again on the question of granting or refusing the injunction? The answer is that what may be a tolerable adjustment when the result is only to award damages for the injury done may lead to extortion if the injunction seriously curtails the defendant's enjoyment of his land.

Id. Although most, if not all, of the factors examined are the same as those involved in the initial nuisance analysis, different weights may be attached to individual factors. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES; DAMAGES — EQUITY — RESTITUTION § 5.7, at 358-59 (1973). The Restatement (Second) of Torts lists the primary

The balancing of equities doctrine is an improvement on the older rule that held an injunction must issue once a nuisance was established and it was shown that damages would not be an adequate remedy.[35] The older rule ignored the extreme hardship that an injunction might cause to the defendant, the interests of society, and the efforts of the defendant in minimizing the nuisance.[36] Nearly all jurisdictions have now adopted the balancing of equities doctrine.[37] California courts have

---

factors to be considered in granting an injunction: the adequacy of other remedies to the plaintiff, the relative hardship to plaintiff if denied and to defendant if granted, the interests of third parties and the public, the nature of the interest to be protected, any unreasonable delay or misconduct by the plaintiff, and the practicability of framing and enforcing the order. RESTATEMENT (SECOND) OF TORTS § 936(1) (1979).

[35] The older view is expressed in Hulbert v. California Portland Cement Co., 161 Cal. 239, 248, 118 P. 928, 932 (1911) (orange grower granted damages and injunction against cement plant when cement dust damaged orange grove; "[t]here can be no balancing of conveniences when such balancing involves the preservation of an established right . . ."); *see also* Vowinckel v. N. Clark & Sons, 216 Cal. 156, 13 P.2d 733 (1932) (operation of kilns and furnaces of clay pipe and tile factory enjoined as a nuisance); Judson v. Los Angeles Surburban Gas Co., 157 Cal. 168, 106 P. 581 (1910) (damages and injunction granted against gas plant where smoke, fumes and gas escaped). These California cases, and others of the early 1900's decided prior to the enactment of § 731a, interpreted California Code of Civil Procedure § 731 as prohibiting a balancing of equities.

[36] *See supra* cases cited in note 35.

[37] *E.g.*, City of Harrisonville, Mo. v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334 (1933) (reversing injunction of city's sewage disposal plant which drained into stream running through plaintiff's land); Florida E. Coast Properties, Inc. v. Metropolitan Dade County, 572 F.2d 1108 (5th Cir.) (denying relief in action seeking to enjoin as a nuisance a jail/work-release facility adjacent to residential property), *cert. denied*, 439 U.S. 894 (1978); Green v. Smith, 231 Ark. 94, 328 S.W. 357 (1959) (action to enjoin broiler business that produced noises, odors and attracted flies; remanded for further proceedings); Maykut v. Plasko, 170 Conn. 310, 365 A.2d 1114 (1975) (farmer enjoined from using noisemaking device known as a "corn cannon" to protect crops from birds); Koseris v. J.R. Simplot Co., 82 Idaho 263, 352 P.2d 235 (1960) (injunction against operation of chemical fertilizer plant emitting dust, smoke and obnoxious odors reversed); Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126 (Iowa 1974) (operation of cement plant enjoined as a nuisance); Weltshe v. Graf, 323 Mass. 498, 82 N.E.2d 795 (1948) (operation of freight terminal enjoined between 8 p.m. and 7 a.m.); Cullum v. Topps-Stillman's, Inc., 1 Mich. App. 92, 134 N.W.2d 349 (1965) (action to enjoin operation of incinerator near residential neighborhood); Rebel v. Big Tarkio Drainage Dist., 602 S.W.2d 787 (Mo. App. 1980) (reversing dismissal of action seeking injunction to force city to return water to channel and restore land after levee broke); Waserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738, *modified*, 144 N.W.2d 209 (1966) (limited injunction granted to prohibit upper irrigators from exhausting stream by diversions); Protokowicz v. Lesofski, 69 N.J. Super. 436, 174 A.2d 385 (Ch. Div. 1961) (denying damages but enjoining use and storage of diesel motor trucks and hours of operation of truck terminal); Boomer v. Atlantic Cement Co., 26 N.Y.2d 219,

applied the balancing of equities doctrine[38] except when prevented by section 731a.

