13

Common Law

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I. Introduction §13.1 1

II. Nuisance 1
A. In General §13.2 1
B. Public Nuisance §13.3 1
C. Private Nuisance 3
1. In General §13.4 3
2. "No-Fault" Nuisance §13.5 4
3. "Negligent" Nuisances §13.6 4
4. Violation of Statute or Regulation as Nuisance §13.7 5
D. Parties 6
1. Plaintiffs §13.8 6
2. Defendants §13.9 6
a. Defendant Created the Nuisance §13.10 6
b. Possessors of Land §13.11 6
c. Owners of Land §13.12 7
d. Generators or Arrangers of Pollutants §13.13 8
e. Joint or Several Liability of Owners or Possessors of Discrete Sources §13.14 9
E. Defenses 11
1. In General §13.15 11
2. "Coming to the Nuisance" §13.16 11
3. Contributory or Comparative Fault §13.17 11
4. Statutes of Limitations 12
a. In General §13.18 12
b. Discovery Rule §13.19 14
5. Laches §13.20 16
6. Governmental Immunity §13.21 16
a. Federal Government §13.22 16
b. State and Local Governments §13.23 16
i. Sewage Intrusions §13.24 17
ii. Trespass-Nuisance §13.25 17
iii. Intentional Torts §13.26 17
7. Right to Farm Act §13.27 18
8. Lawfulness of Activity §13.28 18
F. Non-Nuisances §13.29 18
1. Attractive Nuisances §13.30 19
2. Intentional Nuisance §13.31 19

III. Trespass 19
A. Interference with Possession of Land, Not with Use and Enjoyment §13.32 19
B. Trespass as an Intentional Tort §13.33 20
C. Same Activity May Be Both Trespass and Nuisance §13.34 20
D. Treble Damages §13.35 21

IV. Negligence 21
A. Requires Proof of Fault §13.36 21
B. Need Not Be Continuing or Repeated §13.37 21

V. Strict Liability 22
A. Abnormally Dangerous Activities §13.38 22
B. Toxic Wastes §13.39 22

VI. Trespass-Nuisance 23
A. The Creation of the Trespass-Nuisance Doctrine §13.40 23
B. The Demise of the Trespass-Nuisance Doctrine §13.41 24

VII. Other Common Law Theories 25
A. Fraud and Deceit 25
1. Against Sellers of Tainted Property §13.42 25
2. Against Brokers of Tainted Property §13.43 26
B. Waste §13.44 26
C. Inverse Condemnation §13.45 27

VIII. Remedies 28
A. Equitable Relief §13.46 28
B. Damages 29
1. In General §13.47 29
2. Diminution of Property Value §13.48 29
3. Damages to Real and Personal Property; "Clean-up" Costs §13.49 30
4. Personal Injury Damages §13.50 30
5. Damages Peculiar to Nuisance §13.51 30
a. Loss of the Normal Use and Enjoyment of Premises §13.52 31
b. Annoyance, Inconvenience and Discomfort, Including Mental Stress §13.53 31
6. Temporal Period for Which Damages May Be Recovered §13.54 33
7. Separate Assessment of Damages in Class Actions and Joinder of Parties §13.55 33
8. Future Damages and Successive Suits 34
a. In General §13.56 34
b. Temporary or Permanent Conditions §13.57 34

IX. Conclusion §13.58 34

Table of Authorities 35

FORMS 40
Model Complaint - Common Law Action in Nuisance for Damages 40
Jury Instructions - Common Law Action in Nuisance for Damages 43

I. Introduction §13.1

Blowing from the direction of his neighbor's lime kiln, the wind carried corrosive quicklime dust onto plaintiff's fruit orchard, killing trees. Plaintiff sued. The court in assizes ruled: "He shall have his writte." 4 Edward III, *Lib. Ass. Pl.* 3. It was England. It was 1331 A.D. It was the dawn of environmental common law.

Environmental common law is almost all tort law. Typically the tort is pollution of the air or water. The remedies sought may be either at law or in equity. In addition to the body of case law that has built up over the centuries, statutory enactments in modification of the common law are of great importance. Environmental common law is dominated by the common law of nuisance, with contributions from other theories, such as trespass and strict liability. Reading the cases, it is not always clear what the theory of liability is. Knowledge of theory may not be important for the litigant, but, for the legal researcher and the advocate, it is nevertheless important to be mindful of what has gone before in environmental common law. Common law is the source for and a place from whence useful concepts in environmental law continue to be appropriated.

II. Nuisance

A. In General §13.2

The ancient nuisance cases were founded on the maxim *sic utere tuo, ut alienum non laedas* (use your property so as not to injure another's). These cases said nothing about negligence or "reasonable use." The prohibition was absolute. Thus nuisance was, at early common law, a type of strict liability. Monson, Plowden, Wray & Manwood, *A Briefe DECLARATION for What Manner of Speciall Nusance concerning private dwelling Houses, a man may have his remedy by Assise, or other Action as the Case requires* at 8, 20 (1639). Remedies were available in equity and at law. They still are.

To use a taxonomic metaphor, the genus nuisance has two species, public nuisance (sometimes called "nuisance *per se*") and private nuisance ("nuisance *per accidens*"). Environmental nuisances may be one or the other or a hybrid of both. The more common is the private nuisance. A nuisance *per se* is a condition that will always be a nuisance, no matter where or when. A nuisance *per accidens* depends on the circumstances, like a pigsty in a food court instead of in a barnyard.

It is important in researching nuisance cases to ascertain whether they are in equity or at law because the courts often impose different rules or higher standards of proof for injunctions than for actions seeking only money damages.

B. Public Nuisance §13.3

A nuisance is a public or "common" nuisance when it involves annoyance, injury or danger to the public in general. The term "public nuisance" generally refers to a group of low-grade criminal activities that interfere with the interest of the community or a significant part of it, or

with the public health, morals or peace. Brothels, after-hours drinking establishments, drug houses, and clamorous noise-making in the nighttime have been declared to be public nuisances, entitling the prosecutor to an injunction to abate the activity. Various public nuisances are defined in MCL 600.3801; see *Michigan ex rel Wayne Cty Prosecutor v Dizzy Duck*, 449 Mich 353; 535 NW2d 178 (1995).

A public nuisance may also impinge on the rights of a private person nearby to use and enjoy her property, and thus be, as to her, also a private nuisance. She can sue for those of her damages that are distinct from those sustained by the public at large. *Adkins v Thomas Solvent Co*, 440 Mich 293; 487 NW2d 715 (1992)

Usually the prosecutor seeks to enjoin public nuisances, but in Michigan a private person has long been empowered to bring an action to abate a public nuisance. *Detroit Realty Co v Barnett*, 156 Mich 385; 120 NW 804 (1909), *Brady v Detroit Steel & Spring Co*, 102 Mich 277; 60 NW 687 (1894), and *Robinson v Baugh*, 31 Mich 290 (1875). This old rule is now enshrined by statute. MCL 600.3805.

In the environmental context, activities that would constitute a fire hazard or danger to life can be enjoined as public nuisances. *City of Dearborn v Charles E Austin, Inc*, 365 Mich 1; 112 NW2d 104 (1961). Several statutes provide remedies for activities that sound very much like public nuisances when environmental harm results. Examples are hazardous waste violations, MCL 324.11148; releases of hazardous waste, MCL 324.20126(a)(6); and waste water discharge violations, MCL 324.3115.

In *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346; 760 NW2d 856 (2008), the Traverse City Iron Works dumped pollutants into the Boardman River for many years before Waterous acquired the site. The DEQ sued for clean-up costs under several theories, including public nuisance. The trial court concluded that the site conditions constituted a public nuisance, saying, "[i]t is difficult to imagine a right more common to the public than the right to a safe and healthy environment." The Court of Appeals affirmed the trial judge's remediation orders.

A public nuisance cannot arise from a natural condition, but only when a human act has contributed to its existence. *Ken Cowden Chevrolet, Inc v Corts*, 112 Mich App 570; 316 NW2d 259 (1982). A private action against a public nuisance can be maintained only when the plaintiff can show that he has sustained damages of a specific character, distinct and different from the injury suffered by the public generally. *Ken Cowden Chevrolet*; see *Akzo Coatings of America, Inc v American Renovating Co*, 842 F Supp 267 (ED Mich 1993). In *Akzo* the court ruled that plaintiffs stated a claim for public nuisance because defendants arranged for the disposal and treatment of hazardous wastes at their site, so were thus liable under CERCLA, 42 USC 9607 (see Chapter 5), and because plaintiffs suffered pecuniary damages different from the public where plaintiffs had to pay a share of the response costs to remediate the site.

Congress did not intend CERCLA to preempt state common law remedies, such as nuisance. *United States v Akzo Coatings of America, Inc*, 949 F2d 1409 (6th Cir 1991). The court in *Akzo Coatings* may have confused statutory liability with statutory violation. Under CERCLA and Part 201, a person may become liable for clean-up costs and may have an affirmative duty to remediate, without having violated any statute. In *Ken Cowden Chevrolet*, the condition

complained of was a natural attribute of the land, so there was no statutory violation; the court's language about a requirement for such is dicta. Some of the cases discussed in this section deemed conditions to be public nuisances without necessarily referring to specific statutes. In cases like *Ken Cowden Chevrolet* and *Akzo* the courts may confuse stating a claim with standing to sue. What the courts may have meant is that a private person may sue to enjoin a public nuisance, but to have standing the person must have sustained some damages distinct from that suffered by the general public.

C. Private Nuisance

1. In General §13.4

Judge Victor Baum in Wayne County Circuit Court instructing a jury fashioned a definition of a nuisance as:

> [A]n activity on one's own property, which activity over a substantial length of time or on successive and repeated occasions causes significant and substantial interference with the person, property, health, safety or comfort of others.

Heine v The Budd Co, Wayne Cty Cir Ct, No. 56172, Nov. 21, 1969.

This is the best definition of a private nuisance *per accidens* this author has ever seen. A close second would be that found in *Kilts v Kent Cty Bd of Supervisors*, 162 Mich 646, 652; 127 NW 821 (1910), where the court said that a condition which:

> deprives his neighbor of the reasonable and comfortable enjoyment and use of his property, or which violates the unwritten but accepted law of decency, or which endangers or renders insecure the life and health of his neighbor is a nuisance.

There is no standard jury instruction for private nuisance. As discussed in §13.5 and §13.6, the Michigan appellate courts have used two inconsistent definitions from time to time.

Nuisance may result in a detriment to health, but a detriment to health need not be proved to show a private nuisance. *Mitchell v Hines*, 305 Mich 296; 9 NW2d 547 (1943).

In Michigan the circuit courts have jurisdiction to hear cases based upon nuisance.

> All claims based on or to abate nuisance may be brought in the circuit court. The circuit court may grant injunctions to stay and prevent nuisance.

MCL 600.2940. This grant of jurisdiction is consistent with the exclusive equity powers of the circuit court, but the statute does not preclude the filing of nuisance cases in the district courts seeking only money damages.

> ***Unpublished decision:*** *Hainer v Lasalle Bank Midwest National Bank,* unpublished opinion per curiam of the Court of Appeals, issued September 23, 2010 (Docket No. 292124) (nuisance found where neighbor imported dirt causing flooding of plaintiffs' backyard; $15,000 award for two-year loss of the normal use and enjoyment held not excessive).

2. "No-Fault" Nuisance §13.5

The "no-fault" character of common law nuisance has been squarely recognized. In *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630; 178 NW2d 476 (1970), a building owned by the state was held to have been a fire hazard nuisance to plaintiff's adjoining property. The court distinguished negligence cases from nuisance cases, and as to nuisance, defined it as follows:

> Primarily, nuisance is a condition. Liability is not predicated on tortious conduct through action or inaction on the part of those responsible for the condition. Nuisance may result from want of due care . . . , but may still exist as a dangerous, offensive or hazardous condition even with the best of care.

383 Mich at 636. *Buckeye Union* requires that the nuisance be a condition, that is, something that exists over time, or is continuing or repeating, not a one-time event. It would seem that the element of continuation in nuisance substitutes for the element of fault in negligence. The *Buckeye Union* rule has sometimes been applied in the court of appeals. *Traver Lakes Community Maintenance Ass'n v The Douglas Co*, 224 Mich App 335; 568 NW2d 847 (1997). The test is the unreasonableness of the interference, not the unreasonableness of the interfering activity. *Id*. at 346-347.

> ***Unpublished decision:*** *Rose v Braciszewski*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 13, 2009 (Docket No. 285316) (burning leaves twice a year as permitted by a local ordinance is not a nuisance).

3. "Negligent" Nuisances §13.6

There is another line of cases, divorced from *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630; 178 NW2d 476 (1970) (discussed in §13.5), that adopts the definition of nuisance from the Restatement:

> [A]n actor is subject to liability for private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if (a) the other has property rights and privileges in respect to the use of the enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise

> actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct.

Adkins v Thomas Solvent Co, 440 Mich 293; 487 NW2d 715 (1992), citing 4 Restatement Torts 2d, §§821D-F, §822, pp 100-115. The *Adkins* rule was adopted by a panel in the court of appeals in *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186; 540 NW2d 297 (1995). The *Adkins* court did not reverse, disavow or distinguish *Buckeye Union* or even mention it in a footnote. It simply ignored *Buckeye Union* and went off in a different direction.

