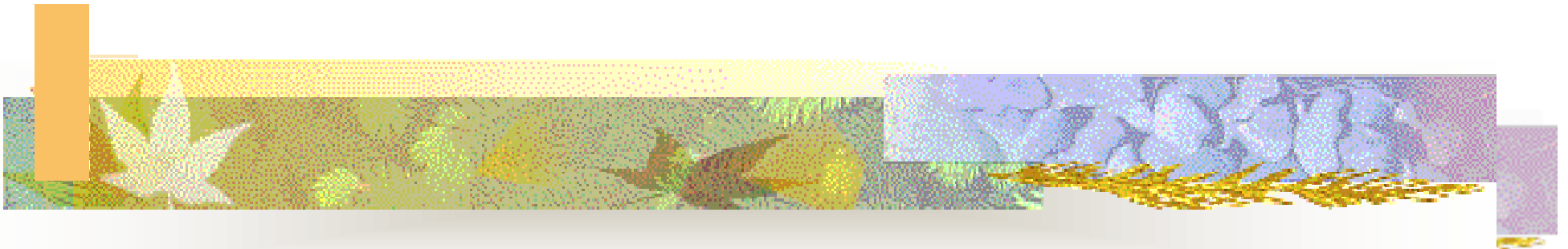


Environmental Causes of Action



Six Minute Environmental Law
Dianne Saxe, Ph.D.



Overview

- Nuisance
- Negligence
- Trespass
- Strict Liability (*Rylands v. Fletcher*)
- Riparian Rights
- Statutory Causes of Action



Nuisance - Private

Elements of the Tort

- Unreasonable interference
 - Use and enjoyment of private right
 - Actual harm
- Causation
- Does not require wilfulness or negligence



Nuisance - Private

■ Enjoyment

- *Groat v. Edmonton (City)*: “Pollution is always unlawful and, in itself, constitutes a nuisance.”

■ Use

- Claim may not be actionable, where it does not prevent the current use of the property (*Almel Inc. v. Sunoco Inc.*)





Nuisance - Private

- Harm

- Current interference:

- It is not about retroactive compensation for activities that stopped long before and which were not a nuisance at the time (*Smith v. Inco*).



Nuisance - yes

- Odour, noise, dust, and litter from a waste disposal site (*Plater v. Collingwood*)
- Escape of methane gas from a waste disposal site (*Gertsen v. Metropolitan Toronto*)
- Aerial application of pesticides (*Newman v. Conair Aviation Ltd.*; *Bridges Brothers Ltd. v. Forest Protection Ltd.*; *Freisen v. Forest Protection Ltd.*; *Paul v. C.A. McKay Ltd.*)
- Seepage from a sewage lagoon (*Roberts v. Portage LaPrairie*)
- Salt spray arising from winter highway maintenance (*Schenck v. Ontario*)
- Contamination of wellwater (*Jackson v. Drury Construction Co.*)
- Discharge of corrosive air contaminants (*Russell Transport Ltd. v. Ontario Malleable Iron Co. Ltd.*)



Nuisance - no

- Mere presence of contaminants without actual risk to human health or interference with use. (*Smith v. Inco*).
- Degree of contamination not sufficient to prevent use (*Almel Inc. v. Sunoco Inc.*)
- Only limited interference when wind shifts (*Nesbitt Aggregates Ltd. v. Smiths Construction Co. (Arnprior) Ltd.*)



Nuisance - Public

Elements of the Tort

- Unreasonable interference
 - Use and enjoyment of public right - e.g. highway, right of way, navigable waters, pollution of public beach.
- Causation
- Does not require wilfulness or negligence



Standing

- Attorney General, or by a person authorized to bring a “relator action” in the name of the Attorney General
- Persons who experience “special damage”
 - e.g. personal injury or property damage that differs in kind or degree from the rest of the public at large
- Partially reformed by section 103 of the *Environmental Bill of Rights*



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Negligence

Elements of the Tort

- Duty
- Breach
- Causation
- Damages



Negligence

■ Duty

- Well established general duty of property owners/occupiers to take reasonable care to prevent damage to adjoining properties.
- May be policy reasons to deny duty, especially re: government actors
 - Policy v. Operational
 - Residual discretion: *Cooper v. Hobart*



Negligence

- **Breach** - failure to conform with the required standard of care)
 - Standard of care = that which "would be expected of an ordinary, reasonable and prudent person in the same circumstances (*Ryan v. Victoria (City)*)
 - What is “reasonable” may be influenced by
 - Standards in the industry or common practices
 - Statute



Negligence

- Causation (failure to conform with the required standard of care)
 - Must be the proximate cause.
- Damages - material injury to the plaintiff
 - Just exposing someone to danger is not enough



