SHOO, ODORS AND POLLUTANTS! DON'T BOTHER ME!: THE IMPACT OF *SCHNEIDER NATIONAL CARRIERS, INC. V. BATES* ON PRIVATE NUISANCES IN TEXAS

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I. INTRODUCTION

The law of private nuisance gives landowners a cause of action for another's interference with their property.[1] The Texas Supreme Court has defined private nuisance as "a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it."[2] Unlike trespass, a nuisance cause of action does not require actual entry onto the land or an interference with possession thereof.[3] Rather, the interests protected by nuisance law are use and enjoyment.[4]

A crucial issue in any nuisance case is whether the nuisance is permanent or temporary.[5] The distinction is critical because of its effect upon the application of the statute of limitations.[6] Noting that previous cases turning on this issue had been decided inconsistently and unpredictably, the Texas Supreme Court sought to clarify the applicable standards for determining whether a nuisance is permanent or temporary in *Schneider National Carriers, Inc. v. Bates*.[7] The court held that when future damages can be estimated with reasonable certainty the nuisance is permanent, and when they cannot, the nuisance is temporary.[8]

This Note analyzes the practical effects of the *Schneider* decision on Texas law. Part II examines the historical application of private nuisance law in Texas. Part III discusses the analysis and holding of the *Schneider* court. Part IV considers the major consequences of *Schneider* and how it will affect future cases. Finally, Part V suggests possible solutions in order to ensure that future cases reach fair results.

II. HISTORICAL BACKGROUND

A. Elements of Private Nuisance

In establishing a nuisance claim, the first requirement is that there is

[1] RESTATEMENT (SECOND) OF TORTS § 821D (1979).

[2] Holubec v. Brandenberger, 111 S.W.3d 32, 37 (Tex. 2003).

[3] RESTATEMENT (SECOND) OF TORTS § 821D cmt. d (1979).

[4] *Id.*

[5] *See* Baker v. City of Fort Worth, 146 Tex. 600, 210 S.W.2d 564, 566 (1948).

[6] *See id.*

[7] 147 S.W.3d 264, 274–75 (Tex. 2004).

[8] *Id.* at 281.

some conduct or condition which substantially interferes with the use or enjoyment of the plaintiff's land.[9] An interference is substantial if it "involves more than slight inconvenience or petty annoyance."[10] Additionally, the condition must be one that would cause "unreasonable discomfort or annoyance to persons of ordinary sensibilities."[11] Typical examples include conditions that entail detrimental effects on the physical condition of the land itself,[12] such as flooding,[13] and other non-physical injuries that disturb the comfort or convenience of the occupant, such as unpleasant odors, smoke, dust, gas, loud noises, excessive light, high temperatures, or even repeated phone calls.[14]

Nuisances may arise under three standards of culpability.[15] Intentional invasions of the occupant's use or enjoyment of land are the most common.[16] "Intent" includes a substantial certainty that the interference will occur.[17] Next, nuisances may arise by a negligent interference.[18] Finally, a nuisance may be found in the case of any "[o]ther conduct, which is abnormal, out of place in its surroundings, and substantially interferes with use and enjoyment" of property.[19]

B. Statute of Limitations

The limitations period on a private nuisance claim is two years.[20] Because the statute is silent as to when the cause of action accrues, accrual

[9] Lethu, Inc. v. City of Houston, 23 S.W.3d 482, 489 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

[10] City of Temple v. Mitchell, 180 S.W.2d 959, 962 (Tex. Civ. App.—Austin 1944, no writ).

[11] *Lethu*, 23 S.W.3d at 489.

[12] *Mitchell*, 180 S.W.2d at 962.

[13] *See, e.g.*, Baker v. City of Fort Worth, 146 Tex. 600, 210 S.W.2d 564, 567 (1948) (finding a nuisance where the city erected a bridge which caused water to be diverted onto plaintiff's land).

[14] W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 87 at 619–20 (5th ed. 1984).

[15] 19 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 311.02[2][a] (2005).

[16] *Id.*

[17] *See id.*

[18] *Id.*

[19] *Id.* In *Village of Euclid v. Ambler Realty Co.*, the U.S. Supreme Court noted "[a] nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." 272 U.S. 365, 388 (1926).

[20] TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2005).

is a question of law to be decided by the courts.[21] The general and long-articulated rule is that a cause of action accrues at the time a legal injury is sustained.[22] However, the cause of action accrues at the time a nuisance is constructed if this in itself is an invasion of the plaintiff's rights, the natural sequence of which results in legal injury.[23]

The distinction between a temporary or permanent nuisance becomes critical in determining when the action accrues. The court has explained that "where a nuisance is permanent and continuing, the damages resulting from it should all be estimated in one suit, but where it is not permanent, but depends on accidents and contingencies so that it is of a transient character, successive actions may be brought for injury as it occurs."[24] Thus, if a nuisance is found to be temporary, the only available damages are compensation for injuries that have already happened.[25] Specifically, the damages are measured by loss of reasonable rental value of the property.[26] Upon each successive new injury, a new limitations period begins for the plaintiff to bring successive separate suits for recovery.[27] Additionally, the plaintiff may be entitled to an injunction.[28]

In the case of a permanent nuisance, all damages, both past and probable future injuries, must be calculated in a single suit.[29] It follows that there is only a single limitations period running from the initial injury during which the plaintiff must bring suit.[30] Unlike the victim of a temporary nuisance, one who is injured by a permanent nuisance will be time-barred to bring a new suit upon a subsequent injury. Damages recoverable for permanent nuisance are measured by depreciation in the fair market value of the property.[31]

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[21] Childs v. Haussecker, 974 S.W.2d 31, 36 (Tex. 1998).