The *Adkins-Cloverleaf* rule, sandwiched between *Buckeye Union* and *Traver Lakes Community Maintenance Ass'n v The Douglas Co*, 224 Mich App 335; 568 NW2d 847 (1997), may have been a temporary excursion into the Restatement. And *Adkins* can be factually distinguished from the *Buckeye Union* line. For further exposition, see Hadden, *Michigan Nuisance Law: Fuzzy Logic at Work*, 76 Mich BJ 187 (Feb 1997). While the *Buckeye Union* doctrine requires a continuing or repeated condition, the Restatement rule does not. The situation in *Adkins* did involve a contamination of groundwater over time, but *Cloverleaf* involved a single event, the bursting of a pipe. Perhaps the no-fault rule applies where there is a continuing or repeated nuisance condition and the Restatement can be used to establish a "negligent nuisance" where there is no enduring condition. Plaintiffs will urge that *Buckeye Union* is the law; defendants will prefer *Adkins.* Trial judges can go either way. The appellate courts need to clarify this law.

4. Violation of Statute or Regulation as Nuisance §13.7

Even though compliance with statutes or regulations does not excuse a nuisance (see §13.28), violation of statutes or regulations may be evidence that a nuisance condition exists. This is by the same analogy that holds violation of the motor vehicle code to establish a prima facie case from which the jury can infer negligence, *Zeni v Anderson*, 397 Mich 117; 243 NW2d 270 (1976), and violation of regulations and ordinances is evidence of negligence, *Hodgdon v Barr*, 334 Mich 60; 53 NW2d 844 (1952). There are many statutes and administrative rules governing environmental pollution that can be relevant to the common law case. Many of these are quite detailed, but they usually contain a catch-all or "nuisance" provision. The administrative rules concerning air pollution, for example, contain this section:

> R 336.1901 Air Contaminants or water vapor, when prohibited.
>
> Notwithstanding the provisions of any other commission rule, a person shall not cause or permit the emission of an air contaminant or water vapor in quantities that cause, alone or in reaction with other air contaminants, either of the following:
>
> (a) Injurious effects to human health or safety, animal life, plant life of significant economic value, or property.
>
> (b) Unreasonable interference with the comfortable enjoyment of life and property.

1980 AACS, R 336.1901.

Practitioners should study local ordinances. For example, the Code of the City of Detroit requires that the city dispose of solid waste "in the manner least harmful to the environment." City of Detroit Code §7-202. There are no state statutes or administrative rules in Michigan with respect to noise pollution, but almost every local government has some kind of noise ordinance, and most of them contain a "nuisance" or catch-all section, e.g., City of Romulus Code of Ordinances §20-113, "It shall be unlawful for any person to make unreasonable noise which tends to cause a public danger, alarm, disorder or nuisance", as well as sections with objective numerical decibel standards.

D. Parties

1. Plaintiffs §13.8

In common law environmental cases there are no rules as to who can be a plaintiff that are different from other kinds of common law cases. Generally, a plaintiff must be able to show some damage to himself or his property to have standing to sue. This standing requirement has been changed by several environmental statutes, covered in other chapters of this Deskbook. See Chapter 16, Procedure and Remedies.

A private citizen may file an action for public nuisance where the individual can show he suffered a type of harm different from that of the general public. Michigan cases have long recognized the right of a private person to bring a civil action with respect to pollution whether characterized as "public" or "private". See *Robinson v Baugh*, 31 Mich 290 (1875), *Detroit Realty Co v Barnett,* 156 Mich 385; 120 NW 804 (1909), *Brady v Detroit Steel & Spring Co*, 102 Mich 277; 60 NW 687 (1894), and *Adkins v Thomas Solvent Co*, 440 Mich 293, 306 n 11; 487 NW2d 715 (1992).

2. Defendants §13.9

A defendant is liable for a nuisance where (a) the defendant created the nuisance, (b) the defendant owned or controlled the land from which the nuisance arose, or (c) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise. *Radloff v Michigan*, 116 Mich App 745, 758; 323 NW2d 541 (1982), and *Gelman Sciences, Inc v Dow Chemical Co*, 202 Mich App 250, 252; 508 NW2d 142 (1993).

a. Defendant Created the Nuisance §13.10

It is universally accepted that a defendant who created the nuisance can be held liable. *Stemen v Coffman*, 92 Mich App 595; 285 NW2d 305 (1979), citing 58 Am Jur 2d, Nuisances §49, p 616. *Cloverleaf Car Co v Phillips Petroleum*, 213 Mich App 186; 540 NW2d 297 (1995), attributes the rule to 4 Restatement Torts 2d, §834, p 149.

b. Possessors of Land §13.11

Any defendant who is in possession of property from which the nuisance emanates can be sued. The universal rule with respect to the liability of possessors of land for nuisance is stated in *Stemen v Coffman*, 92 Mich App 595; 285 NW2d 305 (1979): "liability for damage caused by a

nuisance turns upon whether the defendant was in control, either through ownership or otherwise." See also 58 Am Jur 2d Nuisances §113, p 643. Whether an absentee landlord owner in fee but not in possession can be sued has not been answered in Michigan. There is authority in other states that shows that the courts will search diligently for someone to be responsible:

> Public policy in a civilized community requires that there be someone to be held responsible for private nuisances on each piece of real estate, and particularly in an urban area, that there be no oases of non-liability where private nuisances may be maintained with impunity.

Kurtigan v City of Worcester, 348 Mass 284, 203; 203 NE2d 692 (1965).

c. Owners of Land §13.12

The general rules is that being an owner gives one some degree of control over the premises. In *District of Columbia v Fowler*, 497 A2d 456, 462 (DC App 1985), the court held, "We hold that notice of the existence of a nuisance imposes upon the landowner a duty to abate it." Nevertheless, the truly absentee landlord may be able to avoid liability for the environmental tort created on her land, at common law. The court in *Fowler* further held that the owner "may be held liable . . . for those damages that accrued after it had notice and an opportunity to abate the nuisance" and that a question of fact existed as to whether the landlord had notice.

Where liability for a nuisance grows out of the ownership of real estate held jointly or in common, all of the proprietors of the land must be joined as defendants. *Minner v City of Pittsburgh*, 363 Pa 199; 69 A2d 384 (1949). Even though the businesses and activities conducted on the commonly-owned premises may have been different, and even though substances from only one of these businesses strayed off site creating damage, all of the tenants in common of the real estate are liable. *Wilson v White*, 77 Neb 351; 109 NW 367 (1906).

In the cases brought under the abnormally dangerous activities theory that involve toxic chemicals, there is even more reason to hold a landowner defendant to tough scrutiny. The general rule is best stated by the Supreme Court of New Jersey in *State v Ventron Corp*, 94 NJ 473, 488; 468 A2d 150 (1983):

> We believe it is time to recognize expressly that the law of liability has evolved so that a land owner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others . . . . The net result is that those who use, or permit others to use, land for the conduct of abnormally dangerous activities are strictly liable for resultant damages.

Some chemicals, such as PCBs, have been declared by federal and state law to be unreasonably dangerous, and now have been effectively banned in the United States and Michigan. 15 USC 2605(e); MCL 324.14704. It would seem that a defendant who keeps things like PCBs on his premises does so at his peril and would be a viable defendant if any escaped. Under nuisance law, he could be defendant for just having them there if it interfered with his neighbors' rights by

its mere presence. In *Adkins v Thomas Solvent Co*, 440 Mich 293; 487 NW2d 715 (1992), the court ruled that although there was contamination under defendant's land, mere presence there cannot cause diminution of property value where there was a hydrogeologic watershed that prevented that contamination from ever getting under plaintiff's land. The door was left open for plaintiffs to sue for elements of damages other than diminution in property value. See § 13.48 and § 13.53.

d. Generators or Arrangers of Pollutants §13.13

An employer, contractor, generator or producer of materials who sends out work or ships materials to another and who knows or, in the exercise of reasonable diligence should know, that a nuisance may result from this conduct is subject to liability for the harm caused by the nuisance. This is the law even if the nuisance was created on lands not owned by the employer, contractor or producer. If a defendant's business activity results in pollution, odors, noise, increased truck traffic or other things that become a nuisance or contribute to a nuisance, and the problem or condition created was within the contemplation of the defendant or is an ordinary usual adjunct to its business, then that defendant is liable for the nuisance even though it was actually physically created by others. *Bleeda v Hickman-Williams & Co*, 44 Mich App 29; 205 NW2d 85 (1972). See also *Shannon v Missouri Valley Limestone Co*, 255 Iowa 528; 122 NW2d 278 (1963).

Buckeye Union Ins Co v Michigan, 383 Mich 630, 636; 178 NW2d 476 (1970), specifically predicates liability for nuisance on "those responsible for the condition." The leading case on who is responsible for a nuisance is *Bleeda*, in which Judge (later Justice) Levin wrote:

> On principle, we see no reason why the factor of ownership of property should be determinative.
>
> The reasons for affixing vicarious responsibility are totally unrelated to the happenstance of ownership. If, as Professors Harper and James wrote, the "chief warrant for vicarious liability must be found in the principle that an enterprise (and its beneficiaries) should pay for the losses caused by the risks which it creates" . . . , then it is entirely beside the point whether the enterprise owns the land from which the nuisance emanates.

44 Mich App at 35-36. The court held that is beside the point whether the enterprise owns the land from which the nuisance emanates. The court adopted language from the Restatement Torts 2d, § 427B:

> One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve a trespass upon the land of another or the creation of a public or private nuisance, is subject to liability from harm resulting to others from such trespass or nuisance.

The facts in *Bleeda* are that Hickman-Williams Company purchased coke from coke ovens for distribution to its customers. It sent the coke to the Korno company for sizing and preparation for shipment. Korno created an air pollution nuisance with Hickman-Williams' coke dust. The court allowed plaintiff neighbors to sue both defendants on a nuisance theory. According to the Restatement this rule applies to trespass as well as nuisance cases (see §13.34).

Another basis for this kind of liability can be found in the law of bailments. Michigan follows the rule in 2 Restatement Torts 2d, §390, p 314:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Fredericks v General Motors Corp, 48 Mich App 580, 584; 211 NW2d 44 (1973). This rule has been applied most often in cases where a motor vehicle has been lent by the owner to an incompetent driver. But there is no reason from its terms why this rule could not also be used to hold liable one who ships noxious material to a disposal site with knowledge (actual or constructive) that the disposer is likely to cause harm with its material.

In all of the situations above, the originator ("generator" or "arranger" in statutory parlance, see Chapter 5) retained, theoretically at least, the "title" to the noxious material used in the trespass or nuisance. What if the generator is a person who sells a product to the creator of the nuisance or trespass? Title has passed, so is the seller-supplier still liable? There are no appellate cases, yet, on this point. The *Bleeda* rationale does not turn on who owns the product, but on what the supplier knew or should have known about the probable use of the product.

e. Joint or Several Liability of Owners or Possessors of Discrete Sources §13.14

Many environmental problems stem from the mixing of pollutants from several sources or cumulative activities of several persons. The legislature abolished joint liability for tort and related actions in the Tort Reform Act of 1995, MCL 600.2956 *et seq.* Liability is now several, so that each polluter is liable only for the percentage of "fault" proximately caused by its nuisance. MCL 600.2957(1). The statute replaced the common-law doctrine of joint and several liability with several liability only among multiple tortfeasors. The statute applies to all actions, "based upon tort or another legal theory seeking damages for personal injury, property damage or wrongful death." The statute thus includes lawsuits based on nuisance. The statute would also apply to suits alleging trespass, negligence or strict liability for abnormally dangerous activities.

The existing cases holding as jointly liable defendants whose pollution mixed together forming an indivisible plume of contaminants therefore are no longer good law. Practitioners should ignore cases such as *Michie v Great Lakes Steel Div*, 495 F2d 213 (6th Cir 1974), *Abel v Eli Lilly & Co*, 418 Mich 311, 329; 343 NW2d 164 (1984), and *Oakwood Homeowners Ass'n, Inc v Ford Motor Co*, 77 Mich App 197; 258 NW2d 475 (1977).

A plaintiff suing more than one polluter has the burden of proving what percentage of damages should be allocated to each defendant. MCL 600.2958.

If the plaintiff does not name all the potential defendants, a court rule requires a defendant who wants to show there are non-parties at fault to file a notice to that effect within 91 days after filing its answer, naming the non-parties and describing why they are at fault. MCR 2.112(K). Plaintiff may then add those parties as defendants, and the statute of limitations as to them relates back to the original lawsuit filing date. MCL 600.2957(2). This procedural court rule takes precedence over the statute. *Staff v Johnson*, 242 Mich App 521; 619 NW2d 57 (2000). If these defendants are added, then plaintiff has the burden of proving their allocation of responsibility; if they are not added, then defendants have that burden. MCL 600.2960; *American Home Mortgage Acceptance, Inc v The Appraisal Place, Inc*, 476 F Supp 2d 636 (ED Mich 2006)

There are exceptions to this rule. Cases in which joint liability continues to exist are where a statute creates joint liability, another scheme for apportioning liability, or strict liability. In *John Hancock Financial Services, Inc v Old Kent Bank*, 346 F3d 727 (6th Cir 2003), the Uniform Commercial Code allocation of liability was held to control over the Michigan Tort Reform Act. In a dog-bite case pursuant to the dog-bite strict liability statute, the Tort Reform Act did not require allocation of fault severally. *Hill v Sacka,* 256 Mich App 443; 666 NW2d 282 (2003).

There are environmental cases in which the several liability statute does not apply, because another statute, such as CERCLA or Part 201, establishes joint liability or some other method for allocating liability. See chapter 5.

The several liability statute applies to actions for damages, i.e., actions at law. It does not apply to actions in equity. In equitable actions the court may order injunctive relief without regard to the relative fault of the defendants. Class actions are creatures of equity. *Paley v Coca Cola Co,* 389 Mich 583, 589-591; 209 NW2d 232 (1973). It follows that the Tort Reform Act should not apply in class actions.

A statute says that actions alleging nuisance shall be considered as being in equity unless only money damages are claimed. MCL 600.2941(5). Since nuisance can address both, if a complaint asks for both equitable relief (to prevent future damages) and compensation at law (to redress past damages) the case is in equity; therefore the Tort Reform Act would not apply.

