

Revisiting *Mangini II*: Should the Burden of Proof in Contamination-Nuisance Cases Be Re-Examined?

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Introduction

Many causes of action allow the plaintiff to elect from an assortment of remedies. Claims for nuisance and trespass are unique exceptions to this general rule. For these causes of action, the remedy is governed by a finding on whether the effect of the wrongful activity is continuing or temporary (on the one hand) or permanent (on the other). When the effect of the nuisance or trespass is continuing, the plaintiff may obtain injunctive relief and loss-of-use damages, but not damages for diminution in value. When the effect is permanent, however, the plaintiff may recover damages for diminution in value and stigma, but not loss-of-use damages or injunctive relief. See *California Real Property Remedies and Damages* §§11.13, 11.22–11.28 (2d ed Cal CEB 2002).

The distinction between continuing and permanent effects also dictates the accrual of the statute of limitations. When the injury is found to be continuing, the plaintiff may bring successive actions for damages until the nuisance is abated, but may recover only actual damages incurred in the 3 years before commencement of the action. When the injury is permanent, however, the statute begins to run when the last fact essential to the cause of action under the substantive law has occurred and consequential damages are sufficiently apparent to give a reasonable person notice of the injury. If the injury is permanent, the plaintiff must bring one action for all past, present, and future damage within 3 years. Thus, the ultimate characterization of the injury by the factfinder in the action can be fatal to a claim if the statute of limitations is an issue. The factors considered to determine the classification are complex. See *Real Property Remedies* §§11.13–11.14.

A redeeming feature is that, traditionally, the courts have permitted the plaintiff in some cases to elect to treat the injury caused by nuisance or trespass as either continuing or permanent, as long as there is reasonable basis for the choice. See, e.g., *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1217, 52 CR2d 518; *Real Property Remedies* §§11.15.

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“The reasoning in this opinion is contrary to generally accepted principles of nuisance law and produced . . . a miscarriage of justice.”

Contamination Cases: The *Mangini II* Anomaly

The distinction between continuing and permanent nuisance and trespass in cases involving soil and ground water contamination has engendered an enigmatic maze of complex, rigid, and arbitrary rules. The California Supreme Court decision in *Mangini v Aerojet-Gen. Corp.* (1996) 12 C4th 1087, 51 CR2d 272 (*Mangini II*) increased the confusion. This case held that in order to establish soil contamination as a continuing rather than a permanent nuisance, the plaintiff must present substantial evidence that the contaminated condition is subject to remediation and the cost of cleanup is reasonable. The reasoning in this opinion is contrary to generally accepted principles of nuisance law and produced an anomalous outcome and a miscarriage of justice. The end result of *Mangini II* was that the defendant, which had created severe contamination that would be very expensive to remediate, was not required to compensate the Manginis for the loss of use while the property was under remediation. This time was estimated to be 10 years.

***Mangini II*: Facts and Holding**

Aerojet manufactured rocket fuels at its plant and dumped millions of pounds of toxic solvents and heavy metals into holding ponds on nearby leased property. When the owner sold that property to Manginis in 1975, the holding ponds were covered with dirt and were not visible or obvious. After the state and the EPA sued Aerojet in an earlier action, Aerojet agreed to undertake a remedial investigation and feasibility study, which was slated to be completed 10 years later. Before the study, no one knew how much contamination there was, where it was located, what the chemicals were, or how much it was going to cost to remediate the property. The estimates were that it could run between \$20 and \$75 million.

The Manginis sued for the loss of use of the property during the remediation period, and the jury awarded them \$13.2 million. At trial, the Manginis established that the contamination was extensive and would be expensive to remediate, and that the technology needed to remediate this situation was available. The exact remediation method had not been chosen, however, because the feasibility study had not been completed.