---

309 N.Y.S.2d 312, 257 N.E.2d 870 (1970) (injunction issued against operation of cement plant, but injunction made dissolvable upon payment of permanent damages); Staton v. Atlantic Coast Line R.R., 147 N.C. 428, 61 S.E. 455 (1908) (action for damages and to enjoin operation of steam engines on railroad; reversed and remanded on issue of private nuisance); Sakler v. Huls, 20 Ohio Op. 2d 283, 183 N.E.2d 152 (1961) (drag strip creating excessive noise enjoined as nuisance); Crushed Stone Co. v. Moore, 369 P.2d 811 (Okla. 1962) (operation of limestone quarry enjoined as a nuisance); Atkinson v. Bernard, Inc., 223 Ore. 624, 355 P.2d 229 (1960) (action to enjoin flights from private airport over adjoining landowners' property); Herring v. H.W. Walker Co., 409 Pa. 126, 185 A.2d 565 (1962) (action by neighboring business to enjoin discharge of vapors, ash and soot from waste dairy products); Storey v. Central Hide & Rendering Co., 148 Tex. 509, 226 S.W.2d 615 (1950) (reversing injunction of operation of rendering plant); Steele v. Queen City Broadcasting Co., 54 Wash. 2d 402, 341 P.2d 499 (1959) (damages awarded but injunction denied against erection of television tower on property adjoining plaintiff's); Pure Milk Prods. Coop. v. National Farmers Org., 90 Wis. 2d 781, 280 N.W.2d 691 (1979) (injunction vacated and action remanded for rehearing on whether injunction should issue to prohibit nonprofit corporation from inducing members of cooperatives to breach membership and marketing agreements); Schork v. Epperson, 74 Wyo. 286, 287 P.2d 467 (1955) (injunction issued ordering defendant to lower height of spite fence).

[38] *E.g.*, Continental Baking Co. v. Katz, 68 Cal. 2d 512, 528, 439 P.2d 889, 899, 67 Cal. Rptr. 761, 771 (1968) (preliminary injunction granted against interference with easement; "the court examines all of the material before it in order to consider 'whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it' ") (quoting Santa Cruz Fair Bldg. Ass'n v. Grant, 104 Cal. 306, 308, 37 P. 1034, 1035 (1894)); Loma Portal Civic Club v. American Airlines, 61 Cal. 2d 582, 588, 394 P.2d 548, 552, 39 Cal. Rptr. 708, 712 (1964) (neighboring residents unsuccessfully sought to enjoin airport flight operations; "in determining the availability of injunctive relief, the court must consider the interests of third persons and of the general public"); Brown Derby Hollywood Corp. v. Hatton, 61 Cal. 2d 855, 858, 395 P.2d 896, 898, 40 Cal. Rptr. 848, 850 (1964) (action for mandatory injunction to compel removal of encroachments; injunction denied, damages granted; " 'where [defendant's action] does not irreparably injure the plaintiff, was innocently made, and where the cost of removal would be great compared to the inconvenience caused plaintiff by the continuance of the encroachment, the equity court may, in its discretion, deny the injunction and compel the plaintiff to accept damages' ") (citing Christensen v. Tucker, 114 Cal. App. 2d 554, 559, 250 P.2d 660, 665 (1st Dist. 1952)); Bigelow v. City of Los Angeles, 85 Cal. 614, 618, 24 P. 778, 778 (1890) (injunction refused, even though amount of damages uncertain, against public improvement of bridge to be constructed across Los Angeles River; "that the work sought to be enjoined is . . . one which affects the public convenience, and that . . . the defendant [is able] to respond in damages, are important matters to be considered in determining the rights to an injunction").

II. California Code of Civil Procedure Section 731a

When the defendant is a business or industry operating in an area zoned for that use, California law imposes an additional barrier to the nuisance action. Section 731a expressly bars injunctive relief unless there is a showing that defendant employed "unnecessary and injurious methods of operation."[39] Rarely have courts found that the required showing has been made. Since the enactment of section 731a in 1935,[40] only three reported cases have found that unnecessary and injurious methods had been employed.[41]

The first case to hold that unnecessary and injurious methods had been employed was *Gelfand v. O'Haver*,[42] decided in 1948. *Gelfand* involved the operation of a music studio in a properly zoned area, surrounded by residences and other businesses. The court found that there had been no attempt to soundproof the building and that the "discordant musical sounds"[43] emanating from the studio day and night disturbed plaintiffs and injured their businesses.[44] The court held that "the methods of operation of defendants' . . . studios [were] unnecessary, unreasonable and injurious."[45]

The second case, *Christopher v. Jones*,[46] decided in 1964, involved a

---

[39] Section 731a provides:

> Whenever any city . . . or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial or airport uses are expressly permitted, . . . no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation . . . of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation.

CAL. CIV. PROC. CODE § 731a (West 1980).

Section 731a provides an additional exception for the "regulation and working hours of canneries, fertilizing plants, refineries and other similar establishments whose operation produce offensive odors." *Id.* Discussion of these exceptions is beyond the scope of this Comment.

[40] Act of July 15, 1935, ch. 511, 1935 Cal. Stat. 1584.