[22] Houston Water-Works Co. v. Kennedy, 70 Tex. 233, 8 S.W. 36, 37 (1888).

[23] *See* Baker v. City of Fort Worth, 146 Tex. 600, 210 S.W.2d 564, 565–66 (1948).

[24] *Id.* at 566.

[25] Parsons v. Uvalde Elec. Light Co., 106 Tex. 212, 163 S.W. 1, 2 (1914).

[26] Gillespie v. Grimes, 577 S.W.2d 538, 540 (Tex. Civ. App—Tyler 1979, no writ).

[27] *Parsons*, 163 S.W. at 2.

[28] Burbridge v. Rich Props., Inc., 365 S.W.2d 657, 660 (Tex. Civ. App—Houston 1963, no writ) (citing Shuttles v. Butcher, 1 S.W.2d 661, 665 (Tex. Civ. App.—El Paso 1927, writ ref'd)).

[29] Rosenthal v. Taylor, Bastrop & Houston Ry. Co., 79 Tex. 325, 15 S.W. 268, 269 (1891) (citing Fowle v. New Haven & Northampton Co., 112 Mass. 334, 339 (1873)).

[30] *Parsons*, 163 S.W. at 2.

[31] Baugh v. Tex. & New Orleans Ry. Co., 80 Tex. 56, 15 S.W. 587, 587 (1891).

In awarding damages for a permanent nuisance, courts are careful to avoid double recovery. The Texas Supreme Court indicated that recovery may implicate res judicata, explaining that "'[i]f the damages recovered were for deterioration in the value of the plaintiff's property, such recovery would be a bar to any further prosecution for the same cause . . . .'"[32] In addition, courts have historically declined to enjoin a permanent nuisance. The first reason is that if the nuisance could be abated by injunction, it was treated as temporary, so there was no permanent nuisance to enjoin in the first place.[33] The other reason is that granting both an injunction and future damages would necessarily constitute a duplicative reward.[34] Thus, rather than letting plaintiffs have their cake and eat it, too, courts will only award damages for the property depreciation, denying injunctive relief.[35]

The accrual of a nuisance cause of action also affects subsequent landowners. When a permanent nuisance causes injury to property, the right of action accrues to the owner at the time the injury occurs.[36] This right to sue does not run with the land, so a subsequent owner generally does not have standing to assert a nuisance claim.[37] However, the subsequent owner can bargain for the seller to assign all possible claims for injuries to the land which occurred during the seller's ownership.[38] Still, after acquiring the seller's claim, the subsequent owner must bring suit within the limitations period, which began to run at the time of the pre-existing injury, so the subsequent owner is also barred if the seller would have been.[39]

C. The Test for Distinguishing Permanent and Temporary Nuisances

Texas courts have historically determined the character of the injury as either temporary or permanent by its place on a continuum between the

[32] *Parsons*, 163 S.W. at 2 (quoting Ill. Cent. R.R. Co. v. Grabill, 50 Ill. 241 (1869)).

[33] Nugent v. Pilgrim's Pride Corp., 30 S.W.3d 562, 571 (Tex. App.—Texarkana 2000, pet. denied).

[34] Eberts v. Businesspeople Pers. Servs., Inc., 620 S.W.2d 861, 864 (Tex. Civ. App.—Dallas 1981, no writ).

[35] *See Baugh*, 15 S.W. at 587.

[36] Vann v. Bowie Sewerage Co., 127 Tex. 97, 90 S.W.2d 561, 562 (1936).

[37] *See* Senn v. Texaco, Inc., 55 S.W.3d 222, 225–26 (Tex. App.—Eastland 2001, pet. denied).

[38] *Id.* at 226.

[39] *See Vann*, 90 S.W.2d at 562; *Senn*, 55 S.W.3d at 225–26.

two.[40] Nuisances have traditionally been held permanent if the injury is "constant and continuous,"[41] "presumed to continue indefinitely,"[42] or "regularly recurs."[43] For example, in *Vann v. Bowie Sewerage Co.*, the conflict arose out of a septic tank which the sewerage company had constructed in 1916.[44] The plaintiff purchased an adjoining tract in 1925, which included a creek.[45] Six months later, he discovered noxious odors coming from the creek, apparently caused by an ongoing discharge of polluted water from the septic tank.[46] The court held that plaintiff could not recover on his nuisance claim, pointing to evidence that polluted water had "been continually discharged from the septic tank ever since the tank was put in operation in 1916; and . . . ever since then, found its way, from time to time after each recurring rainfall, down the creek upon the land now belonging to [the plaintiff]."[47] Holding that the nuisance was permanent, the court stated that only the previous landowner at the time of the original injury had standing to sue for injury.[48] The nuisance was characterized as permanent because the injury had occurred continuously and regularly over a period of many years.[49]

