



Common Law: Trespass, Nuisance and Negligence

An Introduction to Common Law: Trespass, Nuisance and Negligence

Mostly, the “environmental law” that we rely on to protect the environment comes from legislation, such as the Environmental Protection Act 1986 (WA), which is made by Parliament. However, the courts have over many years also developed some additional causes of action and remedies, known as the “common law”, that may be useful for remedying or preventing harm to the environment, particularly where the issue involves private land holders.

This fact sheet examines the three key common law actions that can be used to protect the environment – trespass, nuisance and negligence.

What is the “common law”?

Common law is law that exists independently of any legislation. It is a set of laws and principles that has been continually developed by courts over hundreds of years.

There are no specific common law actions designed to protect the environment, as the common law has principally developed to protect the individual's rights and private property rights. However, when an environmental impact also interferes with an individual's right or a private property right, the common law can be used to protect the environment indirectly. For this reason, generally only a person whose interests have actually been affected by the harm can bring an action under the common law.

A breach of the common law is said to give rise to a “cause of action”. Some common law causes of action that might be used to protect the environment are:

- trespass;
- private nuisance;
- public nuisance; and
- negligence.

Each of these causes of action can be used to protect different rights in different situations, although it is often the case that several causes of action may be applicable to a single issue.

If a person successfully proves to a court that another person has or will cause them or their property harm, that person can be ordered to:

- pay damages to compensate for the harm suffered; and/or
- stop causing the harm.

Important disclaimer:

This fact sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this fact sheet.



The common law may be used to protect the environment instead of statute because it may provide a legal recourse that is not otherwise available under the legislation, or because in some situations it may provide remedies that are more desirable or suitable than those available under legislation.

Trespass

Trespass occurs where a person *directly, intentionally or negligently* and *without permission* causes some physical interference with another person's property. Trespass does not require proof of damage or harm.

An example of trespass in an environmental situation might be if a person deliberately sprays pesticides or dumps waste on your property. However, a trespass action will not be successful unless the interference was deliberate. For example, if pesticides being used on your neighbour's property accidentally blow onto your land, it is unlikely that this would constitute trespass. This means that, in practice, actions in trespass are seldom used to address environmental damage.

Private nuisance

Private nuisance is committed where one person ("the defendant") *substantially and unreasonably interferes* with another person ("the plaintiff")'s *right to the use and enjoyment* of their land. Unlike trespass, an interference can amount to a private nuisance even if it is not direct or intentional. Private nuisance is one of the most commonly used actions for addressing environmental concerns.

A person's use and enjoyment of their land might be interfered with by dust, noise, vibration, tree roots, sewerage or odours. However, claims relating to an interference with privacy or a view will probably do not amount to a private nuisance. Private nuisance only protects "ordinary and reasonable" uses of land. Private nuisance is therefore usually not available where the land is used for a particularly sensitive purpose or the person claiming to be affected is particularly sensitive.

To determine whether the interference is substantial and unreasonable, the court might consider things like the locality and standard of comfort that a person living in the area where the property is situated might reasonably expect, the duration, frequency or extent of the interference or the time of day (especially for noise). The court might also take into account whether it was possible for the defendant to take precautions to prevent causing the nuisance. It is not a defence for the defendant to say that the nuisance existed before the plaintiff moved into the neighbourhood.

Abating the nuisance

Where a person has a cause of action in private nuisance, that person may be able to enter the property from where the nuisance is emanating to stop (or "abate") the source of the nuisance. Notice must be given to the person causing the nuisance before entering the land, unless there is an immediate threat to life and health.

We recommend that you seek legal advice before abating a nuisance, because if the matter later goes to trial, and in the court's opinion, no nuisance had been committed, you may be guilty of trespass.

Important disclaimer:

This fact sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this fact sheet.



Public nuisance

In addition to private nuisance, a cause of action called “public nuisance” also exists. “Public nuisance” occurs when a person causes a nuisance which “endangers the life, health, property morals or comfort of the public” or “obstructs the public in the exercise or enjoyment of rights common to all Her Majesty’s Subjects”. Again, the interference has to be both substantial and unreasonable.

Actions in public nuisance may be brought on behalf of the community by the Attorney-General, or by a person who has suffered damage over and above that suffered by the public in general.

It is rare for public nuisance actions brought by the public to be successful, as it is difficult to prove that one person has suffered special loss. For example, in *Ball v Consolidated Rutile Ltd*, a mining company allowed earth and slurry to fall into a watercourse, interfering with fish stocks. A group of commercial fishing operators took action against the company in public nuisance. However, the court refused the claim on the basis that the watercourse was open to all members of the public to fish and therefore the commercial fishing operators suffered no special loss.

