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## Kentucky's New Nuisance Statute

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# Kentucky's New Nuisance Statute

JOHN S. PALMORE\*

## I. INTRODUCTION

During its 1991 special session the General Assembly of Kentucky enacted as a part of Kentucky Revised Statutes [hereinafter KRS] chapter 411 "AN ACT relating to nuisances" (the Act).<sup>1</sup> The bill was signed by the Governor and became effective on May 24, 1991. Its stated purpose is to codify the common law relating to nuisance without abridging "any other rights or remedies available for personal or property damage. . . ."<sup>2</sup> In that it makes no reference to public nuisance and the term "private nuisance" appears frequently throughout the statute,<sup>3</sup> it is clear that the Act deals exclusively with the law of private nuisance vis-a-vis nuisance in general. As it expressly disclaims any change in existing law,<sup>4</sup> existing case precedents will continue to occupy an important role in the litigation of nuisance cases, especially if it should be contended that in some relevant respect the statute does not accurately reflect the case law prevailing at the time of its enactment. The purpose of this article is to examine the statute in terms of existing case law.

## II. DEFINITIONS

Essentially, KRS 411.530(2) and 411.540(2) define a private nuisance as any use of property (defined in KRS 411.510(7) as "real property") that "causes unreasonable and substantial annoyance to the occupants of [other] property or unreasonably

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<sup>1</sup> KY. REV. STAT. ANN. § 411.500 (Michie/Bobbs Merrill 1991) [hereinafter KRS].

<sup>2</sup> KRS §§ 411.500, 411.570.

<sup>3</sup> KRS §§ 411.510(1), (5); 411.520(1), (2); 411.530(1); 411.540(1); 411.550(1); 411.560(1), (3)-(5).

<sup>4</sup> KRS § 411.500.

interferes with [their] use and enjoyment of [it]. . . .” In the instance of a permanent nuisance, it must result in a “material” reduction in the fair market value of the claimant’s property,<sup>5</sup> and for a temporary nuisance it must cause a reduction in the value of the use or the rental value of the affected property.<sup>6</sup>

∞ These definitions are in keeping with case law as exemplified by *Louisville Refining Co. v. Mudd*<sup>7</sup> and numerous other decisions. Though negligence on the defendant’s part may be an important factor in weighing the reasonableness of his conduct, it is not essential to a cause of action against him.<sup>8</sup> “The focus is on reasonableness as against unreasonableness, possible negligence being no more than an element entering into a resolution of that question.”<sup>9</sup> In short, the basic question is whether under all of the circumstances the damage inflicted on the claimant’s property interest by reason of the defendant’s use of his own property is unreasonable.

### III. DISTINCTION BETWEEN PERMANENT AND TEMPORARY NUISANCES

KRS 411.530(1) defines as permanent “any private nuisance that: (a) [c]annot be corrected or abated at reasonable expense to the owner; and (b) [i]s relatively enduring and not likely to be abated voluntarily or by court order.” Any nuisance that is not permanent according to this definition is a temporary nuisance.<sup>10</sup>

Whether a structure or condition is permanent “is decided by determining whether it can be readily corrected or abated at a reasonable expense; if it can, it is temporary; if it cannot, it is permanent.”<sup>11</sup>

If it be permanent, usually it is necessary that it be created by the inherent character of the structure or business, and that its lawful and necessary operation creates a permanent injury; but where the structure or the business when properly conducted

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<sup>5</sup> KRS § 411.530(2).

<sup>6</sup> KRS § 411.540(2).

<sup>7</sup> 339 S.W.2d 181, 186-87 (Ky. 1960).

<sup>8</sup> *Lynn Mining Co. v. Kelly*, 394 S.W.2d 755, 758 (Ky. 1965); *Louisville and Jefferson County Air Bd. v. Porter*, 397 S.W.2d 146, 151-52 (Ky. 1965).