[41] Gelfand v. O'Haver, 33 Cal. 2d 218, 200 P.2d 790 (1948) (no attempt made to soundproof a music studio located in mixed business-residential neighborhood); Sierra Screw Products v. Azusa Greens, Inc., 88 Cal. App. 3d 358, 151 Cal. Rptr. 799 (2d Dist. 1979) (design of golf course resulted in repeated entry of golf balls onto plaintiff's property, causing damage); Christopher v. Jones, 231 Cal. App. 2d 408, 41 Cal. Rptr. 828 (1st Dist. 1964) (chlorine gas leaking from chemical plant).

[42] 33 Cal. 2d 218, 200 P.2d 790 (1948).

[43] *Id.* at 219, 200 P.2d at 790-91.

[44] *Id.*

[45] *Id.*

[46] 231 Cal. App. 2d 408, 41 Cal. Rptr. 828 (1st Dist. 1964).

chemical repackaging plant which had allowed chlorine gas to leak onto and damage plaintiffs' orchard. Reasoning that a well-maintained plant would not leak chlorine gas, the court held that the defendant had operated the plant in an unnecessary and injurious manner.[47]

The third and most recent case, *Sierra Screw Products v. Azusa Greens, Inc.*,[48] decided in 1979, involved the operation of a golf course. As a result of the golf course's design, golf balls were frequently hit onto the plaintiffs' property. Automobiles were damaged and the plaintiffs' employees were occasionally struck and injured by the golf balls.[49] The court of appeals affirmed a mandatory injunction to change the design of the golf course, holding that the defendants had employed unnecessary and injurious methods of operation.[50]

These three cases offer scant guidance as to what constitutes the "unnecessary and injurious methods of operation" required by section 731a for injunctive relief to be available. In each case there was damage to a business interest of the plaintiff. In *Christopher* and *Sierra Screw Products*, the nuisances posed a hazard to life and health as well as to property, but this element was not present in *Gelfand*. Only *Gelfand* involved noise alone as the nuisance. It is questionable whether *Gelfand* would be decided the same way today, however, since the facts of *Gelfand* and *Wilson* are remarkably similar. In each case the defendants caused noise to emanate from their business day and night, interfering with the use and enjoyment of the plaintiffs' property. One possible distinction is that the *Gelfand* noise injuriously affected businesses and residences, while the *Wilson* noise injuriously affected residences only. Yet, while the court granted injunctive relief in *Gelfand*, the court denied it in *Wilson*.[51]

While section 731a bars injunctive relief in nuisance actions brought against businesses, it remains unclear whether section 731a also precludes recovery of damages. If it does, the nuisance action would be effectively eliminated as a legal remedy against businesses located in compliance with local zoning.[52] Although the *Wilson* court noted in dic-

---

[47] *Id.* at 412, 41 Cal. Rptr. at 830.

[48] 88 Cal. App. 3d 358, 151 Cal. Rptr. 799 (2d Dist. 1979).

[49] *Id.* at 363, 151 Cal. Rptr. at 801.

[50] *Id.* at 370, 151 Cal. Rptr. at 806.

[51] 32 Cal. 3d at 232, 649 P.2d at 924, 185 Cal. Rptr. at 282. *See supra* note 1.

[52] Given the holding of *Wilson* that the action of trespass will not lie for intangible intrusions absent physical damage, *see supra* note 5 and accompanying text, a holding that § 731a precludes recovery of damages as well as injunctive relief would be a denial of all relief to plaintiffs suffering from intangible intrusions caused by defendant businesses operating in appropriately zoned locations.

tum that "[o]ne court, considering a nuisance action, has observed that 'Section 731a does not operate to bar recovery for damages',"[53] the cases cited by the court do not clearly support this conclusion. The case referred to in the court's statement, *Venuto v. Owens-Corning Fiberglas Corp.*,[54] held that the plaintiffs lacked standing to sue; thus the discussion of section 731a in that case was dictum. A second case cited, *Gelfand v. O'Haver*,[55] concerned injunctive relief only. The three remaining cases which the court cited, *Kornoff v. Kingsburg Cotton Oil Co.*,[56] *Roberts v. Permanente Corp.*,[57] and *McNeill v. Redington*,[58] all held that section 731a did not bar recovery of damages when *trespass* had been proved in addition to nuisance.