On denying the defendant’s motion for judgment notwithstanding the verdict, the trial court found that the costs of abating the contamination could not be estimated with any accuracy. The court of appeal, however, overturned the jury’s verdict in favor of the Manginis, ruling that the trial court should have granted Aerojet’s motion for judgment notwithstanding the verdict. The Manginis appealed to the supreme court.

The supreme court ruled that the Manginis had failed to meet their burden of proof to establish that the nuisance was abatable and, therefore, temporary.

Specifically, the court held that the Manginis should have proved not only that the contaminated condition could be cleaned up, but also that the cost of cleanup would be reasonable. The court then found that they failed to present substantial evidence that the costs of cleanup would be reasonable. Because damages for loss of use can be recovered only in an action for a temporary nuisance, and because the Manginis had failed to prove that the nuisance was temporary, the court held that the trial court should have granted Aerojet's motion for judgment notwithstanding the verdict. In addition, the supreme court held that the claim for permanent nuisance was barred by [CCP §338](#)'s 3-year statute of limitations.

The Trouble With *Mangini II*

Ex Post Facto Requirement That Abatement Costs Be Reasonable

Mangini II presents many problems, whether examined from a practical, equitable, public policy, or legal point of view. First, the ruling was particularly unfair to the Manginis, who were not aware of their burden of proof until the supreme court rendered its decision. The Manginis knew that they needed to prove—and they did prove—that the property was contaminated and that a means existed to remediate the property. They did not know that they had the additional burden of proving that it would be feasible to remediate the contamination at a reasonable cost until the supreme court invented that burden. Also, because the Manginis were not seeking abatement, it is not surprising that their counsel did not focus on or present evidence regarding the costs to remediate the property. They sought damages only for loss of use; the cleanup was to be performed under government-initiated regulatory orders. Under these circumstances, it is not surprising that the Manginis were not prepared to present precise evidence regarding the cleanup costs.

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Burden on Plaintiffs To Prove Reasonableness of Cleanup Cost

Second, although it was the defendant who had caused the problem, *Mangini II* unfairly held that the plaintiffs had the burden of proving that the remediation could be done without unreasonable burden or expense. This result was especially unfair in view of the fact that the contamination was intentional, exotic, complex, and extensive, and Aerojet was under regulatory orders to investigate and remediate the property. The decision put an unfair burden on the owner not only to discover the contamination within 3 years of notice of a possible toxic contamination problem, but also to come up with the remediation procedures and a reasonable estimate of

the remediation costs within 3 years. The sheer costs of prelitigation investigation and expert fees makes litigation for any amount of damages economically questionable for the innocent plaintiff.

Abatement by Polluters Discouraged

Third, the result in *Mangini II* completely ignored the real issue of whether or not the condition was abatable. The fact that the government agencies were going to require remediation should have been enough to show that the nuisance was abatable. The extent of feasible remediation and its costs may require years to determine. That does not mean, however, that the nuisance cannot or will not eventually be abated—at least to the extent that government agencies determine it is feasible. It would seem more just, and more consistent with public policy to encourage remediation, to place the burden on the defendants to prove that abatement is impossible, too burdensome, or too expensive. Also, from a purely legal point of view, the statute of limitations is an affirmative defense. Accordingly, the burden of proof should be on the defendant. See, e.g., *Capogeannis v Superior Court* (1993) 12 CA4th 668, 15 CR2d 796.

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Polluters Encouraged To Conceal Contamination

Fourth, from a public policy point of view, *Mangini II* encourages polluters not to report or acknowledge the damage they have created and to delay all remediation efforts because time is on their side. As the *Mangini II* dissent (by Justice Mosk) pointed out, the majority effectively rewarded Aerojet for its own delays in evaluating the costs and methods of remediation.

