

What is common law?

Generally in the UK, there are two different ways in which laws can be made. The first is *statutory law*, which is made by Parliament and sets out measures to protect the environment and the public by establishing general rules under which environmental matters are regulated. Generally, although not exclusively, breaches of statutory law are crimes and are punished by the courts using criminal sanctions, such as fines, imprisonment or Court Orders. The second system is that of *Common Law*, which is law made by Judges establishing legal precedents arising from disputes between one person and another. Common law looks at the reasonableness of actions and where actions are judged to be counter to established rights, the Courts can impose civil sanctions such as injunctions, award of compensatory damages and Court Orders. The framework of environmental rights is established under various types of common law, principally the law of **tort**, but to a lesser extent contract and property.

Breach of statutory law generally renders a person liable to prosecution and punishment through the criminal system, although this is not always the case. In most cases the right to bring a prosecution is limited to a specific body. In the case of environmental law, the Environment Agency and Local Authorities are commonly the enforcing bodies. There are some limited circumstances where an individual can seek leave to bring a prosecution through the criminal court system. Criminal trials are held either at a Magistrates Court or at the High Court.

Breach of common law by one person (the defendant or Tortfeasor) may render them liable to be sued by another person that they have adversely affected in some way (the plaintiff). Common law disputes are dealt with through a separate court system referred to as the civil courts. The aim of the civil courts is to regulate relationships, rather than to punish wrongdoers which is the role of the criminal system. Civil court matters are dealt with at County Courts or at the High Court

Under common law, the right to sue is normally limited to those whose interests have been directly affected. This usually means the person(s) who is in possession of the land where the damage has occurred or the person who has suffered harm. There are however limited circumstances where there are narrow rights for action to be brought for public nuisance, although this is largely centred around protection of land.

What are the Torts?

Under common law, the most frequently used private law remedy is that of the law of tort. Under tort, there are four main rights of action relevant to environmental protection: negligence; nuisance; trespass; and the rule in 'Rylands v Fletcher'. In addition there are rights of civil action under statute which give rise to liability under the principle of breach of statutory duty (not strictly tort but treated here as a related concept). Each of the above has its own area of application and general principles that have been established and have evolved through a series of previous cases.

Negligence is essentially a fault based system where a fault by the defendant causes damage which is suffered by the plaintiff. There are three essential tests that must be passed in establishing that a person has been negligent:

1. That the defendant owed the plaintiff a duty of care. The duty of care arises when it is foreseeable that in doing something or by not doing something that should be done (acts or omissions), that a particular type of damage will be caused to someone else.
2. That the duty of care had been breached by the defendant.
3. And that as a result of the breach of duty by the defendant, the plaintiff suffered damage of a type that was foreseeable.

Common law **nuisance** (private nuisance) is unreasonable interference with a person's right to use and enjoy: their land; some right over the land; or connection with their land. In this respect nuisance is different from all other torts in that it is concerned with proprietary rights of the plaintiff rather than the control of a person's conduct. If a defendant is using his property unreasonably and if as a result of this unreasonable use, the plaintiff's proprietary rights are affected, then the defendant may be held liable under nuisance. However, in making a judgement as to liability, the court may consider the locality of the nuisance, its duration and any abnormal or hyper-sensitivity of the plaintiff. Locality is important as the standards to be expected in an established industrial area may be different from those in a quiet residential area. Duration of the nuisance is also important, isolated incidents are unlikely to be held to be a nuisance unless they are caused by unreasonable methods. Sensitivity arises as an issue because the court have developed the doctrine that whilst nuisance relies on an unreasonable use of land by the defendant, the plaintiff's use of his land must also be reasonable. If a plaintiff is particularly sensitive to a type of nuisance, it would not be actionable unless the nuisance would have been such to affect a reasonable person. In addition to the concept of private nuisance, a separate doctrine has also developed through that of public nuisance. Public nuisance is one which affects a wide class of the general public. Unlike private nuisance, public nuisance is a criminal offence and damages may only be claimed where a person suffers special damage over and above that suffered by the rest of the public. The principles of common law nuisance have been adopted into statute through the Environmental Protection Act 1990 (see E key facts No 15) in order to provide a rapid remedy to abate nuisance through the service of notices requiring abatement. Local Authorities are given powers under the Act to serve notice directly upon a person causing a statutory nuisance. Breach of a notice under statutory nuisance gives rise to the potential for criminal penalties to be imposed.