A literal reading of section 731a supports a conclusion opposite from that in the *Wilson* dictum. Section 731a states that "no person . . . shall be enjoined or restrained by the injunctive process . . . *nor shall such use be deemed a nuisance* without evidence of the employment of unnecessary and injurious methods of operation."[59] A strict construction of section 731a would require holding that an interference could not be deemed a nuisance at all without proof of unnecessary and injurious methods of operation. Thus, the plaintiff would be barred from recovery of damages as well as from injunctive relief. Such a construction, coupled with the holding of *Wilson* that the action of trespass may not be brought for nondamaging intangible intrusions, would result in a complete denial of relief to the private plaintiff.[60]

Critics maintain that section 731a is a harsh rule which imposes an almost unsurmountable barrier for plaintiffs seeking injunctive relief.[61]

---

[53] 32 Cal. 3d at 234, 649 P.2d at 925, 185 Cal. Rptr. at 283.

[54] 22 Cal. App. 3d 116, 99 Cal. Rptr. 350 (1st Dist. 1971).

[55] 33 Cal. 2d 218, 200 P.2d 790 (1948).

[56] 45 Cal. 2d 265, 288 P.2d 507 (1955) (granting damages arising from lint, dust, fumes, and vapors from cotton gin).

[57] 188 Cal. App. 2d 526, 10 Cal. Rptr. 519 (1st Dist. 1961) (judgment for defendant reversed in action for damages caused by cement dust emitted from defendant's plant).

[58] 67 Cal. App. 2d 315, 154 P.2d 428 (2d Dist. 1944) (judgment for defendant reversed in action for damages and to enjoin vibrations and noise from drop forge; remanded on issue of damages).

[59] CAL. CIV. PROC. CODE § 731a (West 1980) (emphasis added).

[60] However, in light of the dictum in *Wilson*, it is doubtful that a court would now construe § 731a as precluding recovery of damages as well as injunctive relief.

[61] One author suggests that the California Legislature enacted § 731a in response to the refusal of California courts to adopt the doctrine of the balancing of equities. Comment, *California Code of Civil Procedure § 731(a): Denial of Private Injunctive Relief from Air Pollution*, 22 HASTINGS L.J. 1401 (1971). The legislative history of § 731a is too incomplete to support this theory firmly. Research has unearthed nothing more

Because it prevents courts from balancing the equities in reaching their decisions,[62] courts can only grant injunctive relief if the business is either in violation of the local zoning ordinances or has engaged in "unnecessary and injurious methods of operation,"[63] a standard left undefined by the legislature and rarely found to be satisfied by California courts.

The majority of other state courts that have considered the question have decided that a zoning ordinance, like any other general legislative authorization, does not prevent a private plaintiff from enjoining a pri-

---

than the various versions of the bill as it passed through the Assembly, the Assembly Committee on Manufacturers, and the Senate. Only minor changes in the wording are shown. Cal. A.B. 338 (1935) (introduced in Assembly Jan. 21, 1935, amended in Assembly May 11, 1935 and May 21, 1935, amended in Senate May 29, 1935). However, the judicial record, *see supra* note 35, and social history of the early thirties lend credence to the theory. The Great Depression devastated businesses and industries throughout the United States, and it seems reasonable to assume that the California Legislature could be convinced to grant protection to businesses and industries located in areas zoned for their use.

Additionally, when § 731a was enacted in 1935, zoning law was relatively new. The landmark case of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), in which the United States Supreme Court first held the concept of zoning constitutional, had only been decided nine years before the statute was enacted. Zoning was a new tool, and perhaps too much reliance was placed on the planning capabilities of those enacting local zoning ordinances. For example, as the facts of *Wilson* demonstrate, the planners of the city of Lodi failed to foresee the need for a buffer zone between the industrial and residential zones involved. *See supra* note 1.

[62] For example, in McNeill v. Redington, 67 Cal. App. 2d 315, 318-19, 154 P.2d 428, 429-30 (2d Dist. 1944) (damaging vibrations and noise from drop forging plant), the court held that although plaintiffs' property was physically damaged, § 731a barred injunctive relief. Concerning the recovery of damages, the court said: "Apart from the provisions of Section 731a, Code of Civil Procedure, the plaintiffs would be entitled to recover the damages thus sustained." *Id.* However, the court held that § 731a did not bar recovery of damages when the plaintiff had proved trespass as well as nuisance. *Id. See also* Loma Portal Civic Club v. American Airlines, 61 Cal. 2d 582, 589-90, 394 P.2d 548, 553, 39 Cal. Rptr. 708, 713 (1964) (injunction against certain flight operations at airport barred by § 731a; alternative grounds for decision based upon balancing of public interest against that of homeowners); Wheeler v. Gregg, 90 Cal. App. 2d 348, 369-70, 203 P.2d 37, 51 (2d Dist. 1949) (injunction against operation of gravel quarry barred by § 731a); North Side Property Owners' Ass'n v. Hillside Memorial Park, 70 Cal. App. 2d 609, 617, 161 P.2d 618, 622 (2d Dist. 1945) (action by neighboring residents and businesses to enjoin establishment of cemetary as nuisance; judgment on the pleadings denying injunction affirmed; "we are persuaded that . . . the court was required, because of section 731a of the Code of Civil Procedure, to grant the motion [for judgment on the pleadings]").