Established Precedent Ignored; Damage Remedies Narrowed

Fifth, before *Mangini II*, the courts had consistently stated that, when there is doubt as to whether a nuisance is continuing or permanent, the court should designate it a continuing nuisance to protect the plaintiff from contingencies (such as unforeseen future injury), to prevent the plaintiff from being barred by the statute of limitations, and to encourage termination of the condition causing the nuisance. See, e.g., *Capogeannis v Superior Court* (1993) 12 CA4th 668, 678, 15 CR2d 796; *Mangini v Aerojet-Gen. Corp.* (1991) 230 CA3d 1125, 1148, 281 CR 827 (*Mangini I*); *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 870, 218 CR 293. These well-reasoned opinions recognized important public policy considerations that the supreme court ignored in *Mangini II*. The *Mangini II* opinion appears, without good reason, to make permanent nuisance the preferred option

when there is doubt, at least for the purposes of the statute of limitations in contamination cases.

For the purposes of the statute of limitations, the *Mangini II* decision, in effect, creates a presumption that the nuisance is permanent and imposes on the plaintiff the burden of proving it is continuing. If the contamination is found to be permanent, the plaintiff cannot obtain an injunction to clean up the contamination and cannot recover the costs of remediation. The plaintiff is limited to a recovery of the difference in value between the land without contamination and its current value with the contamination. The cost to remediate may exceed this amount, and it is unfair to leave the innocent landowner with this cost. If the remediation costs are too high, it is likely that the contamination will remain unless some government agency takes action. There is no justification for such a rule change.

Plaintiff's Choice Eliminated in Doubtful Cases

Sixth, before *Mangini II*, the courts had consistently held that in doubtful cases the plaintiff had the option to elect to treat the nuisance as permanent or continuing. See [Real Property Remedies §11.15](#). The supreme court in *Mangini II* disregarded this rule as it pertains to the statute of limitations. At the very least, the court should have allowed the Manginis to bring an action for continuing nuisance until either party was able to prove that the nuisance was permanent because it could not be abated. At that point, the statute of limitations for a permanent nuisance would start to run, and plaintiffs would then be required to bring an action for permanent nuisance within the applicable statute of limitations. See [CCP §§338\(b\), 340](#); [Federal Tort Claims Act \(28 USC §2674\)](#); see also [Bartleson v U.S. \(9th Cir 1996\) 96 F3d 1270](#).

Mangini II's Unresolved Issues

Innocent Owner May Be Stuck With CERCLA Cleanup; Owner's Remedies Limited

Mangini II leaves landowners in an extremely precarious position for many reasons. If the government had not forced Aerojet to clean up the contamination, it could have compelled the Manginis, as the owner of the property, to clean it up. Furthermore, under *Mangini II*, the owner could not recover these costs from Aerojet in a nuisance or trespass action, although it may have been able to recover contribution under the [Comprehensive Environmental Response, Compensation, and Liability Act of 1980 \(CERCLA\) \(42 USC §§9601–9675\)](#). See [42 USC §9613\(f\)\(1\)](#); see also [Key Tronic Corp. v U.S. \(1994\) 511 US 809, 816, 128 L Ed 2d 797, 805, 114 S Ct 1960](#). If the government had not been involved, the Manginis would have been faced with the prospect of either paying the cost of remediation itself or allowing the property to remain contaminated.

Under the *Mangini II* holding, the plaintiffs could not obtain an injunction against a permanent nuisance. Furthermore, under [CERCLA](#) and the [Resource](#)

Conservation and Recovery Act of 1976 (RCRA) (42 USC §§6901–6992k), damages are not recoverable.

Other Ambiguities and Problems With Mangini II

The *Mangini II* opinion creates a great deal of confusion and uncertainty in the law of nuisance.

