



## Chapter II

### COMMON LAW & TOXIC TORTS

Before studying the particular statute and regulations that govern the environment, we will examine the basic common law rules that apply to environmental issues. Tort law gives persons the right to compensation for wrongs and injuries which do not derive from a statute or a contract. An individual who commits a tort can be sued in a civil action for the resulting damages. Theories of tort recovery include negligence, trespass, nuisance, and strict liability. A “toxic tort” is a tort arising out of an injury caused by a toxic substance. In particular, we will focus on how these principles create the right to sue for “toxic torts.” While generally New York law will be discussed, most states follow the same rules, with minor variations.

#### A. General Principles of Tort Law

Tort law gives persons the right to compensation for wrongs and injuries that do not derive from a statute or a contract. In general, a tort is committed when: (1) one person owes a duty to the other person, (2) the duty is breached, and (3) the breach is the “proximate cause” of (4) injury or damage to the owner of a legally protected interest. An individual who commits a tort can be sued in a civil action for the resulting damages. Theories of tort recovery include negligence, trespass, nuisance, strict liability, fraud, and inverse condemnation.

A “toxic tort” is an injury caused by a toxic substance which is actionable under basic common law tort principles. Other than scientific complexities and the difficulties of proof, a toxic tort case is really no different than any other personal injury or property damage case.

##### 1. Duty

One of the requirements for tort liability is the presence of a duty to act. For example, a driver has a duty to other motorists and pedestrians to drive safely, a surgeon has a duty to his or

her patient to operate proficiently, and a factory has a duty to protect its downstream neighbors from water pollution.

However, if there is no duty, there can be no tort. Generally, a person only has a duty to those it is reasonably foreseeable that he or she may harm. Usually, someone who has no prior relationship or dealing with another, and would not be expected to come into contact with him or her either personally or through agents or instrumentalities he or she sets into motion, does not have a duty. For example, a driver who ran over a pedestrian would be liable for his or her injuries, but probably not for emotional distress sustained by the pedestrian's friends who watched the accident in horror.

The concept of “duty” has been construed fairly widely with respect to environmental issues. While generally the owner/operator of a facility that causes pollution is responsible, even a non-landowner can be held liable for creating environmental conditions causing a nuisance. *State v. Fermenta Asc Corp.*, 160 Misc.2d 187, 608 N.Y.S.2d 980 (Sup. Ct. Suffolk Co. 1994), *aff'd* 238 A.D.2d 400, 656 N.Y.S.2d 342 (2<sup>nd</sup> Dep’t 1997), *app. den’d* 90 N.Y.2d 810, 664 N.Y.S.2d 271 (1997). A landowner may be liable for actions of his tenant if he has been made aware of contamination, but has failed to fully abate the situation, since he has “control over the premises.” *State v. Monarch Chemicals, Inc.*, 90 A.D.2d 907, 456 N.Y.S.2d 867, 868 (3d Dep’t 1982).

A purchaser of contaminated property may be liable for cleanup of environmental contamination, even if he did not cause the situation, if “upon learning of the nuisance and having a reasonable opportunity to abate it” the purchaser fails to do so. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985); *see also N.Y. Telephone Co. v. Mobil Oil Corp.*, 99 A.D.2d 185, 473 N.Y.S.2d 172 (1st Dep’t 1984); *Restatement (Second) of Torts* §839,

comment d (1979) (“liability is not based upon responsibility for the creation of the harmful condition, but upon the fact that he has exclusive control over the land and the things done upon it....”). Conversely, a seller’s liability may shift to the buyer if, after a reasonable time after the transfer of title, the new owner fails to take steps necessary to remediate the continuing environmental problem. *N.Y. Telephone Co. v. Mobil Oil Corp.*, 99 A.D.2d 185, 473 N.Y.S.2d 172 (1st Dep’t 1984).

## **2. Proximate Cause**

There can be no tort liability without “proximate cause,” which is defined as that which in a natural and continuous sequence, unbroken by an intervening cause, produces the event, and without which the event would not have occurred. The “but for” test is often used -- but for the act, the event would not have occurred. If there is more than one cause, each of which could have independently caused the harm, under the “substantial factor” test each is considered a proximate cause.

Nonetheless, if the consequences of a negligent act are not reasonably foreseeable, they are not considered the proximate cause, even if they are in fact the cause. While certain hazards, such as the possibility that an underground tank may leak, may be foreseeable, *N.Y. Telephone Co. v. Mobil Oil Corp.*, 99 A.D.2d 185, 473 N.Y.S.2d 172 (1st Dep’t 1984), that may not always be the case. *Nodine v. Tarpenting Trucking Co., Inc.* 64 A.D.2d 808, 407 N.Y.S.2d 277 (4th Dep’t 1978).

For example, even if Mrs. O’Leary was negligent in leaving a lantern near her cow for it to kick over, she might not be held responsible for the great Chicago fire. Likewise, a driver who negligently collided with a surgeon on a highway would be liable for injuries sustained by

the doctor and his or her passenger, but not for a patient who might die because the surgeon was delayed reaching a hospital to perform an emergency operation.

A supervening act is an act which occurs after the defendant's tort, and relieves him or her of liability because it is the sole cause of the injury. For example, a company that spills hazardous wastes might not be liable for an explosion caused when a "Hazmat" team treated the spill with the wrong chemical, unless such an event is foreseeable.

### **3. Joint and Several Liability**

If two or more persons ("tortfeasors") acted together to commit a tort, and the harm they caused to the plaintiff is not divisible, their liability is generally "joint and several." This means that each is liable to the plaintiff for all of the plaintiff's damages, and if the plaintiff chooses to sue only one, he or she will have to pay all of the damages. Nonetheless, if the harm is divisible, there is no "joint and several" liability.

For example, A and B both pollute the groundwater with perchloroethylene, contributing to the plaintiff's water contamination. A and B will be jointly and severally liable. However, if A negligently pollutes the north half of a landfill with TCE, and B negligently pollutes the south half with fuel oil, A will be liable for damages to north half, but not the south portion.

### **4. Contributory Negligence/Relative Culpability**

Under the common law doctrine of contributory negligence, a plaintiff who is also negligent or otherwise acted tortiously is barred from recovery unless the defendant had the "last clear chance" to avoid the accident. Suppose Smith was hurt in an auto accident in which he broadsided Jones, who negligently turned left in front of him. Under this doctrine, Smith would be barred from recovery if his negligent speeding was a contributing cause of the accident, unless Jones had the "last clear chance" to swerve and avoid the accident.

Likewise, under the doctrine of assumed risk, which may be considered part of the doctrine of contributory negligence, a person who assumes the risk of a particular activity (*e.g.* playing football, or perhaps even moving next to a chemical factory) may be precluded from recovery for an injury caused by negligence.

New York and many other states have changed the rules of contributory negligence and assumption of risk by statute, and adopted a rule of “comparative negligence” or “relative culpability.” Under New York CPLR §1411, the “culpable conduct attributable to the claimant... including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant... bears to the culpable conduct which caused the damages.” While assumption of risk is a factor to be considered when applying this system, it may still result in a complete bar to recovery.

