

1970

Private Legal Action for Air Pollution

James E. Melle

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Environmental Law Commons](#), and the [Torts Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

James E. Melle, *Private Legal Action for Air Pollution*, 19 Clev. St. L. Rev. 480 (1970)
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol19/iss3/9>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

Private Legal Action for Air Pollution

James E. Melle*

THE VAGUENESS OF THE CONCEPT of *nuisance* has resulted from the varying interpretations given it by the courts. It is still debatable whether liability for nuisance exists because of the harm done, or how the harm was created.¹ Though there are many different-purpose classifications of nuisances, this paper deals only with the basic ones—*i.e.*, public, private, and public nuisances which are also private nuisances.

A public nuisance at common law was always a crime; and, after 1536, also a tort. It consisted of an interference with rights which were common to the community. It was not necessary for the entire community to be affected, so long as the nuisance interfered with those who came in contact with it in the exercise of a public right.² The Ohio courts have agreed with this concept. A public nuisance is one in which the whole community is annoyed or inconvenienced by the offensive acts, as where one carries on a trade that fills the air with noxious and offensive fumes.³ A public nuisance arises out of the violation of public rights by the doing of unlawful acts.⁴

The common law concept of a private nuisance was the invasion of the interest in the use and enjoyment of land, and the remedy for it was exclusively with the individual whose rights have been disturbed.⁵ Ohio has also adopted this view. A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another and not amounting to a trespass.⁶ The essence of a private nuisance is an interference with the use and enjoyment of land.⁷

A public nuisance can also be a private nuisance if the injured plaintiff can show special damage to himself. Until 1536 every public nuisance was a crime, and every attempt on the part of a private plaintiff to recover for any harm that it did to him was rejected. In that year, the English courts established an *exception* to the general rule. “. . . unless

* B.S.B.A., John Carroll University; Third-year student at Cleveland State University, Cleveland-Marshall College of Law.

¹ Prosser, Torts 595-604 (3rd ed. 1964); 2 Oleck (ed.), Encyclopedia of Negligence, § 440 (1962).

² Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 1001 (1966).

³ Village of Cardington v. Adm'r of Fredericks, 46 Ohio St. 442, 446, 21 N.E. 766, 767 (1889). It is the intent of the author to state the present status of Ohio law in terms of public nuisance and air pollution.

⁴ The Toledo Disposal Company v. The State of Ohio, 89 Ohio St. 230, 106 N.E. 6 (1914).

⁵ *Supra* n. 2 at 999.

⁶ Williams v. Pomeroy Coal Company, 37 Ohio St. 583, 589, 7 W.L.B. 126, 131 (1882).

⁷ Sakler v. Huls, 20 Ohio Op. 2d 283, 183 N.E. 2d 152 (1961).

it be where one man has greater hurt or inconvenience than any other man had, and then he who had more displeasure, or hurt, etc., can have an action to recover his damages that he had by reason of the special hurt.”⁸ This was an attempt by the court to liberalize a harsh rule.

Ohio has followed this rule. To give the individual a right either in a suit for damages or by injunction, plaintiff must aver and show that the injury he suffers is different in kind from that of the general public.⁹ The difference is that in 1536 the court used that rationale to redress an injury to an injured plaintiff, while today the same reasoning is used to deny recovery. “The reason . . . he cannot have such an action is because it would cause such a multiplicity of suits as to be itself an intolerable evil.”¹⁰

Of what consequence is this to the many plaintiffs who have been injured? Because the defendant will be required to defend an action more than once, the courts have said he need not defend one at all. It is also said, as a justification for this rule, that to allow every injured party to sue would result in suits for inconsequential damages and thereby clog the dockets.¹¹ Also, that no one person can sue as trustee for the other injured parties; and that different adjudications will result in varying standards of conduct for the defendant.¹²

When a public nuisance substantially interferes with the use or enjoyment of the plaintiff's rights in land, it has never been disputed that there is special damage, for which a private action will lie.¹³ The reason is that the landowners in the immediate vicinity must necessarily suffer harm different from that of the general public. As to the plaintiff this is also a private nuisance, and the action may be brought on either basis or both.¹⁴

What can a healthy individual do who does not live in the “neighborhood” of a polluter and yet fears that air pollution has harmful effects on his health? The air transmits the pollution, and it affects all healthy persons alike. But it affects those over 55 and under one year as well as those with existing respiratory diseases more than the healthy individual. Yet this cannot technically be used as special damage since the amount of harm necessary to constitute a nuisance is measured by the standards

⁸ *Supra* n. 2 at 1005.

