

# The Common Law Nuisance Actions and the Environmental Battle-Well-Tempered Swords or Broken Reeds

John P. S. McLaren

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>  
Article

## Citation Information

McLaren, John P. S.. "The Common Law Nuisance Actions and the Environmental Battle-Well-Tempered Swords or Broken Reeds."  
*Osgoode Hall Law Journal* 10.3 (1972) : 505-561.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol10/iss3/1>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

# OSGOODE HALL LAW JOURNAL

Vol. 10

No. 3

December 1972

## THE COMMON LAW NUISANCE ACTIONS AND THE ENVIRONMENTAL BATTLE — WELL-TEMPERED SWORDS OR BROKEN REEDS?

By JOHN P. S. McLAREN\*

The opportunity for anyone to obtain at least a hearing and honest consideration of matters that he feels important must not be under-estimated. The availability of a judicial forum means that access to government is a reality for the ordinary citizen — that he can be heard and, that in a setting of equality, he can *require* bureaucrats and even the biggest industries to respond to his questions and to justify themselves before a disinterested auditor who has the responsibility and the professional tradition of having to decide controversies upon the merits. The citizen asserts rights which are entitled to enforcement; he is not a mere supplicant.<sup>1</sup>

### *The Law and the Environmental Crisis: Attitudes and Realities*

It is only in recent years that significant attention has been directed by legal scholars, in dealing with the legal ramifications of the environmental crisis, toward assessing the viability of existing common law actions as instruments of pollution control. The breadth of the pollution problem in North America and the apparent urgency of remedial and combative measures on a broad scale have tended to foster the notion that the only effective and universal expedients lie in the realm of legislative initiative and administrative intervention. By comparison the common law, with its substantive limits apparently tied to the resolution of narrow conflicts between individuals, and the capricious incidence of litigation has seemed to the environmentally sensitive lawyer to be essentially impotent as the source of a viable response.

\* Dean of the Faculty of Law, University of Windsor.

<sup>1</sup> J. Sax, *Defending the Environment — A Strategy for Citizen Action* (New York: Alfred Knopf, 1970) at 112.

Unfortunately, legal action on the environmental front has not squared with the aspirations of environmentalists, and while it may be foolhardy to suggest that there has been a reversal of priorities in the minds of environmental lawyers, it is the case that existing legal actions increasingly are being explored and vaunted as a complementary, or at least a stop-gap, means of attacking pollution, and of giving legal substance to environmental values. Environmentalists have found to their frustration that political realities in both Canada and the United States have belied the expeditious development of comprehensive and integrated solutions to pollution problems.<sup>2</sup> At the same time the public, particularly in urban areas, has been progressively sensitized by environmentalists and the news media to the serious nature of the blight of pollution. Accordingly, citizens, both individually and collectively, are more and more solicitous of exploiting existing avenues for remedial action.<sup>3</sup> In this uneasy social milieu concerned lawyers cannot afford to sit back and idly hope that by some legislative miracle the overall problem and the dysphoria which it engenders will be abated overnight. Their ability to utilize the existing law to produce constructive answers has become crucial.<sup>4</sup> The advantages of creativity in working traditional rules are enhanced with the realization that it is not safe to assume that those who are charged with protecting the public interest under legislative schemes will always play that role satisfactorily. Indeed there is increasing

---

<sup>2</sup> For an instructive comparative account of the inadequacy of and lack of integration in contemporary pollution legislation, see J. Juergensmeyer, *A Comparative View of the Legal Aspects of Pollution Control* (1971), 5 *Suffolk U. L. Rev.* 741, at 741-6. For the Canadian situation, see A. Lucas, *Legal Techniques for Pollution Control: The Role of the Public* (1971), 6 *U.B.C.L. Rev.* 167, and P. Good, *Anti Pollution Legislation and its Enforcement: An Empirical Study* (1971), 6 *U.B.C.L. Rev.* 271. The complex of legislation relating to pollution in Canada is collected in 1 & 2 Canadian Industries Limited, *A Digest of Environmental Pollution in Canada* (Montreal: Canadian Council of Resource Ministers 1970) and Chinook Chemicals Ltd., *Eco/Log — Canadian Pollution Legislation* (Toronto: 1971).