Under this statutory system of comparative fault, if in our example Smith sustained \$100,000 in damages, but was found 35% responsible for the accident, he would only be able to recover \$65,000. Furthermore, if Jones had a counterclaim for \$50,000, he might be able to recover \$17,500 back from Smith.

Similarly, if two or more persons are liable for the damages, under New York CPLR §1402 their “relative share of responsibility is apportioned” in accordance with the relative culpability of each person liable for contribution.” However, each “joint tortfeasor” is liable for the entire verdict, and may have to bring an action for contribution for the amount he or she pays beyond his or her “equitable share.” Suppose Blue was injured by a chemical spill caused by Brown and Green, and the jury finds Brown 40% at fault, and Green 60% at fault, for Blue's \$20,000 in damages. If Blue cannot find Green, he can collect the entire \$20,000 from Brown,

and leave it up to Brown to collect \$12,000 from Green.

If a defendant is forced to pay to the plaintiff more than his or her relative share of liability, one joint tortfeasor may bring an action for “contribution” against the other joint tortfeasors for reimbursement. Likewise, if by contract, such as an insurance policy, someone has promised to reimburse a tortfeasor for damages, he or she may bring an action for “indemnification” to enforce that promise.

While traditionally joint tortfeasors may be held liable for 100% of damages even if they are only 30% at fault, a different standard may apply to limit liability of joint tortfeasors in personal injury actions in New York. Under New York CPLR Article 16, if a joint tortfeasor is 50% or less at fault, his or her liability for non-economic damages (*e.g.* pain and suffering, loss of quality of life, consortium) is limited to his equitable share. However, there are many exceptions to this rule, and a joint tortfeasor who is 51% or greater at fault remains jointly liable for 100%.

## **5. Other Rules**

Certain special rules limit a potential plaintiff's ability to sue for torts. Under the common law doctrine of “sovereign immunity,” the government is generally not subject to tort liability. Nonetheless, by statute the federal and most state governments have, to some extent, surrendered their sovereign immunity, except for acts or failures related to the performance of a discretionary function or duty. The Federal Tort Claims Act, 28 U.S.C. §2671, *et seq.*, provides that the United States government has accepted tort liability for itself and its agencies and employees. Nonetheless, no tort suit can be brought until a formal claim has been filed and denied by the administrative agency involved.

The ability of a governmental agency to proceed through administrative action does not necessarily preempt the right to pursue common law remedies. *State v. Schenectady Chemicals, Inc.*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (3d Dep't 1984); *State v. Monarch Chemicals, Inc.*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (3d Dep't 1982). However, some statutes may preempt common law claims. For example, the Federal Insecticide, Fungicide and Rodenticide Act preempts claims for failure to warn due to inadequacy of pesticide labeling or fraud, since that is governed by the statute, *Bates v. Dow Agrosciences*, 544 U.S. 431, 125 S.Ct. 1788 (2005); *June v. Laris*, 205 A.D.2d 166, 618 N.Y.S.2d 138 (3d Dep't 1995), *app. dis'd* 85 N.Y.2d 955, 628 N.Y.S.2d 47 (1995), but not other claims like defective design, defective manufacture, negligent testing, and breach of express warranty. *Bates v. Dow Agrosciences*, 544 U.S. 431, 125 S.Ct. 1788 (2005); *State v. Fermenta Asc Corp.*, 238 A.D.2d 400, 656 N.Y.S.2d 342 (2d Dep't 1997), *mot. den'd* 90 N.Y.2d 810, 664 N.Y.S.2d 271 (1997).

Under the doctrine of *respondeat superior*, a principal is liable for his or her agent's torts or other wrongful acts, provided they were committed within the scope of his or her actual or apparent authority. An agent might include an employee or someone else a principal arranged to assist him or her. Thus, a corporation may be liable in a civil or criminal proceeding for its employee's torts, or the employee's violations of statutes or regulations.

However, an agent is also personally liable for his or her own actions. Accordingly, an individual corporate officer or employee that "controls corporate conduct and thus is an active participant in that conduct is liable for the torts of the corporation," including those involving responsibility for environmental contamination. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

Workers compensation laws in New York and other states prohibit an employee from suing his or her employer or co-workers if he or she is injured on the job. Thus, while an employee injured by a toxic spill at work can collect workers compensation benefits or perhaps sue the manufacturer of the chemical or a contractor who was working on the job site, he or she usually cannot sue his or her employer for the injuries. Many states have also enacted “no-fault” automobile laws, which generally prohibit lawsuits over automobile accidents unless serious injuries are involved, and leave it for private insurance companies to apportion and pay for the damages.

## **B. Theories of Liability**

There are several different categories of torts and other legal theories which can be used to complain of harm caused by others. Sometimes, offensive action might fit into more than one category, *e.g.* negligent conduct might also produce a nuisance. A plaintiff is free to plead numerous alternative claims. We will focus on several of the numerous theories of tort liability, particularly as they relate to environmental pollution.

### **1. Trespass**

Trespass is the intentional invasion of another's property. A trespasser is liable for property damages caused by his or her action. In *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331 (1954), the New York Court of Appeals held:

[W]hile the trespasser, to be liable, need not intend or expect the damaging consequences of his intrusion, he must intend the act which amounts to or produces his unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or he does so negligently as to amount to willfulness.



However, trespass may include the unintentional (but inevitable) consequences of an intentional act. *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996). Thus, a landowner who dumps wastes on his or her own land has been held liable for the inevitable migration of the contamination to the adjacent property. *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996). See also *Serotta v. M&M Utilities, Inc.*, 55 Misc.2d 286, 285 N.Y.S.2d 121 (Sup. Ct. Nassau Co. 1967) (spill caused by unauthorized oil delivery); *Dunlop Tire v. FMC*, 53 A.D.2d 150, 385 N.Y.S.2d 971 (4th Dep't 1976) (unintended explosion resulting in trespass on nearby property); *CARE v. Southview Farm*, 834 F. Supp. 1422 (W.D.N.Y. 1993), *rev'd on other grounds* 34 F.3d 114 (2d Cir. 1994), *cert. den'd* 514 U.S. 1082, 115 S.Ct. 1793 (1995) (overspreading of cow manure resulted in trespass); *State v. Fermenta ASC Corp.*, 238 A.D.2d 400, 656 N.Y.S.2d 342 (2d Dep't 1997), *mot. den'd* 90 N.Y.2d 810, 664 N.Y.S.2d 271 (1997) (use of pesticide resulted in trespass).