⁹ *Hall v. Pittsburg, C. C. and St. L. Ry.*, 85 Ohio St. 148, 159, 97 N.E. 381 (1911); *Widmer v. Fretti*, 95 Ohio App. 7, 116 N.E. 2d 728 (1952).

¹⁰ *Hall v. Pittsburg, C. C. and St. L. Ry.*, *supra* n. 9.

¹¹ Smith, *Private Action for Obstruction to Public Right of Passage*, 15 Colum. L. Rev. 1, 7 (1915).

¹² *Supra* n. 3 at 1002.

¹³ *Id.* at 1018.

¹⁴ *Id.*

of comfort entertained by persons of ordinary sensibilities.¹⁵ This leads to the overriding question whether special damage is a necessary element in public nuisance actions by a private individual for air pollution.

Abatement by Statutes

Under Section 3767.03 of the Ohio Revised Code (hereinafter referred to by section number) whenever a nuisance exists, a person who is a citizen of the county where the nuisance exists, may bring an action to abate the nuisance.¹⁶ Chapter 37 declares certain nuisances criminal, while others are prohibited nuisances which may also be proceeded on by indictment. Section 3767.23 states that if the prohibitions are proceeded on by indictment and a conviction is obtained, the court shall abate the nuisance.

If not proceeded on by indictment, must a party seeking to abate a nuisance under Section 3767.03 show special damage? The question appears not to have been decided, and there are relatively few cases involving this section. The most recent involved an action under Section 3767.03 to abate a nuisance as declared by Section 4301.71 (illegal sale of alcoholic beverages). The court held that the citizen's right to abate the nuisance extended only to Chapter 37. The court further questioned whether the relator would have the capacity to maintain this action merely by virtue of statutory authority and notwithstanding that he had not suffered any special damage by reason of the alleged nuisance.¹⁷

In *State ex rel. Chafin v. Glick*,¹⁸ plaintiff brought an action for injunction, and the defendant contended that such an action could only be prosecuted as provided for in Section 3767.03. The court did not decide this question since it found that the act complained of was not a public nuisance.¹⁹ In 1940, the Attorney General stated that under Section 3767.03 neither he nor the prosecuting attorney would have to prove special damages.²⁰

¹⁵ *Columbus Gas Light and Coke Co. v. Freeland*, 12 Ohio St. 392 (1861); *Kepler v. Industrial Disposal Co.*, 84 Ohio App. 80, 85 N.E. 2d 308 (1948).

¹⁶ "If such action is instituted by other than the prosecuting attorney, or attorney general, the complainant must execute a bond . . . to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the injunction ought not to have been granted."

¹⁷ *State ex rel. MacDonald v. Shawnee Country Club, Inc.*, 20 Ohio App. 2d 37, 40, 251 N.E. 2d 618, 620 (1969).

¹⁸ 113 Ohio App. 23, 31, 177 N.E. 2d 293, 301 (1960).

¹⁹ See also: *Wind v. State*, 102 Ohio St. 62, 130 N.E. 35 (1921); *State ex rel. Pansing v. Lightner*, 32 Ohio N. P. (n.s.) 376 (1934); *State ex rel. Hover v. Rumpke*, 60 Ohio Op. 25, 130 N.E. 2d 243 (1955); *State ex rel. Heck v. Grillot*, 71 Ohio L. Abs. 170, 128 N.E. 2d 552 (1955).

²⁰ 1940 Op. Att'y Gen. v. 2 at 1105.