On the other hand, injuries were traditionally found temporary if they were not continuous but were instead "sporadic and contingent upon some irregular force such as rain"[50] or were "occasional, intermittent or recurrent."[51] In *Atlas Chemical Industries v. Anderson*, the defendant operated a plant for manufacturing activated carbon.[52] Waste from the plant was discharged into a creek which ran into the plaintiff's land, resulting in the deposit of carbon washwater on the entire tract of land.[53] The court held

[40] Bayouth v. Lion Oil Co., 671 S.W.2d 867, 868 (Tex. 1984).

[41] *See id.*

[42] *Id.*

[43] *See* Rosenthal v. Taylor, Bastrop & Houston Ry. Co., 79 Tex. 325, 15 S.W. 268, 269 (1891).

[44] 90 S.W.2d at 562.

[45] *Id.* at 561.

[46] *Id.* at 562.

[47] *Id.*

[48] *Id.* at 563.

[49] *Id.* at 562–63.

[50] Bayouth v. Lion Oil Co., 671 S.W.2d 867, 868 (Tex. 1984).

[51] *Id.*

[52] 524 S.W.2d 681, 683 (Tex. 1975).

[53] *Id.*

that the nuisance was temporary, and thus the statute of limitations did not bar the plaintiff's action.[54] The court reached this conclusion because normal flooding after rain would not (and did not) cause the same damage as did the abnormal winter floods resulting from more than three inches of rainfall.[55] The dense accumulation, deposited in the previous two years, was abnormal and completely dissimilar to the usual and expected flooding resulting from average rainfall.[56] Thus, the nuisance had to be temporary because the injury depended upon the irregular occurrence of an unusually heavy winter rain.[57]

The Texas Supreme Court has noted that it does not look at the structure creating the nuisance but the nuisance itself in determining the permanence of its character.[58] Thus, a particular structure may itself be permanent but only create a temporary nuisance when no constant and continuous injury to the plaintiff exists.[59] For instance, in *Parsons v. Uvalde Electric Light Co.*, the defendant finished building its plant and began operating it more than two years before the lawsuit.[60] The plaintiff complained that smoke, dust, and cinders from the plant reached his home, causing his family inconvenience, discomfort, and illness.[61] The court held that the plaintiff's claim was not barred by limitations because the nuisance was temporary.[62] The plaintiff only suffered legal injury on the occasions when wind carried particles to his premises.[63] The nuisance was temporary because "the electric light plant, its buildings and machinery, were permanent and continuing, but smoke, cinders, etc., the nuisance which caused the injury, were not continuous."[64]

As previously noted, Texas courts historically considered nuisances temporary if they were abatable.[65] Logically, "[a]n injury which can be

[54] *Id.* at 685.

[55] *Id.* at 686.

[56] *Id.*

[57] *See id.* at 685–86.

[58] *See* Austin & Nw. Ry. Co. v. Anderson, 79 Tex. 427, 15 S.W. 484, 485 (1891).

[59] *Id.*

[60] 106 Tex. 212, 163 S.W. 1, 1 (1914).

[61] *Id.* at 1.

[62] *See id.* at 2.

[63] *Id.*

[64] *Id.*

[65] *See* Baugh v. Texas & New Orleans Ry. Co., 80 Tex. 56, 15 S.W. 587, 587–88 (1891) (stating "when the nuisances complained of are of a temporary character, such as may be

terminated cannot be a permanent injury."[66] In *Nugent v. Pilgrim's Pride Corp.*, the defendants operated a chicken farm, from which they dumped chicken litter and toxic chemicals into a creek.[67] Torrential rains then carried the waste to the plaintiff's adjoining property, causing the destruction of grasses in her pastures and the death of her cattle which were poisoned by the polluted soil.[68] In finding the nuisance temporary, the court explained that "Defendants did not build a facility . . . whose removal would have been economically impractical . . . ."[69] Rather, the defendants' method of stockpiling and disposing of chicken manure was "easily abatable" and "could be discontinued without unreasonable cost."[70] Relying on the commonsensical reasoning that activities which could be brought to a halt are necessarily not permanent, the court affirmed abatability as an important factor which usually results in a finding of temporary nuisance.[71]

III. THE RULE OF *SCHNEIDER NATIONAL CARRIERS, INC. V. BATES*

A. Facts of the Case

Andrea Bates, along with seventy-eight others, filed a nuisance suit in Harris County, Texas, against ten manufacturing companies, including Schneider National Carriers, Inc.[72] The plaintiffs were all homeowners and renters residing near the Houston Ship Channel, where the defendant companies operated their respective firms.[73] Specifically, the defendants operated firms engaged in trucking, painting, sandblasting, and manufacturing bleach, wood preservatives, polyesters, and chemical

voluntarily removed or avoided by the wrongdoer, or such as the injured party may cause to be abated, only such damages as have accrued up to the institution of the suit . . . can be recovered").

