Common Law Environmental Remedies

A. General Overview

Underlying the development of legal theory in the United States is a body of rules and principles relating to the government and security of persons and property that had its origin, development and formulation in England.

Brought to the American colonies by peoples of Anglo-Saxon stock, these basic rules were formally adopted in the states in which they were in force after the American Revolution. Known as the "common law," these principles are derived from the application of natural reason, an innate sense of justice and the dictates of conscience. The common law is not the result of legislative enactment. Rather, its authority is derived solely from usages and customs that have been recognized, affirmed and enforced by the courts through judicial decisions.

It is important to realize that "common law" is not a fixed or absolute set of written rules in the same sense as statutory or legislatively enacted law. The unwritten principles of common law are flexible and adaptable to the changes that occur in a growing society. New institutions and public policies; modifications of usage and practice; changes in mores, trade, and commerce; inventions; and increasing knowledge--all generate new factual situations which require application and reinterpretation of the fundamental principles of common law by the courts.

As the courts examine each new set of facts in the light of past precedent, an orderly development of common laws occurs through a slow and natural process. Thus, the basic principles underlying American jurisprudence remain fundamentally constant, evolving slowly and progressively.

The common law, so far as it has not been expressly abrogated, is recognized as an organic part of the jurisprudence of most of the states. However, since the state court systems have functioned independently of each other, subject only to federal review in cases of national importance, the common law varies slightly from state to state.

The common law actions are civil suits in which the plaintiff (the party bringing the lawsuit) seeks to remedy a violation of a right. Civil actions are distinguished from criminal proceedings. Criminal actions are those in which the state seeks to redress a breach of public or collective rights that are established in codified penal law.

The three types of common law actions most commonly encountered in the environmental field are: (1) nuisance, (2) trespass and (3) negligence.

Which action fits where? Plaintiffs will use negligence to seek damages for personal injury from environmental pollution. For invasions of property interest, plaintiffs rely on trespass and nuisance actions to address environmental harm.

In every common law action, the plaintiff must bring the case within the statute of limitations and establish the causation between the harm and the defendant’s conduct. Let’s take a closer look at each of these common law actions.
B. Nuisance

Nuisance is the most frequently pled common law action in environmental litigation. Nuisance law traditionally protected the right of a landowner to use and enjoy property.

Nuisance is defined as “that activity which arises from the unreasonable, unwarrantable or unlawful use by a person of his own property, working an obstruction or injury to the right of another or to the public, and producing such material annoyance, inconvenience, and discomfort that the law will presume resulting damage.”

The general rule is that a person may use his land or personal property in any manner he sees fit. However, this rule is subject to limitation. The owner must use his property in a reasonable manner. A nuisance arises whenever a person uses his property to cause material injury or annoyance to a reasonable neighbor. Odors, dust, smoke, other airborne pollutants, water pollutants and hazardous substances have all been held to be nuisances. Nuisance actions come in two forms: public and private

Under both private and public nuisance law, the plaintiff must prove that the defendant’s activity unreasonably interfered with the use or enjoyment of a protected interest and caused the plaintiff substantial harm.

The trier of fact determines whether an activity is unreasonable by balancing the social utility of the activities against the harm they create.

Plaintiffs have used private nuisance actions to gain compensation and force polluters to discontinue interference with their physical private property as well as with their comfort and enjoyment of their property. In Boomer et al. v. Atlantic Cement Company, 257 N.E.2d 870 (N.Y. 1970), the plaintiffs claimed that the dirt, smoke, and vibrations coming from the defendant's cement plant caused injury to their property. The property owners sought damages and an injunction to close the plant. The plant already employed the best pollution control technology. The Boomer court addressed the economic consequence of the injunction and the effect of the nuisance. The court weighed the economic effect of closing the plant against the harm to the individual plaintiff's land, and concluded that the cement company could pay permanent damages in lieu of an injunction or closing. This case illustrates the limitations of private nuisance law to remedy pollution. Courts typically balance the equities and hardships. Private nuisances do not always outweigh the economic contribution of the polluting entity.

