RCW 7.48.010

A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF MENTAL DISTRESS FOR HARM AND DAMAGE OF LAND; REFERENCE RCW 7.48 NUISANCE CASES:

In ***Everett v. Paschall***, 61 Wash. 47, 111 Pac. 879, Ann. Cas. 1912 B 1128, 31 L. R. A. (N. S.) 827, that the building of a tuberculosis sanitarium in the residential section of a city will been joined as a nuisance where its construction creates fear and dread of disease, which will result in a depreciation of the value of adjacent property, and where it will affect the mind, health and nerves of the occupants thereof. Sections 943 and 8309, Rem. Code (P. C. SS SS 8231, 9131-68), describe as a nuisance anything which is injurious to the health, or which is an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life and property.

The court said, in the sanitarium case, supra, that, although the danger of communication of disease might be reduced to a negligible quantity, and that such a sanitarium might be constructed with due regard to the safety of patients and the public, and that there might be no danger to persons living in the immediate vicinity, and that the sanitarium would be a great benefit to the general community, yet that it constituted a nuisance for the reason that there had grown into the law of nuisances an element not recognized at common law; that is, that making uncomfortable the enjoyment of another's property is a nuisance. ***It was there held that, though the fear of disease might be unfounded, imaginary and fanciful, yet where there is a positive dread which science has not yet been able to eliminate, such dread, robbing as it did the home owner of the pleasure in and comfortable enjoyment of his home, would make the thing dreaded an actionable nuisance, and the depreciation of the property consequent thereon would warrant a decree against its continuance.*** Further, that dread of disease and fear induced by the proximity of the sanitarium, if that in fact destroys the comfortable enjoyment of the property owners, is not unfounded and unreasonable when it is shared by the whole of the interested public, and property values become endangered, and that:

> ***"The question is, not whether the fear is rounded in science, but whether it exists; not whether it is imaginary, but whether it is real, in that it affects the movements and conduct of men. Such fears are actual, and must be recognized by the courts as other emotions of the human mind....Comfortable enjoyment means mental quiet as; veil as physical comfort....Nuisance is a question of***

degree, depending upon varying circumstances. There must be more than a tendency to injury; there must be something appreciable. The cases generally say tangible, actual, measurable, or subsisting. But in all cases, in determining whether the injury charged comes within these general terms, resort should be had to sound common sense.... The theories and dogmas of scientific men, though provable by scientific reference, cannot be held to be controlling unless shared by the people generally.... The only case we find holding that fear alone will not support a decree in this class of cases is Anonymous, 3 Atk. 750.... Our statute modifies, if indeed it was not designed to change this rule. Under the facts, we cannot say that the dread which is the disquieting element upon which plaintiffs' complaint is made to rest, is unreal, imaginary or fanciful."

The only case we find holding that *fear* alone will not support a decree in this class of cases is Anonymous, 3 Ark. 750, where Lord Hardwicke said:

"And the fears of mankind, though they may be reasonable ones, will not create a nuisance." Our statute modifies, if indeed it was not designed to change this rule. Under the facts, we cannot say that the dread which is the disquieting element upon which plaintiffs' complaint is made to rest, is unreal, imaginary, or fanciful. In so doing, we are not violating the settled principles of the law, but affirming them.

We conceive the case of ***Stotler v. Rochelle*** (Kan.), 109 Pac. 788, to be directly in point.

The question was, whether the fear of cancer was sustained in the light of medical authority. The court said:

"In the present state of accurate knowledge on the subject, it is quite within bounds to say that, whether or not there is actual danger of the transmission of the disease trader the conditions stated, the fear of it is not entirely unreasonable."

It was held in ***Goodrich v. Starrett***, 108 Wash. 437, 184 Pac. 220, that under SS SS 943 and 8309 of Rem. Code (P. C. SS SS 8231 and 9131-68), which define nuisance, and which add to the Common law definition the new element of "comfortable enjoyment of one's property", that an undertaking establishment in the residential section of a city, so constructed as to affect property values in the neighborhood, is a nuisance and will be enjoined. In that case the case of ***Rea v. Tacoma Mausoleum Ass'n***, 103 Wash. 429, 174 Pac. 961, 1 A. L. R. 541, referred to in the department opinion, was discussed and held not to be in conflict with the case of ***Everett v. Paschall***, supra.