It is also uncommon for public nuisance actions to be brought by the Attorney-General, as public nuisance actions brought by the Attorney-General are limited to the remedy of an injunction to stop or prevent the nuisance.

Negligence

Negligence may also be used as a cause of action to address environmental harm. To plead negligence, the person bringing the action (“the plaintiff”) must be able to prove that :

- 1) The defendant owed the plaintiff a “duty of care”;
- 2) the defendant breached this duty; and
- 3) this breach of duty caused damage to the plaintiff.

People only owe a duty of care to those people who are so closely and directly affected by their activities that they ought reasonably to have foreseen that their conduct may be likely to cause damage to that other person. However, defendants do not have to have been able to foresee the specific type of damage that they caused.

A defendant will only breach a duty of care if they do not carry out their activities in accordance with the necessary standard of care. As a general rule, this is the level of care that a “reasonable person” in that situation would take when conducting that activity. In determining this question, the court will consider whether that risk was a risk of which the person knew or ought to have known, the severity of the risk and whether a reasonable person would have taken precautions.

Defences to negligence

A defendant’s liability in negligence will be reduced if they can show that the plaintiff contributed to their own loss in some way. For example, a plaintiff who was injured in a car accident due to the defendant’s negligent driving would be likely to receive less damages if they were not wearing a seatbelt at the time of the accident, and this contributed to their injuries.

Important disclaimer:

This fact sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender’s Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this fact sheet.



It is a defence to negligence if the plaintiff voluntarily assumes the risk of an activity. However, to assume a risk, a person must have been fully aware of the extent and nature of the risk and accepted the whole risk.

Statutory causes of action

In Western Australia, the *Environmental Protection Act 1986 (WA)* also provides people with a cause of action in addition to those mentioned above, where their property is damaged by another person's failure to comply with an environmental protection notice, vegetation conservation notice or a prevention notice issued under the *Environmental Protection Act 1986 (WA)*. A claim for this type of statutory compensation can be made either at the time the person is convicted, or on a later application by the affected person.

Can government bodies be liable?

Government authorities are usually liable in negligence, nuisance and trespass in the same way as a private person. However, the liability of government authorities does have some restrictions.

Government authorities are not liable in negligence for decisions which involve or are dictated by financial, economic, social or political factors. For example, a council is not liable in negligence for damage caused as a result of council inspectors failing to pick up a deficiency in a new building which allowed it to later subside, due to the number of inspectors they employ, how often the agency carries out inspections or what tests the agency carries out.

It is a defence to a cause of action in nuisance that a statutory authority was authorised by legislation to carry out an activity which caused the nuisance. However, if the damage was not inevitable, but merely a consequence of the way the body decided to carry out its statutory powers and duties, the defence of statutory authority will generally not apply. Note that the *Environmental Protection Act 1986 (WA)* expressly provides that nothing in that Act, including approvals given under it, takes away anyone's common law right to prevent, control or abate pollution or environmental harm, or to obtain damages.

Government employees are usually not liable for anything which they do in good faith in the course of carrying out their statutory powers and duties.

What orders can a court make to remedy common law breaches?

If you believe that you have a common law action and want to take the matter to court, there are two main remedies that you can ask the court to award you with if you win. These are either for the defendant to:

- pay money to you to compensate for the harm that you have suffered. This is called "damages"; or, if damages are not appropriate
- stop causing the harm. This is called an "injunction".

Important disclaimer:

This fact sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this fact sheet.



Damages

The usual remedy for common law causes of action is damages. Damages are an amount of money that the defendant must pay to the plaintiff as compensation for the damage or injury caused by the defendant's conduct. The sum of damages awarded will be calculated based on the estimated cost of returning the plaintiff to the same position they would be in if the defendant had not engaged in that conduct. Unfortunately, damage to the environment generally, or to a specific species or population, is quite difficult to quantify in monetary terms.

In addition, as the common law is developed to address interferences with private rights, harm to the environment, unless it also affects the plaintiff's interests, will not be compensated for with damages. For example, if your neighbour pollutes the river that runs through your property and you use the river for watering your crops, you might bring an action in nuisance. The court might then award damages to pay for returning the river to acceptable purity, and to compensate you for loss of earnings from your crops. However, if a species of frog became extinct through the pollution, but it has not actually affected your private interests in any way, apart from the fact that you enjoyed listening to them at night from your veranda, the courts will not award damages to compensate for the loss of the frogs or to rehabilitate them. This is a severely limiting factor in using the common law to protect the environment from harm or for addressing the harm once it has occurred.