It is quite likely that a leaking oil tank or other petroleum spill will be unintentional, and thus not actionable as a trespass. See, e.g., *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331 (1954); *Snyder v. Jessie*, 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991); *Drouin v. Ridge Lumber, Inc.*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep't 1994). However, in *Hilltop Nyack Corp. v. TRMI Holdings*, 264 A.D.2d 503, 694 N.Y.S.2d 717 (2d Dep't 1999), a trespass claim was allowed to proceed where there was “‘good reason to know or expect’ that the contaminants would pass from the gasoline service station to the plaintiffs' property.” Furthermore, a defendant cannot trespass on his or her own property. *55 Motor Ave. Co. v. Liberty Industrial Finishing Corp*, 885 F.Supp. 410 (E.D.N.Y. 1994); *Metzger v. Agway*, Index No. 81362 (Sup. Ct. Ontario Co. 1994, Harvey, J.).

## 2. Negligence

A landowner is held to the standard of a “reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.” *Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564 (1976). Thus, a landlord owes a duty to his or her tenant to maintain safe premises, and to avoid environmental hazards such as flaking lead paint. *Morales v. Felice Properties Corp.*, 221 A.D.2d 181, 633 N.Y.S.2d 305 (1st Dep’t 1995).

A landowner cannot have a duty with regard to tanks or other conditions she does not know exist. *White v. Long*, 204 A.D.2d 892, 612 N.Y.S.2d 482 (3d Dep’t 1994), *rev. on other grounds* 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995); *Strand v. Neglia*, 232 A.D.2d 907, 649 N.Y.S.2d 729 (3d Dep’t 1996), *app. dis’d* 89 N.Y.2d 1086, 659 N.Y.S.2d 859 (1997). “[F]or negligence liability to ensue in cases involving the pollution of underground waters, the plaintiff must demonstrate that the defendant failed to exercise due care in conducting the allegedly polluting activity or in installing the allegedly polluting device, and that he knew or should have known that such conduct could result in the contamination of the plaintiff’s well.” *Fetter v. DeCamp*, 195 A.D.2d 771, 773, 600 N.Y.S.2d 340 (3d Dep’t 1993).

Negligence can often be demonstrated in cases involving a leaking tank or other discharge of pollutants. *See, e.g., N.Y. Telephone Co. v. Mobil Oil Corp.*, 99 A.D.2d 185, 473 N.Y.S.2d 172 (1st Dep’t 1984) (negligence due to leaking tanks); *Snyder v. Jessie*, 145 Misc.2d 293, 546 N.Y.S.2d 777 (Sup. Ct. Monroe Co. 1989), *mod.* 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep’t 1990), *mot. den’d* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991) (unusually frequent deliveries to tank later found to be leaking may be negligence). Further, a landowner can be liable for pollution resulting from a failure “to use reasonable care to maintain” underground

tanks or other facilities “in a reasonably safe condition.” *Leone v. Leewood Service Station, Inc.*, 212 A.D.2d 669, 670, 624 N.Y.S.2d 610, 612 (2d Dep’t 1995), *mot. den’d* 86 N.Y.2d 709, 634 N.Y.S.2d 443 (1995). An environmental consultant may be liable for negligence for failing to discover or properly address contamination. *Benz v. Burrows*, 191 A.D.2d 1021, 594 N.Y.S.2d 929 (4th Dep’t 1993); *Hilltop Nyack Corp. v. TRMI Holdings*, 264 A.D.2d 503, 694 N.Y.S.2d 717 (2d Dep’t 1999).

An environmental law or regulation may create a duty, so that violation of the law will constitute negligence. *Leone v. Leewood Service Station, Inc.*, 212 A.D.2d 669, 624 N.Y.S.2d 610 (2d Dep’t 1995), *mot. den’d* 86 N.Y.2d 709, 634 N.Y.S.2d 443 (1995) (negligent failure to test gasoline tanks). Nonetheless, violation of a regulation is merely evidence of negligence, and does not automatically create tort liability. *Juarez v. Wavecrest Mgt. Team Ltd.*, 88 N.Y.2d 628, 649 N.Y.S.2d 115 (1996) (violation of New York City Administrative Code requirements to abate lead paint hazards did not result in absolute liability).

### **3. Private Nuisance**

In the seminal case, *Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 172 (1977), the New York Court of Appeals explained the nature of a private nuisance:

A private nuisance threatens one person or a relatively few (*McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 344), an essential feature being an interference with the use or enjoyment of land (*Blessington v. McCrory Stores Corp.*, 198 Misc. 291, 299, 95 N.Y.S.2d 414, 421, *affd.* 279 App. Div. 807, 110 N.Y.S.2d 456, *affd.* 305 N.Y. 140). It is actionable by the individual person or persons whose rights have been disturbed (*Restatement, Torts*, notes preceding §822, p. 217).

The necessary elements of a private nuisance are as follows:

one is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities (Restatement, Torts 2d (Tent Draft No. 16), s 822; Prosser, Torts (4th ed.), p. 574; 2 N.Y.P.J.I. 563-654; *see Spano v. Perini Corp.*, 25 N.Y.2d 11, 15, 302 N.Y.S.2d 527, 529, 250 N.E.2d 31, 33; *Kingsland v. Erie Co. Agric. Soc.*, 298 N.Y. 409, 426-427, 84 N.E.2d 38, 46-47; *Wright v. Masonite Corp., D.C.*, 237 F.Supp. 129, 138, *affd.* 4th Cir., 368 F.2d 661, *cert. den.* 386 U.S. 934, 87 S.Ct. 957, 17 L.Ed.2d 806.

*Copart* at 569, 394 N.Y.S.2d at 172-173.

Pollution may be actionable as a private nuisance. *See, e.g., Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996) (neighboring property contaminated by hazardous waste); *Snyder v. Jessie*, 145 Misc.2d 293, 546 N.Y.S.2d 777 (Sup. Ct. Monroe Co. 1989), *mod.* 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991) (oil spill); *CARE v. Southview Farm*, 834 F. Supp. 1410 (W.D.N.Y. 1993) (spreading of cow manure). However, a private nuisance claim generally does not lie with regard to conditions created by a landowner or tenant on its own property where there is no off-site impact. *Rose v. Grumman Aerospace Corp.*, 196 A.D.2d 861, 602 N.Y.S.2d 34 (2d Dep't 1993); *Drouin v. Ridge Lumber, Inc.*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep't 1994); *Nashua Corp. v. Norton Company*, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. 1997).

In order to bring their private nuisance claim, plaintiffs must show an interference with their property that is "substantial in nature" and "unreasonable in character." *Scribner v. Summers*, 84 F.3d 554, 559 (2d Cir. 1996); *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 71 F.Supp.2d 179, 188 (W.D.N.Y. 1999), *vacated on other grounds* 216 F.3d 391 (2d Cir. 2000). This may require exceedance of an applicable regulatory or cleanup standard. *State of New York v.*

*Fermenta ASC Corp.*, 166 Misc.2d 524, 630 N.Y.S.2d 884 (Sup. Ct. Suffolk Co 1995), *aff'd* 238 A.D.2d 400, 656 N.Y.S.2d 342 (2d Dep't 1997), *app. den'd* 90 N.Y.2d 810, 664 N.Y.S.2d 271 (1997); *Suffolk Co. Water Authority v. Union Carbide Corp.*, N.Y.L.J., May 2, 1991, p. 28, col. 1 (Sup. Ct. Suffolk Co. 1991); *Lessord v. General Electric Co.*, 2002 U.S. Dist. LEXIS 24839 (W.D.N.Y. Aug. 29, 2002).