There is no jury trial in equity. A plaintiff needs to weigh the advantages of a jury trial with several liability against advantages of a bench trial with joint liability.

In an action at law against multiple defendants the plaintiff needs to present some evidence, expert or otherwise, as to how the damages should be apportioned. If a defendant names non-parties who may be at fault, plaintiff will want to conduct some discovery regarding them and add them as defendants. If the alleged non-parties at fault are “small fry”, plaintiff may wish to ignore them and leave the burden on the defendants to prove allocation.

E. Defenses

1. In General §13.15

All standard tort defenses, such as release, proximate cause, or non-parties at fault, are available in nuisance cases if supported by facts. Some defenses peculiarly apply to nuisance cases.

2. "Coming to the Nuisance" §13.16

"Coming to the nuisance" is a common affirmative defense, always asserted where the defendant's activities are of long standing, when, for example, the defendant was polluting already when the plaintiff purchased the property claimed to be harmed. This defense may be important in some cases to show whether the plaintiff or defendant was established in the neighborhood first. In equity this priority of occupation or "coming to the nuisance" has been held to be a defense in some cases. See *Ensign v Walls*, 323 Mich 49; 34 NW2d 549 (1948). In other cases it was rejected, see e.g., *Mitchell v Hines*, 305 Mich 296; 9 NW2d 547 (1943). Where the nuisance results in a hazard to health the defense will not lie, even in equity. *Ballantine v Webb*, 84 Mich 38, 47 N.W. 485 (1890). The defense is not available where the nuisance action is at law only. Anno, *"Coming to Nuisance" as a Defense or Estoppel*, 42 ALR3d 344, 372.

The pleader should beware that MCL 600.2940(5) deems all private nuisance actions to be equitable unless only money damages are claimed. A plaintiff who includes any remedy that could be considered equitable relief may open up an avenue for the "coming to the nuisance" defense. He also waives his right to jury trial.

The affirmative defense of "coming to the nuisance" is dangerous, because it requires the defendant to prove that its nuisance activity has been going on a long time. If the defense backfires, this would be an admission of liability.

Local zoning ordinances often are important in private nuisance actions. A defendant asserts that it is legally within its rights to make noise, smells, or dust because it is located in an industrial zone and can rely upon the legal rights conferred by such zoning. Sometimes the industrial zone is separated from a residential zone by only the width of a street. Plaintiffs certainly can counter that they are entitled to live in a zone designated for domestic life and should be able to live there free from interference from the industry's pollution. The Detroit Zoning Ordinance, §81.0000, for example, states that the R1 residential district is "designed to . . . promote and encourage a suitable environment for activities associated with family life." Residents can also rely upon such a zoning ordinance, and if the environment is rendered unsuitable for family life by reason of activities from another zone, a nuisance action will lie that cannot be defeated by the defense of "coming to the nuisance."

3. Contributory or Comparative Fault §13.17

The affirmative defense of contributory or comparative fault does not apply to an action based upon nuisance under the line of cases starting with *Buckeye Union Ins Co v Michigan*, 383 Mich 630; 178 NW2d 476 (1970), discussed in §13.5. Since, under that theory, it is not necessary to show "fault" by the defendant to establish liability, it is immaterial if the plaintiff is guilty of

comparative negligence. This rule does not relieve the plaintiff of the usual burden of mitigating his damages, and if the plaintiff's own activities are part of the nuisance condition of which he complains, then the portion so attributable would not be the obligation of the defendant to abate.

If the trial judge chooses to follow the *Adkins* line discussed in §13.6, then, in theory, a plaintiff could be accused of comparative negligence. In practice, it would be hard to establish that a plaintiff on his own premises could have any control over what defendant does on its land that could constitute comparative negligence.

4. Statutes of Limitations

a. In General §13.18

The judicial interpretation of the statute of limitations for injuries to person or property is in a state of both confusion and flux.

The very nature of nuisance requires that it has a continuing or repeating nature. The tort does not occur at a specific point in time like an auto collision. It has been said that every emission of pollutant is a new tort, each day a potential new lawsuit. Or is the existence of the nuisance not a series of torts, but rather one long tort that occurs over time? Certainly if the nuisance has ceased, the plaintiff must commence his action within three years after the cessation or be barred. *Defnet v City of Detroit*, 327 Mich 254; 41 NW2d 539 (1950). If the action is commenced while the nuisance is on-going, or within three years after its end, the question becomes, how far back in time can the plaintiff reach to collect damages? Until 2005 the law was well settled.

In *Oakwood Homeowners Ass'n, Inc v Ford Motor Co*, 77 Mich App 197; 258 NW2d 475 (1977), Judge (later Justice) Dorothy Comstock Riley noted:

> With regard to the availability of the statute of limitations, however, we note our approval of the lower court's comments:
>
> The defendant claims the statute of limitations prevents any claims which accrued more than three years prior to the filing of the complaint. This argument is not persuasive in that the general rule provides that where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from the date of the last injury. 54 CJS, Limitations of Actions §169. Therefore, in the normal pollution case, since the tort is committed every day, the cause of action will accrue up to the time of trial.

77 Mich App 220 n 7. Another panel of the court of appeals endorsed this footnote in its holding in *Oakwood Homeowners Ass'n, Inc v Marathon Oil Co*, 104 Mich App 689, 693; 305 NW2d 567 (1981) ("*Oakwood II*"). See also *Hodgeson v Genesee Cty Drain Comm'r*, 52 Mich App 411; 217 NW2d 395 (1974), and *Traver Lakes Community Maintenance Ass'n v The Douglas Co,* 224 Mich App 335; 568 NW2d 847 (1997), in which the court of appeals said that, while there is no such thing as continuing negligence, there is continuing nuisance.

Continuing effects from a single tortious act do not constitute a continuing tort. *Horvath v Delida*, 213 Mich App 620; 540 NW2d 760 (1995) (dredging of a lake was a single act; the fact that its effects were continuous did not extend the limitations period). Migration of underground water pollutants does not constitute a new act of trespass. *Village of Milford v K-H Holding Corp*, 390 F3d 926 (6th Cir 2004).

The Michigan Supreme Court perhaps dispatched the continuing or repeated wrongful acts theory in a civil rights case. *Garg v Macomb Cty Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005). Although the facts of the case involved retaliatory discrimination in the workplace in violation of the Civil Rights Act, the court in a sweeping flourish of dicta announced: "We conclude that the "continuing violations" doctrine is contrary to the language of § 5805 and hold, therefore, that the doctrine has no continued place in the jurisprudence of this state."

Garg was applied in *Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264; 769 NW2d 134 (2009), where the plaintiffs complained that defendants had created conditions (alterations in the natural topography) on their properties that caused floodwaters to be cast upon plaintiffs' land resulting in physical damages to real property. They sued in nuisance. The court, without stating which nuisance theory it was applying, characterized the actions of the defendants in altering the storm-water flow as "negligence." It held that "*Garg* and its progeny completely and retroactively abrogated the common-law continuing wrongs doctrine in the jurisprudence of this state, including in trespass and nuisance cases." *Froling*, 283 Mich App at 288. It concluded that where the last acts of the continuing negligence occurred in 1998 and the last damaging results of *that* conduct was a flood in June 2001, the plaintiffs had until June 2004 to sue for the damages caused by that flood. A subsequent flood in 2004 was a result of the conduct that had been completed in 1998, a "continued result of the neighbors' completed conduct", and time-barred. *Id*. at 291. The court cited *Terlecki v Stewart*, 278 Mich App 644; 754 NW2d 899 (2008), where defendant added to the top of a weir and other acts which made the water level of Silver Lake rise to the point where it flooded plaintiff's forest. That panel found the claim time-barred because the acts which caused the flooding were complete more than three years prior to filing. Plaintiff noticed some dying trees more than three years before filing, but did not discover the cause until a few months before. Treating this as a continuing effect of a completed wrongful act, the court held for the defendants. The court also held that the fact plaintiff did not discover the cause of his dying trees until shortly before filing was to no avail because the discovery doctrine has been abolished in Michigan (see §13.19).

Suppose the wrongful act(s) have not been completed? No published case since *Froling* has addressed a scenario where a discharge into the water or air, as from a smokestack, occurs continuously. Would the cause of action accrue when the stack is constructed and starts to belch? Under *Froling*, the claim might be barred.

Schaendorf v Consumers Energy Co, 275 Mich App 507; 739 NW2d 402 (2007), was a stray voltage case. Two stray voltage problems allegedly caused decreased milk production on plaintiff's dairy farm; one was complete in 2000, but the second didn't occur until some additional electrical installation was done in 2003. Plaintiff filed in June 2004. The court held

that the continuing damages caused by the stray voltage that was abated in 2000 was time-barred, but those arising from the 2003 nuisance were not.

> ***Unpublished decision:*** *Taylor Land Group v BP Products North America, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 2011 (Docket No. 294764) (plaintiff discovered a previously undisclosed underground storage tanks and pipeline under its property; trespass claim erroneously dismissed based on difference between the continuing effect of a past intrusive act (barred under *Trentadue*) and a continuing physical invasion that remained under the property, interfering with plaintiff's use and enjoyment of it).

b. Discovery Rule §13.19

In *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007), the supreme court overruled the common-law discovery rule, holding that a cause of action accrues when the wrongful act is committed, regardless of when the damage is manifested. So a plaintiff's common-law action against a polluter could be time-barred three years after an unlawful release even though the contaminants did not affect plaintiff for four years. The dissent likened the discussion to declaring "the bread is stale before it is baked." 479 Mich at 428 (Weaver, J., dissenting).

In *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346; 760 NW2d 856 (2008), a public nuisance case where the DEQ sued in 2003 for pre-1982 contamination acts, the court of appeals held that the statute of limitations did not bar the DEQ's equity case because the nuisance was continuing. The court cited neither *Trentadue* nor *Garg*, but cited the unpublished decision in *Bielat v South Macomb Disposal Authority* (discussed below).

If *Garg* is applied to nuisance cases, it would mean that a plaintiff may file a case anytime while the nuisance condition exists or within three years of its cessation, but could collect only those damages which have accrued during the three years immediately preceding the filing. Coupling such a rule with the holdings in *Horvath* and *Trentadue* that the statute of limitations begins to run with the cessation of the *release* of the contaminant, not with the date of its impact on the plaintiff, makes no sense, especially in the context of groundwater cases. Groundwater contamination migration is slow, often measured in inches per year. It may be decades before a release of contamination to groundwater reaches a plaintiff and causes damage. She cannot bring an action at law until she has been damaged, and by that time the statute of limitations, under *Trentadue*, has long since barred her case.

A discovery rule still applies to actions for personal injury or property damage arising from contamination at facilities as defined by the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC 9601(9). In such actions, if the applicable state statute of limitations provides a commencement date earlier than the "federally required commencement date," the statute of limitations begins to run on the date "the plaintiff knew (or reasonably should have known)" of the damage. 42 USC 9658. This federal standard "trumps a less generous state rule that would start the statute of limitations earlier." *Ritter v Consolidation*

Coal Co, 2011 US Dist Lexis 95131 (D W Va 2011), citing *O'Connor v Boeing N America, Inc*, 311 F3d 1139, 1143-44 (9th Cir 2002), magistrate recommendation adopted, 2011 US Dist Lexis 120603 (D W Va 2011). Application of the federal discovery rule does not require a pending CERCLA action. *Id*. Because *Trentadue* requires a commencement date earlier than the federally required commencement date, CERCLA preempts *Trentadue*. For damages arising from CERCLA facilities in Michigan, the three-year statute of limitations begins to run when plaintiff discovered or should have discovered the contamination.

> ***Unpublished decisions:*** *Bielat v South Macomb Disposal Auth*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2004 (Docket No. 249147) (discussing extensive line of cases supporting the continuing or repeated nuisance as tolling the statute of limitation ignored in *Trentadue*); *Beaulier v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, issued September 25, 2008 (Docket No. 284064) (methane released in 1999 migrated to beneath plaintiffs' property before 2001 when plaintiffs discovered it; action dismissed under *Trentadue*); *Colaianni v Stuart Frankel Development Corp*, unpublished opinion per curiam of the Court of Appeals, issued June 18, 2009 (Docket No. 282587) (in a "sick building" case where plaintiff was exposed to toxic molds, the court felt compelled by *Trentadue* to dismiss her case, but in a footnote urged the supreme court to reconsider its harsh and unjust decision barring a lawsuit before the claimant could even know of the wrongdoing), lv gtd 485 Mich 1070; 777 NW2d 410 (2010) (leave granted to consider whether *Trentadue* was correctly decided), appeal dismissed by stipulation, 488 Mich 1019; 791 NW2d 720 (2010); *Marks v Hulstrom*, unpublished opinion per curiam of the Court of Appeals, issued May 27, 2010 (Docket No. 294453) (blight on a neighbor's land existing essentially unchanged for over ten years was a time-barred nuisance; court noted that "*Froling* also recognized that it is possible for a claim to accrue at a later date than the first causal conduct if there is further causal conduct"); *Taylor Land Group v BP Products North America, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 2011 (Docket No. 294764) (plaintiff discovered a previously undisclosed underground storage tanks and pipeline under its property; trespass claim erroneously dismissed based on difference between the continuing effect of a past intrusive act (barred under *Trentadue*) and a continuing physical invasion that remained under the property, interfering with plaintiff's use and enjoyment of it).

5. Laches §13.20

The equitable doctrine of laches is a judicially-imposed principle described as "the passage of time combined with a change in condition which would make it inequitable to enforce a claim against the defendant." *Lothian v City of Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982). Laches is a defense only in equity, so does not bar an action at law. Laches sometimes follows the statute of limitations, but not necessarily so. *Sloan v Silberstein*, 2 Mich App 660; 141 NW2d 332 (1966).

