



# ENVIRONMENTAL POLLUTION

By Jason J. Thompson

Today's lawsuits  
against polluters  
are including claims  
for emotional distress  
damages

If your home is your castle, then environmental pollution can be a royal pain. Environmental pollutants such as black mold, air pollution, and chemical spills, can cause great stress on those exposed to the pollution. It is a quality of life issue.

Today, people impacted by pollution are demanding more from the polluters than mere compliance with regulations and permits; they want compensation for mental anguish and emotional distress. Entire neighborhoods are filing class action lawsuits to sue polluters. The cases are typically based on two tort theories: negligence and nuisance. While both theories allow for recovery of emotional distress damages, they have different proof requirements. This article will analyze three of the different proof requirements and suggest tactics for attorneys litigating today's new environmental tort cases.

## NEGLIGENCE

Negligence is a tort theory that permits someone who is injured by another's unreasonable conduct to recover money damages. The primary element of a successful negligence case is proof of the defendant's wrongful conduct, or failure to take reasonable steps to prevent the harm. In environmental tort cases, violations of EPA regulations or state issued permits can establish a defendant's wrongful conduct. Significant variances from established industry standards can also establish negligence.

## NUISANCE

Nuisance is a tort theory that protects someone's right to use and enjoyment of their real property. The Michigan Supreme Court described a nuisance as follows:

*There are countless ways to interfere with the use and enjoyment of land including 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 a present menace and interference with enjoyment. The essence of private nuisance is the protection of a property owner's or occupier's reasonable comfort in occupation of the land in question.<sup>1</sup>*

## DIFFERENCES BETWEEN NEGLIGENCE AND NUISANCE

There are three important differences between negligence and nuisance when it comes to recovering emotional distress damages: (1) the physical injury requirement; (2) the conduct vs. condition distinction; and (3) the significant harm requirement. The facts of a given case may support one of the theories, but not the other. Understanding the differences could mean the difference between a verdict limited to property damages, and one that includes emotional distress damages.

### The Physical Injury Requirement

To recover emotional distress damages in a negligence claim, a plaintiff must demonstrate a definite and objective physical injury.<sup>2</sup> The physical injury can arise during the accident, such as a broken leg, or later because of the emotional distress, such as nervousness.

## FAST FACTS:

**Emotional distress claims are typically based on two tort theories: negligence and nuisance.**

**The greater the impact of the pollution on a plaintiff's lifestyle, the more likely the jury will award emotional damages.**

In nuisance, there is no physical injury requirement. Therefore, the plaintiff is not required to prove a definite and objective physical injury to recover emotional distress damages.

In environmental pollution cases, the physical injury requirement can dictate what legal theory must be used. This is because environmental pollution does not always cause physical injuries. Sometimes the pollution may simply make the living conditions of those exposed to the pollution intolerable, through extreme noise or odors, excessive air particulate fall-out, or mold growth throughout the home. Therefore, in cases involving physical injuries, negligence may be used. In cases lacking a physical injury, even a minimal injury, the case must be developed under nuisance.

### Conduct vs. Condition

Another important difference between the two theories is the conduct-condition distinction. In negligence, liability turns on the defendant's wrongful conduct. In nuisance, the focus is on the condition that unreasonably interferes with the plaintiff's property rights. Nuisance examines the reasonableness of the interference with the plaintiff's property, irrespective of the reasonableness of the defendant's conduct in creating the condition.<sup>3</sup> Thus, a nuisance may exist even with the best of care by a defendant.

The "reasonableness" of the interference with the plaintiff's property rights mentioned above is determined by a balancing test. Specifically, the plaintiff's right to quiet enjoyment of his or her property is weighed against society's interest in retaining defendant's condition.

For example, a jury could be asked to decide whether a plaintiff's right to live without pig odors is more important than the pig farm's value to the community; whether a community's right to live free from burning trash odors outweighs a city's need for trash incineration; or whether a neighborhood's need for clean groundwater is more important than a leaking landfill's usefulness. If the plaintiffs' property rights outweigh the offensive conditions value to the community, then the interference is unreasonable.

The conduct-condition distinction becomes very important in environmental cases where a defendant's conduct does not violate permits, industrial standards, or otherwise qualify as unreasonable.



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There, negligence might be impossible to prove. However, if the pollution constitutes an unreasonable condition, the defendant may be liable for damages under nuisance. The condition is the key in a nuisance case, not the defendant's conduct.

### The Significant Harm Requirement

The third important difference between the two theories concerns damages, specifically, the amount of harm experienced by the plaintiff. In nuisance, a plaintiff must prove significant harm. In the context of an environmental tort case, the jury must find that plaintiff's emotional damages are significant before they can award money damages. However, in negligence, there is no significant harm requirement. A plaintiff may recover damages for minor or moderate injuries, including minor emotional distress. Thus, the threshold for recovery of emotional distress damages is lower under negligence than it is under nuisance.

In a practical sense, the question of whether a plaintiff's emotional distress is significant is usually a question of fact. Emotional distress damages are subjective—a jury may or may not find them to be significant. Thus, when deciding which theory is better in a given case, the significant injury requirement may not be as critical to the decision as the other two criteria. Certainly, summary disposition in a nuisance claim based on the significant injury requirement is less likely than in a negligence case that lacks any proof of physical injury or wrongful conduct.

### DISCOVERY

Regardless of the theory used in a pollution case, it will be important to investigate a plaintiff's reaction to the pollution during discovery. The goal is to determine how the pollution affected the plaintiff's quality of life. Some important topics requiring investigation include: effects of the pollution on the plaintiff's daily routine; environmental clean-up of the home; required evacuation from the home; what the plaintiff's friends, relatives, or co-workers will say about plaintiff's living conditions; and the plaintiff's level of anxiety, fear, or embarrassment.

### TRIAL

At trial, the jury becomes the focus of attention. Attorneys must decide what evidence and witnesses will effectively demonstrate or defeat the plaintiff's emotional distress claim. Photos or videos of the plaintiff's living conditions can be worth a thousand words. It

may be necessary to call experts from the fields of biology, chemistry, geology, engineering, architecture, weather, and behavioral sciences. The objective scientific data discussed by these experts will balance the subjective emotional damage claim.

For the plaintiff's attorney, impact is crucial to success. The plaintiff's attorney must boldly display the effects of the pollution on the plaintiff's lifestyle. The greater the impact, the more likely the jury will award emotional damages.

For the defense, the opposite is true. Evidence and witnesses that demonstrate the plaintiff's experience was nothing out of the ordinary will disarm plaintiff's emotional damage claim.

As a rule, trial decisions are never made in a vacuum. Environmental tort cases involving claims of emotional distress damages are no exception. The times in which the trial is held and the jury composition affect strategy decisions. For example, many people believe the events of September 11 have affected juror's views on quality of life issues. Attorneys need to explore this issue in voir dire, make necessary adjustments in their witness presentation, and build arguments in line with the jury's expectations.

### CONCLUSION

Today, lawsuits against polluters are including claims for emotional distress damages. The tort theories of negligence and nuisance are commonly being used in the lawsuits. Attorneys that litigate pollution cases will increasingly be handling negligence and nuisance cases, not just statutory or permit violation cases. Emotional damages have become the new cost of environmental pollution. ◆



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### Footnotes

1. *Adkins v Thomas Solvent Co*, 440 Mich 293, 303 (1992).
2. *Daley v La Croix*, 384 Mich 4 (1970).
3. *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335 (1997).