<sup>9</sup> *George v. Standard Slag Co.*, 431 S.W.2d 711, 715 (Ky. 1968).

<sup>10</sup> KRS § 411.540(1).

<sup>11</sup> *City of Ashland v. Kittle*, 305 S.W.2d 768, 769 (Ky. 1957).

and operated does not constitute a nuisance and only becomes such through negligence, it is temporary. If the structure is in character relatively enduring and not likely to be abated, either voluntarily or by an order of court, it is generally held that the nuisance is a permanent one. . . .<sup>12</sup>

In determining whether a nuisance is permanent or temporary, "the question . . . is to examine whether the cause of the nuisance results from some improper installation or method of operation *which can be remedied at reasonable expense*. If so, the nuisance is a temporary one."<sup>13</sup>

One test of whether a nuisance is temporary or permanent is whether the cause of the nuisance can be readily corrected or abated at a reasonable expense. . . . But another test is whether the offending structure will be 'relatively enduring and not likely to be abated, either voluntarily or by an order of court.'<sup>14</sup>

Clearly, the statutory definitions of permanent and temporary nuisances are in conformity with the case law.

When the facts are not in dispute, whether an alleged nuisance is permanent or temporary is an issue of law for the trial court to decide; otherwise, it is a jury question.<sup>15</sup>

#### IV. FACTORS DETERMINING THE ISSUE OF REASONABLENESS

KRS 411.550(1) provides that in "determining whether a defendant's use of his property constitutes a nuisance" the fact-finder (in a suit for damages, the jury, or in an injunction suit, the judge) "shall consider all relevant facts and circumstances," including the following:

- (a) The lawful nature of the defendant's use of his property;
- (b) The manner in which the defendant has used it;
- (c) The importance of the defendant's use of the property to the community;
- (d) The influence of [his] use of property on the growth and prosperity of the community;

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<sup>12</sup> Kentucky-Ohio Gas Co. v. Bowling, 95 S.W.2d 1, 4-5 (Ky. 1936) (citations omitted).

<sup>13</sup> Lynn Mining Co., 394 S.W.2d at 759 (emphasis added).

<sup>14</sup> Kentland-Elkhorn Coal Co. v. Charles, 514 S.W.2d 659, 664 (Ky. 1974) (citations omitted).

<sup>15</sup> Lynn Mining Co., 394 S.W.2d at 759.

- (e) The kind, volume and duration of the annoyance or interference with the use and enjoyment of claimant's property;
- (f) The respective situations of the defendant and claimant; and
- (g) The character of the area in which the defendant's property is located, including, but not limited to, all applicable statutes, laws or regulations.<sup>16</sup>

These factors are taken almost *verbatim* from *Louisville Refining Company*<sup>17</sup> and *George v. Standard Slag Co.*<sup>18</sup>

## V. ALLOWABLE DAMAGES

### A. Real Property

The allowable damages in a private nuisance suit are (1) for a permanent nuisance, the resulting loss in market value of the claimant's property,<sup>19</sup> and (2) for a temporary nuisance, the resulting diminution in the value of the use of the claimant's property if it was occupied by the claimant or, if it was not so occupied, the resulting diminution in its fair rental value during the time the nuisance existed within the period of limitations.<sup>20</sup>

The measures of recoverable property damage thus

<sup>16</sup> KRS § 411.550(1)(a)-(g).

<sup>17</sup> *Louisville Refining Co. v. Mudd*, 339 S.W.2d 181, 187 (Ky. 1960).

<sup>18</sup> *George*, 431 S.W.2d at 715.