[63] CAL. CIV. PROC. CODE § 731a (West 1980).

vate nuisance.[64] Most jurisdictions reason that while the legislative zoning action has authorized the general operation of certain types of businesses in a given location, it has not authorized the business to operate in disregard of the rights of others.[65] Thus, in the great majority of

---

[64] *E.g.*, Commerce Oil Ref. Corp. v. Miner, 281 F.2d 465 (1st Cir. 1960) (injunction denied for prospective nuisance of air pollution by refinery); Desruisseau v. Isley, 27 Ariz. App. 257, 553 P.2d 1242 (1976) (injunction denied in action to enjoin noise and unsightliness of motor vehicle repair business as nuisance); Howard v. Etchieson, 228 Ark. 809, 310 S.W.2d 473 (1958) (permit to establish funeral home in residential neighborhood no defense to action to enjoin as nuisance; injunction granted); Maykut v. Plasko, 170 Conn. 310, 365 A.2d 1114 (1976) (farmer enjoined from using noisemaking device known as a "corn cannon" to protect crops from birds); Bauman v. Piser Undertakers Co., 34 Ill. App. 2d 145, 180 N.E.2d 705 (1962) (injunction against maintenance of funeral home denied); Schlotfelt v. Vinton Farmers' Supply Co., 252 Iowa 1102, 109 N.W.2d 695 (1961) (injunction issued to prohibit feed mixing and fertilizer sales business from emitting excessive noise, vibrations, dust, and odors); Asmann v. Masters, 151 Kan. 281, 98 P.2d 419 (1940) (hotel operators sought injunction against operation of dance hall; remanded with instructions for trial court to grant only that degree of relief necessary); Robichaux v. Huppenbauer, 258 La. 139, 245 So. 2d 385 (1971) (injunction issued against maintenance of horse stable unless health protective measures taken); Weltshe v. Graf, 323 Mass. 498, 82 N.E.2d 795 (1948) (operation of freight terminal enjoined between 8 p.m. and 7 a.m.); Rockenbach v. Apostle, 330 Mich. 338, 47 N.W.2d 636 (1951) (establishment of funeral home enjoined); Scallet v. Stock, 363 Mo. 721, 253 S.W.2d 143 (1952) (injunction granted against use of certain lots as parking space, but injunction denied against erection of mortuary); Kosich v. Poultrymen's Serv. Corp., 136 N.J. Eq. 571, 43 A.2d 15 (1945) (operation of chicken feed plant in manner creating nuisance enjoined); Sakler v. Huls, 20 Ohio Op. 2d 283, 183 N.E.2d 152 (1961) (operation of drag strip creating excessive noise enjoined as nuisance); Lunda v. Matthews, 46 Or. App. 701, 613 P.2d 63 (1980) (zoning not a defense to injunction where operation of cement plant created private nuisance; injunction and damages granted); Reid v. Brodsky, 397 Pa. 463, 156 A.2d 334 (1959) (restaurant located in residential neighborhood enjoined as nuisance); DeNucci v. Pezza, 114 R.I. 123, 329 A.2d 807 (1974) (operation of freight terminal between 11 p.m. and 7 a.m. enjoined); Winget v. Winn-Dixie Stores, Inc., 242 S.C. 152, 130 S.E.2d 363 (1963) (action for damages from location and operation of supermarket; reversed and remanded for new trial); Barnes v. Graham Virginia Quarries, Inc., 204 Va. 414, 132 S.E.2d 395 (1963) (blasting operations in quarry found to be a private nuisance, but damages denied because of insufficient evidence); Jones v. Rumford, 64 Wash. 2d 570, 392 P.2d 808 (1964) (damages awarded but injunction denied against chicken breeding plant, located in area zoned for agricultural use, that drew flies and gave off offensive odors).

[65] This view was expressed, for example, in Green v. Castle Concrete Co., 181 Colo. 309, 313, 509 P.2d 588, 590 (1973) (action to enjoin operation of limestone quarry authorized by zoning ordinance; " '[i]t is now the generally accepted rule that regardless of compliance with zoning ordinances or regulations, both business and residential uses may be enjoined *if they constitute a nuisance to an adjoining property owner or resident*' ") (quoting Hobbs v. Smith, 177 Colo. 299, 302, 493 P.2d 1352, 1354

jurisdictions, zoning ordinances do not provide immunity to businesses creating a nuisance.[66]