In *Fischer v. Cleveland*,²¹ (a taxpayer's suit not involving Section 3767.03) the lower court stated that the defendant raised an interesting question, *viz.*, Whether—a taxpayer, who suffers no special injury different from that of the general public, may bring an action to enjoin a public nuisance. The court did not find it necessary to decide the question. The Court of Appeals did. It found that as an individual, the plaintiff did not allege or prove that he would suffer any damage different from that which the other residents of Cleveland would suffer, and refused to grant the injunction.

The question comes to this: If a public nuisance causes special damage to a party so that it is a private nuisance as to him and he can bring the action either for damages or injunction, or both, then of what consequence is Section 3767.03 if the injured party is required to show special damage? He can get the same relief in equity *without* the statute (enjoin the maintenance of the nuisance) as he can with it. Therefore, this author submits that the statute was designed to confer standing on any individual who was injured by a public nuisance whether or not special damages can be shown. Section 3767.03 is an exception to the rule that abatement of public nuisances should be left to the state or municipal authorities.

Nuisance: The Class Action Approach

There is another method which the injured party may use. He may bring an action for injunction or damages or both, on the theory of public nuisance. With this cause of action one must clearly distinguish between public and private nuisance. In *Taylor v. Cincinnati*,²² the most often cited case on nuisance in Ohio, the court failed to clearly distinguish between public and private nuisance. The court stated that nuisance comprehends not only the wrongful invasion of the use and enjoyment of property, but also the wrongful invasion of personal legal rights and privileges.²³ This statement is not precise, for this is exactly where public and private nuisance differ. Private nuisance is an invasion of an interest of the use and enjoyment of land, while public nuisance is the invasion of a right or privilege held by people generally. For a public nuisance there should be absolute liability.

The court did state that, the violation of a law, or the violation of a safety statute which is a specific requirement for the safety of others results in absolute liability. "This is on the theory that a violation of a specific lawful requirement which fixes a legal standard of duty, creates

²¹ 10 Ohio L. Abs. 683 (1931).

²² 143 Ohio St. 426, 55 N.E. 2d 724 (1944).

²³ *Id.* at 432.

liability and *the degree of care exercised is not in issue.*"²⁴ "This rule applies especially to the creation or maintenance of a public nuisance by a private person, which always involves an unlawful act."²⁵

Section 3767.13 of the Ohio Revised Code is such a statute. It states that *no person* shall maintain a business which occasions noxious exhalations or noisome or offensive smells which are injurious to the health, comfort, or property of individuals or the public.

It has been held that this section does not apply to manufacturing. In *The Industrial Fibre Co. v. State*,²⁶ the court traced the history of Section 3767.13 (then 12646 General Code) to its enactment in 1832. It noted that in 1857 the word manufacture was "dropped" from the statute. Holding that there was a difference between manufacture and trade or business, the court said that the defendant could not be convicted of a crime. But in 1961, the State legislature defined "person" under Chapter 37 as including a corporation or partnership.²⁷ Therefore the doubt that existed since the *Industrial Fibre Co.* case, *supra*, is removed.

In 1967, the State legislature enacted the Air Pollution Control statutes for the protection of the public. "'Air Pollution' means the presence in the ambient air of one or more air contaminants or any combination thereof in sufficient quantity and of such characteristics and duration as to injure human health or welfare, plant or animal life, or property, or which unreasonably interfere with the comfortable enjoyment of life or property."²⁸ This statute defines the degree of care to be exercised by the defendant, and is designed as a specific requirement for the safety of others. A violation should result in absolute liability.

Even with absolute liability established, under past practice an injured plaintiff could not enjoin or recover damages. Five reasons are advanced for denying the injured parties relief unless they show special damages. These are: (1) the defendant will be subjected to a multiplicity of suits; (2) no one plaintiff can sue as trustee for all the injured plaintiffs; (3) the standard of conduct required from the defendant may vary with each adjudication; (4) too many suits will clog the dockets; and, (5) parties would bring actions for minimal damages. Rule 23 of the new Ohio Rules of Civil Procedure is the reason those objections no longer are valid. The injured plaintiff(s) may bring a class action on behalf of all the parties that have been injured by the public nuisance.

One or more members of the class may sue as a representative party on behalf of all, if the class is so numerous that joinder of all members

²⁴ *Id.* at 433.

