Unit 7 – Nuisance and Other Common Law Solutions to Environmental Issues

I. Right of Landowners to Lateral and Subjacent Support

The owner of real property not only has the right to possess his land but he also has certain other specific rights. For example, he has the absolute right to have the land supported on the sides (lateral) and from beneath (subjacent) by adjoining property. These rights exist whether or not there is negligence on the part of the adjoining landowner. However, the right to support only applies to land in its natural condition. If the land is improved (has structures on it), there is no absolute right to support for the structures. It then becomes a question of negligence.

II. Air and Light

The right to use all or a portion of the air space above real property is vested by the grant of the property (e.g., fee simple or lease). Common law also grants the right to have an unobstructed passage of light admitted to one's real property.

III. Remedies in Tort

A. Trespass

Trespass is defined as the unlawful entry (physical invasion) onto the land of another. This tort is based on the absolute right to exclusive possession of land, including the surface, the area below and the air above. Trespass is an intentional tort that may be found even in the absence of damages. This tort protects the landowner's right to possession.

B. Nuisance

Nuisance is defined as the unlawful and unreasonable interference with the enjoyment of the property of another (in other words, someone creates a condition that is obnoxious to his neighbor). This tort protects the landowner's right to quiet enjoyment (use) of his property. It is not necessary to have a physical invasion in order to establish the tort of nuisance. Rather, the disturbance is often noises or odors.

Nuisances may be of two types: (1) public or (2) private. A public nuisance is one that affects a large group of members of the public, not necessarily their land. An action to abate (correct) a public nuisance must be brought by a governmental agency, and, in addition to the civil suit, the government could also bring criminal charges against the wrongdoer. A public nuisance is not generally considered a tort.

A private nuisance involves a particular injury to a specific individual landowner. In this case, the suit against the wrongdoer may be brought by the affected individual. If he can establish that his enjoyment of his property was significantly diminished, he may recover monetary damages and/or injunctive relief. Private nuisances may be brought

under any of the three tort theories (strict liability, intentional tort, negligence) that we studied. Most nuisance suits are based upon a theory of intentional tort. A nuisance may begin as a negligent act; however, once a neighboring landowner objects to the activity and the person creating the nuisance refuses to stop, the activity becomes intentional. Example: Elvis is in his apartment playing his guitar. Nate lives in the apartment next door and tells Elvis to stop. Elvis refuses. If Elvis' music is a nuisance then the tort has become intentional.

A nuisance may be both public and private if a large group is affected and, in addition, some individuals are injured in unique ways. This depends on the facts of the specific case, and because of the difficulty involved in determining those facts, courts and attorneys do not always distinguish between public and private nuisances.

There are several nuisance theories on which private nuisance claims can be based. The first is strict liability. If the activity of the wrongdoer or the conditions are abnormally dangerous, he can be held strictly liable for resulting injuries, even if he was not negligent. A second nuisance theory is intentional interference with another's enjoyment. This is the most frequently used basis for nuisance suits. The intentional interference must also be considered to be unreasonable (i.e., (a) the gravity of the harm outweighs the utility of the conduct or (b) the harm caused is serious and the cost to compensate for it makes the conduct not feasible). A third nuisance theory is negligence, where all of the elements must be present: (1) existence of a duty, (2) breach of that duty, (3) causation in fact and proximate causation, and (4) actual damages.

The courts have found different remedies for private nuisances, based on the circumstances. One remedy is an injunction (the correction of the condition) which is an appropriate remedy when the condition is one that can be changed. This is also called "abatement." If the condition cannot be abated, the plaintiff will seek monetary damages for the loss of his property value due to the permanent nature of the nuisance. The court has the flexibility to impose both remedies if it finds that to be appropriate for the particular circumstances.

In deciding whether to enjoin a nuisance or award monetary damages, the court often balances hardships and benefits. Once a nuisance is determined, then the court must find an appropriate remedy. The North Carolina Court of Appeals distinguished between the two balancing tests (unreasonable interference and remedy) by looking at the *consequences* of the defendant's actions versus the *unreasonableness* of the defendant's actions themselves. Where the plaintiff is not without fault it is possible that the plaintiff may be forced to pay part or all of the cost of abating the nuisance.

IV. Economic Impact of the Common Law Approach

What the tort system seeks is to take externalities created by one party and force that party to internalize those costs. This is fair since we are forcing the individual who created the costs rather than a third party or society to bear those costs. Unfortunately the tort system does this only imperfectly. Transactions costs associated with the legal

system are high so the legal system does a poor job of handling small but meritorious claims. The tort system is also poorly equipped to handle injuries (e.g., low-level chemical exposure) with long lag times. Proving causation is also a major problem because of the lag times and because it is often difficult to isolate the sources of some injuries. For example, we know that the Neuse River contains an excess of N. However, most of the sources are small and diffuse and it is therefore impossible to prove that any particular source caused any harm. Nonetheless taking all the sources together the cumulative is enormous. This is one reason that society has been forced to supplement the tort system with a system of regulation. A second reason is that he tort system is only available once there is an actual injury. Unlike the tort system, a regulatory system can focus on prevention.

V. Right-to-Farm Laws

One of the important factors in deciding a nuisance case is the nature of the area in which the activity is located. In response to urban sprawl, the encroachment of residential development on farmland, and the increased nuisance lawsuits by the new urban dwellers against existing farms, many states have enacted *right-to-farm* laws. These statutes limit the circumstances under which a farm can be considered a nuisance by requiring the court to consider the change in conditions in the area surrounding the farm before declaring it a nuisance. Essentially many right-to-farm laws reverse the "coming to the nuisance" rule that required courts to ignore which use came first in determining whether a nuisance exists (the courts could always consider which use came first at the remedy stage of the trial.)

The right-to-farm statutes generally fall into four types: (1) a time period is established after which the farm may not be considered a nuisance if it was not a nuisance when it began (the most common type, reverses the "coming to the nuisance" rule), (2) there is a presumption that the farm is not a nuisance, (3) certain types of agricultural operations are excluded from nuisance suits, or (4) certain types of claims are excluded (e.g., private but not public nuisances). North Carolina's right-to-farm law is an example of the first type. N.C.G.S. §106-701(a) says that "No agricultural or forestry operation . . . shall be or become a nuisance, public or private, by any changed conditions in or about the locality thereof after the same has been in operation for more than a year, when such operation was not a nuisance at the time the operation began; provided, that the provision of this subsection shall not apply whenever a nuisance results from the negligence or improper operation of any such agricultural or forestry operation . . . ."
The decision by the Iowa Supreme Court in *Bormann* has cast serious doubt on the constitutionality of some right-to-farm laws. Many right to farm laws in effect limit the riht of use and enjoyment of property by limiting the right to force the abatement of nuisances. The Iowa Supreme Court held that the statute at issue in *Bormann* (which is almost identical to the NC right-to-farm law) represented an uncompensated governmental taking of private property in violation of the 5th Amendment.