In ***Wilson v. Key Tronic Corporation*** 40 Wn. App. 802 701 P.2d 518 (1985) **RCW 70.105A.010**, enacted in 1983 to supplement and provide funds necessary for full implementation of hazardous waste regulation, provides in part: (1) It is the policy of the state of Washington to protect the public health and welfare of all its citizens against the dangers arising from the generation, transport, treatment, storage, and disposal of hazardous wastes and from releases of hazardous substances. In order to reach that policy objective, it is not only necessary to provide state government with broad powers of regulation, control, and removal of these hazardous wastes and substances, including the power to fashion and effectuate remedial directives, but it is imperative that adequate funds are also provided to carry out these powers in a vigorous manner.

The ***County and Key Tronic*** argue subsections (6)(a) and (b) should be read in the conjunctive, requiring a finding of persistency and toxicity, even where quantities of dangerous wastes as defined by **RCW 70.105.010(5)** are sufficient in themselves to present an extreme hazard. This we decline to do. The absence of a conjunctive "and" or disjunctive "or" connecting the two provisions is not cause to reach a strained result contrary to the broadly stated legislative purpose of protection from hazardous wastes. Consequently, we find the statute satisfied upon a showing of either subsection (6)(a), persistency and toxicity, or (6)(b), quantity of dangerous wastes as defined in subsection (5). The testimony describing the dangerous qualities of 1-1-1 and the quantities in which it was dumped at Colbert was sufficient to support the trial court's conclusion based solely on **RCW 70.105.**010(6)(b) that 1-1-1 was an EHW. The instruction was proper.

Second, we are asked to decide whether it was error to allow an action against the County based on **RCW 70.105**, hazardous waste disposal. Instruction 15 outlined the provisions of **RCW 70.105.050** that prohibits a person, counties included, from disposing of EHW at any disposal site in the state (other than that established by chapter 70.105 at Hanford). The County argues it operated the landfill, but did not "dispose" of the EHW as contemplated by the statute. We are not persuaded. Testimony indicated that a former county employee and landfill supervisor, going beyond merely accepting the wastes, actually directed and developed the method for dumping the 1-1-1 at Colbert. This active participation will support the conclusion the County disposed of EHW in violation of the provisions of **RCW 70.105.050**.

Third, the ***County and Key Tronic*** contend since no proof of objective symptoms was offered at trial, the jury was improperly instructed on the issue of emotional distress. The court's instructions concerning damages for emotional distress were set out in instruction 21:

> In order to find damages for mental and emotional distress or anguish on behalf of any plaintiff against either defendant, you must find:
>
> (1) That the mental and emotional distress or anguish claimed by any plaintiff must be manifested by objective evidence.
>
> (2) That the plaintiff's reaction was that of a normally constituted person.

and a portion of instruction 23:

> If you find for one or more plaintiffs ... you may consider the following items...
>
> ...
>
> (3) Mental anguish and emotional distress, both past and future, proximately caused by the actions of defendant...

In an action for nuisance, mental anguish resulting from that nuisance is compensable. ***Miotke v. Spokane***, 101 Wn.2d 307, 332, 678 P.2d 803 (1984) (quoting ***Riblet v. Spokane-Portland Cement Co.***, 45 Wn.2d 346, 353, 274 P.2d 574 (1954)). When the mental distress results from less than intentional or malicious conduct, under the former "zone of danger" test, a showing of actual or possible direct physical invasion was generally necessary. ***Murphy v. Tacoma***, 60 Wn.2d 603, 620-21, 374 P.2d 976 (1962). Under that test, pollution of a household water supply was regarded as a physical invasion of the occupant's person. ***Murphy***, at 621, citing ***Drake v. Smith***, 54 Wn.2d 57, 337 P.2d 1059 (1959). Applying that standard, the landowners here would recover.

The modern test set forth in ***Hunsley v. Giard***, 87 Wn.2d 424, 553 P.2d 1096 (1976) provides a broader basis for recovery. Under the ***Hunsley*** test, where actual invasion of a plaintiff's person or security or a direct possibility thereof could not be made out, recovery was nevertheless warranted if the plaintiff's mental distress was the reaction of a reasonable person and manifested by objective symptoms.