Because in chancery the judge may "balance the equities," a defendant may successfully bar injunctive relief where it has invested large sums of money on an economically vital enterprise equipped with the very latest pollution control technology but which is nonetheless a nuisance. In such a case, where plaintiffs did not commence their action to block the project, or for correction of deficiencies, or for other equitable relief within a reasonable time, to the substantial detriment of the defendant, plaintiffs may be denied equitable relief and be left to their action at law for money damages.

6. Governmental Immunity §13.21

Governments are capable of polluting and committing environmental torts. In most instances they are immune from tort liability. The immunity depends on the kind of government and the theory of liability.

a. Federal Government §13.22

Tort liability of the United States is established by the Federal Tort Claims Act, 28 USC 2671 *et seq.*, which provides that if a private party in the state would be liable in tort, so is the federal government. The federal district courts have jurisdiction to hear tort claims against the United States. 28 USC 1346. In *Lemaire v United States*, 76 F Supp 498 (D Mass 1948), the court held that the federal government could be liable for damages to realty in a suit alleging continuing trespass and nuisance. Since private persons are strictly liable for nuisance in Michigan, it follows that the United States would be also. But there may be a catch. The federal government is liable only for torts committed while in the exercise of ministerial activities, not discretionary ones. 28 USC 2680(a). So if the federal government pollutes the environment pursuant to a policy-making decision, it is immune; if the pollution is due to a mere ministerial function, it is not. See *Dalehite v United States*, 346 US 15 (1953), and *Laird v Nelms*, 406 US 797 (1972).

Before suit can be filed against the federal government the claimant must first present the claim to the appropriate federal agency. If the agency denies it, or takes no action within six months, then a lawsuit can be filed. See 28 USC 2675.

b. State and Local Governments §13.23

In Michigan the state and local governments are immune from tort liability in negligence for governmental functions unless the negligence falls within one of the five exceptions to immunity that are spelled out in MCL 691.1405 (auto negligence), -.1406 (defects in public buildings), -.1407 (gross negligence), -.1413 (some medical malpractice and proprietary functions). Since

none of these exceptions encompasses nuisance or any other environmental tort, it would seem that the state and local governments cannot be sued for damages from their polluting activities. (They would, of course, be subject to liability in equity.) A case could be conceived in which gross negligence or negligence in the exercise of a proprietary function led to environmental pollution. In *Dextrom v Wexford Cty*, 287 Mich App 406; 789 NW2d 211 (2010), the Court of Appeals held that there was a fact question as to whether a municipally-owned and operated landfill was actually a proprietary function under the facts of the case. There are three other exceptions:

i. Sewage Intrusions §13.24

By statute, MCL 691.1417, effective January 2, 2002, governmental immunity for property damages or personal injuries caused by sewage disposal system events is abrogated. Governments are liable for raw sewage intrusions or sewage back-up events due to defects in municipal or other government-owned sewerage systems into private buildings. The statute requires a 45-day notice to the controlling government and has other procedural and substantive restrictions with which the injured party must comply. It provides for compensation for property damages and, if there is a serious physical injury, for non-economic damages. The statute is self-executing, i.e., it provides a cause of action against the government. *Bosanic v Motz Development, Inc*, 277 Mich App 277; 745 NW2d 513 (2007). The statute is the sole remedy for sewage back-up events. *Pohutsky v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). This includes actions for equitable relief, not just for damages. *Jackson Cty Drain Comm'r v Village of Stockbridge*, 270 Mich App 273; 717 NW2d 391 (2006).

A roadside ditch serving as a conduit for storm water drainage is a "sewage disposal system" as defined by the statute, so debris floating down the ditch that dammed it at a conduit was a defect giving a cause of action to the plaintiff who was flooded because of it. *Linton v Arenac Cty Road Comm'n*, 273 Mich App 107; 729 NW2d 883 (2006).

The plaintiffs must prove there were one or more defects in the sewerage system, that the governmental agency knew or should have known of it, and that the defect was "substantial proximate cause" of the damages. The statute does not require "fault" to be proved. *Willett v Waterford Charter Twp,* 271 Mich App 38; 718 NW2d 386 (2006). An obstruction consisting of an asphalt or concrete block placed in the sewer by an unknown third party is a "defect" in the system. *Id.*

Giving notice of the "sewage disposal system event" to a city as required by MCL 691.1417 was sufficient notice to a county to satisfy the notice of claim requirements of MCL 691.1419. *Dybata v Wayne Cty*, 287 Mich App 635; 791 NW2d 499 (2010).

ii. Trespass-Nuisance §13.25

The doctrine of trespass-nuisance *may* still be a viable theory of liability against the *state*, although it has been abolished as to local governments. See Part VI below.

iii. Intentional Torts §13.26

The grant of immunity in MCL 691.1407(2) does not apply to an individual government employee's intentional torts. *Lavery v Mills*, 248 Mich App 244; 639 NW2d 261 (2001). This is because intentional torts generally are not authorized and are not within the scope of the discharge of a governmental function. *Brewer v Perrin*, 132 Mich App 520; 349 NW2d 198 (1984). The employee may be liable but the government agency employer is not.

7. Right to Farm Act §13.27

The Michigan Right to Farm Act, MCL 286.471 *et seq.,* prohibits nuisance lawsuits against commercial farms that conform to generally-accepted agricultural practices. *Northville Twp v Coyne*, 170 Mich App 446; 429 NW2d 185 (1988). Even where a local zoning ordinance prohibited an individual from operating a farm on a parcel of land because of the small size of that parcel, the ordinance is preempted by the Right to Farm Act where that statute would otherwise protect the farm. *Shelby Charter Twp v Papesh*, 267 Mich App 92; 704 NW2d 92 (2005). This prohibition has teeth. MCL 286.473b says that in a case where a farm is alleged to be a nuisance and the farm prevails, the farmer may recover actual costs and actual attorney fees from the plaintiff. The definitions of "farm" and "farming operation" in MCL 286.472 are so broad almost any act of producing or marketing a product intended to be marketed will qualify. *Id.* Farmers typically call upon representatives of the Michigan Department of Agriculture as experts as to what is a "generally accepted agricultural and management practice" and that Department zealously supports farmers.

> ***Unpublished decision:*** *Woodland Hills Homeowners Ass'n v Thetford Twp*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2008 (Docket No. 275315) (the Right to Farm Act preempts zoning ordinance; plaintiffs assessed actual costs and attorney fees).

8. Lawfulness of Activity §13.28

It is not material to a nuisance that the defendant may have been engaged in a lawful or legitimate business at the time or place at issue. However lawful the business may be in itself, and however suitable in the abstract its location may be, these factors cannot avail to authorize the conductor of the business to continue it in a way that damages the persons or property of others, or their right to normal use and enjoyment of property they occupy. In other words, even if defendant's activities were lawfully permitted on its premises, it is still liable if these conditions were a nuisance to others on other premises. *Brady v Detroit Spring & Steel Co*, 102 Mich 277; 60 NW 687 (1894); *O'Connor v Jersey Creamery Co*, 263 Mich 86; 248 NW 557 (1933); *Robinson v Baugh*, 31 Mich 290 (1875). "An oil refinery is a legitimate business and not a nuisance *per se*, but it may become a nuisance by reason of fumes being given off." *Waier v Peerless Oil Co*, 265 Mich 398; 251 NW 552 (1938). The first two cases are equity cases. Cases for damages are stronger. If equity would grant relief, then surely an action at law would lie.

F. Non-Nuisances §13.29

There are two classes of cases where one encounters the term "nuisance" that are not really classic or "true" nuisance cases at all. These cases involve the doctrines of "attractive nuisance"

and "intentional nuisance." They are like a carrot and a pomegranate that are mixed in the apple basket. Attractive nuisance claims are really cases within the realm of premises liability law that have unfortunately been given an appellation containing the word "nuisance." The only thing they share in common with real nuisance is that they are concerned with a condition on land.

1. Attractive Nuisances §13.30

"Attractive nuisance" is an excuse for trespass by a minor. *Edgerton v Lynch*, 255 Mich 456; 238 NW 322 (1931). A typical case would be a man who is roofing his garage uses a ladder with a cracked rung. He knows this and avoids stepping on it. He leaves it leaning against the building while he goes to lunch. To the neighbor's young boy this ladder is an irresistible temptation to climb to a lofty perch. He trespasses onto the roofer's premises, climbs up the ladder, steps on the defective rung, which breaks, and falls to the ground injuring himself. An adult in such a lawsuit could not recover because he would be a trespasser on the ladder. But to the child the ladder might be an "attractive nuisance" that would negate the trespass defense. This rule is immaterial in environmental nuisance cases.

2. Intentional Nuisance §13.31

Intentional nuisance seems to be a device created by imaginative lawyers as a way to thwart the defense of sovereign immunity. It probably emanated from the "like a hole in the highway" phrase in *Buckeye Union Ins Co v Michigan*, 383 Mich 630, 636; 178 NW2d 476 (1970). The idea was that if the condition could be characterized as intentionally created or allowed to exist by the government, there would be no immunity from tort with respect to it. Therefore a person injured on the government's premises could sue it. This route around the governmental immunity defense has now been closed by the Michigan Supreme Court in *Li v Feldt*, 434 Mich 584; 456 NW2d 55 (1990), and *Pohutsky v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). Since the only useful purpose served by the theory of "intentional nuisance" was as a way to avoid governmental immunity, the doctrine will likely expire. Governmental immunity is discussed in §13.21 and following.

III. Trespass

A. Interference with Possession of Land, Not with Use and Enjoyment §13.32

Trespass and nuisance have been clearly distinguished in Michigan, unlike in some other states. In *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51; 602 NW2d 215 (1999), plaintiffs sued in both trespass and nuisance for damages, complaining of dust, noise and vibrations from the Empire iron mine in Marquette County. The court held that trespass is a tort against the *possession* of land and nuisance is a tort against the *use and enjoyment* of land. Trespass requires that there be a physical invasion of plaintiffs' land to the effect that plaintiffs are dispossessed of all or a portion of their domain, or suffer a physical destruction of property because of a physical invasion of it. "Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right to exclusive possession." *Id.* at 67. The court held that noise and vibrations are not physical invasions and the dust particles, while tangible objects in a strict

sense, do not occupy the land upon which they settle in any meaningful sense; they simply become a part of the ambient circumstance of that space. To be a "physical, tangible object" it must be more substantial than dust, gas or fumes. The "direct or immediate" invasion can be by means of an intervening force such as wind or water that transports pollutants onto the plaintiff's property or "by any means that the offender knew or reasonable should have known would result in the physical invasion of plaintiff's land. *Id.* at 71. Surface water diversion is a physical invasion. *Kernen v Homestead Development Co*, 232 Mich App 503; 591 NW2d 369 (1998).

Although a servient estate may be obliged to bear natural surface storm water run-off from a neighboring dominant estate, a city is liable for trespass when the possessor of the dominant estate prevailed on the city to install a drain pipe that increased the volume of water flooding the plaintiffs' land. *Wiggins v City of Burton*, 291 Mich App 532, 805 NW2d 517 (2011).

Trespass does not require plaintiff to show a continuing or repeating condition as does *Buckeye Union Ins Co v Michigan*, 383 Mich 630; 178 NW2d 476 (1970), for nuisance. See §13.5. A single physical invasion gives rise to a cause of action, although continuing or repeated invasions make it more egregious. Indeed, a circuit court may enjoin a continuing trespass. MCL 600.2919(3)(a).

> ***Unpublished decision:*** *Philipou v CMC Investments*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2006 (Docket No. 261781) (surface water runoff caused by defendant's redirecting historic and natural flow constituted a continuing trespass),

B. Trespass as an Intentional Tort §13.33

Trespass is often thought of as an intentional tort. *Adams v Cleveland Cliffs Iron Co*, 237 Mich App 51; 602 NW2d 215 (1999), does not require proof of intent, but requires only "proof of an unauthorized direct or immediate intrusion" accomplished by any means that the offender knew or reasonably should have known would result in the physical invasion of plaintiff's land. In the absence of an admission by defendant or its agent or employee, knowledge of what a defendant should have known can only be proved by circumstantial evidence. See §13.35 regarding statutory treble damages for some kinds of trespass.

C. Same Activity May Be Both Trespass and Nuisance §13.34

There can be cases in which the same activity or condition is both a trespass and a nuisance. The obvious example is groundwater contamination. Where a defendant contaminates the groundwater that physically flows under a plaintiff's land and into his domestic well, depriving him of the possession of it, a trespass action could lie. And because it also interferes with the normal use and enjoyment of his property, causes inconvenience, annoyance and mental stress, the groundwater contamination would also be a nuisance.

D. Treble Damages §13.35

MCL 600.2919 provides for treble damages in some kinds of trespass, such as destruction of trees. This statute recognizes a difference between intentional trespass, to which treble damages apply, and "negligent" trespass entitling the plaintiff only to single damages. The crucial inquiry is whether a distinction can be drawn between the intent to do the act and the intent to do injury. *Iacobelli Const Co v Western Casualty & Surety Co*, 130 Mich App 255; 343 NW2d 517 (1983).

> ***Unpublished decision*:** *Rudy v Lints,* unpublished opinion per curiam of the Court of Appeals, issued February 22, 2011 (Docket No. 293501) (defendants cut trees on plaintiffs' land, plaintiff's expert estimated value of the trees, and the trial court correctly trebled this amount).

IV. Negligence

A. Requires Proof of Fault §13.36

Negligence in the environmental context is no different than negligence in any other context. Negligence requires some proof of "fault," i.e., that, under the circumstances, the defendant did something that a reasonable person would not do or has failed to do something that a reasonable person would do. Proof of fault puts at issue the "standard of care" and gives the polluter an opportunity to claim that it is doing everything according to accepted standards and is thus not negligent, even though polluting. See Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 Duke LJ 1126.