The courts in New York and around the country have generally held that a property owner may not sue for nuisance caused by a nearby environmental problem if there is no physical invasion of the plaintiff's property. *See Adkins v. Thomas Solvent Co.*, 440 Mich. 293 (1992); *Adams v. Star Enterprise*, 51 F.3d 417 (4th Cir.1995); *Bradley v. Armstrong Rubber Company*, 989 F.2d 822 (5th Cir. 1993), *cert. den'd* 114 S.Ct. 1067 (1994); *Golen v. Union Corp.*, 718 A.2d 298 (Pa. Super. 1998). In *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 71 F.Supp.2d 179 (W.D.N.Y. 1999), *vac'd on other grounds* 216 F.3d 391 (2d Cir. 2000), Judge Larimer held that "[i]n order to recover damages for diminution in value, property owners must show... that their property has been physically damaged." 71 F.Supp.2d 188. Likewise, in *Halliday v. Norton Company*, 265 A.D.2d 614, 696 N.Y.S.2d 549 (3d Dep't 1999), *mot. den'd* 94 N.Y.2d 894, 706 N.Y.S.2d 696 (2000), the court dismissed a claim for stigma where there was no actual contamination of the plaintiff's property by a nearby landfill. *See also Nalley v. General Electric Company*, 165 Misc.2d 803, 630 N.Y.S.2d 452 (Sup. Ct. Rensselaer Co. 1995).

There may, however, be a claim for injunctive relief arising out of an anticipatory nuisance claim. *See* 81 N.Y. Jur. 2d *Nuisances* §64. Furthermore, in *Scheg v. Agway, Inc.*, 229 A.D.2d 963, 645 N.Y.S.2d 687, 688 (4th Dep't 1996), where the plaintiffs' properties were near a landfill, but had never actually been contaminated, the court held that the "complaint, insofar as

it alleges that the value of their property was diminished as a result of its proximity to the landfill, does state a cause of action.”

#### 4. Public Nuisance

In *Copart Industries, Inc. v. Consolidated Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 172 (1977), the New York Court of Appeals also explained the nature of a public nuisance:

A public, or as sometimes termed a common, nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency (*Restatement, Torts*, notes preceding § 822, p. 217; *see* Penal Law, § 240.45). It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all (*New York Trap Rock Corp. v. Town of Clarkston*, 299 N.Y. 77, 80, 85), in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons (*Melker v. City of New York*, 190 N.Y. 481, 488; *Restatement, Torts*, notes preceding § 822, p. 217).

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although an individual cannot institute an action for public nuisance as such, he may maintain an action when he suffers special damage from a public nuisance (*Restatement, Torts*, notes preceding §822, p. 217; *Wakeman v. Wilbur*, 147 N.Y. 657, 663-664).

Clearly, pollution may be actionable as a public nuisance. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *Drouin v. Ridge Lumber, Inc.*, 209 A.D.2d 957, 619 N.Y.S.2d 433 (4th Dep’t 1994). In *Drouin*, the Fourth Department allowed a landowner to make a claim for public (as opposed to private) nuisance for leaking oil tanks maintained by a tenant on his or her own property. Similarly, in *Nashua Corp. v. Norton Company*, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. 1997), response costs were sufficient “special damages” to enable a

landowner to sue the prior owner for hazardous waste contamination. In *Booth v. Hanson Aggregates of New York, Inc.*, 16 A.D.2d 1137, 791 N.Y.S.2d 766 (4<sup>th</sup> Dep't 2005), homeowners were entitled to proceed with a public nuisance claim against a quarry that allegedly pumped their wells dry.

## **5. Strict Liability**

Under the doctrine of “strict liability,” certain activities are so dangerous that the common law imposes liability regardless of whether or not a person acts reasonably. *Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 440, 448, 398 N.Y.S.2d 401, 404 (1977). This principle has historically applied to activities such as blasting or storage of explosives, and may apply to “generation and disposal of chemical wastes.” *State v. Schenectady Chemical, Inc.*, 117 Misc.2d 960, 459 N.Y.S.2d 971 (Sup. Ct. Rensselaer Co. 1983), *mod.* 103 A.D.2d 33, 37, 479 N.Y.S.2d 1010, 1013 (3d Dep't 1989); *State v. Monarch Chemicals*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (3d Dep't 1982); *see also New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985). Thus, a person who uses all due care in the storage of a hazardous chemicals, and complies with all applicable regulations, may still be liable for damages arising from an accidental spill under the theory of strict liability. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *State v. Schenectady Chemical, Inc.*, 103 A.D.2d 33, 37, 479 N.Y.S.2d 1010, 1013 (3d Dep't 1989).

However, home heating oil has been held not to give rise to common law strict liability. *Snyder v. Jessie*, 164 A.D.2d 405, 565 N.Y.S.2d 924 (4th Dep't 1990), *mot. den'd* 77 N.Y.2d 940, 569 N.Y.S.2d 613 (1991). Likewise, storage of gasoline is not an ultrahazardous activity. *750 Old Country Road Realty Corp. v. Exxon Corp.*, 229 A.D.2d 1034, 645 N.Y.S.2d 186 (4<sup>th</sup> Dep't

1996); *Hilltop Nyack Corp. v. TRMI Holdings*, 264 A.D.2d 503, 694 N.Y.S.2d 717 (2d Dep't 1999).

## 6. Fraud

Fraud is an intentional misrepresentation. If a seller intentionally deceives a buyer with respect to property conditions, the seller may be liable for fraud. *Keywell v. Weinstein*, 33 F.3d 159 (2d Cir. 1994) (misrepresentation with regard to the extent of TCE disposal); *Kaddo v. King Service Inc.*, 250 A.D.2d 948, 673 N.Y.S.2d 235 (3d Dep't 1998) (misrepresentation of condition of underground storage tanks which had leaked onto neighboring properties and subsequently led to the closing of gas station); *Scharf v. Tiegerman*, 166 A.D.2d 697, 561 N.Y.S.2d 271 (2d Dep't 1990) (seller knew city was considering revoking status as legal three-family dwelling).

Under the doctrine of *caveat emptor* ("buyer beware"), silence is not fraud, so that unless a seller intentionally gives false information about the property, there is no fraud:

It is settled law... that the seller of real property is under no duty to speak when the parties deal at arms length. The mere silence of the seller, without some act or conduct which deceived the purchaser, does not amount to a concealment that is actionable as a fraud (*see, Perin v. Mardine Realty Co.*, 5 A.D.2d 685, 168 N.Y.S.2d 647, *affd.* 6 N.Y.2d 920, 190 N.Y.S.2d 995; *Moser v. Spizzirro*, 31 A.D.2d 537, 295 N.Y.S.2d 188, *affd.* 25 N.Y.2d 941, 305 N.Y.S.2d 153). The buyer has the duty to satisfy himself as to the quality of his bargain pursuant to the doctrine *caveat emptor*, which in New York State still applies to real estate transactions.