[66] Kraft v. Langford, 565 S.W.2d 223, 227 (Tex. 1978).

[67] 30 S.W.3d 562, 565 (Tex. App.—Texarkana 2000, pet. denied).

[68] *Id.* at 566.

[69] *Id.* at 571.

[70] *Id.*

[71] *See id.*

[72] Bates v. Schneider Nat'l Carriers, Inc. (*Bates I*), 95 S.W.3d 309, 311 (Tex. App.—Houston [1st Dist.] 2002), *rev'd*, 147 S.W.3d 264 (Tex. 2004); Schneider Nat'l Carriers, Inc. v. Bates (*Bates II*), 147 S.W.3d 264, 268 (Tex. 2004).

[73] *Bates II*, 147 S.W.3d at 268.

products.[74] The plaintiffs alleged that resulting emissions of light, noise, odors, chemicals, dust, and other substances caused them physical discomfort and inconvenience and otherwise unreasonably interfered with the use and enjoyment of their property.[75]

All of the plaintiffs' affidavits stated the conditions complained of were ongoing and frequent, existing for as long as they had lived in the area.[76] The conditions occurred "each time the wind is out of the south, when conditions are humid, or when it rains."[77] Among their specific complaints, various plaintiffs alleged trouble breathing at night; headaches while spending time outside; black film covering outdoor furniture and cars; the sounds of loudspeakers, explosions, and equipment; sinus problems; unbearable smells outside; and blowing dust.[78]

B. Procedural History

Because the plaintiffs' affidavits established that they had all lived in the area for more than two years before filing the suit, the defendants moved for summary judgment, arguing that the nuisance was permanent and the statute of limitations had run.[79] The trial court agreed and granted the motions.[80] The First Court of Appeals considered certain contradictions in the affidavits regarding the frequency of the conditions[81] as well as an expert's affidavit suggesting that the nuisance might be abatable.[82] The court held that these contradictions created a fact issue sufficient to defeat the motion for summary judgment and remanded the case.[83] The Texas Supreme Court then granted the defendants' petition for review.

C. The Supreme Court's Holding

Justice Brister began the discussion of the case by developing the rule

[74] *Id.*
[75] *Bates I*, 95 S.W.3d at 311.
[76] *Id.* at 313.
[77] *Id.* (internal quotation marks omitted).
[78] *Id.*
[79] *Bates II*, 147 S.W.3d at 269.
[80] *Id.*
[81] *Id.*
[82] *Bates I*, 95 S.W.3d at 314.
[83] *Bates II*, 147 S.W.3d at 269.

that nuisances are distinguished as permanent or temporary based on whether they are constant and continuous or sporadic and contingent upon some irregular force, a rule which "has been in place for more than a hundred years."[84] The court went on to concede that "the line in Texas between temporary and permanent nuisances 'can be plainly and simply stated,' but 'its application to the facts involved in each case has been a continuing problem.'"[85] The problem stemmed from the lack of some standard of reference by which to draw a boundary line.[86] After citing numerous Texas cases consisting of similar facts but reaching opposite results, the court concluded that "half of them must be wrong; they are simply unreconcilable."[87] It was therefore time to clarify the applicable standards.[88]

The court reasoned that the application of the distinction between temporary and permanent nuisances should correspond to the consequences of that designation.[89] In particular, the court addressed three major consequences of the distinction: "(1) whether damages are available for future or only past injuries; (2) whether one or a series of suits is required; and (3) whether the claims accrue (and thus limitations begins) with the first or each subsequent injury."[90]

First, the distinction affects whether future or only past injuries are compensable. Thus, the law should reflect that long-term loss of market value only occurs when "the damage cannot be remedied or is likely to occur again."[91] Injuries do not have to occur daily or even weekly to be sufficiently "constant and continuous" to calculate future damages since this is based on the expected impact over a period of years.[92] Thus, the court determined that when "injury occurs often enough before trial that jurors can make a reasonable estimate of the long-term impact of the nuisance on the market value of a property, they ought to be allowed to do

[84] *Id.* at 272.

[85] *Id.* at 273 (quoting Nugent v. Pilgrim's Pride Corp., 30 S.W.3d 562, 569 (Tex. App.—Texarkana 2000, pet. denied)).

[86] *Id.*

[87] *Id.* at 274.

[88] *Id.* at 275.

[89] *Id.* at 276.

[90] *Id.* at 275.

[91] *Id.* at 276.