B. Need Not Be Continuing or Repeated §13.37

Where nuisance is available, a plaintiff need not allege negligence. About the only occasion where negligence might be alleged would be where there has been a one-time offense that was not a trespass and no better basis for a cause of action exists. This may be rare, as the "negligent nuisance" theory may be applied to a single-event nuisance. As discussed in §13.18, there is no continuing wrong doctrine in negligence claims, *Traver Lakes Community Maintenance Ass'n v The Douglas Co,* 224 Mich App 335, 341; 568 NW2d 847 (1997), so if there is a continuing wrong nuisance or trespass should be pleaded.

Environmental cases lend themselves to proof of negligence by circumstantial evidence. The requirements in Michigan are: (1) the event must be of a kind that normally does not occur in the absence of someone's negligence, (2) the event must have been caused by an agency or instrumentality within the defendant's control, (3) the event must not have been due to any voluntary action or contribution on the part of the plaintiff, and (4) evidence of the true explanation of the event must be more readily available to the defendant than to the plaintiff. *Jones v Poretta*, 428 Mich 132; 405 NW2d 863 (1987). Many environmental occurrences, such as explosions or releases of contaminants, could satisfy these criteria.

V. Strict Liability

A. Abnormally Dangerous Activities §13.38

The theory of strict liability grew out of the celebrated English case of *Rylands v Fletcher*, L R 3 HL 330 (1868). In that case, the defendant constructed a reservoir on land separated from plaintiff's land by intervening lands. Plaintiff had coal mines under his land and had opened passages underground between his mine tunnels and some old mine tunnels under the intervening land. Defendant did not know about the underground connections or that his reservoir was built over five old shafts leading down into the abandoned mine. Water in the reservoir burst down these shafts into the old mine tunnels and flooded plaintiff's mine. There was no negligence, no knowledge of impending harm, and no repeated or continuous condition, but the plaintiff prevailed anyway. The House of Lords ruled that anyone who brings to his or her land anything not naturally there and which, if it escapes, is likely to do mischief, keeps it at his or her peril, and is strictly liable for the consequences if it escapes. From this doctrine has sprung the concept of strict liability for abnormally dangerous activities, which is summarized in the 3 Restatement Torts 2d, §519, pp 34-36. Many strict liability cases have involved floodings, keeping explosives stored in a shed, or blasting. Prosser & Keeton, Torts (4th ed) §78, pp 513-514. Electricity, however, has been held not to be abnormally dangerous. *Williams v Detroit Edison Co*, 63 Mich App 559; 234 NW2d 702 (1975). One may have to prove negligence, or perhaps nuisance, if an electric power line is an environmental problem.

In the environmental context, strict liability cases in Michigan have been flooding cases, just as was *Rylands*. Often it is difficult to tell whether the courts adopt *Rylands*, nuisance or trespass in an opinion, and often it does not matter, as a case may fit all three models. In *Herro v Chippewa Cty Rd Comm'r*, 368 Mich 263; 118 NW2d 271 (1962), the road commission collected water in an artificial reservoir. It escaped, flooded and upended plaintiff's decedent's summer cottage and caused her death. The opinion calls the flooding a trespass, says the artificially impounded water constituted a nuisance, declares that the defendant had a obligation to use due care "proportioned to danger of injury from the escape," and holds that the invasion of real estate by superinduced water, earth, sand or other material constitutes an unconstitutional taking of property. Take your pick of theories, but the result is the same as the *Rylands* doctrine. In *Pezo v Tuscola Cty*, 284 Mich 369; 279 NW 864 (1938), the court said that if plaintiff is damaged by water coming onto his land from defendant's new artesian well he is entitled to have the "nuisance" stopped and to be compensated.

B. Toxic Wastes §13.39

The *Rylands v Fletcher* rule fits well in a case where there is a release of toxic substances. *State Dep't of Environmental Protection v Ventron Corp*, 94 NJ 473; 468 A2d 150 (1983), is the leading case holding that a landowner who stores toxic wastes on his premises is strictly liable to anyone damaged by any such wastes that escape and flow onto the property of others. In Missouri a class action by workers employed on land next to a radiopharmaceutical processing plant successfully used this theory in a suit alleging injuries to their physical and mental health. *Bennett v Mallinckrodt, Inc*, 698 SW2d 854 (Mo App 1985). See generally Anno, *Tort Liability for Nonmedical Radiological Harm*, 73 ALR4th 582.

There are long lists of substances declared hazardous by law, such as the Toxic Substances Control Act (TSCA), 15 USC 2601 *et seq.,* the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 USC 136 *et seq.*, and the Resource Conservation and Recovery Act (RCRA), 42 USC 6901 *et seq.,* and similar state statutes and regulations. Strict liability could apply to anyone harboring and releasing such materials.

The release of a toxic substance into the environment could be both a product of an abnormally dangerous activity and a nuisance *per se* depending on how long the release continued. Astute counsel pleads these theories in the alternative.

VI. Trespass-Nuisance

A. The Creation of the Trespass-Nuisance Doctrine §13.40

"Trespass-nuisance" was a rule providing for governmental liability by state and local governments for some kinds of environmental torts. There was no immunity from trespass-nuisance.

Trespass-nuisance was relevant only to the State of Michigan and local governments. The trespass-nuisance doctrine was first defined in *Hadfield v Oakland Cty Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988). The holding is boldly stated near the beginning of the lead opinion by Justice Brickley:

> [W]e hold that there is a limited trespass-nuisance exception to governmental immunity. The trespass-nuisance exception has a long history in Michigan jurisprudence, it has a strong policy basis in the Michigan Constitution, and its continuing viability comports well with the language of the governmental tort liability act and the *Ross* decision.
>
> Trespass-nuisance shall be defined as a direct trespass on, or the interference with the use and enjoyment of, land that results from a physical intrusion caused by, or under the control of, a government entity. Damages may be awarded for injury to person or property.

Id. at 145. The Brickley opinion essentially holds that the law of governmental immunity regarding "trespass-nuisance" should be as it was before 1965, which is when the legislature established some immunity by statute, MCL 691.1401 *et seq.*, discussed in §13.41, after the Supreme Court had abrogated all common-law sovereign immunity in *Williams v City of Detroit*, 364 Mich 231; 111 NW2d 1 (1961). The result is that where plaintiff is the occupier of land distinct from the land from which the trespass or nuisance emanates, plaintiff can sue the government that causes the trespass-nuisance:

> Trespass-nuisance shall be defined as trespass or interference with the use and enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in

> personal or property damage. The elements may be summarized as: condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government).

Hadfield, 430 Mich at 169. The court says nothing about any concept of fault. The authorities cited in support say nothing about fault.

B. The Demise of the Trespass-Nuisance Doctrine §13.41

The Michigan Supreme Court abolished the doctrine of trespass-nuisance, at least as to local governments, and gave them governmental immunity from virtually all environmental torts in the case of *Pohutsky v City of Allen Park,* 465 Mich 675; 641 NW2d 219 (2002), which specifically reversed *Hadfield v Oakland Cty Drain Comm'r,* 430 Mich 139; 422 NW2d 205 (1988) (discussed in §13.40), and abolished the doctrine of trespass-nuisance as a theory of liability as to local governments. The court did so only prospectively, because it realized it was overthrowing 150 years of precedent upon which the public relied, thus preserving all trespass-nuisance causes of action that were then pending, but outlawed the filing of any more cases. The rationale of the opinion is that the common-law doctrine of trespass-nuisance was not intended to be preserved by the legislature in MCL 691.1407(1), as was held in *Hadfield*. That statute reads:

> Except as otherwise provided in this act, a *governmental agency* is immune from tort liability if the governmental agency is engaged in the exercise of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the *state* from tort liability as it existed before July 1, 1965, which immunity is affirmed.

(emphasis added). *Hadfield* held that MCL 691.1407(1) preserved the old doctrine of trespass-nuisance liability as it existed prior to July 1, 1965. *Pohutsky* seized upon the legislature's use of "governmental agency" in the first sentence and "state" in the second to hold that this section preserved the immunity of any *local* governmental agencies such as the defendant City of Allen Park in that case. It would seem from the logic of the opinion that the State of Michigan is still liable in trespass-nuisance. In *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537; 688 NW2d 550 (2004), however, the court of appeals concluded that *Pohustky* granted immunity from trespass-nuisance to the state. *Hinojosa* did not address the core logic of *Pohutsky*, but analyzed whether the governmental act was a tort or an unconstitutional taking, saying that the DNR was immune from tort liability because MCL 691.1407(1), as rendered by *Pohutsky*, says so. The fact that, according to the logic of *Pohutsky*, *Pohutsky* does not say so did not occur to the *Hinojosa* panel, or if it did, the panel ignored it.

The Court of Appeals, however, has decided that there is "no basis to conclude that a trespass-nuisance exception exists for claims against the state." *Blue Harvest, Inc v Dep't of Transportation*, 288 Mich App 267, 274; 792 NW2d 798 (2010).

VII. Other Common Law Theories

A. Fraud and Deceit

1. Against Sellers of Tainted Property §13.42

The common law of fraud and deceit applies to some kinds of environmental problems. These could be where a vendee of realty finds he has paid a great deal of money for a parcel of land with leaking underground storage tanks or downwind from an odiferous landfill. He wants to rescind his purchase and collect damages. He claims the seller, who misrepresented the conditions, defrauded him. There is authority that false statements as to the condition of property by a seller can be actionable. *Crook v Ford*, 249 Mich 500; 229 NW 587 (1930). In that case the builder was held liable for a false statement as to the condition of the foundation, where he made statements that were peculiarly within his knowledge and upon which the buyer relied. There are many cases where purchasers bought buildings constructed on filled land that later settled or washed out. Where the seller-builder-developer knows of the condition and does not disclose it, he may be liable in fraud. *Oakes v McCarthy Co*, 267 Cal App 2d 231; 73 Cal Rptr 127 (l968), is an example of such a case. There the plaintiff was permitted to recover against the land-filler contractor in negligence and against the developer-seller in fraud.

From these principles it readily follows that the seller of land with leaking underground storage tanks or near an old landfill may be liable in fraud to the buyer. This logical step has been taken in New York in *Tahini Investments, Ltd v Bobrowsky*, 99 App Div 2d 489; 470 NYS 2d 431 (1984).

Fraud may consist of either making affirmative misrepresentations of fact or of fraudulent concealment, i.e., remaining silent where there is a duty to speak. The first kind is easier to prove. Where a seller affirmatively concealed the fact that a trailer park could not expand its sewer system, by misstating what the local health department required, was a better case of fraud than mere nondisclosure of the sewer condition. *Morykwas v McKnight*, 37 Mich App 304; 194 NW2d 522 (1971). Where a seller knows of a condition that might affect the health or safety of a buyer, and the condition is unknown and unapparent to the buyer, the seller is bound to disclose its existence. *Weikel v Sterns*, 142 Ky 513; 134 SW 908 (1911).

The Michigan Seller's Disclosure Act is relevant to fraud in the sale of four units or less of residential property. MCL 565.951 *et seq.* requires the disclosure of a list of potential defects in a home for sale. The list is prescribed by the statute, MCL 565.957, and includes some environmental conditions such as "substances, materials or products that may be an environmental hazard, . . . fuel or chemical storage tanks and contaminated soil on the property, . . . proximity to a landfill . . . ." In *Bergen v Baker*, 264 Mich App 376; 691 NW2d 770 (2004), the plaintiff was allowed to claim misrepresentations in the disclosure statement as a basis for a lawsuit based upon fraud, negligent misrepresentation and breach of contract. Although the statute does not prescribe any particular remedy for violation, *Bergen* held that the legislature intended that a violating seller should be liable in a civil suit for misrepresentations or omissions in a disclosure statement. 264 Mich App at 385. The fact that a disclosure statement is made does not foreclose a lawsuit based upon other legal theories. MCL 565.961.

2. Against Brokers of Tainted Property §13.43

In *Hammond v Matthes*, 109 Mich App 352; 311 NW2d 357 (1981), the broker, along with the seller, was liable where he "negligently and fraudulently" failed to disclose a hidden and dangerous condition in the gas line of the house sold. See Anno, *Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold*, 46 ALR4th 546. If the broker fraudulently conceals some environmental defect pertaining to the property, he can be liable directly to the buyer despite there being no privity of contract between them. It is enough that defendant makes a fraudulent representation or concealment that induces plaintiff to act to his damage. *Oppenhuizen v Wennerstein*, 2 Mich App 288; 139 NW2d 765 (1966).

A broker has a duty to disclose newly-acquired information about the environmental condition of a property being offered. *Alfieri v Bertorelli*, __ Mich App __; __ NW2d __ (2012) (Docket No. 297733, Jan, 10, 2012). Buyer alleged silent fraud and negligent misrepresentation arising from the purchase of a condominium in an abandoned factory that was never properly decontaminated. The court held that a duty of disclosure may be imposed on the seller's agent to disclose newly-acquired information that is recognized by the agent as rendering a prior affirmative statement as untrue or misleading. But the jury could consider as comparative negligence the buyer's deciding not to obtain an environmental inspection and signing a purchase agreement specifically stating that the broker had no knowledge of the property's environmental condition.

In home sales, the Seller's Disclosure Act protects the broker somewhat. It says that the agent of a transferor (seller) shall not be liable unless the agent knowingly acts in concert with a transferor to violate the act. MCL 565.965.

B. Waste §13.44

A tenant cannot, without the consent of the landlord, make material changes or alterations in the leased premises to suit his taste or convenience. If he does so, it is called "waste." *Pearson v Sullivan*, 209 Mich 306; 176 NW 597 (1920). It is waste even if the value of the property is enhanced by the alterations. *Id.* Waste began as a common-law doctrine but is now subsumed by statute. MCL 600.2919(2)(a). The elements of waste are: (1) plaintiff is the landlord and defendant is or was a tenant, (2) tenant committed or allowed waste during his term, and (3) physical damages occurred to the premises.