²⁵ *Id.* at 434.

²⁶ 31 Ohio App. 347, 166 N.E. 418 (1928).

²⁷ Ohio Rev. Code, § 3767.01(B).

²⁸ Ohio Rev. Code § 3704.01, et seq. for definitions.

is impracticable.²⁹ The number of people affected by air pollution is apparent. One or more members may sue if there are questions of law or fact common to the class.³⁰ Usually this provision is either not considered by the courts, or it is stated to be implied in Rule 23B.³¹ The claims of the representative parties must be typical of the class.³² This requirement is usually implied if the other requirements of Rule 23A are found.³³ Finally, the representative parties must fairly and adequately represent the class.³⁴ This requirement places the primary responsibility on the plaintiff's attorney to be qualified and able to conduct the litigation in the interest of the class members.³⁵ Rule 23A eliminates three of the reasons for denying relief.

Rule 23B states that an action may be maintained as a class action if the prerequisites of subdivision (A) are met and also (1) that the prosecutions of separate actions by individual members of the class would create a risk of (A) inconsistent or varying adjudications which would establish incompatible standards of conduct for the party opposing the class.

One person may . . . be under duties toward numerous persons constituting a class, and be so positioned that conflicting or varying adjudications . . . might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. In the same way, individual litigations of rights and duties of riparian owners, or of landowners rights and duties respecting a claimed *nuisance* could create a possibility of incomplete adjudications. Actions by . . . a class provide a ready and fair means of achieving unitary adjudications.³⁶

In the alternative, if the prerequisites of subdivision (A) are met, a class action is maintainable if the party opposing the class has acted or refused to act on grounds generally applicable to the whole class, thereby making appropriate final injunctive relief.³⁷ This subdivision is intended to reach situations where a party has taken action or *refused to take action* with respect to a class and final injunctive relief settling the legality of the behavior with respect to the class as a whole is appro-

²⁹ Ohio Rules Civ. Proc. Rule 23(A) (1).

³⁰ *Id.* Rule 23(A) (2).

³¹ 3B Moore's Federal Practice, § 23.06 (1969).

³² *Supra* n. 28, Rule 23(A) (3).

³³ *Supra* n. 30.

³⁴ *Supra* n. 28, Rule 23(A) (4).

³⁵ *Eisen v. Carlisle and Jacquelin*, 391 F. 2d 555, 562-564 (2d. Cir. 1968).

³⁶ 39 Fed. R. Dec. 98, 100, Advisory Committee's Note.

³⁷ *Supra* n. 28, Rule 23(B) (2).

priate.³⁸ Rule 23B is not appropriate in an action for damages only, but if the damages are incident to an injunction they are appropriate.³⁹

Rule 23B2 eliminates the varying standard of conduct objection, and the minimal damage suits objection was answered in 1915. "The danger of a multiplicity of suits is overestimated; the law as to costs furnishes a good reason why suits will not be frequent. The costs recovered probably will not equal counsel fees, and the plaintiff will be out of pocket by litigation."⁴⁰

From the foregoing discussion, it is apparent that the rationale requiring special damages, is of no validity today.

A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, . . . for by the same reason that one person might have an action for it, by the same reason everyone might have an action and then he (i.e., the defendant) would be punished 100 times for one and the same cause. . . . and this the law provides for avoiding a multiplicity of suits, for if any one man might have an action, all men might have the like.⁴¹

If *Williams Case* and the theory behind it are inapplicable to the present-day situation, then the special damages requirement is also inapplicable. That being true, whenever a public nuisance is created, one who is injured thereby has standing to challenge the defendant's action. In the case of air pollution, the statutes (Section 3767.13 and Section 3704.01) were designed for the safety of the public, therefore neither the defendant's conduct nor the degree of care exercised by the defendant is in issue. Plaintiff then is entitled to relief.

Health and Property Damage

This section is designed not as an in-depth study at what damages there are from air pollution, but rather what areas and items should be investigated when contemplating an air pollution suit. The argument put forth is that the scientists cannot agree to a numerical limitation (a standard) on the amount of pollutants that can be emitted. The answer is that the standard has been set in terms of law—when air pollution is detrimental to health. All numerical limitations are superseded by that criterion. It is a manageable standard, and one which the court can interpret. It covers every possible pollutant or situation.