- First, the court expressly left unanswered the question of whether a plaintiff who has filed a timely nuisance action is required to prove that the abatement can be accomplished at a reasonable cost in order to be entitled to an injunction or damages. In other words, is proof that abatement can be accomplished at a reasonable cost now an element of a cause of action for temporary nuisance? The *Mangini II* holding is expressly limited to the statute of limitations. *Mangini v Aerojet-Gen. Corp.* (1996) 12 C4th 1087, 1090, 51 CR2d 272.
- Second, it is unclear whether continuing nuisance will remain the default substantive-law holding when there is doubt about whether the nuisance is continuing or permanent for the purpose of injunction and damages. It is apparently not the rule for the purpose of the statute of limitations.
- Third, it is unclear whether a plaintiff can elect to characterize the nuisance as continuing or permanent for the purpose of damages or injunction. Again, with respect to the statute of limitations, this no longer seems to be the rule.
- Finally, it is uncertain whether the proof necessary to establish a nuisance as continuing or permanent for statute of limitations purposes will be the same as the proof used to determine whether the nuisance is temporary or continuing for purposes of establishing the remedy. If the plaintiff needs to show that the nuisance can be abated at a reasonable cost for the purpose of proving a continuing nuisance for the statute of limitations, and is not required to make the same showing to prove that a nuisance is continuing for other purposes, such as the choice of remedy, a single, contaminated site could be regarded as a permanent nuisance in one context and a continuing one in the other. This is an unnecessary complication and puts the plaintiff at a disadvantage in developing a consistent plan for presenting the evidence in its case.

Reasonable Remediation Not Defined for Future Cases

The court in *Mangini II* stated that an estimate of the cost of remediation would be sufficient. The court, however, did not explain or define the types of estimates that would be acceptable. In *Mangini II* the testimony that remediation cost were between \$20 million and \$70 million was too uncertain. However, the court did not attempt to define what the term “reasonable costs” means, and it did not spell out the factors the court would consider in making this determination. For example, does the term mean reasonable in light of, say, the value of the land? the defendant’s wealth? the defendant’s net worth and cash flow? Would \$10 million be reasonable if the property were the future site of a \$200 million office building, but

not reasonable if the property were a \$20 million plot of grazing land with potential for housing development?

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Defendant’s Culpability and Nature of Contamination Not Addressed

The court also did not consider—or say whether any court should consider—whether the nature of defendant’s conduct in creating the nuisance is relevant. Should the plaintiff’s burden be less if the defendant intentionally or recklessly created the condition? Should the court give the plaintiff more leeway if the contamination is exotic, extensive in concentration, or widespread in area? Should the defendant be able to profit from creating a situation that is difficult to analyze in terms of the method and cost of remediation? The burden of proving that the contamination can be remediated by reasonable means and at reasonable costs can be extremely expensive and time-consuming for the plaintiff. Also, the more extensive the contamination and the more difficult it is to remediate, the greater the contaminator’s chances of avoiding responsibility. The *Mangini II* case also encourages contaminators to delay remediation efforts in order to escape liability: The longer the contaminator delays, the better chance it has of escaping liability because of the 3-year statute of limitations.

Overcoming *Mangini II* Obstacles

Defeating Statute of Limitations Defense

To comply with the statute of limitations under [CCP §338](#), the plaintiff should file its complaint within 3 years of learning of the possibility of contamination. Although there is a danger that the plaintiff will not be able to complete its study of the contamination and prove that it can be abated by reasonable means and reasonable costs, this tactic is less risky than gambling that the court will reject the statute of limitations defense on the basis of finding the nuisance to be “continuing.” Moreover, the plaintiff should plead both permanent and continuing nuisance in the alternative, to allow some flexibility as the analysis and litigation proceed. Additionally, the plaintiff should investigate whether the contamination is migrating or moving; if proved, this may be sufficient to establish that the nuisance is continuing.