Public nuisance law protects from interference a "right common to the general public." Plaintiffs may bring a public nuisance action if there are damages, interference, or inconvenience to the public. A state may assert a public nuisance action as an exercise of its police powers—the typical situation. A private citizen may bring a public nuisance action only if he or she can show that he or she has suffered from a harm that can be distinguished from that suffered by the members of the general public.

Village of Wilsonville v. SCA Services, Inc., 426 N.E.2d 824 (Ill. 1981), is a case in which the plaintiffs, a village and other governmental bodies, alleged that the defendant's hazardous chemical landfill was a public nuisance. The plaintiffs sought to enjoin the operations of the landfill and require removal of toxic waste and contaminated soil. The court found that there was
a substantial danger of groundwater contamination and explosions from chemical reactions. Although the damages were prospective, the nuisance already was present. Therefore, the court granted an injunction and ordered a site clean-up.

“Coming to a nuisance” is the phrase used to describe a defense that the complainant or plaintiff affected by the nuisance moved into the area where the complained about activity” had already been in existence.

An example of “coming to a nuisance” occurs when someone moves onto property near an airport or industrial complex and then complains of the nuisance that existed prior to his moving there. Generally, the fact that an individual purchases property with the knowledge of the existence of a nuisance or that he came to the nuisance will not defeat his right to the abatement of the nuisance or recovery of damages.

C. Trespass

Trespass is distinguished from nuisance in that trespass is interference with the possession of property whereas nuisance is interference with the use and enjoyment of property.

Trespass to land is an unlawful, forcible entry on another’s realty. An injury to the realty of another or an interference with possession, above or below ground, is a trespass, regardless of the condition of the land and regardless of negligence.

Trespass to land is the type of trespass action that is generally used in pollution control cases. In an action for trespass to land, entry upon another’s land need not be in person. It may be made by causing or permitting a thing to cross the boundary of the premises. The trespass may be committed by casting material upon another’s land, by discharging water, soot or carbon, by allowing gas or oil to flow underground into someone else’s land, but not by mere vibrations or light which are generally classed as nuisances.

In the case of Martin v. Reynolds Metal Co the deposit on Martin’s property of microscopic fluoride compounds, which were emitted in vapor form from the Reynolds’ plant, was held to be an invasion of this property—and so a trespass.

The line between trespass and nuisance is sometimes difficult to determine. The distinction which is now accepted is that trespass is an invasion of the plaintiffs interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it.

D. Negligence

“Negligence” is “the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do. Negligence is that part of the law of torts which deals with acts not intended to inflict injury.

The standard of care required by law is that degree which would be exercised by a person of ordinary prudence under the same circumstances. This is often defined as the “reasonable man”
rule, what a reasonable person would do under all the circumstances.

In order to render the defendant liable, his act must be the proximate cause of injury. Proximate cause is that which in the natural and continuous sequence, if unbroken by an efficient intervening act, produces injury and without which the result would not have happened.

*Nissan Motor Corp. v. Maryland Shipbuilding and Drydock Company* exemplifies a negligence action in an environmental case. The shipbuilding company’s employees failed to follow company regulations when painting ships, allowing spray paint to be carried by the wind onto Nissan’s cars. The shipbuilders had knowledge of the likely danger of spray painting, yet failed to exercise due care in conducting the painting operations in question. This failure to exercise due care amounted to negligence.

Persons harmed as a result of careless and improper disposal or handling of hazardous waste can recover for their losses under a negligence cause of action. Indeed, state and federal courts have long recognized this common law theory of recovery against defendants who engage in the negligent disposal of pollutants such as hazardous waste. Where negligence can be established, it is no defense that the negligent action was in full compliance with all government regulations and permit conditions. On the other hand, noncompliance with regulations or a permit may be *prima facie* evidence (proof without any more evidence) of liability in some states.