<sup>3</sup> Perhaps the most interesting example of this trend is the action being currently pursued in the Federal District Court in Detroit by sixteen residents of Sandwich South Township in Ontario. The defendants are three large producers of air pollution in the Detroit-Windsor area, Great Lakes Steel, Allied Chemical Corp., and Detroit Edison — *Michie v. Great Lakes Steel* No. 35019 U.S. Dist. Ct., E. D. Mich. (1970), 1 *Env. Law Reporter* 65150.

<sup>4</sup> This thesis underlies a number of recent articles on the viability of the common law actions. See Esposito, *Air and Water Pollution: What to do While Waiting for Washington* (1970), 5 *Harv. Civ. Rights — Civ. Lib. L. Rev.* 32; J. Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, [1967] *Duke L. J.* 1126; J. Juergensmeyer, *Common Law Remedies and the Protection of the Environment* (1971), 6 *U.B.C.L. Rev.* 216; L. Miller, *Air Pollution Control: An Introduction to Process Liability and Other Private Actions* (1970), 5 *New England L. Rev.* 163; L. Miller and D. Borchers, *Private Law Suits and Air Pollution Control* (1970), 56 *A.B.A.J.* 465; E. Roberts, *The Right to a Decent Environment; E=MC<sup>2</sup>: Environment Equals Man Times Courts Redoubling Their Efforts* (1970), 55 *Cornell L. Rev.* 674; F. Seamans, *Tort Liability for Pollution of Air and Water* (1970), 3 *Natural Resources Law* 146; *Comment, Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution* (1970), 16 *Wayne L. Rev.* 1085; *Comment, Role of Private Nuisance Law in the Control of Air Pollution* (1968), 10 *Ariz. L. Rev.* 107; *Note, Right of a Downstream Riparian Owner to Enjoin Upstream Pollution* (1963), 27 *Albany L. Rev.* 64; *Note, Private Remedies for Water Pollution* (1970), 70 *Colum. L. Rev.* 734; *Note, Air Pollution As A Private Nuisance* (1967), 24 *Wash. and Lee L. Rev.* 314; *Note, Water Quality Standards in Private Nuisance Actions* (1969), 79 *Yale L.J.* 102.

scepticism amongst environmental lawyers over the advisability of consigning our environmental fate entirely to government or to administrative agencies. As one Canadian authority has commented:

. . . [R]egulatory agencies generally have displayed a number of disturbing tendencies. . . . [T]hey may become enmeshed in the bureaucratic web created by the particular system of administration. They may tend to acquiesce in the elevation of permits, or effluent fee receipts to the status of vested property rights. They may, as did several of the major United States regulatory agencies tend, as a result of prolonged contact through the regulatory process, to adopt the values and biases of the industries to be regulated. An accord may then be reached and maintained through agency officials moving to the industry side. They may fail to strongly enforce their legislation, perhaps on the basis of policy directives from their Minister; but more likely, simply through inertia and fear of generating political heat.<sup>5</sup>

In the light of this sober reflection it is natural that greater emphasis should be placed on the merits of encouraging the initiative of the citizenry, and of appealing to the courts as rather more dispassionate forums for the discussion and resolution of environmental issues.<sup>6</sup>

The main purpose of this article is to examine the potential of the common law nuisance actions and the legal and equitable remedies which attend them, in effecting the desirable social objective of pollution abatement and control. This emphasis on nuisance reflects the fact that traditionally it was the area of tort law which was utilized by the courts in responding to what would now be characterized as anti-pollution suits. It thus has a developed conceptual infrastructure which may be responsive to the promotion of environmental values. The discussion of the environmental potential of nuisance includes some reflections upon the action's relationship to the rule in *Rylands v. Fletcher*,<sup>7</sup> and whether that relationship presents any significant substantive hurdles in the environmental lawsuit. In addition some attention is directed towards the viability of an analogous cause of action, the impairment of riparian rights, which shares the field with nuisance in the realm of water pollution.