<sup>19</sup> Permanent nuisance: *Kentland-Elkhorn Coal Co. v. Charles*, 514 S.W.2d 659, 664 (Ky. 1974); *George v. Standard Slag Co.*, 431 S.W.2d 711, 712 (Ky. 1968); *Kentucky-West Virginia Gas Co. v. Matny*, 279 S.W.2d 805, 807 (Ky. 1955); *Searcy v. Kentucky Utilities Co.*, 267 S.W.2d 71, 72-73 (Ky. 1954); *Brumley v. Mary Gail Coal Co.*, 246 S.W.2d 148, 151 (Ky. 1952); *Kentucky-Ohio Gas Co. v. Bowling*, 95 S.W.2d 1, 5 (Ky. 1936); *City of Madisonville v. Hardman*, 92 S.W. 930, 931 (Ky. 1906).

Temporary nuisance: *Nally & Gibson v. Mulholland*, 399 S.W.2d 293, 294 (Ky. 1966); *Lynn Mining Co. v. Kelly*, 394 S.W.2d 754, 760 (Ky. 1965); *Adams Constr. Co. v. Bentley*, 335 S.W.2d 912, 913 (Ky. 1960); *City of Frankfort v. Ballew*, 151 S.W.2d 1063, 1065 (Ky. 1941); *City of Hazard v. Eversole*, 133 S.W.2d 906, 909 (Ky. 1939); *Standard Oil Co. v. Bentley*, 84 S.W.2d 20, 23 (Ky. 1935); *City of Madisonville v. Nisbit*, 39 S.W.2d 690, 691 (Ky. 1931); *Gay v. Perry*, 265 S.W. 437, 438 (Ky. 1924); *Cumberland Torpedo Co. v. Gaines*, 255 S.W. 1048 (Ky. 1923); *Southern Ry. Co. v. Routh*, 170 S.W. 520, 521 (Ky. 1914). *But see Radcliff Homes, Inc. v. Jackson*, 766 S.W.2d 63, 66-67 (Ky. Ct. App. 1989), for an intermediate appellate court opinion that deviates from earlier decisions by Kentucky's highest court on the measure of damages and relies to some extent on a federal case, *Kentucky West Virginia Gas Co. v. Lafferty*, 174 F.2d 848, 853 (6th Cir. 1949), which was later characterized in *Matny*, 279 S.W.2d at 807, as "not binding on us" and "in conflict with our cases."

<sup>20</sup> KRS § 411.560(1)(a).

set forth in KRS 411.560 accurately reflect long and well-established case law as reflected by the opinions of Kentucky's highest court.<sup>21</sup>

### B. *Personal Property*

Under the old traditional principles governing the law of private nuisances one would not ordinarily contemplate damage to personal property, and the Act makes no provision for it. However, in *Klutey v. Commonwealth, Dep't of Highways*,<sup>22</sup> the court extended the principles of nuisance law to surface-water cases,<sup>23</sup> and in *Commonwealth, Dep't of Highways v. Baird*,<sup>24</sup> recovery was allowed under nuisance principles for damage to personalty through the flooding of an upholstery shop.<sup>25</sup>

### C. *Personal Injury*

KRS 411.560(3) specifically prohibits any award "for annoyance, discomfort, sickness, emotional distress, or similar claims." It further provides that if a claim for personal injury or damage is asserted in the same proceeding, it must be resolved on the basis of applicable tort principles independently of whether a nuisance is found to exist.<sup>26</sup> This is in keeping with the fundamental premise that the gravamen of a nuisance is damage to property rather than persons. Otherwise, the factors that are required for consideration in determining the existence of nuisance would be largely inappropriate.

The opinions of the Kentucky courts over the years reflect considerable inconsistency with respect to the role of personal annoyance or injury in nuisance cases. In the early case of *Kemper v. City of Louisville*,<sup>27</sup> the opinion directing a new trial concludes with this admonition:

[T]he appellants are entitled to recover for the injury to the lot by reason of the construction of the fill, and while no

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<sup>21</sup> KRS § 411.560(1)(b).

<sup>22</sup> 428 S.W.2d 766 (Ky. 1967).

<sup>23</sup> *Id.* at 769. See also *Kentland-Elkhorn Coal Co. v. Charles*, 514 S.W.2d 659, 663 (Ky. 1974).