Injunction

An injunction is a discretionary order of the court compelling a person to do or stop doing a particular act. As long as the plaintiff has evidence that they will suffer harm from the defendant's actions, a court can order an injunction even if the plaintiff has not yet suffered any harm. Injunctions are awarded most frequently in trespass and nuisance cases where there is a risk that the damaging conduct will continue or be repeated.

An injunction can be awarded by the court at the conclusion of the case (a "final injunction") if damages will not adequately compensate the plaintiff for the loss that they have suffered.

In addition, plaintiffs often request that the court issue an injunction to stop any damage being done to them while the court case is being heard (an "interlocutory injunction"). An interlocutory injunction will only be issued by the court where the plaintiff can show that:

1. there is a legitimate cause of action before the court;
2. there is a real risk of further serious injury to the plaintiff if the injunction is not granted;
3. an injunction is favoured by the "balance of convenience" (which balances the interests of the plaintiff, the defendant and the public); and
4. damages would not be able to compensate the plaintiff.

Before it issues an interlocutory injunction, the court usually requests that the plaintiff give the court an undertaking that the plaintiff can pay for the losses which the defendant will suffer if the interlocutory injunction is granted but the plaintiff does not eventually succeed in their case. Such undertakings can be for substantial sums of money, especially if it is halting things like construction or dredging work, where the contractors are engaged and waiting for work to be allowed to start again.

Important disclaimer:

This fact sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this fact sheet.



Proof

In order to successfully prove common law causes of action to a court, a plaintiff must prove all elements of their claim on the balance of probabilities. The plaintiff must also show that they would not have suffered harm but for the defendant's conduct. It must be proved that the defendant's conduct significantly contributed to the plaintiff's harm, but not necessarily that it was the only cause of that harm.

The plaintiff must also usually show that their property has, or will, suffer actual damage because of the defendant's conduct. However, if the plaintiff's cause of action is in trespass, the plaintiff only needs to show that the trespass happened and does not have to show that they have suffered or will suffer any actual damage.

Is there a time limit for commencing common law legal proceedings?

In general, actions for trespass, nuisance and negligence must be started within six years of the date which the plaintiff suffered actual damage, unless it is for personal injury, in which case it must be within three years. The six year time limit begins to run as soon as the damage is actually suffered - even if the plaintiff does not know they have suffered damage.

Taking legal action

The court in which a plaintiff must commence an action depends upon the plaintiff's cause of action, the amount of damages suffered and what the plaintiff is requesting the court do. We recommend you seek legal advice about what court to go to before you start any proceedings.

If a plaintiff is concerned about damage to them or their property coming from an agricultural operation in rural areas, then the matter may be subject to the mediation procedures under the *Agricultural Practices (Disputes) Act 1995 (WA)*. Under this Act, either party to a dispute about spray drift, noise, dust, odour, smoke or light may refer the matter to the Agricultural Practices Board for determination. If the Board determines that the activity complained of constitutes "normal farm practice", then the person undertaking the activity will have a defence to an action for negligence or trespass, but not nuisance. It is not a complete defence – a plaintiff may present evidence to rebut the defence.

It is not essential to have a lawyer to start court proceedings for a common law cause of action. However, most people do use lawyers as the court process is formal and there are many rules about how you must write court documents, how you may act in court and how you may present evidence to the court.

One of the major practical limitations to using the courts to seek compensation or prevent environmental harm is the time and expense associated with litigation. If you have a lawyer to represent you, you will usually need to pay your own lawyers' costs. If you win, some, but not all, of those costs will be paid by the defendant. If you lose, you will have to pay some of the defendant's legal costs as well as your own legal costs. The court may also order the plaintiff to provide security for the legal costs that may be incurred by the defendant in successfully defending the proceedings.

Important disclaimer:

This fact sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this fact sheet.



The Environmental Defender's Office WA (Inc)

The Environmental Defender's Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- to provide community groups and individuals with legal advice and representation to help protect the environment;
- to promote law reform that improves environmental protection; and
- to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Federal and State Attorney-General's Departments.

However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over \$2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

Environmental Defender's Office WA (Inc)

Suite 4, 544 Hay Street, Perth WA 6000

Tel: (08) 9221 3030

Fax: (08) 9221 3070

Freecall: 1800 175 542 (for WA callers outside the Perth metropolitan region)

Email: edowa@edowa.org.au

Thank you to our donors

The EDO is grateful for the funding provided by the following organisations to create and maintain these fact sheets.



Important disclaimer:

This fact sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this fact sheet.