#### *The Law of Nuisance and the Environmental Suit: A Policy Orientation*

It is no exaggeration to assert that the Canadian courts have not been over-exercised in the field of pollution abatement suits. Most actions brought under the nuisance rubric have been motivated by the simple desire of individual plaintiffs to improve their personal living conditions, by persuading a court to force the perpetrator of the nuisance to abate it, or to pay damages for the inconveni-

---

<sup>5</sup> A. Lucas, *Legal Techniques for Pollution Control: The Role of the Public* (1971), 6 U.B.C.L. Rev. 271.

<sup>6</sup> The debate in the United States on the place of the Courts in protecting environmental values is already very broad-based, covering not only the potentials of existing common law actions and the remedies provided by administrative law, but also constitutional initiatives by the judiciary and the development of new causes of action — the most vaunted being the 'public trust' doctrine. For comprehensive study of the potentials for citizen action in the courts, see N. Landau & P. Rheingold, *The Environmental Law Handbook* (New York: Ballantine, 1971).

<sup>7</sup> (1968), L.R. 3 H.L. 330, aff'g L. R. 1 Ex. 265.

ence caused.<sup>8</sup> As the courts have tended to limit their response to the character of the complaint made, the more general ramifications of the defendant's conduct, and the broader implications of the remedies for others who may face the same problem as the plaintiff rarely have been considered. The relative lack of environmental case law suggests that it is at least questionable whether the courts will be receptive to the bald argument that the common law actions are obvious vehicles for resolving environmental conflict. It seems to the writer, therefore, that a necessary prelude to a discussion of the potential of the specific actions is an articulation of the policy factors which should enable a judge to use the common law more creatively.

The first point is that the resolution of conflicts between individuals under the common law in no way precludes a court from looking at the problem before it in the light of wider community interests. No one would seriously suggest, for example, that the development of the law of products liability out of *Donoghue v. Stevenson*<sup>9</sup> represents the chance congruence of a series of cases in which the judges wore social blinkers. The underlying motivation has been the desire to extend legal protection to consumers, and more particularly to open up the possibility of suing the one party who has significant control over the form and substance of manufactured goods.<sup>10</sup> Using this experience as a guide there is nothing to prevent the judges recognizing the need for environmental protection in their decision making. Indeed, when one considers the facility which some judges have shown in traditional nuisance litigation in relating plaintiffs' claims for injunctive relief against industrial defendants to the immediate economic welfare of the local community, any attempt to close their minds to environmental concerns would be to adopt an unwarranted double standard.<sup>11</sup> It is not suggested that judges should develop a rigid bias in favour of environmental values, but rather that they should consider them seriously as an important element in the decision-making process, and resist the temptation to accept the facile argument, often used by defendants, that pollution abatement equals economic ruin.<sup>12</sup>

---

<sup>8</sup>Interesting exceptions are provided by the cases of *McKie v. K.V.P. Co.*, [1948] O.R. 398 (H.C.), [1948] 3 D.L.R. 201, aff'd. [1949] 1 D.L.R. 39 (C.A.), aff'd. [1949] S.C.R. 698 and *Gauthier v. Naneff*, [1971] 1 O.R. 97 (H.C.), 14 D.L.R. (3d) 513. Both actions were launched by a group of riparian owners seeking injunctions against actual or potential water pollution by the operations of the defendants. The environmental perspective seems to have been stressed in both, and both judges responded with judgments which considered the broader environmental ramifications of the defendants' activities. See text *infra*.

<sup>9</sup>[1932] A.C. 562 (H.L. Scot.).

<sup>10</sup>Significantly it is Lord Atkin's "neighbour principle", a perfect vehicle for clandestinely importing policy considerations into decision-making, which has been seized upon in case after case to extend the fairly narrow *ratio* of the major case.

<sup>11</sup>Particularly representative of this judicial attitude is the judgment of Middleton, J. in the series of cases dealing with the complaints by farmers in the Sudbury region of damage and inconvenience caused by the nickel smelters in that area — see under the heading *Black v. Canadian Copper Co.*, [1917] O.W.N. 243 (H.C.). See also *Bottom v. Ontario Leaf Tobacco Co.*, [1935] O.R. 205 (C.A.), [1935] 2 D.L.R. 699.