McRae v. Bolstad, 32 Wn. App. 173, 178, 646 P.2d 771 (1982), aff'd on other grounds, 101 Wn.2d 161, 676 P.2d 496 (1984) found sewage and septic tank problems under the family

home sufficient to support a finding of "mental distress", and quoted the trial court's observations regarding objective symptoms:

> This is a case in which the plaintiffs are entitled to recover for [mental suffering] because of the sewage involved, the septic tank problem in the house. That's a direct threat to the health of the family, and water under the house is enough to call mental distress...

McRae, at 178-79.

The "direct threat" in ***McRae*** is similar to the one in this case; however, we decline to adopt the court's reasoning that the threat to the health of the family constituted "objective symptoms". Rather, we find such a threat of contact, or as in our case actual ingestion, satisfies the stricter invasion standard of ***Murphy***. Fears of present and future health problems stemming from actual ingestion of the chemical by family members are not remote and fanciful, but rather are reasonable and therefore compensable.

The ***County and Key Tronic*** further contend jury instructions on damages were erroneous and resulted in double recovery. They argue discomfort, annoyance, and mental anguish are indistinguishably caused by a single harm and should be consolidated as one remedy. We find, however, each distinct item of damage was supported by independent facts and uphold the award.

Instruction 23 states in pertinent part:

> If you find for one or more plaintiffs ... you may consider the following items...
> (1) Diminished value of the plaintiffs' properties;
> (2) Damages for actual discomfort and annoyance up to the time of trial; and
> (3) Mental anguish and emotional distress, both past and future, proximately caused by the actions of defendant Spokane County.

Case law in Washington delineates separate areas of recovery in damages to property and to the person. ***Miotke***, at 332; ***Barci v. Intalco Aluminum Corp.***, 11 Wn. App. 342, 353, 522 P.2d 1159 (1974). In an action for nuisance, injuries involving personal discomfort, annoyance, irritation and anguish, as well as property damage have been found compensable, ***Miotke***, at 332;

Drake, at 62; ***Riblet***, at 353-54; ***Freeman v. Intalco Aluminum Corp***., 15 Wn. App. 677, 681-83, 552 P.2d 214 (1976).

Damages to property are characterized as diminished rental or use value where the injury to land is temporary, but where injury is permanent and irreparable, the damages are the difference in market value of the property before and after the creation of the nuisance. ***Barci***, at 356. Here, diminished market value damages were appropriately awarded based on the permanent nature of the injury.

In addition, "annoyance and inconvenience" damages have been separately awarded in instances similar to that of ***Riblet***, which involved the effects of cement dust on a home and swimming pool. Here, such factors as the inconvenience of months of hauling water and disruption of ordinary activities of family life form distinct and appropriate bases for recovery.

Finally, reasonable mental anguish caused by the threat and actual ingestion of contaminated water is separately compensable, under the rationale of *Murphy* and *Drake.*

Fourth, it is claimed the court erred by omitting two elements from the nuisance instruction: (1) a requirement that plaintiffs be of ordinary sensibilities, and (2) a need to balance the respective rights of the parties.

Instruction 17 provided:

> "Nuisance is any obstruction to the free use of property so as to essentially interfere with the comfortable enjoyment of life and property.
>
> One who creates and/or contributes to the creation of a nuisance is liable to any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance".

The instruction generally incorporates the provisions of **RCW 7.48.010**, which defines an actionable nuisance as:

> "The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment

> of the life and property, is a nuisance and the subject of an action for damages and other and further relief".

It is not error to instruct in the language of the controlling statute if the court's instructions taken as a whole properly inform the jury of the applicable law and allow each side to argue its theory. ***Petersen v. State***, 100 Wn.2d 421, 432, 671 P.2d 230 (1983). Here, the general instruction was a correct statement of the law permitting adequate opportunity within its scope to argue the reasonableness of the landowners' use (ordinary sensibilities) and balancing of interests.