The balancing of equities doctrine protects businesses and affords greater discretion to the courts to fashion equitable remedies.[67] A review of decisions which apply the doctrine discloses a marked reluctance to permanently enjoin the operations of a productive business or industry.[68] Section 731a places California in the minority of jurisdic-

---

(1972)). The majority view is merely an extension of the older doctrine that general legislative authorization does not act to immunize the license holder from a claim for damages brought by a private citizen who has suffered special harm. For example, in Baltimore & P.R.G. v. Fifth Baptist Church, 108 U.S. 317 (1883), a railroad, acting under authority granted by an Act of Congress to lay track and erect an engine house in the City of Washington, D.C., built the engine house next to a church. The loud noise, smoke, and odors from the engine house interfered with the use of the church property and the church sued to enjoin the nuisance. On the issue of whether the Act of Congress gave the railroad immunity, the Court said: "Grants of privileges or powers . . . confer no license to use them in disregard of the private rights of others . . . ." *Id.* at 331.

The rule does not apply if the legislative action *expressly* authorizes the *specific* use. *See, e.g.*, New England Legal Found. v. Costle, 666 F.2d 30 (2d Cir. 1981) (approval by the Environmental Protection Agency of utility's use of high sulphur fuel precluded plaintiffs from maintaining nuisance action against utility for use of such fuel); Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981) (specific legislative authorization held a defense to action seeking to enjoin use of land as toxic waste disposal site).

[66] This is also the position of the Restatement (Second) of Torts. In discussing the suitability of the use to the character of the locality, the Restatement suggests that the mere fact that the area has been zoned for the activity of the defendant "does not mean that the [nuisance] is thus made reasonable and justified." RESTATEMENT (SECOND) OF TORTS § 828 comment g (1979). Instead, the zoning of the area is to be taken into consideration in determining the utility of the conduct of the defendant. *Id.*

[67] *See generally* RESTATEMENT (SECOND) OF TORTS § 941 comment c (1979); D. DOBBS, *supra* note 34, § 5.7, at 357-62.

[68] For example, in City of Harrisonville, Mo. v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334 (1933) (reversing injunction of city's sewage disposal plant which drained into local stream), the Court said:

> The question is whether . . . an injunction is the appropriate remedy. For an injunction is not a remedy which issues as of course. Where substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable . . . . Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling.

Id. at 337-38.

Various techniques are employed by courts to fashion an equitable remedy without completely shutting down the defendant's operations. The Arizona Supreme Court, in Spur Indus., Inc. v. Del Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972), granted

tions that deny injunctive relief from a nuisance when the defendant's activity is generally authorized by local zoning ordinances.[69] While sec-

---

an injunction but ordered the complaining party to pay the expenses of relocating the defendant's cattle feeding operation. The Supreme Court of the state of Washington, in Steele v. Queen City Broadcasting Co., 54 Wash. 2d 402, 341 P.2d 499 (1959) (homeowner sought to enjoin construction of television tower on adjoining property), denied injunctive relief contingent on the payment of damages. Other courts have also used the technique of granting an injunction that is dissolvable upon payment of damages. *See* Baldwin v. McClendon, 292 Ala. 43, 288 So. 2d 761 (1974) (injunction prohibiting operation of hog farm denied contingent upon payment of damages); Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970) (injunction against cement company granted, but dissolvable upon payment of permanent damages). For a discussion of this form of the injunctive remedy, see Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299 (1977).

California courts have also proven to be sympathetic to the needs of businesses, yet able to fashion equitable remedies. For example, in Anderson v. Souza, 38 Cal. 2d 825, 840-41, 243 P.2d 497, 507 (1952), the court stated that the "[i]njunctive process ought never to go beyond the necessities of the case and where a legitimate business is being conducted and in the conduct thereof a nuisance has been created and is being maintained, the relief granted should be directed and confined to the elimination of the nuisance . . . ." In Guttinger v. Calaveras Cement Co., 105 Cal. App. 2d 382, 233 P.2d 914 (3d Dist. 1951), the court awarded damages and issued an injunction limited to prohibiting the emission of more than 13% of the flue dust from defendant's cement plant. Apparently the defendant's cement plant was located in an unzoned area, and therefore § 731a did not apply.

[69] California would follow the majority of jurisdictions but for the effect of § 731a. In Varjabedian v. City of Madera, 20 Cal. 3d 285, 572 P.2d 43, 142 Cal. Rptr. 429 (1977) (action for damages caused by noxious odors from city's sewage treatment plant), the court interpreted California Civil Code § 3482 as requiring "express" authorization, embodied in the language of the statute, to make applicable the rule that nothing done under the express authority of a statute can be deemed a nuisance. *Id.* at 291-92, 572 P.2d at 47-48, 142 Cal. Rptr. at 433; *see also* Hassell v. San Francisco, 11 Cal. 2d 168, 171, 78 P.2d 1021, 1022-23 (1938).