<sup>24</sup> 444 S.W.2d. 541 (Ky. 1969).

<sup>25</sup> *Id.* at 543.

<sup>26</sup> KRS § 411.560(3).

<sup>27</sup> 77 Ky. (14 Bush) 87 (Ky. 1878).

recovery can be had for physicians' bills paid, or the loss of time on the part of the occupants on account of sickness caused by the stagnant water, etc., still these facts may be proven with a view of showing the extent to which the value of the property has been lessened. This is the actual damage sustained.<sup>28</sup>

A generation later, in *City of Madisonville v. Hardman*,<sup>29</sup> without referring to any previous authority on the subject,<sup>30</sup> the court had this to say:

In an action such as this, a recovery may be had where the evidence justifies it for sickness, disease, annoyance, discomfort, and injuries to property. In fact, every injury to person and property that the person complaining has sustained by reason of the nuisance may be recovered in one action.<sup>31</sup>

The court dealt with the subject more at length in *Gay v. Perry*,<sup>32</sup> citing and expressly following the old rule of *Kemper*<sup>33</sup> and quoting from *Southern Ry. Co. v. Routh*,<sup>34</sup> as follows:

When it comes to measuring the damages, the diminution in the value of the use of the property necessarily includes annoyance and discomfort, which directly affect the value of the use. It is not, therefore, proper to permit a recovery both for the diminution in the value of the use and for annoyance and discomfort, which necessarily enter into and constitute a part of the diminution of such value.<sup>35</sup>

This is the rule to which Kentucky's highest court has consistently adhered ever since *Southern Ry. Co.* was decided in

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<sup>28</sup> *Id.* at 96.

<sup>29</sup> 92 S.W. 930 (Ky. 1906).

<sup>30</sup> However, in *Mahan v. Doggett*, 84 S.W. 525, 526 (Ky. 1905), a sawdust case, the court had said the plaintiff was entitled "to recover for the discomforts suffered by him and his family, in addition to the actual damage done to his property, or he was entitled to recover for such discomforts even though his property sustained no actual damage." (Emphasis added).

<sup>31</sup> *City of Madisonville v. Hardman*, 92 S.W. at 931.

<sup>32</sup> 265 S.W. 437 (Ky. 1924).

<sup>33</sup> 77 Ky. (14 Bush) 87 (Ky. 1878).

<sup>34</sup> 170 S.W. 520 (Ky. 1914).

<sup>35</sup> *Gay*, 265 S.W. at 438. In *Southern Ry. Co.*, 170 S.W. at 521, a judgment for the plaintiff was reversed because the instructions authorized recovery for "annoyance and discomfort to her (plaintiff's) family" in addition to diminution in value of the use of the property.

1914,<sup>36</sup> subject only to a possible aberration in *City of Prestonsburg v. Lafferty*.<sup>37</sup> In 1949, however, the United States Court of Appeals for the Sixth Circuit, undertaking to analyze the law of Kentucky, construed *Gay v. Perry*<sup>38</sup> as having recognized "that in given cases, involving a nuisance, there may be, in Kentucky, a recovery for injury to a person's health and a recovery for injury to his property, in the same action. . . ."<sup>39</sup>

Although this federal court opinion has been cited in at least two Kentucky opinions of fairly recent vintage,<sup>40</sup> when the same question came before the Kentucky court in a case involving the same defendant and the same nuisance condition, the response was as follows:

It is plaintiffs' contention that while a party may not recover both types of damages, he may recover for annoyance and discomfort independently if other damages are not sought or have not theretofore been recovered. We are cited to no Kentucky authority so adjudging.