Key Tronic and the County contend the admission of the SNARL document was erroneous because it was hearsay, prejudicial, and, if admitted to refresh recollection, should not have gone to the jury. The document was identified at trial by Claude Sappington, DOE eastern regional environmental quality supervisor, as a guideline widely used by the ***EPA*** and DOE in the absence of a promulgated standard to determine drinking water safety. Government standards not having the force of law are admissible where relevant, trustworthy and necessary to prove the matter contained therein, ***Kelley v. Howard S. Wright Constr***. *Co.*, 90 Wn.2d 323, 338, 582 P.2d 500 (1978). The court may properly refuse to admit "advisory recommendations", however, if the language used raises serious questions of trustworthiness and relevancy. ***Haysom v. Coleman Lantern Co***., 89 Wn.2d 474, 487, 573 P.2d 785, 93 A.L.R.3d 86 (1978). Here, the SNARL document, as an advisory recommendation, does not raise the "serious questions" of ***Haysom*** given the testimony of ***EPA*** and DOE officials' widespread and established reliance on it. Moreover, the objection goes to its weight, rather than admissibility. ***Nordstrom v. White Metal Rolling & Stamping Corp***., 75 Wn.2d 629, 635, 453 P.2d 619 (1969).

The following exchange occurred regarding the admissibility of the SNARL document:

> **MR. EVANS**: Again, Your Honor, I would offer Plaintiffs' Exhibit No. 1. This happened over two years ago. Mr. Malm [a DOE official] has refreshed his recollection as to what he told Mrs. Wilson. To the best of his recollection he recalls telling her what the potential health effects were from the SNARL document. The potential health effects are contained in the SNARL document and I think that is the best evidence of what he probably told her.

THE COURT: On that basis the Court will admit Exhibit 1.

ER 803(a)(5) addresses recorded recollection as an exception to the hearsay rule:

> ***Recorded Recollection***. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

If SNARL was admitted as an ER 803(a)(5) exception, it should have been read into evidence in pertinent part rather than admitted in its entirety as an exhibit, unless offered by Key Tronic or the County. If evidence is not offered to prove the truth of the matter asserted, it is not hearsay. ER 801(c). The SNARL document was admissible as evidence of that which was relied on by the officials and communicated to the landowners and was relevant to a determination of the reasonableness and extent of mental distress damages resulting from the warnings. The effect the warnings had on the landowners rather than the truth of the contents of the document was at issue. *See* ***Moen v. Chestnut***, 9 Wn.2d 93, 108-09, 113 P.2d 1030 (1941). We will not disturb a trial court's ruling on the admissibility of evidence if it is sustainable on alternative grounds. ***Thomas v. French***, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

Sixth, we are asked to determine whether there was sufficient evidence to allow the jury to conclude the 1-1-1 came from the Colbert landfill and thus was the source and therefore the proximate cause of the landowners' damages. The defendants argue the verdict became speculative because the source and proximate cause were not established by expert testimony, *i.e.*, the sole expert, Dr. Maddox, an engineer and geologist hired by the County, could not give an expert opinion in this area. We disagree. The jury heard testimony that Key Tronic had been dumping 1-1-1 at Colbert from 1975 and that during the 9 months prior to cessation of the disposal in 1980, approximately 1,720 gallons of 1-1-1 and methylene chloride were dumped at that site. A county engineer testified that after a diligent search, the County found the Colbert landfill to be the sole source of 1-1-1 in the area.

The plaintiffs presented testimony from Dr. Maddox, who said the source of the contaminant was "either the existing Colbert landfill or a combination of the existing Colbert landfill and the Old Township Dump that is located immediately to the south across the road," but he could not tell as between the two "if it comes solely from one or from a combination of both". He further testified the old dump site had been closed in 1968, which was approximately 7 years prior to the initiation of dumping 1-1-1 in the area by Key Tronic.

When read in its entirety, Dr. Maddox' testimony established the landfill as the source of at least some, if not all of the 1-1-1 contamination and when taken in view of the other facts presented, the jury determination of proximate cause was within the evidence. The testimony of Dr. George Maddox was admissible to assist the trier of fact since the questions at issue involved matters not within the common knowledge of lay persons. ***Tokarz v. Ford Motor Co.***, 8 Wn. App. 645, 653, 508 P.2d 1370 (1973). Once it is determined that the testimony is admissible, the thoroughness of the expert's examination is a matter of weight for the jury. ***Ulmer v. Ford Motor Co., 75 Wn.2d 522, 534, 452 P.2d 729 (1969)***; ***Tokarz***, at 653; ***Merriman v. Toothaker***, 9 Wn. App. 810, 815, 515 P.2d 509 (1973).