In 1965, about 142 million tons of pollutants were emitted into the air. Sulphur oxide emission was 26 million tons (51% from the combustion of coal; it is estimated that 30 million tons will be discharged in

³⁸ *Supra* n. 35 at 102.

³⁹ *Supra* n. 30, § 23.40.

⁴⁰ *Supra* n. 11 at 6.

⁴¹ *Id.* at 3.

1970);⁴² 72 million tons of carbon monoxide; 19 million tons of hydrocarbons; 13 million tons of nitrogen oxide; and, 12 million tons of particulate matter.⁴³ The percentage of sulphur oxide emission from stationary sources is: power generating plants 46%; industry 32%; smelting ores 12%; oil refining, coke processing, and sulphuric acid manufacturing 10%.⁴⁴

The sulphur content of the coal used in Ohio varies between .5% and 5.2%.⁴⁵ The coal used in England is about 1.5% sulphur content. Yet in London, between December 5 and December 9, 1952, because of the temperature inversion, the fog, and the effect of the combination of sulphur dioxide and particulate matter on the human respiratory tract, 4000 more people died than in any comparable period. It is disputed whether it is this pollutant alone, or in conjunction with other pollutants that was responsible.⁴⁶ A similar situation took place in the Meuse Valley in Belgium in 1930 (3 days—60 deaths) and Donora, Pennsylvania in 1948 (3 days—17 deaths). In all these cases, those over 55 and under one year or those who suffered from a previous condition of the heart or lungs, were those that experienced the most suffering and also the ones who died.⁴⁷

The sulphur in coal is of two kinds: in chemical combination with the coal; or as mineral impurity mixed with the coal, principally as iron pyrites. Much of the mineral impurity can be removed by cleaning the coal, and the combined sulphur can be removed by breaking up the coal (though this would increase the cost). An average figure of sulphur removal from cleaning coal is about 25%.⁴⁸ In 1965 figures that itself would be a reduction of 6½ million tons of sulphur dioxide pollution.

Ohio Edison was requested by the Secretary of HEW to limit the particulate and sulphur dioxide emission of its southern Ohio plant by July 1, 1970. Three alternatives were given: (1) substitute low sulphur fuels; (2) install pollution control facilities; (3) suspend operations at that plant.⁴⁹ If the harm is being done, there is no reason for the courts to wait for the federal government to give ultimatums. The above alter-

⁴² Atmospheric Chemistry of Chlorine and Sulphur Compounds, Geophysical Monograph No. 3, American Geophysical Union 55 (1959).

⁴³ The Sources of Air Pollution and Their Control, Public Health Service No. 1548, Govt. Printing Office (1966).

⁴⁴ *Id.*

⁴⁵ Main sources of coal used in Ohio are: Indiana .6%-5.2%; Kentucky 2.7%-5.1%; Ohio 1.1%-4.8%; Pennsylvania .6%-3.7%; West Virginia .5%-4.7%, Coal and the Environment, U. S. Bureau of Mines, Govt. Printing Office (1957).

⁴⁶ World Health Organization, Air Pollution, 172 (1961).

⁴⁷ *Id.* at 173.

⁴⁸ American Chemical Society, Cleaning Our Environment The Chemical Basis for Action, 65 (1969).

⁴⁹ Journal of the Air Pollution Control Association, 906 (November, 1969).

natives could just as easily have been given by a court if a public nuisance did in fact exist.

Sulphur is present in coal and oil and their derivatives, the amount varying with the type of coal or oil used. When these fuels are burnt they give off sulphur dioxide. This is what sulphur dioxide pollution can do.