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To “extend” the statute of limitations, the plaintiff may be able to show that a nuisance was continuing for a period of time and only became permanent at a later time. This argument was accepted by the court in *Bartleson v U.S.* (9th Cir 1996) 96 F3d 1270, in which the owners of agricultural property filed a claim for permanent damages caused by stray shells from an adjacent military artillery range. The court found that the shelling, occurring over many years, was initially intermittent and therefore constituted a continuing nuisance. Within the 3-year period before the complaint was filed, however, the frequency and intensity of the shelling accelerated to the point that it became a permanent nuisance. The court found that the nuisance did not become permanent until the plaintiff realized that it could not be given assurances from the Army regarding future shelling. The court reasoned that, once it became apparent that the Army could not guarantee that the shelling would not reoccur, the nuisance became permanent. Likewise, the court found that when the shelling became frequent, the plaintiff should have recognized that the nuisance was permanent. The court noted that under these circumstances, the owners would be required to disclose the shelling to potential buyers. 96 F3d at 1276.

Although there are no reported cases on this subject, it is possible to argue that a permanent nuisance can become a continuing nuisance. This might happen, for example, if the means to abate a nuisance, which appears to be permanent, develop over time or if a party who is privileged to continue a nuisance elects to discontinue the use causing the injury. If the permanent nuisance were to become a continuing nuisance before the 3-year limitations period for permanent nuisance runs, it would seem that an action for continuing nuisance could be brought without the bar of the statute of limitations.

Effect of Disclosure on Purchase Price or Damages for Contamination

The Fifth District Court of Appeal issued an opinion in a property contamination case that may help property owners avoid the fate of the plaintiffs in *Mangini II*. In *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 23 CR2d 377, the plaintiff had purchased property previously owned and operated as a natural gas treatment plant for 20 years, until late 1970. The plaintiff discovered contamination in August 1989 (when it began to remove the plant’s concrete foundations) and sued several of the previous owners in July 1992, contending that, as a result of plant operations, soil and groundwater were contaminated with hazardous substances.

The *Newhall* court focused on disclosure, ruling that the plaintiff should be able to recover because the contamination had not been disclosed at the time of sale. The

court distinguished *Pinole Point Props. v Bethlehem Field Co.* (ND Cal 1984) 596 F Supp 283, because the plaintiffs in that case knew about the contamination before acquiring the property. Thus, presumably, the damage to the property caused by the defendant's contamination of the waste disposal pond would have been factored into the terms of purchase. Other courts have mentioned disclosure as a factor in various cases, but they have not specifically said what it means or how it affects the determination of liability or damages. See, e.g., *Bartleson v U.S.* (9th Cir 1996) 96 F3d 1270, 1276; *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 52 CR2d 518.

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Disclosure is a key factor that should play a much more important role in determining both liability and damages. Thus, a seller who discloses the existence of the contamination could be protected from future liability, at least in part, if the conduct causing the contamination was lawful at the time it was performed. This protection should apply particularly if the seller records notice of the existence of the contamination so that all future buyers will be made aware of it. If a party, however, sells its interest without disclosing the contamination, other parties who become involved in the property should, on discovery of that condition, be able to bring an action against the party causing or maintaining the contamination or against an owner who knew of the condition and failed to disclose it. The time of creation of the nuisance should be immaterial. See *Newhall Land & Farming Co. v Superior Court, supra*. The innocent parties might also consider a cause of action for damages for fraud or nondisclosure, instead of one for nuisance or trespass, which were the remedies permitted by the court in *Newhall*. See *Barnhouse v City of Pinole* (1982) 133 CA3d 171, 183 CR 881; *Real Property Remedies*, chap 3.

Conclusion

The California Supreme Court ordinarily will follow its earlier decisions. It can, however, reconsider and change its own precedent in appropriate cases. The doctrine of stare decisis serves an important purpose, but “it nevertheless should not shield court-created error from correction.” *Freeman & Mills, Inc. v Belcher Oil Co.* (1995) 11 C4th 85, 93, 44 CR2d 420. The ruling in *Mangini II*, for the reasons discussed above, needs re-examination and correction. The supreme court, the state legislature, or both, should also take a new comprehensive look at the general law of nuisance and trespass and establish a modern cause of action that will eliminate the unnecessary confusion and the obvious injustice inherent in the law today.