Seventh, the County contends there was insufficient evidence to support the jury finding of inverse condemnation. The claim of inverse condemnation is founded on Const. art. 1, § 16 (amend. 9), which provides: "No private property shall be taken or damaged for public or private use without just compensation having been first made ..." and is an action brought against a governmental entity having the power of eminent domain to recover for property appropriation or damage. ***Brazil v. Auburn***, 93 Wn.2d 484, 490, 610 P.2d 909 (1980). Const. art. 1, § 16 (amend. 9) was designed to compensate for damages resulting from planned action rather than mere negligence, ***Fralick v. Clark Cy.***, 22 Wn. App. 156, 162, 589 P.2d 273 (1978), and where nuisance and inverse condemnation claims are brought together, permanence of damage is required. ***Miotke***, at 334. Recovery depends on a showing of "measurable or provable decline in market value ..." ***Highline Sch. Dist. 401 v. Port of Seattle***, 87 Wn.2d 6, 13, 548 P.2d 1085 (1976); ***B & W Constr., Inc. v. Lacey,*** 19 Wn. App. 220, 223, 577 P.2d 583 (1978).

It is conceded by the County that the Colbert landfill was operated by the County for public use and we find its operation analogous to the operation of a gravel pit determined to be a public use in ***Boitano v. Snohomish Cy.***, 11 Wn.2d 664, 120 P.2d 490 (1941). The active supervision of the landfill and the acceptance of chemical wastes, knowing of its duty to avoid allowing disposal of extremely hazardous substances, amounts to planned action. The use was "planned" in that the County in 1975 asked Key Tronic to cease dumping its chemical wastes at Mica and move to Colbert. Moreover, the record discloses a county landfill supervisor actually authorized and developed the dumping method used at the site.

The damages were properly found to be permanent based on expert testimony that it would take a minimum of **25** years for the contamination to leach from the landfill and at least **100** years for it to disappear completely. We find sufficient evidence to support the jury's finding regarding inverse condemnation.

Under ***Hunsley v. Giard***, 87 Wn.2d 424, 553 P.2d 1096 (1976). In ***Hunsley*** we said that a plaintiff who undergoes mental suffering has a cause of action; that is, the defendant has a duty to avoid the negligent infliction of such distress. Physical impact or threat of an immediate invasion of the plaintiff's personal security is no longer required to be alleged or proven. ***Hunsley v. Giard***, *supra* at 435. Rather, the confines of a defendant's liability are now measured by the strictures imposed by negligence theory, *i.e.*, foreseeable risk, threatened danger, and unreasonable conduct measured in light of the danger. ***Hunsley v. Giard***, *supra* at 435. Mental suffering, to be compensable, however, must at least be manifested by objective symptoms. ***Hunsley v. Giard***, *supra* at 436.

The measure of damages recoverable by plaintiffs turns upon the nature of the nuisance whether it is temporary or permanent.

Where the injury to land is temporary, the measure of damages is the diminished rental value if the property is to be rented, or the diminished value of its use if the property is to be used by the owner. ***Papac v. Montesano***, 49 Wn.2d 484, 303 P.2d 654 (1956); ***Riblet v. Spokane-Portland Cement Co.***, 45 Wn.2d 346, 274 P.2d 574 (1954); ***Riblet v. Spokane-Portland Cement Co.***, 41 Wn.2d 249, 248 P.2d 380 (1952). Where injury to land caused by pollution is permanent and irreparable, the measure of damages is the difference in the market value of the property

before and after creation of the nuisance. ***Drake v. Smith***, [54 Wn.2d 57, 337 P.2d 1059 (1959)]; ***Anderson v. Port of Seattle,*** [49 Wn.2d 528, 304 P.2d 705 (1956)]; ***Haveman v. Beulow***, 36 Wn.2d 185, 217 P.2d 313, 19 A.L.R.2d 763 (1950).