[92] *Id.*

so," and the meaning of "constant and continuous" should reflect that ability.[93]

Secondly, the distinction establishes whether to resolve claims in a single or in multiple suits. Concerned with the substantial costs that arise when parties engage in repeated litigation, the court stated that the distinction between permanent and temporary should allow juries to fully evaluate all damages in a single case wherever it is possible to do so.[94]

Finally, the distinction affects accrual and the running of limitations. The court noted that a nuisance cause of action accrues upon substantial injury, or upon notice of injury in the rare cases that the discovery rule applies.[95] A single occurrence of a nuisance condition would only be substantial interference on that occasion, whereas a court would more logically consider recurring conditions as a single injury to the property in general.[96]

Taking all of this into consideration, the court announced the new rule:

> [A] nuisance should be deemed temporary only if it is so irregular or intermittent over the period leading up to filing and trial that future injury cannot be estimated with reasonable certainty. Conversely, a nuisance should be deemed permanent if it is sufficiently constant or regular . . . that future impact can be reasonably evaluated.[97]

Thus, the permanent versus temporary distinction in Texas now turns on the reasonable ability to calculate long-term loss to the fair market value of damaged property. The court reasoned that juries can reasonably calculate this damage if the nuisance occurs a few times a year and that even if conditions only arose during certain months or types of weather, "annual experience should provide a sufficient basis for evaluating the nuisance."[98]

The court also discussed whether to base the distinction on the permanency of the plaintiff's injury itself or the permanency of the source of the injury, namely the defendant's operations.[99] Citing precedents in

[93] *Id.* at 277.
[94] *Id.* at 278–79.
[95] *Id.* at 279.
[96] *Id.* at 280.
[97] *Id.* at 281.
[98] *Id.* at 280.
[99] *Id.* at 282.

support of either approach,[100] the court concluded that a permanent nuisance can be established by either permanent injury or a permanent source.[101] The court supported this conclusion by pointing out that permanent sources usually will result in permanent interference with the plaintiff's property.[102] Sensing the need to provide for exceptional circumstances, the court treated the permanent source rule as a rebuttable presumption in favor of finding a permanent nuisance, rather than an absolute rule.[103] A party can rebut the presumption with evidence that the injuries occur under such rare circumstances that "it remains uncertain whether or to what degree they may ever occur again."[104]

Finally, the court addressed the application of abatability as a factor in the distinction. The court first noted that the necessity of considering potential abatement before awarding future damages was a generally applicable issue, not confined to nuisance law.[105] The court then went on to attack the ostensibly logical premise that an abatable nuisance is, by definition, not permanent.[106] The court pointed out that one flaw in the logic of prior decisions was that the converse was not always accurate; an unabated nuisance is not necessarily permanent.[107] Another problem was that courts have the power to issue varying types of injunctions.[108] An injunction might only be intended to reduce the nuisance or to prevent it only for a short duration of time rather than permanently ending it.[109] Only a permanent and total abatement could ever possibly transform a permanent nuisance into a temporary one, and even in that case it is not universally true that the effects of the nuisance will be rendered temporary.[110] For support, the court cited *Bayouth v. Lion Oil Co.*,[111] in which the defendant had long since ceased its oil operations, but damages to the plaintiff's

[100] *Id.* at nn.81–82.
[101] *Id.* at 283.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 285.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 285–86.
[109] *See id.*
[110] *Id.*
[111] 651 S.W.2d 423, 425 (Tex. App.—Eastland 1983), *rev'd*, 671 S.W.2d 867 (Tex. 1984).

property could only be remedied by a twenty-year plowing and leeching process.[112]

Another problem the court had with the abatability factor was that injunctions are within the discretion of the court, turning on equitable considerations not usually presented to the jury, and decided only at the conclusion of the trial.[113] Thus, anomalous results would ensue when juries determine that a nuisance is temporary because it is abatable, but the court declines to issue an injunction.[114]

Additional problems were that the abatability factor was not sufficiently related to the three consequences of the permanent-temporary distinction[115] and that, in reality, "virtually any nuisance can be said to be abatable."[116] For all of these reasons, the court concluded that abatability was not an appropriate factor in distinguishing permanent and temporary nuisances.[117]

Turning finally to the facts of the case, the court found admissions in the plaintiffs' own affidavits that the interferences were "continuous," "regular," "frequent," and "always" occurred.[118] The very least frequent damages were those which occurred only upon certain combinations of wind and humidity, but even these occurred several times a month or even several times a week.[119] These conditions occurred often enough that a jury would be able to assess the future impact on the fair market value of the plaintiffs' property.[120] Furthermore, the claim could not be saved by the possibility of abatement since this was no longer a valid factor for consideration.[121] As a matter of law, the nuisance was permanent, and the case was barred by limitations.[122]

[112] *Bates II*, 147 S.W.3d at 286, n.110.

[113] *Id.* at 286–87.

[114] *See id.*

[115] *See id.* at 288–89.

[116] *Id.* at 289.

[117] *Id.* at 284.

[118] *Id.* at 290.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 291.

[122] *See id.* at 290.