Reference is made to *Kentucky West Virginia Gas Co. v. Lafferty* . . . wherein the Sixth Circuit Court of Appeals . . . intimated in its opinion that a separate suit for annoyance and discomfort might be maintained under Kentucky law. It does not appear that question was squarely presented in the case, and the possible remedies suggested in the opinion are not binding on us and appear to be in direct conflict with our cases above cited. . . .<sup>41</sup>

In *Kentland-Elkhorn Coal Company v. Charles*,<sup>42</sup> the court concluded with this comment on the subject of injury to the person:

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<sup>36</sup> See e.g., *Kentland-Elkhorn Coal Co.*, 514 S.W.2d at 664; *George*, 431 S.W.2d at 716; *Matny*, 279 S.W.2d at 807; *Searcy*, 267 S.W.2d at 72; *City of Hazard*, 133 S.W.2d at 909; *Kentucky Ohio Gas Co.*, 95 S.W.2d at 5.

<sup>37</sup> 291 S.W. 1030 (Ky. 1927). In *City of Prestonsburg v. Lafferty* a judgment for the plaintiffs was reversed because of errors both in the admission of evidence and in the instructions. Without any reference to prior opinions, and apparently without much thought on the specific point, the opinion concludes with directions that on another trial "the instructions should confine the plaintiffs' right of recovery to damages to their peace and comfort in the occupancy of their homes, and should not be so broad or general as to include damage to their health unless the competent evidence authorizes it." *Id.* at 1031 (emphasis added).

<sup>38</sup> 265 S.W. 437.

<sup>39</sup> *Lafferty*, 174 F.2d at 852.

<sup>40</sup> *Southeast Coal Co. v. Combs*, 760 S.W.2d 83, 84 (Ky. 1988); *Radcliff Homes, Inc.*, 766 S.W.2d at 67.

<sup>41</sup> *Matny*, 279 S.W.2d at 807.

<sup>42</sup> *Kentland-Elkhorn Coal Co.*, 514 S.W.2d 659.



The instructions should not authorize any *recovery* for personal annoyance, discomfort or sickness of the plaintiffs, because there was no claim of damages for personal injury. On a nuisance suit, such as this, while evidence of those elements is admissible as affecting the value of the use of the property, they are necessarily included in the damages for diminution in the value of the use and are not distinct elements of damage. See *Gay v. Perry*, 205 Ky. 38, 265 S.W. 437; *City of Hazard v. Eversole*, 280 Ky. 621, 133 S.W.2d 906.<sup>43</sup>

The opinion from which this excerpt is taken was written for the court by Commissioner Robert Cullen, not one to use words loosely. This passage seems only consistent with the theory that although a claim for personal injury may exist, it cannot be allowed on the basis of nuisance. In other words, the claim for personal injury should be stated separately from the nuisance claim, and must rest upon a legal theory other than nuisance. KRS 411.560(3) reflects this principle.<sup>44</sup> Logically, personal injury simply falls outside the scope of nuisance law.

Insofar as nuisances are unpleasant or offensive and thereby diminish the enjoyment of life, the sights, sounds, and smells that ordinarily suffice to establish their existence would not result in personal injuries. However, damage to one's health is another matter. Perhaps some of the confusion has resulted from the failure of the courts through the years to consider the difference between mere discomfort and annoyance, on the one hand, and physical illness on the other. In *Kemper v. City of Louisville*,<sup>45</sup> for example, the court held that there could be no recovery "for physicians' bills paid, or the loss of time on the part of the occupants on account of sickness. . . ."<sup>46</sup> Again, in *Gay v. Perry*,<sup>47</sup> it was held that "the court erred in authorizing a recovery for personal sickness. . . ."<sup>48</sup> The words "annoyance, dis-

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<sup>43</sup> *Id.* at 664.

<sup>44</sup> KRS § 411.560(3) states in part: "In the event a claim for injury or damage to a person is asserted in the same proceeding as a claim for damage to the claimant's property caused by a private nuisance, liability for such personal injury or damage shall be determined on the basis of applicable principles of tort law."

<sup>45</sup> *Kemper*, 77 Ky. (14 Bush) 87.