The term "use and enjoyment" commonly expresses the utilization and management of real property by its owner. ***A & B Cabrini Realty Co. v. Newman***, 237 N.Y.S.2d 970 (N.Y. City Civ. Ct. 1963); ***Evans v. Reading Chemical Fertilizing Co.***, 160 Pa. 209, 28 A. 702 (1894). The words "use" and "enjoyment" in the court's instruction inject an unneeded redundancy into the deliberations. Further, when the term expresses concepts regarding the utilization of property in the same instructions that express concepts regarding the mental harm done the owner by injury to his land, the word "enjoyment" may be confusing and appear overlapping to a jury. As noted in ***Reynolds Metals Co. v. Lampert,*** **316 F.2d 272, 274 (9th Cir.1963)**:

> Appellees next contend that if appellants' requested instructions were given, an element of compensation would have been excluded. They seem to equate loss of "enjoyment," as used in the term "use and enjoyment," with the concept of "annoyance, inconvenience and discomfort," which we will assume would have been a proper additional element of damage below. See ***Quillen v. Schimpf***, 133 Or. 581, 291 P. 1009; ***Porges v. Jacobs***, 75 Or. 488, 147 P. 396; 4 Restatement of the Law of Torts, Section 929.

... Moreover, in his instructions, the District Judge seems to have used "use" and "enjoyment" interchangeably, which would tend to mislead the jury.

As observed by 4 Restatement of Torts § 929 (1939):

Where a person is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction in value, the damages include compensation for

> (a) at the plaintiff's election
>
> i. the difference between the value of the land before the harm and the value after the harm or the cost of restoration which has been or may be reasonably incurred, or
>
> ii. if a separable portion of the land has been damaged, the loss in its value, and
>
> (b) the loss of use of the land and
>
> (c) discomfort and annoyance, in an action brought by the occupant.

In Comment on Clause (c) it is noted:

Discomfort and other bodily and mental harms. Discomfort and annoyance to an occupant of the land and to the members of his household are distinct grounds of compensation for which in ordinary cases the person in possession is allowed to recover in addition to the harm to his proprietary interests.

See also ***Riblet v. Spokane-Portland Cement Co., supra***. The instruction appropriately covered the right to recover for injury to an owner's proprietary interest in land and to recover for personal mental distress at seeing the land damaged.

A further discussion of temporary as distinguished from permanent damage to land may assist in the drafting of instructions on retrial. Whether damage to land is temporary or permanent is a question of fact. ***Drake v. Smith***, *supra* at 60 said:

We do not agree with defendants' contention that there is no evidence to support the finding that the pollution is permanent. There is evidence, which the trial court chose to believe, that defendants had no intention of removing the ... debris from the stream, nor of removing the fills from the creek. This is sufficient to meet the test announced in ***Haveman v. Beulow***, 36 Wn. (2d) 185, 217 P. (2d) 313, 19 A.L.R. (2d) 763 (1950), wherein this court said:

"The court was of the opinion that the damage to the land should be regarded as permanent, and that, by reason of the destruction of the wells for domestic uses, their respective farms had been depreciated in value. An injury of the kind in question may be permanent in a legal sense, though not coextensive with perpetual, unending or unchangeable. ***Union Oil & Mining Co. v. Bowman***, 144 Okla. 54, 289 Pac. 296."

It is for the trier of the fact to decide whether the defendant will have the ability and intent to correct the emission of fluorides onto the land of the plaintiffs in the future.

Where the injury to land is temporary, the measure of damages is the diminished rental value if the property is to be rented, or the diminished value of its use if the property is to be used by the owner. ***Papac v. Montesano***, 49 Wn.2d 484, 303 P.2d 654 (1956); ***Riblet v. Spokane-Portland Cement Co.***, 45 Wn.2d 346, 274 P.2d 574 (1954); ***Riblet v. Spokane-Portland Cement Co.***, 41 Wn.2d 249, 248 P.2d 380 (1952). Where injury to land caused by pollution is permanent and irreparable, the measure of damages is the difference in the market value of the property before and after creation of the nuisance. ***Drake v. Smith***, *supra*; ***Anderson v. Port of Seattle***,

supra; ***Haveman v. Beulow***, 36 Wn.2d 185, 217 P.2d 313, 19 A.L.R.2d 763 (1950). A jury should be directed in its deliberations as to the measure of damages where the injury to land is transient in nature, where the injury is permanent and should be assisted to properly correlate and link together those damages suffered in the past with those which will be suffered in the future. ***Reynolds Metals Co. v. Wand***, 308 F.2d 504 (9th Cir.1962); 4 Restatement of Torts §§ 929-30 (1939).