IV. CONSEQUENCES OF THE *SCHNEIDER* DECISION

Though the court professed to affirm and adhere to the traditional rule and to merely clarify the standards for application, there can be no doubt that *Schneider* stands for a dramatic overhaul of one hundred years of Texas nuisance law.[123] Thus far, no other state has adopted the *Schneider* approach, but it should be noted that even the historical test of "constant and continuous" versus "sporadic and contingent" was unique to Texas.[124] As the court noted, other jurisdictions apply varying standards and analyses.[125] Common considerations include the permanence of the structure, the source of the nuisance, the presence of any negligence or illegality, and the possibility of abatement.[126] A few states even balance more factors in making the determination.[127] For instance, Kansas courts actually do take the predictability of future damages into account but consider this as one of three factors rather than a dispositive test.[128]

The *Schneider* court reached the correct result for the case before it; it is difficult to imagine any standard under which the weekly interferences suffered by the plaintiffs were not "constant and continuous," and the nuisance would have been found permanent just as easily under the old law as under the *Schneider* rule. As evidence of what an open-and-shut case this was, the supreme court devoted two pages of its thirty-page opinion to the question of whether the particular nuisance was permanent or temporary.[129] Nonetheless, the court used this case to usher in a new era of nuisance law, one which will deprive many injured property owners of their day in court. The major consequences of *Schneider* are: (1) it announces a rule which is difficult to apply prospectively; (2) it makes recovery more difficult in any case involving a permanent source; and (3) it bars the consideration of abatability as a factor.

A. Difficulty of Prospective Application

After *Schneider*, a nuisance will be held permanent when the future

[123] *See id.* at 273–75.

[124] *Id.* at 270–72.

[125] *Id.* at 271.

[126] *Id.*

[127] *Id.*

[128] Dougan v. Rossville Drainage Dist., 15 P.3d 338, 344 (Kan. 2000).

[129] *See Bates II*, 147 S.W.3d at 290–92.

damages to the market value of the property can be predicted with reasonable certainty.[130] But this is a test that lends itself to retrospective application. It will be much easier for a court to hear the evidence and determine that the future market effects are reasonably predictable than it is for a landowner who suffers only the occasional injury.

For example, in *Nugent*, the plaintiff's property was first damaged after a torrential rain washed the defendant's chicken waste to the Nugent farm.[131] The next flood which similarly damaged her property occurred some two years later.[132] Under the *Schneider* standard, a jury could reasonably conclude that comparable flooding would occur—and the plaintiff would suffer a nuisance—roughly once every two years. With this information, the long-term impact on the value of the property could be predicted with reasonable certainty. The plaintiff, on the other hand, does not have the luxury of twenty-twenty hindsight vision. At the time of the first flood, she could easily believe she had suffered a one-time "freak occurrence." She could by no means reasonably predict the future impact on her property's value based on a single event. She has no way of predicting this until the occurrence of the second flood, but by that time the statute of limitations has run. The jury will then have the benefit of the evidence of the second flood to guide them in their decision that the nuisance is permanent although that evidence was not available to the plaintiff. The *Schneider* rule requires the plaintiff in these sorts of cases to see far into the future or else find himself or herself without a remedy.

The most obvious solution for plaintiffs would be to simply file suit immediately any time they suffer interference of any kind rather than gambling on whether a future court will retrospectively decide that a nuisance is permanent. After *Schneider*, it would arguably border on malpractice for an attorney to advise clients otherwise. But this solution is not necessarily in the plaintiff's or society's best interest. In *Baker v. City of Fort Worth*, the city had constructed a bridge and embankments which diverted water onto the plaintiff's property, which was consequently damaged by flooding.[133] The first incident of flooding occurred more than two years before the suit but was not severe and caused only negligible

[130] *Id.* at 281.

[131] Nugent v. Pilgrim's Pride Corp., 30 S.W.3d 562, 565 (Tex. App.—Texarkana 2000, pet. denied).

[132] *Id.* at 571.

[133] 146 Tex. 600, 210 S.W.2d 564, 565 (1948).

injuries.[134] Rather than holding that the minor floods operated to begin the running of limitations, the supreme court proclaimed that when the result is uncertain, a property owner has the right to wait to bring suit until the severity of the injury can be determined.[135] It explained that the plaintiff "should not be penalized for awaiting the disastrous results."[136] However, this is precisely the penalty a similarly situated plaintiff now risks under *Schneider*. Because of the difficulty of applying the *Schneider* test prospectively, the plaintiff must either immediately file suit after any miniscule injury or risk the possibility that the case will be time-barred once a more significant injury occurs. The natural effect of *Schneider* will be to encourage frivolous litigation, which is contrary to Texas's policy to "promote judicial economy by eliminating unnecessary litigation."[137]

Yet, even in bringing suit immediately upon injury, the plaintiff takes a risk. In a case like *Nugent*, where injury occurs only seldomly, yet predictably enough for the nuisance to be held permanent, it would be disadvantageous to the plaintiff to bring suit too soon. As discussed, the plaintiff is likely to be uncertain about the long-term impact when the first injury is all he has to go on. If he brings suit after this single injury and recovers what he believes will be the long-term damages to the market value of his property, he will be barred by res judicata when he later discovers evidence that the future results will be more disastrous than originally anticipated. The supreme court has clearly indicated this result by explaining that "'[i]f the damages recovered were for deterioration in the value of the plaintiff's property, such recovery would be a bar to any further prosecution for the same cause . . . .'"[138] This leaves the plaintiff who brings suit too early with inadequate compensation. *Schneider* places plaintiffs in a precarious position with a significant gamble. Their choices are to bring an early suit at the risk of insufficient recovery or to bring suit later at the risk of the running of limitations—they essentially must "pick their poison."