<sup>46</sup> *Id.* at 96.

<sup>47</sup> *Gay*, 265 S.W. 437.

<sup>48</sup> *Id.* at 438. This case, upon which the Sixth Circuit in *Kentucky West Virginia Gas Co. v. Lafferty*, 174 F.2d 848, 852 (6th Cir. 1949), relied as supporting the proposition that recovery may be had in the same action for both property damage and injury to a person's health, actually followed *Kemper v. City of Louisville* in classifying "personal sickness" as a species of "annoyance and discomfort."

comfort, and illness" are lumped together in *City of Hazard v. Eversole*.<sup>49</sup> In *Searcy v. Kentucky Utilities Co.*<sup>50</sup> and *Kentucky West Virginia Gas Company v. Matny*,<sup>51</sup> the expression is "annoyance and discomfort." And again in *Kentland-Elkhorn Coal Company v. Charles* it is "annoyance, discomfort or sickness."<sup>52</sup>

It seems certain to the writer of this article that the Supreme Court of Kentucky as presently constituted would view an illness as equivalent to a physical injury. If a bodily infirmity can be traced to an external source, it should make no difference whether it is "traumatic." Assuming that the illness is real and substantial, and is proved to have been caused by the same conduct or condition alleged to have created a nuisance with respect to the plaintiff's property, the important question is, what must be proved in order to establish a cause of action? In other words, what is the tort? Is it negligence, or is it some type of activity for which there is liability without fault? In either event, it should make no difference whether the plaintiff was or was not an occupant of the property damaged by the nuisance. A passerby on the public sidewalk made ill by some noxious substance emanating from the defendant's factory or laboratory would be just as wronged as a similarly-affected occupant of an adjacent dwelling.

It is not this writer's purpose to suggest answers to these questions, but only to point out that the practitioner who intends to assert a claim for personal injury or illness in the context of a nuisance action must be prepared with jury instructions premising recovery on elements of proof that are essential to a cause of action other than nuisance. It is a subject that has lurked beneath the surface of our nuisance cases for more than a century, but thus far has never been satisfactorily discussed in any opinion by the courts of Kentucky.<sup>53</sup> This much is certain: the factors prescribed by KRS 411.550(1) to be considered in determining the existence of a nuisance, *vel non*, would not be appropriate to a personal injury or wrongful death claim.<sup>54</sup>

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<sup>49</sup> *Eversole*, 133 S.W.2d at 909.

<sup>50</sup> *Searcy*, 267 S.W.2d at 72.

<sup>51</sup> *Matny*, 279 S.W.2d at 807.

<sup>52</sup> *Kentland-Elkhorn Coal Co.*, 514 S.W.2d at 664.

<sup>53</sup> In *Kentucky West Virginia Gas Company v. Matny*, 279 S.W.2d at 805, however, the court observed that if it were assumed that an independent action would lie for annoyance and discomfort, KRS 413.140, the one-year statute of limitations on personal injury claims, would apply.

<sup>54</sup> See *supra* note 16 and accompanying text.

This phase of our discussion would not be complete without mention of *Radcliff Homes, Inc. v. Jackson*.<sup>55</sup> In *Radcliff Homes*, a panel of the present Kentucky Court of Appeals, apparently oblivious to the latest precedents of the old Court of Appeals (now Kentucky Supreme Court) in *Kentucky West Virginia Gas Company v. Matny*<sup>56</sup> and in *Kentland-Elkhorn Coal Company v. Charles*,<sup>57</sup> proceeded to quote and follow the federal court opinion in *Kentucky West Virginia Gas Company v. Lafferty*.<sup>58</sup> The *Lafferty* opinion had already, in substance, been expressly repudiated and was contrary to the law as stated in these two later state-court cases.<sup>59</sup> Also, contrary to all previous Kentucky authority, the *Radcliff Homes* opinion approved a special measure of damages for a temporary nuisance.<sup>60</sup>

*Radcliff Homes* failed to follow decisions of two previous cases of the highest court in Kentucky. Rule 1.030(8)(a) of the Rules of the Supreme Court of Kentucky provides as follows: "The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court."<sup>61</sup> To the extent that the *Radcliff Homes* opinion deviates from the specific holdings of the controlling precedents, it is the writer's opinion that it cannot be regarded as a part of the common law of the state.