Negligence - yes

- Improper or careless application of pesticides (*Maurice v. Tiny (Township)*; *Bridges Brothers Ltd. v. Forest Protection Ltd.*; *Siemens v. Pfizer C. & G. Inc.*)
- Careless or insecure storage of hazardous substances (*Walker v. Lenbro Holdings Ltd.*)
- Discharge of acidic wastes into sewer works (*North York v. Kent Chemical Industries Inc.*)
- Failure to contain methane gas emissions from a landfill (*Gertsen v. Metropolitan Toronto*)
- Failure to prevent sewer overflows or backups (*Oosthoek v. Thunder Bay*)
- Negligent management of a contaminated property (*Bisson v. Burnette Holdings Ltd.*)



Negligence - no

- Insufficient control over the substance that escaped (*Doherty v. Allen*)
- Where common practice in trade relied upon in the trade relied upon to establish standard of care is itself found to be negligence (*Goodwin v. McCully*)



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Trespass

Elements of the Tort

- Entering without lawful justification
 - Includes placing, throwing, leaking material
 - Where the trespass is series of acts, or an ongoing act – such as the continuing migration of contaminants – it can give rise to a continuous right of action (*Bisson v. Burnette Holdings Ltd.*)



Trespass

Elements of the Tort

■ Directness

- The trespass must be direct rather than consequential
- In contrast with nuisance which can be consequential



Trespass - yes

- Discharge of saw mill dust, ash and smoke (*Kerr v. Revelstoke Building Materials Ltd.*)
- Deposit of stones or fill (*Philips v. California Standard Co.*; *Athwal v. Pania Estates Ltd.*).
- Aerial application of pesticides (*Friesen v. Forest Protection Ltd.*)
- Escape of water onto adjoining lands (*Pinder v. Sanderson*)



Trespass - no

- Waste not deliberately placed, but rather fell onto neighbouring land (*Anmore Development Corp. v. Burnaby (City)*)
- Salt water leaked from a metal tank onto neighbouring land was an indirect intrusion (*Eureka Oils Ltd. v. Colli*)



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Strict Liability (Rylands v. Fletcher)

Elements of the Tort

- Storage of a dangerous agent on the defendant's property
 - Non-natural use of the land by the defendant
- An escape of a substance likely to do mischief
- Does not require wilfulness or negligence



Strict Liability (Rylands v. Fletcher)

- Harm caused by the escaped substance
- Possible additional element: Foreseeability of harm
 - Ontario Court of Appeal declined to decide this point in *Smith v. Inco* but made two observations: 1) foreseeability of damage, rather than foreseeability of escape; 2) there are compelling reasons to require such foreseeability



Strict Liability - yes

- Escape of manure contaminants into wellwater (*Metson v. R.W. DeWolfe Ltd.*)
- Escape of creosote into wellwater (*O'Brien v. Nfld. Light & Power Co.*)
- Escape of explosive methane gas from a landfill (*Gertsen v. Metropolitan Toronto*)
- Escape of fire onto adjoining lands (*McAliffe v. Hubbell*)
- Escape of petroleum products from service stations (*McAliffe v. Hubbell; B.C. Telephone Co. v. Shell Canada Ltd.*)
- Escape of aerially applied herbicide (*Mihalchuk v. Ratke; Bartel v. Ector; Schunicht v. Tiede*)
- Escape of sewage (*Lyon v. Shelburne*)



Strict Liability - no

- Continuous escape (*Burnaby (City) v. Thandi*)
 - Contrast with *Smith v. Inco* where ONCA found that liability should not be limited to a single isolated escape (para. 111).
- If fail to show causation (*Gill v. Geis*)
- Normal emissions of an ordinary industry in a properly zoned location (*Smith v. Inco*)



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Riparian Rights

Elements of the Tort

- Interference with a riparian right.
 - Includes a right to water in its natural quality and quantity
 - May not require proof of actual harm





Riparian Rights - yes

- Discharge of mine wastewater into a stream (*John Young and Co. v. Bankier Distillery Co.*)
- Discharge of paper mill effluent into a stream (*McKie v. K.V.P. Co.*)
- Storm sewer flows into a watercourse (*Groat v. Edmonton*)
- Discharge of untreated sewage into a watercourse (*Stephens v. Village of Richmond Hill*)





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Environmental Protection Act

■ Part X - Spills

- s. 99(2) - Right to compensation
- s. 99(3) - Exception
- s. 99(4) - Qualification of the Exception





Environmental Bill of Rights

- Part VI - Right to Sue
 - s. 84 - Right of Action
 - s. 93 - Remedies





Canadian Environmental Protection Act

- s. 40 - Civil Cause of Action



Questions?

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