*London v. Courduff*, 141 A.D.2d 803, 804, 529 N.Y.S.2d 874 (2d Dep't 1988), *lv. dis'd* 73 N.Y.2d 809, 537 N.Y.S.2d 494 (1988).

Nonetheless, the courts have eroded this doctrine *caveat emptor*, especially with regard to environmental matters, and may imply a duty to disclose defects to a buyer, even if no inquiry is made. *Stambovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 674 (1st Dep't 1991) (duty to



disclose haunted nature of house); *Young v. Keith*, 112 A.D.2d 625, 492 N.Y.S.2d 489 (3d Dep't 1985) (duty to disclose faulty water and sewer systems).

Thus, in spite of *caveat emptor*, a seller who knowingly fails to disclose the presence of environmental contamination or other hidden defects on a property may be liable to the buyer for fraud even if no inquiry or representations were made with regard to environmental contamination. See *Roth v. Leach*, 1990 N.Y. Misc. LEXIS 761 (Sup. Ct. Wayne Co. 1990) (duty to notify buyer of presence of buried hazardous wastes); *195 Broadway Co. v. 195 Broadway Corp.* N.Y.L.J., April 15, 1988, p. 6, col. 4 (Sup. Ct. N.Y. Co. 1988) (duty to notify buyer of presence of asbestos in building); *Tahini Investments, Ltd. v. Bobrowsky*, 99 A.D.2d 489, 470 N.Y.S.2d 431 (2d Dep't 1984) (buried drums). Furthermore, in New York, disclosure of environmental problems is required by the Property Condition Disclosure Act (Real Property Law Article 14) upon sale of most residential properties.

However, no fraud claim can be made if the buyer is on notice to the potential defect. For example, in *Banker North Salem Associates v. Haight*, 204 A.D.2d 949, 612 N.Y.S.2d 281 (3d Dep't 1994), no fraud claim could be made against the seller of an apple orchard who had no knowledge of the use of hazardous chemicals. In *Vandervort v. Higginbotham*, 222 A.D.2d 831, 634 N.Y.S.2d 800 (3d Dep't 1995), a buyer could not make a fraud claim when he was on notice of a possible oil spill, since he knew that the property had been used as a motor vehicle repair shop, and floor drains were obvious.

There may also be a duty to give a buyer correct information about nearby environmental problems that may have an effect on value. *Diggins v. Amato*, Index No. 66839 (Sup. Ct. Steuben Co. 1994, Purple, J.), *aff'd* 214 A.D.2d 1056, 627 N.Y.S.2d 507 (4th Dep't 1995); see also *Strawn v. Canuso*, 271 N.J. Super. 88, 638 A.2d 141 (N.J. App. Div. 1994) (real estate

broker may have obligation to investigate and disclose potential contamination on or near property).

Neither the statement that no representations are made, 60 N.Y. Jur.2d *Fraud and Deceit* §218; *DeBell v. Nothnagle Florida Realty Corp.*, 24 A.D.2d 825, 264 N.Y.S.2d 190 (4th Dep't 1965), nor even an "as is" clause, 60 N.Y. Jur.2d *Fraud and Deceit* §207; *George v. Lumbrazo*, 184 A.D.2d 1050, 584 N.Y.S.2d 704 (4th Dep't 1992), *app. dis'd* 81 N.Y.2d 759, 594 N.Y.S.2d 719 (1992); *Haney v. Castle Meadows, Inc.*, 839 F.Supp. 753 (D. Colo. 1993), necessarily bars a fraud claim.

## **7. Mistake**

If defective property is sold, but there is no intentional fraud (perhaps because the seller did not know), there might be a mutual mistake. In *Rekis v. Lake Minnewaska Mountain Houses, Inc.*, 170 A.D.2d 124, 130, 573 N.Y.S.2d 331, 335 (3d Dep't 1991), *app. dis'd* 79 N.Y.2d 851, 580 N.Y.S.2d 201, *mot. to reargue den'd* 79 N.Y.2d 978, 583 N.Y.S.2d 196 (1992), the court held that:

a contract is voidable under the equitable remedy of rescission if the parties entered into the contract under a mutual mistake of fact which is substantial and existed at the time the contract was entered into.

In *U.S. Postal Service v. Phelps*, 950 F. Supp. 504 (E.D.N.Y. 1997), a land sale was rescinded due to mutual mistake after the seller failed to complete cleanup promised to be completed after the 1986 closing. However, in *Copland v. Nathaniel*, 164 Misc.2d 507, 624 N.Y.S.2d 514 (Sup. Ct. Westchester Co. 1995), no mistake claim could be made for chlordane found in a house, where the buyers were on notice to a termite problem. *See also Vandervort v.*

*Higginbotham*, 222 A.D.2d 831, 634 N.Y.S.2d 800 (3d Dep't 1995) (no mistake claim when buyer on notice to possible contamination).

Relief for unilateral mistake is more restrictive. A “contract may be voided for unilateral mistake of fact only where enforcement of the contract would be unconscionable, the mistake is material and was made despite the exercise of ordinary care.” *Landes v. Sullivan*, 240 A.D.2d 971, 974, 659 N.Y.S.2d 544, 547 (3d Dep't 1997). A unilateral mistake may be grounds for equitable relief, particularly “where the mistake is, or should be, known to the other party, or where it is induced by that party,” *Eastern Freightways, Inc. v. U.S.*, 257 F.2d 703, 707 (2d Cir. 1958), or there is “overreaching or inequitable conduct.” *Schiavone Construction Company, Inc. v. McGough*, 112 A.D.2d 81, 82, 492 N.Y.S.2d 364, 365 (1st Dep't 1985).

## **8. Waste**

A tenant who damages property either through neglect or unreasonable voluntary acts, may be liable for “waste.” Accordingly, a tenant may “waste” property by leaving behind environmental contamination. *See P.B.N. Associates v. Xerox Corp.*, 141 A.D.2d 807, 529 N.Y.S.2d 877 (2d Dep't 1988), *mod.* 176 A.D.2d 861, 575 N.Y.S.2d 451 (2d Dep't 1991).