The smoke emitted sticks to houses and buildings, reacts with the paint, forms a layer of soot which is added to daily, and is not removed by rain.⁵⁰ It corrodes sandstones, limestones, slates and mortar, and any other stone containing carbonates suffers damage because carbonates are converted, by polluted rainwater, into sulphates or chlorides. The rainwater becomes polluted because rain and snow absorb sulphur compounds and as a result become sulphuric acid mist. It has been shown that sulphuric acid mist affects man's teeth.⁵¹ Also as a result of this sulphuric acid mist, iron rusts, and non-ferrous metals corrode more quickly. Wool, cotton, and leather are rotted as a result of absorption of sulphur dioxide and its oxidation to sulphuric acid. Deterioration is most rapid in a humid atmosphere. Even works of art are affected.⁵² In Italy it has been shown that this mist is damaging priceless frescoes.⁵³

This sulphuric acid mist is deposited on high voltage power transmission lines. In humid weather this causes flashovers, which both interrupt service and involve high stresses on the transmission system. It also blocks out sunlight, specifically the ultra-violet rays of the sun which is one source of vitamin D. These rays also kill bacteria which are combined with particulate matter suspended in the air.⁵⁴

As noted, the rainwater becomes polluted because it absorbs the sulphur dioxide and becomes sulphuric acid mist. A pH measurement is the measure of acidity or alkalinity of a solution. A pH measurement of 7.0 is considered neutral. In 1958 in eastern Europe, precipitation showed a value of 5.0. In 1966 the pH reading was 4.5. This mist is eventually deposited in the bodies of water, which increases the acid content of the water and if left uncontrolled will ultimately destroy aquatic life.⁵⁵

80 micrograms of smoke, flyash, and dust per cubic meter is harmful to health. Cleveland as a city averages 120, and in the inner city, 143; Akron, 137; Canton, 125; Lorain, Summit, and Stark counties, about 90. In 1969, 818,405 tons of sulphur oxides were emitted in Cleveland:

⁵⁰ For an interesting comment on soot, odors, and trees in Cleveland see 31 Ohio App. 347, 354, 360-362, 166 N.E. 2d 418 (1928).

⁵¹ 72 Chemical Abstracts No. 4, 15507, at 230 (1970).

⁵² Society of Chemical Industry, Air Pollution, Monograph No. 22, at 18 (1966).

⁵³ 71 Chemical Abstracts, 206113, at 687 (1969).

⁵⁴ *Op. cit. supra* n. 48 at 78.

⁵⁵ *Id.* at 31.

459,224 tons by industry; and 291,482 tons by power plants. There were 303,597 tons of particulate matter emitted in Cleveland: 223,700 tons by industry; and 39,873 tons by power plants. There were also 1,384,375 tons of carbon monoxide emitted, mainly by internal combustion engines.⁵⁶

A study of the contamination of soil in the vicinity of a coke-chemical plant was made in Russia in 1969. It was found that there was a direct relation between the capacity of the plant and the degree of soil contamination of 3,4-benzopyrene (a carcinogenic substance).⁵⁷

About 10 million people die every year from cardiovascular diseases and cancer. Yet the proposition that these two diseases are major killing disorders applies only to industrialized countries. They do not occur in underdeveloped countries as a major killing disease, but as a more or less rare disorder.⁵⁸ Yet work alone does not produce cardiovascular disease,⁵⁹ and the causes of cancer are many.

Ohio in 1955, conducted a study of the influence of urban and rural areas on cancer.⁶⁰ In terms of a "mortality ratio," there were 123 lung cancer deaths in urban areas to 69 rural; 133 cancer of the esophagus deaths urban to 51 rural; 120 buccal cavity and pharynx deaths urban to 68 rural; and 124 cancer of the larynx deaths urban to 63 rural.

Cement works, steels mills, pulp mills, and foundries are among the greatest emitters of particulate matter. Rhode Island's Bay Area Code requires 99% collection efficiency of particulate matter from foundries. The average foundry emits 800 pounds of particulate matter per day. The annual cost of control equipment is about \$30,000 (including amortization).⁶¹ Though the complaint is that this is too much to pay for clean air, this control equipment can reduce particulate emission to 37 pounds per day.⁶²

Pollen pollution is another problem. Pollen causes hay fever or asthma. Some pollens are the product of desirable vegetation, but the largest quantity come from unwanted weed growth. In recent years the quantity of weeds has increased because agricultural programs have caused withdrawal of land from cultivation with the resultant weed growth. These allergenic pollens are carried in the air for long distances.