Waste is akin to trespass in that it involves physical damage to land, the main difference being that trespass is a tort by a third party not in possession of the damaged land, while waste is a tort by the person rightfully in possession. See *Camden Trust Co v Handle*, 132 NJ Eq 97; 26 A2d 865 (1942). Typically the landlord asserts waste against a tenant.

The statute allows double damages against a tenant for waste. MCL 600.2919(2)(a). Waste can be enjoined where the remedy at law is inadequate. MCL 600.2919(3)(a). It is surprising that there do not seem to be any Michigan environmental cases brought on the waste theory. With the growing popularity of leases, franchises, and similar business arrangements it would seem that somewhere, sometime, a tenant has environmentally despoiled its landlord's property.

C. Inverse Condemnation §13.45

Although not strictly a common law remedy, inverse condemnation is sometimes used in environmental litigation, where the defendant is the government. See generally Chapter 12. There is no governmental immunity from such a lawsuit, because the claim based upon the constitutional prohibition against taking of private property without compensation. Recovery is limited to fair market value of the property interest taken. Invasion of one's property by air pollution or contamination of water flowing through it, or by flooding, may amount to a taking without just compensation. If the government or a private corporation having eminent domain power causes the taking, a suit will lie for the losses inflicted. *United States v Causby*, 328 US 256 (1946). The Michigan Constitution prohibits takings without just compensation, Const 1963, art 10, §2, so a suit could be filed in either state or federal court.

The law in this area, so far as it relates to environmental matters, has largely developed through the vehicle of flooding cases, as where private land is flooded by water from a government project. These cases all stem from *Pumpelly v Green Bay Co*, 80 US 166 (1871). There are limitations in this theory of liability. First, there must be a "taking" of private property, and in the flooding context courts have decided that a single flood does not constitute a taking. There has to be permanent inundation or inundation so frequent and so severe that the value of plaintiff's land is substantially reduced. 2 Nichols, The Law of Eminent Domain, §5.33 *et seq.*; Stoebuck, *Nontrespassory Takings in Eminent Domain* (1977). Those same concepts carried into other kinds of environmental devaluations can create great difficulties for plaintiffs. Sometimes, of course, a single flood could destroy plaintiff's home and the loss would be compensable. *Herro v Chippewa Cty Rd Comm'r*, 368 Mich 263; 118 NW2d 271 (1962).

There is no theoretical reason why inverse condemnation could not be used in circumstances other than the flooding and physical taking cases, where a governmental activity causes environmental harm. *Buckeye Union Ins Co v Michigan*, 383 Mich 630; 178 NW2d 476 (1970), was almost an inverse condemnation case. The case was framed in nuisance, but the Michigan Supreme Court held there was no governmental immunity there because the nuisance was equivalent to an unconstitutional taking from which there could never be immunity. But in *Chapin v Coloma Twp*, 163 Mich App 614; 415 NW2d 221 (1987), plaintiffs sued because the township sewer system let raw sewage accumulate beneath their home. The court held that the damages did not "rise to the level of a 'taking,'", *id.* at 620, so that plaintiffs could not sue in inverse condemnation, but could recover on a trespass or "intentional nuisance" theory. The case was later vacated by the Supreme Court, 430 Mich 879; 423 NW2d 33 (1988), in light of *Hadfield v Oakland Cty Drain Comm'r,* 430 Mich 139; 422 NW2d 205 (1988), and the trespass-nuisance escape from governmental immunity has been barred by *Pohutsky v City of Allen Park*, 456 Mich 675; 641 NW2d 219 (2002). See §13.41.

There are circumstances, as where there has been no personal injury, where inverse condemnation will work like no other theory, such as where the government diverted a stream leaving a previously riparian owner's riverside property substantially impaired in value, and where a drain commissioner, exceeding his drain easement, scooped out and hauled away a large part of a homeowner's lawn.

VIII. Remedies

A. Equitable Relief §13.46

A statute provides for injunctive relief from nuisances:

> All claims based on or to abate nuisance may be brought in the circuit court. The circuit court may grant injunctions to stay and prevent nuisance.

MCL 600.2940(1). The statute is not limited to nuisances public or private, *per se* or *per accidens*, intentional or negligent. But the court of appeals has held that injunctions may be obtained by an individual plaintiff only where the nuisance is private and involves a statutory violation. *Ken Cowden Chevrolet, Inc v Corts*, 112 Mich App 570; 316 NW2d 259 (1982).

It is extremely important when reading the nuisance cases to determine the relief sought, because the next section of the statute provides that a plaintiff in a private nuisance case may both collect damages and have abatement. MCL 600.2940(2). So the cases brought pursuant to the statute tend to become lumped together in annotations and articles. Nevertheless, different principles of law and equity do (or should) control.

Injunctions can also be obtained to prevent or stay trespasses. MCL 600.2919. By analogy injunctions should be obtainable against abnormally dangerous activities and inverse condemnation.

Whether one can get an injunction against an environmental wrong may depend on whether or not it causes a "permanent" condition. If it is reasonably feasible to abate it, an injunction may be ordered. If not, and it is permanent, plaintiff may be relegated to a suit at law for damages. Economic considerations may play a role in determining permanency. *Obrecht v National Gypsum Co*, 361 Mich 399; 104 NW2d 143 (1960). In that case, although the offending condition, a loading dock for lake freighters, could theoretically be demolished, abating the nuisance, the court held that it was not economically feasible, and so treated it as a permanent nuisance. The loading dock could have been enjoined, the court said, but it was too late to abate. The court remanded for plaintiffs to prove their money damages.

Our modern procedure and unified court system should allow a suit for both injunctive relief and damages. See *Oakwood Homeowners Ass'n, Inc v Marathon Oil Co,* 104 Mich App 689; 305 NW2d 567 (1981) (*Oakwood II*). The reason to do so is attractive where there is an existing environmental problem, the goals of the suit being to obtain compensation for damages past and to remedy the condition to prevent future damage. Keeping in mind the potential pitfalls (such as waiving the right to jury trial), this combined strategy can be advantageous for a plaintiff. Linking a contingent-fee damages case provides a means for financing the litigation seeking the injunctive remedy.

In cases where there is, or is likely to be, pollution, impairment or destruction of the air, water or other natural resource, the best injunctive attack is by use of the Michigan Environmental Protection Act, MCL 324.1701 *et seq*. (MEPA), discussed in Chapter 14. There are kinds of

environmental difficulties that do not fit within MEPA where traditional remedies may be the only recourse, such as where the impact is to the plaintiff's private property.

B. Damages

1. In General §13.47

Elements of damage that are common to all tort theories are listed in M Civ JI 50.01 *et seq*. These are: medical expenses; earnings loss; other expenses; pain, suffering and discomfort; loss of consortium; property damage; and diminution in the value of realty. There are two others peculiar to nuisance cases, discussed in §13.51 and following. By statute, treble damages can be recovered for certain types of trespass, for example, for cutting down trees. MCL 600.2919.

> ***Unpublished decision:*** *LA Plaza, Inc v Hermiz,* unpublished opinion per curiam of the Court of Appeals, issued October 19, 2010 (Docket No. 293291) (claims for nuisance and trespass may be joined with citizen suit pursuant to Part 201, MCL 324.20135; failure to do so in later citizen suit will be res judicata).

2. Diminution of Property Value §13.48

Diminution in market value of property is not caused by what plaintiffs know and fear, but by what prospective buyers perceive. Diminution in market value of real estate is not treated at law markedly different than the same damages occurring to personalty. See M Civ JI 51.03 and 51.04. In *Adkins v Thomas Solvent Co*, 184 Mich App 693; 459 NW2d 22 (1990), it was held that a decrease in property value occasioned by the activities of another is sufficient for the property owner to maintain an action in nuisance against the actor. (Although it may not be enough to support an injunction against the activity.) On appeal, the Supreme Court did not reverse this proposition, but held that there was no decrease in property value occasioned by the nuisance condition because it could not impact the property. *Adkins v Thomas Solvent Co*, 440 Mich 293; 487 NW2d 715 (1990). Such damages may not be recoverable unless the nuisance or trespass is permanent, that is, unabateable. In *Obrecht v National Gypsum Co*, 361 Mich 399; 105 NW2d 143 (1960), the nuisance could not be removed, so the resulting loss of value was the measure of damages. But where the pollution can be abated, especially where plaintiffs are seeking abatement, then as soon as the condition is cured, the plaintiff's lands will be restored, theoretically, to full value. They will have suffered no loss. So where the nuisance is temporary plaintiffs have to be satisfied without diminution-in-value compensation. If the nuisance is not ended, plaintiff's only remedy is to sue again and again as long as the nuisance continues. In inverse condemnation the damage is usually a permanent taking, but there are cases where damages have been awarded for a temporary taking. See Chapter 12, §12.17.

> ***Unpublished decision:*** *Robarg v Tecumseh Products Co,* unpublished opinion per curiam of the Court of Appeals, issued February 22, 2011 (Docket No. 295418) (plaintiffs alleged that hazardous substances found in soil and groundwater at defendant's property would likely migrate into the groundwater beneath plaintiffs' land and diminish value of their property; the court

distinguished *Adkins* and held that the allegation that "use and enjoyment of the property has been diminished by the uncertainty about the effects of the contamination" (slip op at 5) stated a cause of action in nuisance.

3. Damages to Real and Personal Property; "Clean-up" Costs §13.49

Damage to personal property and the expenses of repair or maintenance or the prevention of such damage are common to all tort theories. This type of damages could be a major factor in cases requiring corrective action by the plaintiff, for example, where pollution from defendant's activities has caused plaintiff's land to become contaminated to the point where extensive clean-up is required. See M Civ JI 50.01 *et seq*., the authorities for which should include *Genna v Jackson*, 286 Mich App 413, 452; 781 NW2d 124 (2009), which held that the owner of personal property is competent to opine as to its value.

4. Personal Injury Damages §13.50

Damages for personal injuries sustained as a proximate cause of a tort are well-established. The law is summarized in M Civ JI 50.01 *et seq.* and the cases cited after that instruction. It does not matter if the tort is nuisance, trespass, negligence or abnormally dangerous activities. Damages include medical expenses, earnings losses, pain and suffering, and loss of consortium.

In *Genna v Jackson*, 286 Mich App 413; 781 NW2d 124 (2009), there was indoor environmental contamination and extensive mold infestation. Two mold experts, neither physicians, testified as to what mold exposure is generically known to cause. Plaintiffs' allergist testified that they had compatible symptoms. The court held this testimony was enough circumstantial evidence to go to a jury on causation. "It does not take an expert to conclude that, under these circumstances, defendant more likely than not is responsible for plaintiffs' injuries." *Id*. at 423.

The weak point in many cases alleging personal injuries due to environmental contamination is proximate cause. It may be difficult to prove that some specific exposure to a pollutant *caused* a particular injury or disease. But it may be easy to prove that an existing debilitating condition can be *aggravated* by the exposure. For examples, see Chiodo, Toxic Torts: Medical & Legal Elements, Chapter 5 and case studies (2d ed 2007).

5. Damages Peculiar to Nuisance §13.51

Some elements of non-economic damages are peculiar to nuisance because of the very nature of nuisance, such as the loss of the normal use and enjoyment of one's premises and an element usually lumped as "annoyance, inconvenience and discomfort." Often in the cases it is difficult to distinguish which element a court is considering. The demarcation line between them, if any, is blurred.

> ***Unpublished decision:*** *Robarg v Tecumseh Products Co,* unpublished opinion per curiam of the Court of Appeals, issued February 22, 2011 (Docket No. 295418) (plaintiffs alleged that hazardous substances found in soil and groundwater at defendant's

> property would likely migrate into the groundwater beneath plaintiffs' land and diminish value of their property; the court distinguished *Adkins* and held that the allegation that "use and enjoyment of the property has been diminished by the uncertainty about the effects of the contamination" (slip op at 5) stated a cause of action in nuisance.

a. Loss of the Normal Use and Enjoyment of Premises §13.52

The very nature of the tort of nuisance makes recovery of the loss of normal use and enjoyment of property axiomatic. A use which:

> deprives his neighbor of the reasonable and comfortable enjoyment and use of his property, or which violates the unwritten but accepted law of decency, or which endangers or renders insecure the life and health of his neighbors is a nuisance.

Kilts v Kent Cty Supervisors, 162 Mich 646, 652; 127 NW 821 (1910). A plaintiff might not be dispossessed of her land, but may be unable to utilize it or enjoy it to a reasonable extent.

Although proof of depreciation in rental value is a valid evidentiary guide for determining damages for the loss of enjoyment of property, such proof is not the only method. *Grand Rapids & I R Co v Heisel*, 47 Mich 393; 11 NW 212 (1887). The trier of fact may also look to such injury as occurs to the use of the property as a residence taking into consideration the discomfort and annoyance the owner has suffered.