## **9. Restitution**

A claim for restitution arises where “it would be against equity and good conscience to permit the defendant to retain what is sought to be recovered.” 22 N.Y.Jur.2d *Contracts* §445. Restitution must be made for “unjust enrichment” for “property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefore.” *Id.* §447. The “essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.” *Id.* §448. There is no need to prove any wrongdoing by the defendant. *Id.*

Thus, some courts have recognized claims for restitution where a defendant should, in fairness, be held accountable for the cleanup of environmental contamination. *New York v. SCA Services*, 754 F. Supp. 995 (S.D.N.Y. 1991); *State of New York v. Almy Brothers, Inc.*, 866 F.Supp. 668 (N.D.N.Y. 1994); *State v. Schenectady Chemicals, Inc.*, 117 Misc.2d 960, 966-67, 459 N.Y.S.2d 971, 977 (Sup. Ct. Rensselaer Co. 1983), *mod.* 103 A.D.2d 33, 479 N.Y.S.2d 1010 (3d Dep't 1984); *City of New York v. Lead Industries Association, Inc.*, 222 A.D.2d 119, 644 N.Y.S.2d 919 (1st Dep't 1996), *later opn.* 241 A.D.2d 387, 660 N.Y.S.2d 422 (1997); *City of New York v. Keene Corp.*, 132 Misc. 2d 745, 505 N.Y.S.2d 782 (Sup. Ct., NY Co. 1986), *aff'd* 129 A.D.2d 504, 513 N.Y.S.2d 1004 (1st Dep't 1987); *see also* *Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000) (restitution claim brought for oil spill). However, if a contribution claim can be brought under CERCLA §113, 42 U.S.C. §9613, a restitution claim is preempted. *Bedford Affiliates v. Sils*, 156 F.3d 416 (2d Cir. 1998).

#### **10. Indemnification or Contribution**

Where two parties are both under a duty to clean up environmental contamination, and the duty, as between the two parties, should have been discharged by the defendant, the plaintiff may recover cleanup costs under a theory of "implied indemnification" or contribution. *City of New York v. Lead Industries Association, Inc.*, 222 A.D.2d 119, 644 N.Y.S.2d 919 (1st Dep't 1996), *later opn.* 241 A.D.2d 387, 660 N.Y.S.2d 422 (1997); *City of New York v. Keene Corp.*, 132 Misc. 2d 745, 505 N.Y.S.2d 782 (Sup. Ct., N.Y. Co. 1986), *aff'd* 129 A.D.2d 504, 513 N.Y.S.2d 1004 (1st Dep't 1987); *State v. Stewart's Ice Cream Co., Inc.*, 64 N.Y.2d 83, 86, 484 N.Y.S.2d 810, 811 (1984). In *City of New York v. Lead Industries*, the City alleged that it had a non-delegable duty to its tenants to remediate lead contamination, and it stated a claim against lead manufacturers to reimburse it for its costs.

If a contribution action is available under CERCLA §113, 42 U.S.C. §9613, such a claim may be preempted. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998). Thus, in *Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000), the plaintiff could pursue contribution claims for expenses it was required to incur under the State Superfund Law or the New York Oil Spill Law, but not those available under a CERCLA contribution claim.

### **11. Quasi-Contract**

“‘Quasi contracts are not contracts at all,’ but are ‘imposed by law where there has been no agreement... to assure a just and equitable result.’” *Wood Realty Trust v. N. Storonske Cooperage Co., Inc.*, 229 A.D.2d 821, 646 N.Y.S.2d 410 (3d Dep’t 1996). In *Wood Trust*, the owner of an apartment building stated a quasi-contract claim when the defendant owner of nearby land that had contaminated the plaintiff’s property stopped providing bottled water to residents after the statute of limitations to sue in tort had expired.

### **12. Contract**

A breach of contract – which is not a tort claim -- may also form the basis for an environmental claim. For example, a landlord may have a cause of action for breach of lease if his or her tenant contaminates the landlord’s property. *P.B.N. Associates v. Xerox Corp.*, 141 A.D.2d 807, 529 N.Y.S.2d 877 (2d Dep’t 1988), *mod.* 176 A.D.2d 861, 575 N.Y.S.2d 451 (2d Dep’t 1991). However, environmental contamination does not make the title to property unmarketable, or result in breach of the warranties of title. *Vandervort v. Higginbotham*, 222 A.D.2d 831, 634 N.Y.S.2d 800 (3d Dep’t 1995); *Roth v. Leach*, 1990 N.Y. Misc. LEXIS 761 (Sup. Ct. Wayne Co. 1990). Thus, in *John Hancock Mutual Life Insurance Co. v. 491-499 Seventh Avenue Associates*, 169 Misc.2d 493, 644 N.Y.S.2d 953 (Sup. Ct. N.Y. Co. 1996), *app.*

*wdrwn.* 232 A.D.2d 966, 648 N.Y.S.2d 490 (2d Dep't 1996), where the notice of sale disclosed oil contamination, a foreclosure sale could proceed.

### **13. Inverse Condemnation**

The doctrine of inverse condemnation has long been recognized by the courts of New York “as a procedural vehicle for granting damages where an entity clothed with the power of eminent domain has interfered with the property rights of a landowner to the extent that it amounts to a compensable taking.” *Knapp v. County of Livingston*, 175 Misc.2d 112, 667 N.Y.S.2d 662, 666 (Sup. Ct. Livingston Co. 1997), *aff'd* 262 A.D.2d 936, 701 N.Y.S.2d 534(4th Dep't 1999) (*citing* 51 N.Y.Jur.2d *Eminent Domain* §464 at 679). If the government pollutes property, it may be subject to an inverse condemnation claim. *See, e.g., Town of Harrison v. National Union Fire Ins. Co.*, 219 A.D.2d 640, 631 N.Y.S.2d 420 (2d Dep't 1995).

### **C. Statute of Limitations**

Torts (and most other legal claims) are subject to statutes of limitations. Once the period prescribed by law has run, a plaintiff is barred from bringing a lawsuit. Under New York CPLR §214, most actions for personal injury and property damage must be brought within three years of the date of the tort, while an action for fraud or breach of contract must be brought within six years under CPLR §213. The time period varies in each state, and may be shorter or longer.

Shorter limitation periods generally apply to actions against the government. For example, a claim against the federal government must be filed within two years under the Federal Tort Claims Act, 28 U.S.C. §2401, while in New York a claim must be filed against the state or a municipality within ninety days, and suit against a municipality must be filed within one year and 90 days.

While the statute of limitations generally runs from the commission of the tort, in most states the statute of limitations for a claim for injuries due to exposure to toxic chemicals runs from the time of discovery of the injury. Similarly, the limitations period with respect to fraud usually runs from the time of discovery of the fraud.

In New York, a special statute of limitations, CPLR §214-c, applies the “discovery rule” to toxic torts. Under this statute, the three-year limitations period under CPLR §214, as well as the limitations periods for filing claims and suits against the state and municipalities, applicable to a claim for personal or property injuries caused by “latent effects of exposure to any substance,” runs “from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.” Thus, even if it takes decades after exposure to the chemical to discover the injury, a lawsuit could still be brought within three years after that discovery. The issue of when a plaintiff “should have known” is generally a question of fact, and the statute is construed liberally in a plaintiff’s favor. *Cochrane v. Owens Corning*, 219 A.D.2d 557, 631 N.Y.S.2d 358, 367 (1st Dep’t 1995). For example, in *Kozemko v. Griffith Oil*, 256 A.D.2d 1199, 682 N.Y.S.2d 503 (4th Dep’t 1998), tank tests prior to closing should have put a buyer on notice to a leak.