There is a significant amount of uncertainty regarding the future for residents and property on Burlington Hill. Without a "clean bill of health" based on additional environmental testing, the level of uncertainty would be expected to continue. Based in part on interviews with Burlington area realtors, the general public perceives asbestos to be a health hazard and it is currently not clear as to what level of health hazard exists on Burlington Hill.

In ***Bainbridge Power Co. v. Ivey***, 41 Ga.App. 193, 152 S.E. 306, cited by Prosser (Handbook of the Law of Torts, 2nd ed., p. 410), the court said:

> "A permanent nuisance is not necessarily one which can never, under any circumstances, be abated; but it is one whose character is such that, from its nature and under the circumstances of its existence, it presumably will continue indefinitely."

In ***Haveman v. Beulow***, 36 Wn. (2d) 185, 217 P. (2d) 313, 19 A.L.R. (2d) 763 (1950), wherein this court said:

> "The court was of the opinion that the damage to the land should be regarded as permanent, and that, by reason of the destruction of the wells for domestic uses, their respective farms had been depreciated in value. An injury of the kind in question may be permanent in a legal sense, though not coextensive with perpetual, unending or unchangeable. ***Union Oil & Mining Co. v. Bowman***, 144 Okla. 54, 289 Pac. 296."

> "The problem whether an occupant (owner or tenant) of real estate may recover damages for what may be regarded as personal injuries (consisting of inconvenience, discomfort, sickness, etc., actually experienced by him) in addition to, or separate from, damages to his property interests (such as diminution in rental or use value, or in market value, of the premises he occupies) presents interesting and perplexing questions. The plausibility of the argument that to allow both the property and the personal damages is to give double damages appears chiefly to arise from the circumstance that the same proof of discomfort, annoyance, etc., which has been actually experienced, and which tends to show that a nuisance exists, is relied upon to establish the

> injury to the plaintiff's property interests, as well as his claim for damages for personal discomfort, annoyance, etc. It seems, however, that there is a fallacy in disallowing the personal damages, the error perhaps arising in part from failure to bear in mind that the gist of a cause of action to recover damages for nuisance rests, not on the acts or omissions which produce the nuisance, but on the resulting damages to the plaintiff."

The annotator states the majority rule (p. 1322):

> "The question whether an occupant of real estate (whether owner or not) may recover damages for discomfort, annoyance, etc., personally resulting to him from a nuisance, in addition to, or separate from, any sort of property damages, is most distinctly presented in cases where the claim for the personal damages is accompanied by a claim for depreciation in rental or use value of premises. In most jurisdictions the rule is that the personal damages are recoverable in addition to, or separate from, damages for diminution in rental or use value. This rule seems clearly to involve the idea that the law will not presume that one responsible for a temporary nuisance will continue it, and will not require the occupant of premises to abandon them to avoid consequences to his person."

This court has recognized that recovery may be had for "sickness, suffering, mental anguish and bodily infirmities" resulting from nuisance, in addition to property damage. ***Champa v. Washington Compressed Gas Co***., 146 Wash. 190, 262 Pac. 228 (1927). While we have never passed upon the precise question involved in the instant case, we believe that the majority rule as stated in the foregoing quotation from the A.L.R. annotation is sound and logical, and that the trial court erred in refusing to apply it in the instant case.

As pointed out in ***Phillips Petroleum Co. v. Ruble***, 191 Okla. 37, 126 P. (2d) 526, 142 A.L.R. 1303 (1942), once the right to prove personal damages, as distinguished from property damages, is recognized and the injuries complained of (personal discomfort and annoyance) are classified as falling within the category of personal damages, the fact that those elements of damage do not involve actual bodily injury or illness indicates a difference only in the degree or amount of damage sustained. See, also, McCormick on Damages 503, § 127 and note 8.

In the instant case, the cement dust was the cause of both the depreciation in the use or rental value of the property and the personal discomfort and annoyance suffered by the occupants. As stated in ***Millet v. Minnesota Crushed Stone Co***., 145 Minn. 475, 477, 478, 177 N.W. 641, 179 N.W. 682 (1920):

> "A property owner, whose property is injured by a nuisance may recover for the property damage sustained. This is generally the diminished rental value, if the property be rented, or the diminished value of the use if the property be used by the owner.

It is well settled that in an action for damages for maintaining a nuisance, recovery may be had for inconvenience, physical discomfort, and illness to the occupant of the property resulting from the nuisance. ***Pierce v. Wagner***, 29 Minn. 355, 13 N.W. 170; 3 Sedgwick, Dam. § 948.