Other jurisdictions following the minority view that zoning is at least a partial defense to a nuisance action include Arizona, Colorado, New Hampshire, and New York. However, the number of jurisdictions following the minority view may be shrinking. Arizona, Colorado and New Hampshire now follow the view that a zoning ordinance prevents the use from being a *public* nuisance but does not prevent a private citizen from seeking damages and an injunction against a *private* nuisance. *E.g.*, Desruisseau v. Isley, 27 Ariz. App. 257, 553 P.2d 1242 (1976) (injunction denied against noisy mobile home park); Green v. Castle Concrete Co., 181 Colo. 309, 509 P.2d 588 (1973) (action to enjoin operation of limestone quarry located in an area authorized by zoning ordinance); Urie v. Franconia Paper Co., 107 N.H. 131, 218 A.2d 360 (1966) (action to enjoin paper manufacturer from polluting river). In New York the rule at one time was that zoning was a complete defense, Bove v. Donner-Hanna Coke Corp., 236 A.D. 37, 258 N.Y.S. 229 (1932) (zoning ordinance precluded granting injunctive relief or damages from operation of coke furnace), but the New York rule today is questionable. For a discussion of the New York law, see Note, *Zoning Ordinances and Common-*

tion 731a has provided protection to businesses, this same protection would have been supplied by the balancing of equities doctrine if section 731a did not exist. The true result of section 731a has not been to afford needed protection to businesses, but to deny relief to plaintiffs otherwise entitled.[70] Therefore, an amendment to section 731a incorporating the balancing of equities doctrine is proposed below and set forth fully in the Appendix.

III. Proposed Amendment to California Code of Civil Procedure Section 731a

The current version of section 731a has proven to be a harsh rule, denying injunctive relief to plaintiffs in nuisance actions except in extremely rare cases.[71] It was enacted in response to the early judicial interpretation of California Code of Civil Procedure section 731 to prohibit a balancing of equities and mandate the issuance of an injunction once a nuisance was found.[72] Section 731a has provided protection to businesses at the expense of plaintiffs' property rights.[73] Repeal of the current version of section 731a might revive the early judicial interpretation of California Code of Civil Procedure section 731 as depriving the court of the discretion to deny an injunction once a nuisance was found. Reviving this interpretation would merely swing the pendulum to the other extreme, providing excessive protection to plaintiff property owners at the expense of the rights of defendant businesses.[74] Therefore, the proposed amendment to section 731a expressly requires the court to balance the factors in each case to determine whether injunctive relief is appropriate.[75] The court is initially directed to determine

---

Law Nuisance, 16 Syracuse L. Rev. 860 (1965).

[70] *See supra* note 62.

[71] Injunctive relief has been allowed in only three reported cases since § 731a was enacted in 1935. *See supra* note 41.

[72] *See supra* notes 35 and 61.

[73] *See supra* note 62. California courts now apply the balancing of equities doctrine when not prohibited by § 731a. *See supra* note 38. The balancing of equities doctrine, in jurisdictions which apply it, has afforded sufficient protection to businesses while more fully protecting plaintiffs' property rights. *See supra* notes 67-68 and accompanying text.

[74] *See supra* notes 35-36 and accompanying text.

[75] The text of the proposed amendment to § 731a, incorporating zoning as a factor in the balancing of equities doctrine, is drawn from the opinions of the cases cited *supra* in notes 38 and 68; Anderson v. Souza, 38 Cal. 2d 825, 840-45, 243 P.2d 497, 507-10 (1952); Restatement (Second) of Torts § 936 (1979); and D. Dobbs, *supra* note 34, § 5.7, at 357-63.

the adequacy of an injunction to the plaintiff relative to other available remedies.[76] At a minimum, the equitable remedy of injunction is proper only when the remedy at law is inadequate.[77] This is but one of several factors, however, that the court must examine.[78] Injunctive relief may provide more protection than is needed, at the expense of defendants' rights. The remedy of damages may be more appropriate even though not fully adequate, or damages may be granted in conjunction with an injunction limited in scope.[79]

Next, the nature of the protected interest must be determined, which may affect the necessity, adequacy and enforceability of injunctive relief.[80] The hardship to the plaintiff if an injunction is denied must be balanced against the hardship likely to result to the defendant if an injunction is granted.[81] In balancing these hardships, the court must determine how great the interference will be with the defendant's right to make a reasonable use of her property, and the magnitude of the interference with the plaintiff's equally important right to freedom from unreasonable interference in the use and enjoyment of her property. The interests of the public and of third persons must also be considered.[82] This requires the court to determine the utility, or the value to society, of the defendant's conduct. Thus, the court may decide not to issue an injunction that would shut down a business or industry if the consequences would be the loss of a great number of jobs to the community. Instead, the court may limit the injunction to correcting the specific wrong, as by issuing a mandatory injunction requiring the business to install soundproofing materials or adopt certain remedial

