

UNIT 5 COMMON LAW SOLUTIONS TO ENVIRONMENTAL PROBLEMS

I. Right to lateral and subjacent support

Landowners have a right to the support of property both on its sides and underneath. When a neighbor violates this right and causes unimproved property to subside, that neighbor is liable without fault (strictly liable) for the damage provided that the land was in its unimproved state. Where the land was improved, e.g., had a building on it, the applicable standard is one of negligence.

II. Water rights

Surface waters

These include streams, rivers, ponds and lakes. Where a body of water has been created by human activities the preexisting ownership patterns are not necessarily altered unless the water that was created has been in existence for a very long time such that it has taken on the character of a natural water. Waters that can support navigation are navigable and the land under them are owned by the state of North Carolina under the public trust doctrine. The state cannot sell public trust doctrine land (without a specific statutory grant of authority from the General Assembly) although it can lease it on a longterm lease. Individuals who own land along a navigable water can fish in it and use it for transportation. Nonnavigable waters are governed by the doctrine of riparian rights. A riparian owner may make reasonable use of the water for domestic uses. North Carolina has modified this rule to permit any reasonable use. A riparian owner owns the land under the water (to the middle of the main channel where the sides of a river are owned by different people.) Even though a riparian owner owns the land under the water he or she may not unreasonably diminish the flow of water.

Underground water in defined channels

To the extent possible this water is treated in the same manner as surface water in defined channels.

Runoff or precipitation (surface water not in defined channels)

Once again North Carolina applies a rule of reasonableness. Diversions of runoff must be reasonable. However, North Carolina applies the old common law rule of absolute ownership to runoff that is retained on a landowner's property.

Percolating groundwater

North Carolina applies a rule of reasonableness except in capacity use areas where wells above a certain size must be permitted. Whether or not a use is reasonable is measured by what is reasonable for a particular industry, not some general rule of reasonableness. [Bayer v. Teer Co., 256 N.C. 509 (1962)] Thus groundwater users are, in practice, afforded little protection.

III. Air and Light

The common law provides some right to air and light. Modern courts have generally not been very receptive to these rights.

IV. Remedies in tort

Trespass

At common one of the important rights of an owner of real property is the right to exclude all others. This right is the right of possession. The tort action that may be brought when this right is violated is called trespass. Trespass is an intentional tort; therefore, nominal or punitive damages, in addition to actual damages, are available. The tort of trespass is committed any time that a person or their instrumentality intentionally enters or invades the real property of another without permission. The fact that one is mistaken as to the boundary is no defense. If one is involuntarily pushed onto the property of another that is not a trespass because there was no intent. One who enters the property of another out of necessity has also not committed the tort of trespass, e.g., an airplane that makes an emergency landing or a boat that docks to avoid a storm (however, actual damages must nonetheless be paid.) The tort of trespass should be distinguished from the crime of trespass. Entering the property of another is also a crime against the state (a misdemeanor) if the property has been posted (with no trespassing signs) in accord with North Carolina statute.

Nuisance

"There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'... Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem..." **Prosser and Keeton on the Law of Torts.**

"As a general rule, an owner is at liberty to use his land as he sees fit, without objection or interference from his neighbor, provided such use does not violate an ordinance or statute. There is, however a limitation to this rule; one made necessary by the intricate, complex, and changing life of today. The old familiar maxim that one must so use his property as to not injure that of another...is deeply imbedded in our law." [Bove v. Donner-Hanna Coke Corporation, 236 A.D. 37, 39, 258 N.Y.S. 229, 231 (1932)] "The general rule that no one has absolute freedom in the use of his property, but is restrained by the coexistence of equal rights in his neighbor to the use of his property, so that each, in exercising his right, must do not act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impregably in the necessities of the social state, that its vindication by argument would be superfluous." [Booth v. Rome, W. & O. T. R. Co., 140 N.Y. 267, 274, 35 N.E. 592, 594, 24 L.R.A. 105, 37 Am. St. Rep. 552.] "Nuisance" may be defined as interference with an owner's reasonable use and enjoyment of his property by means of smoke, odors, noise or vibration, obstruction of private easements and rights of support, interference with public rights, such as free passage along streams and highways, enjoyment of public parks and places of recreation, and, in addition, activities and structures prohibited as statutory nuisances. A nuisance may be classified as a "public nuisance" or a "private nuisance". A public nuisance consists of an unreasonable interference with a right common to the general public. A non-trespassory interference with another's interest in the private use and quiet enjoyment of land constitutes a private nuisance. To subject one to liability for private nuisance, his conduct must be a legal cause of the interference in another's interest in the private use and quiet enjoyment of his land. In addition, the interference must be either: (i) intentional and unreasonable; or, (ii) unintentional, but otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities. An intentional interference with another's interest in the use of land is unreasonable if: (i) the gravity of the harm outweighs the utility of the actor's conduct; or, (ii) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to

others would not make the continuation of the conduct not feasible. In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important: (i) the extent of the harm involved; (ii) the character of the harm involved; (iii) the social value that the law attaches to the type of use or enjoyment invaded; (iv) the suitability of the particular use or enjoyment invaded to the character of the locality; and, (v) the burden on the person harmed of avoiding the harm. The following factors weigh heavily in determining the utility of the conduct that causes the invasion of another's interest in the use and enjoyment of land: (i) the social value that the law attaches to the primary purpose of the conduct; (ii) the suitability of the conduct to the character of the locality; and, (iii) the impracticability of preventing or avoiding the invasion. "The law of nuisance plys between two antithetical extremes: The principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor. For generations, courts, in their tasks of judging, have ruled on these extremes according to the wisdom of the day, and many have recognized that the contemporary view of public policy shifts from generation to generation." [Antonik v. Chamberlain, 81 Ohio App. 465, 78 N.E.2d 752(1947)] The question of whether an interference is unreasonable is not a question of law but one of fact for the jury. Once the court has determined that a nuisance exists, the court must determine the appropriate remedy. A different, but similar, balancing process guides the court in fashioning a remedy. Many courts balance the "hardships" or "equities" in determining whether to enjoin the nuisance or just grant judgment for damages. Much confusion regarding nuisance law results from the tendency of courts to jumble both balancing together into one analysis. The fact that courts consider many of the same factors in each balancing test blurs the lines further. [extracted from: Nuisance Revisited After Buchanan and Bormann By Jesse J. Richardson, Jr. and Theodore A. Feitshans, presented at the 1999 conference of the American Agricultural Law Association.]

Distinction between trespass and nuisance

There exists no bright line between trespass and nuisance. for example, Some courts have held that smoke constitutes a nuisance while others have that it constitutes a trespass. Thus, depending upon the court, pollutants may be characterized as either trespasses or nuisances.

Shortcomings of the Common Law Approach

Causation is often difficult to prove. Damage may be the result of multiple causes or the cumulative effect of many sources of pollution. Without proof of causation there can be no recovery under the common law.

The common law approach generally provides a remedy after damage has occurred . It is not preventative in nature. Since some environmental degradation is irreversible (at least on a human time scale), the common law may be very ineffective in preventing such degradation.

The common law approach is the result of individual plaintiff's bringing lawsuits. For an investor who wants to engage in an activity there is very little way to know in advance how a court might treat an activity. Thus the common law provides little regulatory certainty in the context of the environment.

Long latency periods for some types of environmental damage mean that it is often impossible to

bring a lawsuit once the damage becomes apparent. Either the party that caused the damage no longer exists or the lawsuit is time barred.

Thus the common law often does a poor job of correcting market distortions associated with externalities. A firm that can externalize some of its production costs through polluting the environment is economically rational to do so.

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