> ***Unpublished decisions:*** *Krause v Shell Oil Co,* unpublished opinion per curiam of the Court of Appeals, issued 1985 (Docket No. 80171) (plaintiffs have the right to recover for either the impairment of their property's value or the lost use of the same property, or both); *Hainer v Lasalle Bank Midwest National Bank,* unpublished opinion per curiam of the Court of Appeals, issued September 23, 2010 (Docket No. 292124) (nuisance found where neighbor imported dirt causing flooding of plaintiffs' backyard; $15,000 award for two-year loss of the normal use and enjoyment held not excessive).
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b. Annoyance, Inconvenience and Discomfort, Including Mental Stress §13.53

Damages for mental stress and anguish related to interference with property rights have always been allowed in nuisance cases, without regard as to whether there are actual bodily injuries. Wrapped up in the concept of comfortable use and enjoyment of land is the right to live on it free from fear and anxiety. In *Adkins v Thomas Solvent Co*, 184 Mich App 693, 696; 459 NW2d 22 (1990), the Court of Appeals, quoting Prosser & Keeton, stated that a nuisance may consist of a disturbance of the comfort or convenience of the occupant or it may disturb merely his peace of

mind: "A threat of future injury may be a present menace and interference with enjoyment. . . ." In the Supreme Court in *Adkins*, although reversing the Court of Appeals on diminution of property value issues, the majority noted, "We do not know why counsel chose not to assert claims of personal discomfort or annoyance as he did with regard to other plaintiffs . . . ." 440 Mich 293, 316; 487 NW2d 715 (1992). The court said that interference with the use and enjoyment of land includes "interference with the physical condition of the land itself, disturbance in the comfort or conveniences of the occupant including his peace of mind, and threat of future injury that is present menace and interference with enjoyment." *Id.* at 303.

This rule for nuisance actions is markedly different from other torts:

> Seldom do courts distinguish those causes in which discomfort alone is alleged as injury . . . and those in which it merely accompanies such traditional nuisance harms as physical injury to land and fixtures, depreciation of property value, or creation of conditions deleterious to health. Such a tendency exists in the area of nuisance in sharp contrast with . . . general tort doctrines rigidly restricting suits for emotional disturbance recovery as an independent cause of action.

Recent Decisions, *Torts--Nuisance--Personal Annoyance as Sole Injury*, 55 Mich L Rev 310, 311 (1956). In *Price v High Pointe Oil Co, Inc,* 294 Mich App 42, 59, ___ NW2d ___ (2011) (Docket No. 298460, Aug. 25, 2011), lv gtd No. 143831 (Mar 21, 2012), the court held plaintiff was entitled to $100,000 for mental anguish damages in addition to her property damages where defendant negligently pumped fuel oil into plaintiff's basement, destroying her home and displacing her for two years. The court said that mental anguish compensation for harm to her house is recoverable even though ruining personal property would not give rise to such a claim. The court distinguished "emotional distress," which requires a manifestation of physical injury, and "mental anguish" damages, which are not so circumscribed. There are many cases across the nation supporting this proposition, e.g., *Vestal v Gulf Oil Corp*, 149 Tex 487; 235 SW2d 440 (1951), *Galouye v A R Blossom, Inc*, 32 So 2d 90, 93 (La App 1947), *Champa v Washington Compressed Gas Co*, 146 Wash 190; 262 P 228 (1927), *Herzog v Grosso*, 41 Cal 2d 219; 259 P2d 429 (1953), *Dixon v New York Trap Rock Corp*, 298 NY 932; 58 NE2d 517 (1944), *Fontenot v Magnolia Petroleum Co*, 227 La 866; 80 So 2d 845 (1955), *Freeman v Intalco Aluminum Corp*, 15 Wash App 677; 552 P2d 214 (1976), *Branch v Western Petroleum, Inc*, 657 P2d 267 (Utah 1982), and *Krueger v Mitchell*, 106 Wis 2d 450; 317 NW2d 155 (1982). None of these cases mentions actual physical sickness or bodily injury. No expert medical testimony is recited. In no case is there even a doubt expressed as to whether to include mental anguish or emotional stress damages within the ambit of traditional nuisance remedies.

Although annoyance, inconvenience, discomfort and mental anguish are non-economic damages that are difficult to calculate, the loss of the normal use and enjoyment is an economic loss that can be estimated. It can be done like this: determine the hypothetical rental value of the property as if it were not subject to the environmental burden; subtract from that value the hypothetical rental value of the property "as is"; and the difference is the value of the loss of normal use and enjoyment. This calculation produces a recovery proportionate to the worth of the premises.

Unpublished decisions: *Krause v Shell Oil Co,* unpublished opinion per curiam of the Court of Appeals, issued 1985 (Docket No. 80171) (affirming award for mental stress due to the odors causing physical symptoms and vacating homes); *Bielat v South Macomb Disposal Authority*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2004 (Docket No. 249147) (affirming that plaintiffs' fears were properly encompassed within the damages for personal discomfort and inconvenience, and instructing the trial court on remand to "allow plaintiffs to present evidence regarding their fears and anxieties pertaining to the leachate without a showing of a physical manifestation").

6. Temporal Period for Which Damages May Be Recovered §13.54

In nuisance cases where there is a continuing environmental condition it is important to know how back a plaintiff can reach to collect damages. Once a plaintiff brings suit while the pollution is continuing, she can collect for all damages accumulated since the first day of the defendant's tortious condition, even if it is many decades before. But if she starts her suit after the condition has been abated, she can reach back only three years from date of filing and collect only the damages incurred during that period. This rule may become disestablished if the Supreme Court applies the dicta in *Garg v Macomb Cty Community Mental Health Services,* 472 Mich 263; 696 NW2d 646 (2005) (discussed in §13.18) to environmental situations.

7. Separate Assessment of Damages in Class Actions and Joinder of Parties §13.55

Environmental conditions affecting many citizens may be brought as class actions under MCR 3.501 or as "group" actions where the plaintiffs are simply joined under MCR 2.206. The benefits and pitfalls of class actions are discussed in detail in Chapter 16.

Each plaintiff in a group action is entitled to a separate assessment of his or her damages. In *Nevada Cement Co v Lemler*, 89 Nev 447; 514 P2d 1180 (1973), the court reversed the trial court's equal award of $5,000 to each plaintiff because it is obvious that each plaintiff did not suffer equally.

Attorneys negotiating settlements in multiple-plaintiff cases should weigh the claims of and against each person separately, and be careful not to violate §1.8(g) of the Michigan Rules of Professional Conduct, which requires both plaintiff and defense counsel, in making aggregate settlements for multiple clients, to disclose to each client the participation of all others in the settlement.

Usually in a class action where a court approves an across-the-board equal distribution to all class members, the small cases are over-compensated and the good claims under-paid. It might behoove an attorney to "opt out" the best cases from the class so as to maximize their award.

8. Future Damages and Successive Suits

a. In General §13.56

When an environmental tort causes physical personal injury or has damaged or destroyed property, the rules for future damages are no different than for other tort cases. The differences arise in the determination of damages for loss of use and enjoyment of property, impairment of property values, or annoyance, inconvenience and discomfort usually associated with air and water pollution, flooding and contamination. Future damages in these cases usually turn upon whether the tortious condition is temporary or permanent in nature.

b. Temporary or Permanent Conditions §13.57

Future damages are normally awarded only when the trespass or nuisance is permanent. The basis is that if it can be corrected, it should be, and after the tort ceases the damages stop. If there is an equitable or MEPA (see Chapter 14) count in the litigation, abatement may be part of the remedy. But sometimes the condition is, for all practical purposes, unabateable. In determining whether a tort can be abated, the court may consider, among other things, whether it is economically practical to correct it. In *Obrecht v National Gypsum Co*, 361 Mich 399; 105 NW2d 143 (1960), the offending concrete structure built out into Lake Huron was so massive that it was ruled "permanent" and the plaintiffs whose beaches were eroded could collect future damages. The court held that these damages were to be measured by the difference in the values of their properties with and without the erosion problem. Plaintiffs received nothing for future loss of enjoyment.

If the trespass or nuisance is temporary, no future damages can be awarded, but there can be successive suits if the harm is not abated. For a good discussion of this point, see *Baker v Burbank-Glendale-Pasadena Airport Auth*, 39 Cal 3d 862; 705 P2d 866 (1985). For example, where a noise problem is not permanent, plaintiffs may collect their judgments for damages to the trial, and if the offensive condition continues, file a new suit for the damages accumulated between the first trial and the second, and if not then abated, do it again and again. In cases of doubt as to permanency, plaintiffs can elect whether they want to treat a nuisance one way or the other. The obvious choice is to elect temporary, because the threat of successive lawsuits encourages abatement (and settlement). If a plaintiff, unable any longer to put up with living subject to the noise, sells his house at a loss and moves away, the trespass or nuisance was, as to him, permanent and he can collect the property value loss incurred.

IX. Conclusion §13.58

Although much of the attention in environmental law focuses on statutory and regulatory matters, the common law is the foundation for many of the concepts in these areas. Statutes and regulations often adopt common law concepts or have been devised to remedy defects in the common law system. But the common law rules are still effective tools for environmental lawyers.

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4 Edward III, *Lib. Ass. Pl.* 3 1
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Adkins v Thomas Solvent Co, 440 Mich 293; 487 NW2d 715 (1992) 2, 5, 6, 8, 29, 32
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(Docket No. 297733, Jan, 10, 2012) 26
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Court of Appeals, issued November 9, 2004 (Docket No. 249147) 15, 33
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383 Mich 630; 178 NW2d 476 (1970) 4, 8, 11, 19, 20, 27
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279 Mich App 346; 760 NW2d 856 (2008) 2, 14
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Garg v Macomb Cty Community Mental Health Services, 472 Mich 263; 696 NW2d 646 (2005) 13, 33
Gelman Sciences, Inc v Dow Chemical Co, 202 Mich App 250; 508 NW2d 142 (1993) 6
Genna v Jackson, 286 Mich App 413; 781 NW2d 124 (2009) 30
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77 Mich App 197; 258 NW2d 475 (1977) 9, 12
Oakwood Homeowners Ass'n, Inc v Marathon Oil Co,
104 Mich App 689; 305 NW2d 567 (1981) 12, 28
Obrecht v National Gypsum Co, 361 Mich 399; 104 NW2d 143 (1960) 28, 29, 34
Oppenhuizen v Wennerstein, 2 Mich App 288; 139 NW2d 765 (1966) 26
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224 Mich App 335; 568 NW2d 847 (1997) 4, 5, 12, 21
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Constitutions

Const 1963, art 10, §2, ... 27

Statutes

15 USC 2601 23
15 USC 2605(e) 7
28 USC 1346 16
28 USC 2671 16
28 USC 2675 16
28 USC 2680(a) 16
42 USC 6901 23
7 USC 136 23
MCL 286.471 18
MCL 286.472 18
MCL 286.473b 18
MCL 324.11148 2
MCL 324.14704 7
MCL 324.1701 28
MCL 324.20126(a)(6) 2
MCL 324.3115 2
MCL 565.951 25
MCL 565.957 25
MCL 565.961 25
MCL 565.965 26
MCL 600.2919 ..... 20, 21, 26, 28, 29
MCL 600.2919(3)(a) 20, 26
MCL 600.2940 ..... 3, 11, 28
MCL 600.2941(5) 10
MCL 600.2956 9
MCL 600.2957(1) 9
MCL 600.2957(2) 10
MCL 600.2958 10
MCL 600.2960 10
MCL 600.3801 2
MCL 600.3805 2
MCL 691.1401 23
MCL 691.1405 16
MCL 691.1406 16
MCL 691.1407 ..... 16, 18, 24

MCL 691.1407(1) 24
MCL 691.1413 16
MCL 691.1417 17
MCL 691.1419 17

Administrative Rules

R 336.1901 5

Court Rules

MCR 2.112(K) 10
MCR 2.206 ..... 33, 40
MCR 3.501 33

Jury Instructions

M Civ JI 50.01 ..... 29, 30
M Civ JI 51.03 29

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City of Detroit Code §7-202 6
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FORMS

Model Complaint - Common Law Action in Nuisance for Damages

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LIMPIO

ALLEN ACKERMAN, ABIGAIL ACKERMAN,
BERNARD BEBEAU, BERNICE BEBEAU,
CARLOS CASTANEDA, CARMEN CASTANEDA,
and DOREEN DuVAL,

Plaintiffs

No. 09-23456-CE

-vs- Hon. Justin Fairplay

MESSCO, a Delaware Corporation;
CHEMDEM, INC., a Michigan Corporation;
TOXCO CHEMICAL MANUFACTURING CO.,
a Delaware Corp., and OWTASITE & OWTAMIND
LLP, an Ohio LLP, jointly and severally,

Defendants.
/

QUICK & SMART, P.C.
By: Quenton Quick (P203507)
Attorney for Plaintiffs
876 S. Sur St.
Sylvadelphia MI 49678
(616) 123-4567
/

COMPLAINT

Plaintiffs, by their attorney, complain of defendants and declare:

l. Plaintiffs are residents of Limpio County, Michigan, Defendants all do business in Limpio County, Michigan, the cause of action arose in Limpio County, Michigan, and the amount in controversy is in excess of twenty-five thousand ($25,000.00) dollars. The parties are joined under the provisions of MCR 2.206(A).

2. Plaintiffs are individuals who, during the time stated below and relevant to this matter, have resided in an area in Cathara Township, Limpio County, Michigan, known as the "Happy Hills Subdivision".

3. Defendant, MESSCO, Inc.,is in possession of certain premises located on Dustey Road in Cathara Township, Limpio County, Michigan, near the plaintiffs' residences.

4. At that location defendant MESSCO, Inc. operates a waste disposal site, containing a hazardous waste landfill, a liquid industrial waste incinerator and a low-level nuclear waste depository.

5. Defendants, CHEMDEM, INC., a Michigan Corporation; TOXCO CHEMICAL MANUFACTURING CO., a Delaware Corp., and OWTASITE & OWTAMIND LLP, an Ohio Limited Liability Partnership, are generators, suppliers or furnishers of chemical and industrial wastes which they caused to be shipped to the said premises of MESSCO for disposal.

6. During the course of its business the defendant MESSCO received, handled and deposited chemical and industrial wastes on its premises in such a manner that conditions of air pollution and ground water contamination came to exist upon its premises.

7. These contaminants were carried by air and ground water from the premises of MESSCO to the premises of the plaintiffs, exposing them to a variety of hazardous chemicals, including, but not limited to; benzene, putricine, 3,5,6-hexachlorocyclopentadiene, hydrogen sulfide, manganese and to alfa, beta and gamma radiation.