<sup>12</sup>This type of argument also provided a basis for the courts' opinions in the cases in *supra*, note 11. See also *Huston v. Lloyds Refineries Ltd.*, [1937] O.W.N. 53 (H.C.) where the assumption of economic ruin led the court to substitute a limited for an absolute injunction to restrain air pollution.

One factor which clearly has deflected the attention of both courts and litigants in the past from the environmental ramifications of torts litigation has been the lack of scientific data in relation to both the environmental consequences of unrestrained pollution, and effective methods of abatement. The result has all too often been that the technical ramifications of nuisance litigation have been dictated by the defendant who has been able without fear of contradiction to argue either that the consequences of his operation are not injurious or that everything possible has been done to control pollution.<sup>13</sup> This knowledge vacuum is now being effectively filled, and there is no reason, apart perhaps from the expense to plaintiffs, why expert evidence should not expose fully the character and degree of the pollution problem and suggest constructive and feasible ways of dealing with it. Moreover, the expense factor concerned can be expected to be increasingly offset by greater availability of the findings of both governmental and independent research, and the emergence of environmental protection groups, which may bring together a galaxy of environmental talents possessed by people whose dedication to environmental sanity outweighs their desire to make money.<sup>14</sup>

At first glance tort law and complex questions of science and technology would appear to be strange bedfellows. The cautious judge may perhaps be excused for entertaining some trepidation about entering into the assessment of the type of data and evidence which is likely to mark the anti-pollution common law suit, especially when he reflects that the decision he reaches has a quasi-legislative effect. One can imagine the concern of a judge, used to dealing with relatively straightforward tort issues, suddenly faced with the question of whether he should grant an injunction which he may be told will improve the physical, but retard the economic environment of a community. The existence of judicial discomfort should not, however, be allowed to restrain the development of the law, if considerations of sound social policy demand it and the practical obstacles can be surmounted.

Concern over the complexity of evidence advanced should not dissuade the courts from action. The judges in other fields of tort law, in particular in medical malpractice suits, have been able to master the often complex and detailed evidence relating to a variety of procedures, and there is no reason why they should be thwarted in an attempt to comprehend the type of scientific evidence relevant to pollution suits. Rather more substantial is the objection that the judge in deciding whether an industrial operation should change its processes or go out of business is in some way usurping the legislative or administrative function. The obvious reply to this is that the functions of tort law have never been constant and immutable, but have altered to reflect the demands of new social problems and shifts in social values. Indeed the aims of tort law have changed perceptibly in the course of this century. An increasing stress on social welfare objectives has

---

<sup>13</sup> Even where the plaintiff could establish the existence of a nuisance, he would not have been able in many cases to point with any precision to the complete range of its adverse effects.

<sup>14</sup> It is interesting to note in this regard that the *Michie* case, *supra*, note 3, represents an initiative of Windsor and District Pollution Probe. The writer wishes to express his thanks to Donnelly Hadden, the attorney for the plaintiffs in that action for providing details of the suit, and general information on the state of environmental litigation in the United States.

resulted in a trend away from concern for finding and emphasizing fault, towards stressing the desirability of compensation for the victim, and towards developing cost distribution expedients to guarantee the compensatory objective.<sup>15</sup> It has recently been argued forcefully by some legal commentators that we should be exploring new functional directions for tort law. Of particular interest in the present context is the thesis that courts should emphasize more strongly the admonitory function of tort law. In essence the idea is to utilize tort actions and remedies to compel defendants, in particular industrial defendants, to reflect seriously upon the injurious consequences of their operations and, rather than treating these consequences as external costs to be borne by the rest of society, to seek ways of internalizing them by sensible assessment of available preventive or remedial technology, and the incorporation of the most efficient devices into their processes.<sup>16</sup> Such a shift in theory could, of course, have very positive effects in the area of pollution control in forcing industry to wake up to environmental reality, and compelling it to translate its verbal concern for a more tolerable environment into worthwhile deeds.