---

[76] Since injunctive relief is an equitable remedy, an injunction may not be issued if the legal remedies available to the plaintiff, such as damages, are adequate. City of Harrisonville, Mo. v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334, 337-38 (1933); *see also* D. DOBBS, *supra* note 34, § 2.5, at 57-62. California Code of Civil Procedure § 526 lists a limited number of additional circumstances in which an injunction may be granted. The equitable doctrine of "unclean hands" also applies, and an injunction should not issue if the plaintiff is guilty of laches or of misconduct related to bringing the action. *See* D. DOBBS, *supra* note 34, §§ 2.3-.4, at 43-49. Finally, the injunctive relief sought should be practical and enforceable by the court. *Id.* § 2.5, at 62-65.

[77] RESTATEMENT (SECOND) OF TORTS § 938 comment a (1979).

[78] *Id.*

[79] *Id.* § 938 comments b and c, § 943 comment c.

[80] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 937 (1979); W. PROSSER, *supra* note 9, § 90, at 602-06.

[81] *See* RESTATEMENT (SECOND) OF TORTS § 941 (1979); D. DOBBS, *supra* note 34, § 2.4, at 53-54.

[82] Loma Portal Civic Club v. American Airlines, 61 Cal. 2d 582, 588, 394 P.2d 548, 552, 39 Cal. Rptr. 708, 712 (1964); RESTATEMENT (SECOND) OF TORTS § 942 (1979).

measures.

The California legislature has expressed a desire to promote businesses and industries located in areas zoned for that use.[83] Although factories and other heavy industries may not be the best of neighbors, room must be made for them somewhere. Accordingly, the proposed amendment to section 731a directs the court to look at the zoning of the locality as one of the factors in determining whether injunctive relief is appropriate. Finally, the court is directed to give consideration to the efforts of the defendant to minimize the nuisance, as by the use of modern techniques and equipment to reduce emissions and odors or by the installation of soundproofing materials.

CONCLUSION

The California Supreme Court's decision in *Wilson v. Interlake Steel Company*[84] clarifies the distinction between the law of trespass and nuisance in California. The court's requirement of a showing of physical damage in an action for trespass based upon an intangible intrusion is not a departure from the traditional action of trespass, but a clarification of the grey area between the actions of trespass and nuisance. The required showing of damage serves to distinguish mere interference with use and enjoyment from interference with the right of exclusive possession. Without a showing of interference with the right of possession, as required by common law, the action of trespass will not lie. The refusal by the court to eliminate this distinction between the actions of trespass and nuisance preserves the substantive protections that shield defendants from frivolous nuisance actions. If this distinction had been eliminated, the result would have been an overlapping of the actions of trespass and nuisance when the interference was from an intangible intrusion such as noise. Plaintiffs would have been able to bring the same action as either a nuisance or a trespass, denying the defendant the substantive protections that are part of nuisance but not trespass.

The court's dictum in *Wilson*[85] suggests that section 731a should not act to bar recovery of damages in a nuisance action. This position is desirable from both policy and practical perspectives. Change is needed, however, regarding the ability of a plaintiff to enjoin a nuisance caused by a business operating in a properly zoned area. In the five decades

---

[83] This is arguably the rationale for the current version of § 731a. *See supra* note 61.

[84] 32 Cal. 3d 229, 649 P.2d 922, 185 Cal. Rptr. 280 (1982). *See supra* note 5.

[85] *See supra* note 4.

since section 731a was enacted, it has been a formidable barrier to those seeking injunctive relief against a business located in a proper commercial or industrial zone.[86] The balancing of equities doctrine, now followed by California courts in granting or denying injunctive relief when not prevented by section 731a, affords sufficient protection to defendant businesses. Since section 731a effectively prevents courts from granting equitable relief that is otherwise warranted, the legislature should amend section 731a.

Michael J. Rainville

APPENDIX

California Code of Civil Procedure section 731a should be amended to read as follows:

Section 731a. Factors in Determining Appropriateness of Injunction.

An injunction shall not be issued merely because a nuisance has been found to exist. The court shall determine the appropriateness of the remedy of injunction against a nuisance by balancing the factors present in each case, including but not limited to: the relative adequacy to the plaintiff of injunction and of other remedies; the nature of the interest to be protected; the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied; the effect of either alternative upon the interests of third persons and of the public; the zoning of the locality; and the efforts of defendant to minimize the nuisance.

---

[86] *See supra* notes 39-62 and accompanying text.