8. The conditions on the MESSCO premises have been so noxious, offensive, dangerous and hazardous that they have constituted and are constituting a continuing nuisance as to the plaintiffs.

9. Plaintiffs learned that the residential wells in their neighborhood were contaminated on or about June 19, 2009.

10. Defendant MESSCO is liable for the nuisance condition which existed on its property.

11. The other defendants knew or should have known that shipments of chemicals and wastes to the defendant MESSCO Inc., would likely be involved in the creation or maintenance of a nuisance condition.

12. As a proximate result of this nuisance condition, plaintiffs, Allen Ackerman and Abigail Ackerman have sustained, and continue to sustain, to their damage the following:

a. Impairment of their health,

b. The reasonable and necessary expense of medical care,

c. Damages to real and personal property and the expense of attempts to mitigate such damage,

d. Loss of the normal use and enjoyment of their home,

e. Annoyance, inconvenience, and discomfort, including mental stress and anguish, and

f. Diminution in the value of their property.

[REPEAT SAME ALLEGATIONS, AS WHICH MAY APPLY, FOR OTHER PLAINTIFFS]

WHEREFORE, plaintiffs pray that this court grant them judgment against the defendants, jointly and severally, in the amounts of $235,000.00 for plaintiffs, Allen and Abigail Ackerman; $350,000.00 for plaintiffs, Bernard and Bernice Bebeau; $l95,000.00 for plaintiffs, Carlos and Carmen Castaneda and $260,000.00 for plaintiff, Doreen DuVal; or such other and further amounts to which the plaintiffs may be found entitled at the time of trial. All the above with interest from date of filing, costs and attorney fees.

QUICK & SMART, P.C.

By: Quenton Quick (P203507)
Attorney for Plaintiffs
876 S. Sur St.
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(616) 123-4567

Dated:

Jury Instructions - Common Law Action in Nuisance for Damages

There are presently no standard jury instructions for common law private nuisance actions. The following are suggested.

REQUESTED JURY INSTRUCTIONS

CAUTIONARY INSTRUCTIONS

M Civ JI 3.09 Jury to Consider all the Evidence.

M Civ JI 3.10 Circumstantial Evidence

M Civ JI 3.11 Jurors May Take into Account Ordinary Experience and Observations

CREDIBILITY AND WEIGHT

M Civ JI 4.01 Credibility of Witness

M Civ JI 4.06 Witness Who Has Been Interviewed by an Attorney

M Civ JI 4.07 Weighing Conflicting Evidence - Number of Witnesses

M Civ JI 4.11 Consideration of Deposition Evidence

ISSUES AND THEORIES

M Civ JI 7.01 Issues for the Jury and Theories of the Parties

(Read Theory and Claim, below)

NUISANCE

There is no M Civ JI for Nuisance. Read instructions below.

PROXIMATE CAUSE

M Civ JI 15.01 Definition of Proximate Cause, substituting the words "a nuisance" in place of "negligent."

M Civ JI 15.03 More than One Proximate Cause. Substitute "the claimed nuisance" in place of "the claimed negligence of the defendant."

M Civ JI 15.04 Causation by Multiple Defendants

BURDEN OF PROOF

M Civ JI 16.01 Meaning of Burden of Proof

M Civ JI 16.02 Burden of Proof in Nuisance Cases on the Issues and Legal Effect Thereof. Use M Civ JI 16.02 but modified as on the attached submission.

DAMAGES

M Civ JI 50.01 Measure of Damages - Personal and Property. Modify by substituting "nuisance" in place of "negligence of the defendant."

M Civ JI 50.02 Including the following;

b. mental anguish
c. fright and shock
d. denial of social pleasure and enjoyments
e. embarrassment, humiliation and mortification

and add:

- loss of the normal use and enjoyment of their premises
- annoyance, inconvenience and discomfort.
- impairment of health (see below)

M Civ JI 50.10 Defendants Take the Plaintiffs As It Finds Them

M Civ JI 51.01 *et seq.* Damages to Personal Property (modify to include real and personal property)

FORM OF VERDICT

M Civ JI 66.02 Modified for nuisance instead of negligence, and delete Q's 6 & 7 (Comparative Negligence)

PLAINTIFFS' THEORY AND CLAIM

Plaintiffs' theory and claim may be read from the plaintiffs' Trial Brief.

NUISANCE - DEFINITION

A legal nuisance has been defined in Michigan as a condition which exists. Liability is not predicated on wrongful conduct through action or inaction on the part of those responsible for the condition. A nuisance may result from the want of due care, but may still exist as a dangerous, offensive or hazardous condition even with the best of care.

A nuisance is an unnatural condition or activity created or permitted to exist on one parcel of land which, over a length of time or on successive occasions, causes significant interference with or damage to the person, property, health, welfare safety or comfort of others who are owners or occupants of other property. Where a business establishment repeatedly or continuously disgorges pollutants into the air, surface water or ground water, or conducts activities which cause damage to property, or impairment of health to others, or interfere with the use and enjoyment of other people on different land, then that person or persons is creating a nuisance. Whenever a business becomes a nuisance it must give way to the rights of the public and if as a proximate result of that nuisance persons on other premises suffer injuries of damages, then the defendant is liable to compensate them.

Buckeye Union Fire Ins Co v State, 383 Mich 630; 170 NW2d 476 (1970)
Robinson v Baugh, 31 Mich 290 (1875)
Northwood v Barber Asphalt Paving Co, 126 Mich 284; 85 NW 724 (1901

NUISANCE - ELEMENTS OF PROOF

Plaintiffs have the burden to prove by a preponderance of the evidence that a defendant caused or permitted a nuisance condition to exist upon the defendant's premises. The elements of nuisance which plaintiffs must so prove are the following:

(a) that an unnatural condition was created or permitted to exist by defendant on its premises;

(b) which was a significant and not merely trivial invasion of the premises of others, or interference with the rights of others to use and enjoy these premises, or to be rightfully upon them without danger,

(c) which was a repeated or continuing condition and not merely an isolated event, and,

If you find from the facts that these three factors existed at the times in question then you must find that a nuisance existed for which defendant Messco is responsible. You must then decide whether this nuisance was a proximate cause of any damages to these plaintiffs.

NUISANCE - LAWFUL ACTIVITIES OF DEFENDANT

Under the law of this state it is not necessary for plaintiffs to prove that a defendant was guilty of negligence or that what it did was done intentionally. Nor is it material to this case that a defendant may have been engaged in a lawful or legitimate business at the time or place in question. However lawful the business may be in itself, and however suitable in the abstract its location may be, this cannot avail to authorize the conductor of the business to continue it in a way which directly, probably and substantially damages the persons or property of others, or their right to normal use and enjoyment of different property they occupy. In other words, even if defendant's activities were lawfully permitted on its premises, it is still liable if these conditions were a nuisance to others on other premises.

Brady v Detroit Spring & Steel Co, 102 Mich 277; 60 NW 687 (1894)
O'Connor v Jersey Creamery Co, 263 Mich 86; 248 NW 557 (1933)
Robinson v Baugh, 31 Mich 290 (1875)

NUISANCE - VIOLATION OF REGULATION

There are certain regulations which are relevant here. These are regulations of the State of Michigan, one of which provides:

> R 336.1901 Air Contaminants or water vapor, when prohibited.
>
> Notwithstanding the provisions of any other commission rule, a person shall not cause or permit the emission of an air contaminant or water vapor in quantities that cause, alone or in reaction with other air contaminants, either of the following:
> (a) Injurious effects to human health or safety, animal life, plant life of significant economic value, or property.
> (b) Unreasonable interference with the comfortable enjoyment of life and property.

If you find that defendant was, during any of the time in question, in violation of this regulation, you may consider that as evidence of nuisance.

NUISANCE - TECHNOLOGICAL KNOWLEDGE ("STATE OF THE ART")

The law of this state does not recognize as a defense to a claim of nuisance that the defendant was using the best technological knowledge available at the time to alleviate any such nuisance even though it was using the latest known technical devices in attempts to control the condition. The use of technical equipment and control devices may be considered by you as evidence bearing upon the magnitude of a nuisance but not upon the defendant's liability for it.

O'Connor v Jersey Creamery Co, 263 Mich 86, 90; 248 NW 557 (1933).

NUISANCE - EFFECT OF PRIOR OCCUPATION

It is no defense to a lawsuit for nuisance that the business may have been conducting its operations complained of in an area that only later became residentially populated. Although defendant may have had a legal right to operate on its premises, and may have had a legal right to have wastes shipped to these premises, the plaintiffs also have a legal right to have erected dwellings where they did and to live in them, free from interference from the defendant's operations. The defendants cannot be protected in their business activities when they become a nuisance. Whenever a business becomes a nuisance it must give way to the rights of the public. This state is so careful of human health that no consideration of mere proprietary rights can be allowed to weigh against them.

People v Detroit White Lead Works, 82 Mich 471; 46 NW 735 (1890)
Ballantine v Webb, 84 Mich 38; 47 NW 485 (1890)

NUISANCE - LIABILITY FOR ACTS OF OTHERS

An employer, contractor or generator of producer of materials who sends out work or ships materials to another, and who knows or, in the exercise of reasonable diligence should know, that a nuisance may result from this, is subject to liability for the harm caused by the nuisance. This is the law even if the nuisance was created on lands not owned by the employer, contractor or producer or by the owner or operator of another party on that land. If a defendant's business activity results in pollution, noise, increased truck traffic or other things which become a nuisance or contribute to a nuisance, and the problem or condition created was within the contemplation of the defendant or is an ordinary usual adjunct to its business, then that defendant is liable for the nuisance even though it was actually physically created by others.

Bleeda v Hickman-Williams Co, 44 Mich App 29; 205 NW2d 85 (1972)
Shannon v Missouri Valley Limestone Co, 255 Iowa 528; 122 NW2d 278 (1963)

NUISANCE – DAMAGES

If you find for the plaintiffs you may award each of them such damages as you find they have sustained. There are seven elements of damages recognized in cases such as this and you may consider as many as you find established by the proofs in determining a sum of money to be awarded to each plaintiff.

The kinds of damages you may consider are:

1. Diminution in the value of plaintiffs' premises, if any, which are of a permanent nature. If you find that the nuisance condition is not permanent, that is, that it can be abated, then you should not consider this item as part of any plaintiffs' loss, because at such time as the nuisance is ended the plaintiffs' land will be restored to full value. If you find that the nuisance condition

is unlikely to be corrected within the foreseeable future, you may award damages for the diminution in value of plaintiffs' lands.

2. Loss of normal use and enjoyment by plaintiffs of their home, for such time as they have been subjected to the nuisance up to now.

3. Annoyance, inconvenience and discomfort suffered by the plaintiffs in connection with putting up with the nuisance up to now. This includes any mental stress or emotional anguish resulting from being subjected to the nuisance.

4. Impairment of the health of any plaintiff whose health you find to have been impaired by the nuisance. Impairment of health means more than physical injury or disease. Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

5. Damages to their property, including the expenses of repair, replacement, extra maintenance or measure taken to prevent damages.

6. The reasonable expenses of necessary medical care, treatment and services sustained by any plaintiff who has incurred such losses due to any physical injury or disease proximately caused by the nuisance.

7. The loss of earning capacity by any plaintiff who has incurred such loss due to any physical injury proximately caused by the nuisance.

8. Physical pain and suffering incurred by any plaintiff who has a physical injury or disease proximately caused by the nuisance.

9. Loss of the consortium by the spouse of any plaintiff who has incurred any physical injury or disease proximately caused by the nuisance.

If any element of damages is of a continuing nature you shall decide how long it may continue.

Which, if any, of these elements of damage has been proved is for you to decide based upon the evidence. The amount of money to be awarded for certain of these elements cannot be proved to a precise dollar amount. The law leaves such amount to your sound judgment. Your verdict must be solely to compensate the plaintiffs and not to punish the defendants.

Restatement of Torts 2d, §929
Krueger v Mitchell, 106 Wis 2d 450; 317 NW2d 155 (1982)
Constitution of the World Health Organization, 62 Stat 2679, TIAS 1808
Askey v Occidental Chemical Corp, 102 App Div 2d 130; 477 NYS2d 242 (1984)
M Civ JI 50.01 etc.
M Civ JI 51.01 *et seq.*

FORMS OF VERDICT

I will furnish you a verdict form. In your deliberations you should proceed as follows:

1. Select a foreman to preside over your deliberations.

You may use the exhibits if you wish.

2. Decide whether a nuisance existed.

3. Decide whether any defendant is liable for the nuisance, that is, did it come from its land or from its activities.

4. Decide whether either plaintiff was damaged. If so which one? Then decide the amounts that each plaintiff should be awarded.

5. Decide whether you can apportion the damages among the defendants. If not, so indicate. If you can, then determine the percentage attributable to each defendant.

You may now gather together to consider your verdict.

VERDICT FORM

1. Do you find that a nuisance condition has existed on the defendant's premises? _____(yes or no)

If you say "no," then go no further. Your verdict will be for the defendants, No Cause for Action.

2. Do you find that the conduct of any defendant was a proximate cause of damage to any plaintiff? _____ (yes or no)

If you say "no," go no further, your verdict will be for the defendants, No Cause For Action.

3. If you have said "yes" to the previous questions, list here the total amount of damages you find that each plaintiff should be paid.

Allen Ackerman $_____

Abigail Ackerman $_____

[Etc.]

4. List here the percentage that each defendant contributed to the nuisance condition. If you find any of the defendants not responsible for the nuisance condition, list that defendant's percentage as "0" (zero).

MESSCO _%

CHEMDEM, INC. _%

TOXCO CHEMICAL MANUFACTURING CO. _%

OWTASITE & OWTAMIND LLP _%

_____
Jury foreperson