Trespass is the unlawful interference with personal or proprietary rights. Trespass must involve an intentional or negligent act which inevitably affects a person or their land. There is no need to prove damage, merely that unreasonable interference has occurred.

The rule in **Rylands v Fletcher** established the principle that a person who for his own purposes bring onto his land and collects and keeps there anything which is likely to do mischief if it escapes must keep it at his own peril. If it escapes, he is prima facie answerable for the damage which is a natural consequence of its escape. This means that a person who uses land for some non-natural (abnormal) purpose which brings with it increased danger to others which is not an ordinary use of the land may, be held to be strictly liable for damages to another persons property if it escapes. Recent cases have established that in order for the principle to apply, the relevant damage must have been foreseeable, that is to say that there must have been some element of negligence, nuisance or trespass. With increasingly tight regulation of hazardous activities, the future of the rule looks uncertain.

Breach of Statutory Duty is established as a right of action under various areas of statute law. The Nuclear Installations Act 1965, Merchant Shipping (Oil Pollution) Act 1971 and the Environmental Protection Act 1990, s.73 all establish civil liability where injury or damage is caused as a consequence of specified occurrences. The latter imposes civil liability arising from damage or injury caused by waste which has been deposited in or on land in breach of s.33(1) of the Act (see E key facts No.1). Many other statutes place specific limitations on rights to bring civil proceedings based upon breach of a statutory provision. For example, s100 of the Water Resources Act 1991 (see E key facts No.6) specifically precludes civil proceedings being based on breach of pollution provisions of the Act.

It is common to find that an injured party takes action through the civil courts based on two or more of the above Torts. This has the advantage that should the court fail to be convinced as to liability under one Tort, they may determine liability under another.

Defences

In addition to the requirement that a plaintiff establishes that a specific tort applies to the matter in question, there are various specific defences that have established against liability under particular torts. In summary these are as follows:

Tort	Defences
Common Law Nuisance	<p>Prescription – a person who openly and continuously does something that amounts to nuisance but without complaint for period in excess of 20 years effectively establishes a right or easement which can be held to be a defence against any subsequent claim from the person who has tolerated the nuisance. Where a new person moves into an area affected by a nuisance which has operated for 20 years, the prescriptive rights are negated and they may have cause to bring action under nuisance.</p> <p>Statutory authority – a body exercising its statutory authority may rely on that statutory authority as a defence against any consequential nuisance so long as the nuisance is unavoidable.</p>
Rylands v Fletcher	<p>Prescription – where a person has consented to a mischievous thing being brought onto land by another, they may be unable to sue if it escapes.</p> <p>Statutory authority – see nuisance above.</p> <p>Act of God – The use of this defence is somewhat limited and would only be likely to succeed in extreme events, such as an earthquake or freak act of nature.</p>

Remedies

Under common law there are three main remedies which can be sought: damages, injunctions and abatement.

Damages are a means by which the courts can act to place the plaintiff as far as possible in a position that they would have been had the wrongful act not occurred. Damages may be awarded to pay for restoration to a previous state, or may recompense for any loss in value that has occurred as a result of pollution. In very specific circumstances, exemplary or punitive damages may be awarded to deter the defendant or others from wrongful acts where they achieve a financial benefit.

Injunctions are a form of court order which aims to prohibit a defendant from carrying on an activity which is causing damage, injury or nuisance or may require certain steps to be taken to mitigate against any such problems. In granting an injunction, the court will try to balance the competing interests between the two parties. Where the benefit to the plaintiff is less than the impact that an injunction would have for the defendant, an injunction may not be granted. In the County Court, an injunction may only be granted where there is a corresponding claim for damages. The High Court can issue an injunction without any corresponding damages claim.

Abatement allows the injured party to take steps directly to remove the cause of a nuisance. This form of remedy is taken directly by the injured party and therefore is not favoured by the courts. Excessive action may render the injured party open to counter claims from the other party.