Suppose an injury is discovered, but the cause of the injury is uncertain and is not discovered until much later - after a claim would be barred under this rule. New York CPLR §214-c(4) addresses this problem, and provides that a plaintiff would have one year after the time of discovery of the cause of the injury to bring suit if he or she could show that “technical, scientific or medical knowledge and information sufficient to ascertain the cause of his or her injury had not been discovered, identified or determined” prior to the expiration of the three-year

period after discovery of the injures, but was discovered within five years of discovery of the injury.

Some jurisdictions, including New York, recognize the doctrine of “continuing torts,” so that the statute of limitations for a continuing trespass (*e.g.* seeping water) recommences each day the tort continues. In *Jensen v. General Electric Co.*, 82 N.Y.2d 77, 603 N.Y.S.2d 420 (1993), the New York Court of Appeals held that the doctrine of “continuing trespass” for damage claims does not apply to damage claims governed by CPLR §214-c, the doctrine may apply to a plaintiff’s request for an injunction.

Section 309 of CERCLA, 42 U.S.C. §9658, provides an “exception to state statutes,” pursuant to which the “federally required commencement date” supersedes any date for commencement of the state statute of limitations in a case involving:

personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

42 U.S.C. §9658(a)(1). The “federally required commencement date” is defined as” “the date plaintiff knew (or reasonably should have known) that the personal injury or property damages... were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.” 42 U.S.C. §9658(b)(4)(A). The definition of “hazardous substance or pollutant” will be covered in our discussion of CERCLA.

Under the “two-injury” rule, “[w]here the statute of limitations has run on one exposure related medical problem, a later exposure-related medical problem that is ‘separate and distinct’ is still actionable.” *Braune v. Abbot Labs.*, 895 F.Supp. 530, 555-6 (E.D.N.Y. 1995). New York courts have extended the two-injury rule to environmental contamination cases. *See, e.g., Bimbo Chromalloy American Corp.*, 226 A.D.2d 812, 640 N.Y.S.2d 623 (3d Dep’t 1996) (well



contamination did not necessarily put a landowner on notice to soil and shallow groundwater contamination). However, the rule does not apply if the plaintiff was on notice to the second environmental problem. *Syms v. Olin Corp.*, 408 F.3d 95 (2d Cir. 2005).

Thus, under CERCLA §309, the state statute of limitations does not begin to run until a plaintiff knows, or should know, that a hazardous substance is the cause of his or her injury. *Freier v. Westinghouse*, 303 F.3d 176 (2d Cir. 2002). Since petroleum is not a CERCLA “hazardous substance” or “pollutant or contaminant,” this provision does not apply to oil spill cases that do not also involve hazardous substances.

Claims for response costs in the nature of indemnification or contribution (as opposed to property damages to the claimant) are subject to the six-year statute of limitations under New York CPLR §213, *AL Tech Specialty Steel Corp. v. Allegheny International Credit Corp.*, 104 F.3d 601 (3d Cir. 1997); *State v. Stewart's Ice Cream Co., Inc.*, 64 N.Y.2d 83, 86, 484 N.Y.S.2d 810, 811 (1984). For each cost, the six years begins to run at the time of the expenditure. *State v. Speonk Fuel, Inc.*, 3 N.Y.2d 720, 786 N.Y.S.2d 375 (2004).

#### **D. Remedies**

A wide variety of remedies may be awarded to a successful plaintiff in a tort action. These remedies have recently been extended by application of the particular problems of “toxic tort” cases involving chemical contamination, and will also apply in other sorts of disaster cases.

Normally, a plaintiff sues for damages, *i.e.* an award of money paid by the defendant. Compensatory damages compensate a plaintiff for his or her losses due to personal injury or property damage. *Sock v. 330 Hull Realty Corp.*, 225 A.D.2d 365, 638 N.Y.S.2d 654 (1st Dep’t 1996) (verdict of \$2,250,000 for personal injuries, including future pain and suffering, due to lead poisoning). In general, “the defendant is liable for ‘reasonably anticipated’ consequential

damages which may flow later from that invasion although the invasion itself is ‘an injury too slight to be noticed at the time it is inflicted.’” *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 136, 477 N.Y.S.2d 242, 247 (4th Dep't 1984).

### **1. Property Damages**

The general rule is that “[a] person whose property is taken, damaged, or destroyed by the negligent or wrongful act or omission of another is entitled to compensation for the damage sustained in such a sum as will restore him as nearly as possible to his former position.” 36 N.Y. Jur.2d *Damages* §72. “[T]he proper measure of damages for permanent injury to real property is the lesser of the decline in market value and the cost of restoration.” *Jenkins v. Etlinger*, 55 N.Y.2d 35, 39, 447 N.Y.S.2d 696, 698 (1982); *Scribner v. Summers*, 138 F.3d 471 (2d Cir. 1998). Permanent property damages can include loss due to stigma that remains even after a property is cleaned up. *Nashua Corp. v. Norton Company*, 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. 1997); *In Re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994).

Where injury to property is temporary, damages are measured by “the reduction of the rental or usable value of the property.” *Guzzardi v. Perry’s Boats, Inc.*, 92 A.D.2d 250, 460 N.Y.S.2d 78, 82 (2d Dep’t 1983). Even if there is a partial restoration, property damages include both damages due to the temporary loss in rental value, as well as “further damage, if any, caused.” *Mead v. State*, 24 A.D.2d 1043, 265 N.Y.S.2d 302, 303 (3d Dep’t 1965).

Suppose Smith Chemical Corp. pollutes Jones’ property, and as a result Jones develops a lung disease, and even after a partial cleanup his \$200,000 property is now only worth \$150,000. A jury might award him \$200,000 as compensation for his personal injuries, plus \$50,000 in property damages. Note that property damages may include two elements -- the permanent loss in value, as determined by appraisal, as well as the temporary loss of value, which might be

measured by the rental value of the property. In this example, Jones might also be entitled to the lost rental value of his property while he awaited the cleanup. Likewise, a personal injury award may include compensation for such items as the present value of the loss of future earnings, and pain and suffering.

## **2. Other Economic Damages**

Other economic damages may flow from property contamination or disasters. In *Syracuse Cablesystems, Inc. v. Niagara Mohawk Power Co.*, 173 A.D.2d 138, 578 N.Y.S.2d 770 (4th Dep't 1991), the plaintiffs (including cable companies and law firms) were forced to move their businesses out of a building for a month due to PCB contamination caused by an explosion of defendant's transformer. They were allowed to make claims for damages due to interruption of their businesses, including lost profits, and additional business expenses such as “rental expense, lost subscriber revenue, lost installation revenue, employee overtime, lost sales commission, employee wages and additional advertising expense.” Under the doctrine of avoidable consequence, a plaintiff may be able to recover for the costs of such things as bottled water, testing water and installing filters in order to avoid damages from a contaminated water supply. *Leicht v. Town of Newburgh Water District*, 213 A.D.2d 604, 624 N.Y.S.2d 506 (2d Dep't 1995).