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[134] *Id.*

[135] *Id.* at 567 (quoting City of Amarillo v. Ware, 120 Tex. 456, 40 S.W.2d 57, 62 (1931)).

[136] *Id.*

[137] Interstate Contracting Corp. v. City of Dallas, 135 S.W.3d 605, 620 (Tex. 2004).

[138] Parsons v. Uvalde Elec. Light Co., 106 Tex. 212, 163 S.W. 1, 2 (1914) (quoting Ill. Cent. R.R. v. Grabill, 50 Ill. 241, 247 (1869)).

B. The Permanent Source Rule

Under *Schneider*, courts are more likely to find a permanent nuisance in any case where there is a permanent source. Historically, little weight was given to the permanency of the source of the injury, considering only the permanency of the interference itself.[139] This jurisprudence is now effectively overruled by the presumption created in *Schneider* that where there is a permanent source, there is a permanent nuisance.[140] This is a significant advantage to the defendant, who merely has to prove the existence of some permanent structure in order to get the benefit of a presumption that the nuisance is permanent. The presumption, of course, is rebuttable,[141] so in most cases, this issue will not necessarily be dispositive. However, in the majority of cases the defendant will have some permanent structure to point to, which means that most plaintiffs will have the additional burden to overcome the presumption and prove that the nuisance is temporary.

C. Abatability

The possibility of abating the nuisance by injunction is no longer properly considered as a factor in the permanent-temporary distinction.[142] Considering the court's intent that the test reflects its consequences,[143] including the damages available,[144] this is a peculiar conclusion. The reason abatability was considered in the first place was that it affected the type of compensation which would be appropriately awarded to the plaintiff.[145] The *Schneider* court itself recognized that awarding an injunction as well as future damages to compensate for lost property value would constitute a double recovery.[146] Thus, the abatability factor met the *Schneider* court's express goal that the permanent-temporary distinction be applied in reference to the consequences flowing from it.

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[139] *See supra* notes 58–59, Part II.C.

[140] *Bates II*, 147 S.W.3d 264, 283 (Tex. 2004).

[141] *Id.*

[142] *Id.* at 284.

[143] *Id.* at 280.

[144] *Id.* at 276.

[145] *See* Rosenthal v. Taylor, Bastrop & Houston Ry., 79 Tex. 325, 15 S.W. 268, 269 (1891).

[146] *Bates II*, 147 S.W.3d at 284.

The court nonetheless discarded abatability as a factor, finding it "problematic" and "misleading."[147] As part of its primary reasoning, the court discussed that, in some cases, an injunction will not render the nuisance temporary, and injury will continue in spite of it.[148] Essentially, the court held that a nuisance could be abated, and yet still remain permanent, thus negating the traditional logic on which the factor was based.[149] However, it seems contradictory that an injury could be at the same time abated and continuing. The *Schneider* court apparently misconstrued the abatability factor as meaning that a nuisance is temporary if its effects can be in any way reduced or improved.[150] To the contrary, the traditional application held that nuisances were temporary if the injury could be "terminated" by an injunction, not merely decreased.[151] In the types of situations hypothesized by the *Schneider* court, rather than saying that a nuisance is abatable but permanent, it would be more reasonable to hold that the nuisance is in fact not abatable by injunction because the injury will continue. Such a nuisance would not be found to be temporary because it would fail the test of abatability. Applied in this way, the abatability factor would not have the misleading effect with which the court was concerned.

Another effect of the rejection of abatability may be the encouragement of courts not to issue injunctions. Whether to issue an injunction is a discretionary decision for the trial judge.[152] In deciding whether an injunction is an appropriate form of relief, the court must balance equitable considerations such as the severity of the plaintiff's injury, the hardship an injunction would impose on the defendant, and the social utility of the defendant's conduct.[153] Thus, the judge has the power to decide simply not to order an injunction, despite a finding that there is a nuisance. Now that the jury can no longer find that a nuisance will be rendered temporary by abatement, future damages will be awarded for a permanent nuisance. Where there is an adequate legal remedy—monetary damages in this

[147] *See id.* at 285.

[148] *Id.* at 286.

[149] *See supra* notes 105–15 and accompanying text.

[150] *Bates II*, 147 S.W.3d at 289.

[151] Nugent v. Pilgrim's Pride Corp., 30 S.W.3d 562, 571 (Tex. App.—Texarkana 2000, pet. denied).

[152] State v. Tex. Pet Foods, Inc., 591 S.W.2d 800, 803 (Tex. 1979).

[153] *See* Storey v. Cent. Hide & Rendering Co., 148 Tex. 509, 226 S.W.2d 615, 618–19 (1950).

case—an injunction is not appropriate.[154] A judge would therefore readily conclude that no injunction should be issued because of the availability of future monetary compensation even in those cases where abatement would be a simple and unoppressive remedy. The net result is that the plaintiff will be compensated but will still be forced to live with an easily abatable nuisance. However, in most cases a reasonable person would probably prefer to live at home free of conditions that unreasonably interfere with the enjoyment of his property than to have monetary compensation for such interferences.