Superficially, the above may seem a thoroughly revolutionary suggestion. However, there already exists in certain tort actions and remedies the seminal elements of this more general doctrine of enterprise liability, or liability for distinctive risk. Underlying the historical development of nuisance in particular is the thought that those responsible for unnecessarily troublesome operations should be saddled with the burden of underwriting the cost of the injuries caused,<sup>17</sup> and in extreme cases faced with the choice of modifying their processes or going out of business. Moreover, the availability of injunctive relief has always reflected the thought that in some cases permanent redemption must be compelled by the law, and its application the belief that there may be more than one road to redemption.<sup>18</sup> It would thus be difficult for a judge to argue convincingly that directly compelling changes in conduct is entirely alien to the common law of torts. The only significant difference is that, with the acceptance of this new thesis, decision making will be directed more openly towards working social change than has been the case in the past. As the judge operates in a milieu which is by tradition free from political pressure and lobbying, and is given to dispassionate weighing of the merits, there is much to be said for the extension of the judicial role in the present context. Indeed, if it is the genius of the common law to extend existing principle to accommodate new social reality, the challenge here is irresistible.

### *The Nuisance Action and Pollution Abatement*

The conceptual jungle which constitutes the common law of nuisance has

---

<sup>15</sup>See C. Wright, *The Adequacy of the Law of Torts*, [1961] Cam. L.J. 44 for an excellent analysis of this trend.

<sup>16</sup>The most recent and relevant articulation of this thesis is in M. Katz, *The Function of Tort Liability in Technology Assessment* (1969), 38 U. of Cinn. L. Rev. 587. See also R. Keeton, *Venturing to do Justice* (1969) 161; W. Baxter, *The SST: From Watts to Harlem in Two Hours* (1968), 21 Stan. L. Rev. 1 at 56; G. Calabresi, *The Decision for Accidents: An Approach to Non Fault Allocation of Costs* (1965), 78 Harv. L. Rev. 713, 713-4; Note, *The Cost-Internalization Case for Class Actions* (1969), 21 Stan. L. Rev. 383 at 415, 419.

<sup>17</sup>Katz, *supra* note 16 at 606.

<sup>18</sup>*Id.*, at 608-13.

been exposed elsewhere.<sup>19</sup> The confusion which has always attended the discussion and application of this branch of the law may be a mixed blessing for the environmental litigant. Lack of conceptual precision and of crystallized doctrine at certain points may be of advantage to him in suggesting new trends in judicial thought. At the same time, illogicality in classification and definition where the shape and substance of liability have concretized may preclude any significant forensic manoeuvre.

### A. *An Initial Dilemma—Which Nuisance?*

#### 1. *Public Nuisance*

In terms of litigation strategy the first problem is to determine whether the factual situation falls within the boundaries of public or private nuisance. Given the environmental litigant's concern for championing what he conceives to be the public interest, public nuisance which purports to protect the individual in the exercise of his public rights and which has its genesis in criminal actions to counteract publicly offensive pursuits, such as causing noxious odours, dust, soot and noise, and fouling public thoroughfares and waterways, would seem to be an obvious choice. Superficially, an action which appears to stress the plaintiff's concern for the public interest has obvious attractions for the litigant emphasizing the environmental perspective. Reality, however, is less than kind to the plaintiff in this regard. The courts in recognizing a private action for public nuisance have sought to draw a clear dividing line between its criminal and civil aspects. In brief the civil litigant can only protect his own adversely affected interest. In the absence of facultative legislation he has no inherent standing to sue in the public interest, as a private attorney-general.<sup>20</sup> Well established Canadian authority holds that if the vindication of the public interest is required then the only party who has standing to initiate a prosecution or a civil suit is the governmental representative of that interest, usually the provincial, but on occasion the federal, Attorney-General.<sup>21</sup> Even a municipality, which one might have thought would have a claim to standing as the custodian of the local community interest, has been found impotent in this respect.<sup>22</sup> As action by the

<sup>19</sup> See F. Newark, *The Boundaries of Nuisance* (1949), 65 L.Q.R. 480; W. Friedmann, *The Incidence of Liability in Nuisance* (1943), 59 L.Q.R. 63; J. McLaren, "Nuisance in Canada" in A. Linden ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968) at 320.