## **3. Injunction**

A plaintiff may also be able to obtain the “equitable” remedy of injunction, if he or she can show “irreparable harm.” *Poughkeepsie Gas Co. v. Citizens' Gas Company*, 89 N.Y. 493, 497-8 (1882). An injunction is, in effect, a court order prohibiting the defendant from continuing offensive conduct, or requiring the defendant to take certain action. For example, a court may require a polluter to stop polluting, or to clean up a spill.

Since an injunction is an equitable remedy, the court must balance the equities of the situation, and take into consideration whether the plaintiff has an adequate remedy “at law” by obtaining damages. For instance, a court might allow a factory to continue to emit air pollution which caused a private nuisance due to the public interest in maintaining the local economy, but still require the factory to pay damages to the injured neighbors. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312 (1970).

#### **4. Punitive Damages**

Punitive damages go beyond the amount necessary to make a plaintiff “whole,” and are assessed to deter the defendant and other persons from similar conduct. Generally, punitive damages are only allowed if a defendant acted with a “conscious disregard of the rights of others or conduct so reckless as to amount to such disregard.” *Welch v. Mr. Christmas Inc.*, 57 N.Y.2d 143, 454 N.Y.S.2d 971 (1982).

#### **5. Attorney's Fees**

Under the “American rule,” attorney's fees are not recoverable by a successful litigant. The only exceptions are cases of “outrageous” conduct by a defendant, or where a statute specifically provides for recovery of fees by a successful party. A number of environmental statutes, as well as civil rights laws, have attorney's fee provisions that citizen plaintiffs can utilize, and federal and many state civil procedure codes provide for attorney's fees in “frivolous” cases.

#### **6. Other Damages**

A number of other types of damages are available. Obviously, personal injuries are available. *See, e.g., Hancock v. 330 Hull Realty Corp.*, 225 A.D.2d 365, 638 N.Y.S.2d 654 (1st Dep't 1996). However, damages are not available for the mere increase in risk of developing a

disease due to exposure to a toxic substance, but rather the damages can only be awarded when a disease is actually manifested. *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 (4th Dep't 1984); *Gerardi v. Nuclear Utility Services*, 149 Misc.2d 657, 566 N.Y.S.2d 1002 (Sup. Ct. Westchester Co. 1991).

Exposure to a chemical may create a substantial enough risk of future disease that regular medical checkups would be warranted. In such a case, some courts in New York and other states have allowed a recovery for the cost of future "medical monitoring." This is not damages for increased risk, but merely to pay for the necessary cost of addressing the risk. Courts may allow such an award if the risk is sufficiently significant that it is reasonably necessary that a plaintiff obtain periodic medical examinations to monitor his or her health and facilitate early diagnosis and treatment of diseases which might be caused by the exposure. *See, e.g., Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242 (4th Dep't 1984); *Gibbs v. E.I. DuPont De Nemours & Co., Inc.*, 1995 W.L. 60788 (W.D.N.Y. 1995); *Patton v. General Signal*, 984 F.Supp. 666 (W.D.N.Y. 1997); *cf. Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S.424, 117 S.Ct. 2113 (1997) (medical monitoring not available under the Federal Employers' Liability Act). Many courts have required that where medical surveillance is appropriate, the court should administer a trust funded by the defendant to pay out medical expenses, rather than awarding money directly to the plaintiff. *See Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987).

Courts have long recognized that an element of damage for nuisance is compensation for discomfort or annoyance. In toxic tort cases, this principle has been extended to allow recovery for "loss of quality of life," including damages for "inconveniences, aggravation, and unnecessary expenditures of time and effort... as well as other disruption in their lives." *Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987); *see also* 42 *Proof of Facts* 2d 247 §7; *CARE v.*

*Southview Farm*, 834 F. Supp. 1422 (W.D.N.Y. 1993), *rev'd on other grounds* 34 F.3d 114 (2d Cir. 1994), *cert. den'd* 514 U.S. 1082, 115 S.Ct. 1793 (1995). This might involve, for example, compensation for the disruption of home life due to the necessity of using bottled water, or the inability to invite a guest to visit one's home. This may be considered an element of property damages. *Scribner v. Summers*, CIV No. 6094L (W.D.N.Y. 1996), *mod. Scribner v. Summers*, 138 F.3d 471 (2d Cir. 1998).

## **F. Proof**

### **1. Burden of Proof**

The courts have recently considered whether or not “alternative liability” applies. In a California case arising under RCRA, where it was not clear which past or present owner controlled the tanks at the time they leaked, the burden of proof shifted to the defendants to show they were not responsible. *Zands v. Nelson*, 779 F.Supp. 1254 (S.D. Cal. 1991).

### **2. Expert Proof**

The Federal Rules of Evidence (“F.R.E.”) govern the admissibility of experts' opinions in federal court. Under F.R.E. Rule 702, an expert's opinion will only be admissible if he or she is determined to be “qualified as an expert by knowledge, skill, experience, training or education.” Under F.R.E. Rule 703, an expert may rely upon non-admissible evidence (e.g. hearsay evidence that he or she did not personally observe, such as studies by researchers) “if it is of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject.” Thus, the question under Rule 703 is not whether the expert's opinion is reliable, but rather the data he or she bases his or her opinion upon is reliable.

Rule 702 also requires that the evidence be “helpful.” Some courts have construed this as a test of whether or not the expert used “well-founded methodology,” or whether his or her

analysis is “reliable.” Similarly, F.R.E Rule 403 would bar relevant evidence “if its probative value is substantially outweighed by the damages of unfair prejudice, confusion of the issues, or misleading the jury.” Some courts have used these standards to exclude expert opinions characterized as “junk science” by defendants. Other courts have been more liberal in allowing novel scientific theories and methodologies, rejecting the “strict scrutiny” approach, leaving it for the jury to choose the winner of the “battle of the experts.”

In *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), the U.S. Supreme Court held that “general acceptability” or “peer review” of a scientific theory, while helpful, is not necessary for it to be admissible, and that it is, in general, up to a jury whether to give credibility to scientific theories. Nonetheless, the trial judge acts as a “gate keeper,” and may hold a *Daubert* hearing to screen out expert testimony from being presented to the jury. Although *Daubert* involved scientific proof, its flexible standard applies to all experts, including engineers. *Kumho Tire Co. v. Carmichael*, 526 U.S.137, 119 S.Ct. 1167 (1999). An appellate court may only reverse a trial court’s decision whether to admit scientific evidence if it finds an abuse of discretion. *General Electric Co. v. Joiner*, 522 U.S. 136,118 S.Ct. 512 (1997).

While *Daubert* rejected the test for admissibility established in *Frye v. United States*, 293 F. 1013 (a lie detector case), finding it overruled by the Federal Rules of Evidence, the New York Court of Appeals still follows *Frye*, since F.R.E. does not apply. Thus, under the *Frye* test in New York courts, “expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has ‘gained general acceptance’ in its specified field.” *People v. Wesley*, 83 N.Y.2d 417, 422, 611 N.Y.S.2d 97, 100 (1994).