⁵⁶ The *Cleveland Press*, Jan. 16, 1970, at 1.

⁵⁷ 69 *Chemical Abstracts*, 109619, at 10283 (1968).

⁵⁸ Ciba Foundation 100th Symposium, *Health of Mankind*, 151 (1967).

⁵⁹ National Health Education Comm., Inc., *Facts on the Major Killing and Crippling Diseases in the U. S. Today*, 142 (1966).

⁶⁰ Mancusco, T. F., Macfarlene, E. M., and Porterfield, J. D., *Geographical Distribution of Cancer in Ohio*. 45 *A.P.H.A.*, 58-70 (1955). The mortality ratio was based on eight metropolitan counties against 73 rural counties. The figures were determined by dividing the observed deaths by the expected deaths and multiplying by 100.

⁶¹ *Journal of the Air Pollution Control Association*, 72 (February, 1970).

⁶² *Id.* at 108.

A reduction of the pollen in the air would afford relief to a sizeable number of persons.⁶³

If it is argued that adequate control devices are not available, the answer is that they are. The American Chemical Society stated that there is enough technical information now to clean the air.⁶⁴ If it is argued that the economic cost is too much at the present time, it can be answered that some solutions to pollution problems have actually resulted in economic gain to industry. For example, Venturi scrubbing of blast furnace gases lowered maintenance costs and gave hotter temperatures; the gas take-off below the charging door of a cupola allowed the use of smaller cleaning equipment and gave fuel; the collection of carbon monoxide before combustion in the basic oxygen furnace gives higher temperatures; the use of the Kraft closed loop recycle for paper pulp saved on chemicals and heat; and a scrubbing device on a power plant was able to create sulphur oxides to be used as an ingredient in the manufacture of sulphuric acid.⁶⁵

In *Eller v. Kohler*, the court stated: "What is required of men who engage in lawful business is that they shall regard the fitness of the locality."⁶⁶ Though the courts have generally given relief to plaintiffs in residential neighborhoods when health was involved,⁶⁷ the concept of neighborhood today includes at least an entire city if not the county or state. The courts should abolish this distinction; and on the theory of public nuisance, grant relief for air pollution when it is harmful to health. Today, what is required of men who engage in lawful business is that they shall regard the health of mankind.

⁶³ National Commission on Community Health Services, *Changing Environmental Hazards*, Public Affairs Press, 45 (1967).

⁶⁴ *Op. cit. supra* n. 48 at 9.

⁶⁵ 72 Chemical Abstracts No. 6, 24290, at 225 (1970).

⁶⁶ 68 Ohio St. 51, 67 N.E. 89 (1903).

⁶⁷ *McClung v. North Bend Coal and Coke Co.*, 1 Ohio Dec. 247, 31 W.L.B. 9 (1893). The court enjoined the operation of 110 coke ovens. ". . . is it not manifest that if these gasses so seriously affect one with a predisposition to weakness in this regard, they would make some inroad, by continuous assault night and day, upon the health, and at least the ordinary physical comfort, of those even in good health?" *Arb v. Penn.*, 7 Ohio L. Abs. 307 (1929). The court required the defendant to install the newest control devices. *Antol v. Dayton Malleable Iron Co.*, 30 Ohio L. Abs. 312, 38 N.E. 2d 100 (1939). The fact that the equipment used by a manufacturer is in general use does not entitle him to damage property by emitting coal dust. *Graham and Wagner Inc. v. Ridge*, 41 Ohio App. 288, 179 N.E. 693 (1931). Court enjoined defendant from emitting dust and particulate matter. Witness was allowed to testify she contracted tuberculosis. *Adams v. Snouffer*, 88 Ohio App. 79, 87 N.E. 2d 484 (1949). Court enjoined dissemination of dust as the damage was irreparable. *Dale v. Bryant*, 75 Ohio L. Abs. 401, 141 N.E. 2d 504 (1957). The plaintiff is not required to establish that he is suffering from some ailment or disease, nor is it necessary that he be forced to abandon his home.