V. POSSIBLE RESOLUTIONS TO THE ISSUES CREATED BY *SCHNEIDER*

A. Judicial Determination of Accrual

It is likely that Texas Courts of Appeals will seek to ameliorate the effects of the *Schneider* rule in cases where it would reach an inequitable result. The best solution to the problems posed would be for the courts to employ a specialized application of the discovery rule in permanent nuisance cases. As previously noted, accrual is a question for the court.[155] This means the court is free to hold that a permanent nuisance cause of action accrues not at the time of the very first injury but at the time when the plaintiff, in reasonable diligence, should discover the long-term impact of the damages.

The court would separately apply the *Schneider* rule to each successive occasion in which an injury occurred, analyzing the facts from the plaintiff's perspective. The court would ask the question, "At the time of the first injury, would a person using reasonable diligence be able to calculate future damages with reasonable certainty?" If the plaintiff could not have reasonably estimated future damages at that point, the court would conclude that the nature of the injury was inherently undiscoverable. Accordingly, applying the discovery rule, the court would hold that the cause of action had not yet accrued at the time of the first injury. The same analysis would be applied to each successive injury until the time at which future damages became reasonably predictable to the plaintiff using reasonable diligence. Only upon that injury would the cause of action accrue and the statute of limitations begin to run.

[154] Town of Palm Valley v. Johnson, 87 S.W.3d 110, 111 (Tex. 2001) (per curiam).

[155] Childs v. Haussecker, 974 S.W.2d 31, 36 (Tex. 1998).

Such a rule would essentially place the injured party in the same shoes that the jury is in making the permanent-temporary distinction. Because it makes the prospective ability to estimate future damages a part of the test for accrual, it avoids the problem where some injuries only become reasonably predictable in hindsight. The plaintiff in a case similar to *Nugent* would no longer be held responsible for evidence which only the jury has available to it after the fact. The proposed rule would both prevent cases from being barred despite the plaintiff's inability to predict the likely future damages as well as limit frivolous litigation as this rule would not encourage landowners to bring uncertain claims into the courtroom.

B. Legislative Remedy

One way to ensure a more fair result for injured property owners would be for the legislature to amend the statute of limitations. Other states have varying limitations periods for private nuisance actions. For instance, California's statute of limitations is three years.[156] Ohio applies a four-year statute of limitations.[157] In Alaska, private nuisances are subject to a six-year limitations period.[158]

The Texas legislature could enact a specific limitations period which would be applicable to nuisance actions, extending it from the current two-year period.[159] The longer the statute of limitations, the more the problem illustrated by *Nugent*, where injuries occur predictably but very seldomly, will be alleviated. Naturally, there could still be some hypothetical case where even a six-year statute of limitations might prove inadequate for a plaintiff to suffer enough injuries to prospectively predict the long-term impact. For instance, if a tract of land was affected by flooding only once every two years and a subsequent owner purchased the land five years after the first injury, the purchaser might still be time-barred before realizing there was any ongoing injury to the land. However, even if it would not address every possible circumstance, a longer limitations period would at least reduce the number of cases where an injured party is barred by a standard which lends itself best to retrospective application.

[156] CAL. CIV. PROC. CODE § 338(b) (West 1982).

[157] OHIO REV. CODE ANN. 2305.09(D) (Anderson 2001).

[158] ALASKA STAT. § 09.10.050 (LexisNexis 2005).

[159] TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2005).

C. Articulation of Specific Standards

The court could simply go on applying the *Schneider* and accrual rules as they currently exist but articulate a continuum for when nuisances are permanent or temporary. As discussed, an injury occurring consistently and predictably but less than once every two years might be held to constitute a permanent nuisance under *Schneider*. To avoid unfair results in this context, the court could set a floor for how often a nuisance absolutely must occur within a specific time frame in order to be held permanent as a matter of law. The court mentioned that when conditions occur only during certain months or weather conditions, annual experience is enough to provide a basis for evaluating its future impact.[160] But this fails to address the *Nugent* situation. The court should state that such interferences must occur, for instance, twice a year or at least once a year in order to be held permanent. Such a rule would operate as a caveat to the *Schneider* rule in order to protect parties who are injured by nuisance conditions which only occur over very long intervals. A property owner suffering injury at least once a year is far less likely to have a valid excuse for not timely bringing suit.

VI. CONCLUSION

In seeking to clarify the standards for whether a private nuisance is temporary or permanent, *Schneider National Carriers, Inc., v. Bates* made a significant impact upon the law in Texas.[161] It set reasonable ability to evaluate future impact on the value of the property as the new standard by which the crucial distinction is made. Under this rule, it is likely that litigation over minor and insignificant injuries will be increased. However, it is even more likely to create a limitations bar for many future plaintiffs because it is more easily applied in hindsight than it is prospectively at the time of injury. These problems could be remedied by a new judicial definition of accrual of a permanent nuisance cause of action, a legislative extension of the statute of limitations, or by the addition of specific boundaries upon the *Schneider* rule so as to ensure that only injuries which truly occur frequently will trigger the rule.

[160] *Bates II*, 147 S.W.3d 264, 280 (Tex. 2004).

[161] *See generally id.*