This element of damages is something additional to the element of diminished rental value. ***Berger v. Minneapolis Gaslight Co***., 60 Minn. 296, 62 N.W. 336. Decisions to the contrary, such as ***Swift v. Broyles***, 115 Ga. 885, 42 S.E. 277, 58 L.R.A. 390, are out of harmony with our decisions.

"We think, too, it is something additional to diminished value of the use, as that term is ordinarily understood. The value of the use is the value not to particular persons, who may be of peculiar susceptibility to injury, or who may be subject to peculiar conditions or situations, but is general value to ordinary persons for the legitimate uses to which it may be adapted, including, in this case, use as a homestead. That value is determined by taking into account the various facts and circumstances which make the use more or less desirable and in determining the extent to which a nuisance may have diminished such value, facts that naturally or reasonably tend to cause discomfort, annoyance or illness may be taken into account. ***Gempp v. Bassham***, 60 Ill. App. 84; ***Cohen v. Bellenot*** (Va.) 32 S.E. 455; *Emery v. Lowell*, 109 Mass. 197. But the actual discomfort, annoyance or illness, which has resulted in damage or injury to the particular occupant involved, is another and distinct element of damage. This distinction is not clearly brought out in the decided cases, but we think it is recognized and it seems to us logical and just."

We are also convinced that the trial court erred in finding that there was insufficient evidence on which an award for damages for personal discomfort and annoyance could be based. Although the fall of cement dust usually was imperceptible, not being detected by sight, smell, or sound, as is usually the case when nuisance involves dust, gas, smoke, noise, etc., its effects soon became apparent to the physical senses. One cause of discomfort was the need to keep the

windows of the sleeping rooms closed because the sleepers' "nostrils would be kind of filled up in the morning," and, as Mr. Riblet testified, "We just had a feeling that our nostrils were breathing dust." We think, too, that it can be inferred, even if not testified to in explicit terms that cement dust on tables, chairs, automobiles, etc., was an annoyance. Sludge on the bottom of the swimming pool, which caused Mr. Riblet to slip and slide and made it impossible to walk in the pool on the rare occasions when he used it in 1948 and 1949, created both a discomfort and an annoyance. The testimony reveals that drawings in Mr. Riblet's drafting room were constantly covered with cement dust, and when he was inking a drawing dust would collect on the pen and blur the drawing, which clearly constituted an annoyance.

Admittedly, no one testified to damages in consequence of personal discomfort and annoyance in terms of dollars and cents, but the fact that no one has placed a monetary value on personal discomfort and annoyance does not make the damage speculative or conjectural. It is recognized that the determination of the extent of the discomfort and annoyance to plaintiffs, and the amounts which will reasonably compensate them for such injuries, rests largely in the discretion of the jury. ***Baltimore & Potomac R. Co. v. Fifth Baptist Church***, 108 U.S. 317, 27 L.Ed. 739, 2 S.Ct. 719 (1883); ***Frick v. Kansas City***, 117 Mo. App. 488, 93 S.W. 351 (1906); ***Oklahoma City v. Tytenicz***, 171 Okla. 519, 43 P. (2d) 747 (1935); 2 Wood on Nuisances (3d ed.) 1314, Damages, § 866. Since the record contains evidence of personal discomfort and annoyance suffered by the appellants, it was the duty of the trial court, when sitting without a jury, to determine the damages sustained in consequence thereof. As said by the supreme court of California in ***Judson v. Los Angeles Suburban Gas Co***., 157 Cal. 356*356 168, 172, 106 Pac. 581 (1910), where smoke, odors, and noise disturbed the plaintiff:

> "In the very nature of things the amount of detriment sustained is not susceptible of exact pecuniary computation. It is for the court to say what sum of money the plaintiff should receive in view of the discomfort or annoyance to which he has been subjected."

When this case was first before the court, we distinguished the case of ***Powell v. Superior Portland Cement, Inc***., 15 Wn. (2d) 14, 129 P. (2d) 536 (1942), and held that it was not controlling.

It should in all fairness be noted that, on this phase of the damages, we arrive at a conclusion seemingly at variance with the views expressed by the judges who joined in a concurring opinion in that case. This has not been done without a careful weighing of the reasons given.