## VI. PARTIAL CAUSATION

KRS 411.560(2) provides that one who contributes to a nuisance shall be liable only to the extent of his proportionate contribution to it, as prescribed by KRS 411.182. This is in accordance with *George v. Standard Slag Company*<sup>62</sup> and *South-east Coal Co., Inc. v. Combs*.<sup>63</sup> As yet unanswered is the ques-

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<sup>55</sup> *Radcliff Homes, Inc.*, 766 S.W.2d 63.

<sup>56</sup> *Matny*, 279 S.W.2d 807.

<sup>57</sup> *Kentland-Elkhorn Coal Co.*, 514 S.W.2d 664.

<sup>58</sup> *Lafferty*, 174 F.2d 853.

<sup>59</sup> *Radcliff Homes, Inc.*, 766 S.W.2d at 67.

<sup>60</sup> *Id.* at 66-67. The opinion further says that in a nuisance case "either strict liability or negligence may form the basis for liability," citing *Louisville and Jeffers n County Air Board v. Porter*, 397 S.W.2d 146 (Ky. 1965), as supporting authority. *Radcliff Homes, Inc.*, 766 S.W.2d at 69. This proposition comes to the writer of the *Air Board* opinion as a considerable surprise.

<sup>61</sup> KY. SUP. CT. R. § 1.030(8)(a).

<sup>62</sup> *George*, 431 S.W.2d at 716.

<sup>63</sup> 760 S.W.2d 83, 84 (Ky. 1988).

tion of whether a contributing cause that would not in itself create a nuisance could result in liability. Would it, for example, have to be a "substantial factor," as in negligence cases?

## VII. STANDING TO SUE

KRS 411.560(5) provides that "[n]o person shall have standing to bring an action for private nuisance unless [he] has an ownership interest or possessory interest in the property alleged to be affected by the nuisance." The term "possessory interest" is defined in KRS 411.510(6) as "lawfully possessing property" but not including "mere occupancy."

Considering the different measures of damages, as discussed above, it is obvious that legal possession alone would not give standing to sue or recover for a permanent nuisance.<sup>64</sup> The Kentucky courts have not thus far addressed the question of what constitutes "possession" or "lawful possession" within the context of nuisance claims.

## VIII. STATUTE OF LIMITATIONS

The Act does not prescribe time limitations. According to settled case law, however, the applicable statute of limitations is KRS 413.120 (five years). For a permanent nuisance, the period ordinarily runs from the time the conduct or activity in question became a substantial annoyance to the claimant.<sup>65</sup> A temporary nuisance, on the other hand, is like a continuing trespass, for which recovery can be had for so much of the damage as has accrued during the five-year period immediately preceding the filing of the action.<sup>66</sup>

## IX. CONCLUSION

The 1991 Nuisance Act does not appear to add to or deviate from existing case law in any material respect. As in the instance of other codifications, it should make it easier to find the law and determine what it is.

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<sup>64</sup> See *Brink v. Moeschl Edwards Corrugating Co.*, 133 S.W. 1147, 1148 (Ky. 1911), holding that plaintiffs who had failed to prove their title could recover for injury to their possession but not for damage to the fee without such proof. See also RESTATEMENT (SECOND) OF TORTS § 821E (1977).

<sup>65</sup> *Louisville Refining Co. v. Mudd*, 339 S.W.2d at 187.

<sup>66</sup> *West Kentucky Coal Co. v. Rudd*, 328 S.W.2d 156, 160 (Ky. 1959).