<sup>20</sup> *Oak Bay v. Gardner* (1914), 19 B.C.R. 391 (C.A.), 6 W.W.R. 1023, 17 D.L.R. 805; *Turtle v. Toronto* (1924), 56 O.L.R. (C.A.); *St. Lawrence Rendering Co. v. Cornwall*, [1951] O.R. 669 (H.C.), [1951] 4 D.L.R. 790; *Grant v. St. Lawrence Seaway Authority*, [1960] O.W.N. 249 (C.A.).

<sup>21</sup> See the authorities cited in *supra*, note 20. For a recent example of initiative by a provincial Attorney-General, see *A-G for B.C. v. Haney Speedways Ltd.* (1963), 39 D.L.R. (2d) 48 (B.C.S.C.) (noise from a speedway track). For a case in which the Attorney-General for Canada brought action, see *A-G for Canada v. Bristow* (1943), 17 M.P.R. 39 (N.S.C.A.), [1943] 3 D.L.R. 50 (obstruction to navigation on public waterway).

<sup>22</sup> *Oak Bay v. Gardner* (1914), 19 B.C.R. 391 (C.A.), 6 W.W.R. 1023, 17 D.L.R. 805; *St. Lawrence Rendering v. Cornwall*, [1951] O.R. 669 (H.C.), [1951] 4 D.L.R. 790.



Attorney-General is discretionary, there is no guarantee that he will respond affirmatively to complaints and pleas for action by concerned citizens.<sup>23</sup>

The practical effect of this limitation on actionability can best be highlighted by testing the viability of public nuisance in the area of conservation of wilderness and resort areas. The adverse effects of pollution upon our recreational pursuits have become only too obvious in the last decade. Prior to that point in time most urbanites who experienced pollution in their everyday lives could find perhaps some solace in the possibility of vacationing in a clean rural environment. Now in many instances the escape is from one form of pollution to another. With the realization that pollution is no respecter of urban-rural boundaries, and greater citizen sensitivity to the need to protect the natural environment, the question is raised of what the individual can do through the courts to protect the wilderness, the resort area, the provincial or national park from the blight of pollution. The answer, insofar as he seeks to found his claim in tort law solely on the basis of his concern as a member of the public, is nothing. Unless he can tie his action to the infringement of a private right which he possesses, his only resort to remedy the polluted environment is to fall back upon the traditional and often ineffective device of bringing pressure to bear in the political arena, more especially by seeking to goad the Attorney-General into action. The agonizing truth is that the only common law tort action which has its origins in solicitude for the public welfare is of negligible utility in satisfying a growing public concern for the conservation of the country's natural heritage.<sup>24</sup>

In addition to its limited viability as an action for the citizen to protect the public interest, public nuisance has distinct shortcomings as a vehicle for the protection of individual rights. Consonant with their desire to divorce the public and private elements in this action, the courts have sought to limit its application to situations in which the plaintiff can claim damage which is "special", that is different from that which is or could be expected to be suffered by other members of the public. Interpretations of both the terms "the public" and "special damage" rendered by some Canadian courts suggest that counsel for the environmental interest may have to tread with considerable caution in seeking to launch an environmental suit in public nuisance. In the first place there is some doubt as to whether 'the public' embraces all those who in a variety of ways do or could make use of the public facility. It has recently been suggested that a plaintiff or group of plaintiffs who make a special use of a public facility in conjunction with others in the neighbourhood are barred from suit, on the ground that their damage in relation to other members of the class is not unique. This was the considered opinion of Furlong C. J. of the Newfoundland Supreme Court in

---

<sup>23</sup> If a complainant, whether a municipality or private citizen, is successful in inducing the Attorney-General to act he may be included in the suit as a *relator* — see *A-G for B.C. v. Haney Speedways Ltd.* (1963), 39 D.L.R. (2d) 48 (B.C.S.C.), where the seven local residents who complained of the noise were joined as *relators*. *Quaere* whether as land occupiers they needed to rely on public nuisance.

<sup>24</sup> This explains the developing enthusiasm in the United States for the 'public trust' doctrine which recognizes the utility of a private action to protect the public interest. See Sax, *supra*, note 1 at 158-74; Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention* (1970), 68 Mich. L. Rev. 471.

*Hickey v. Electric Reduction Co. of Canada*,<sup>25</sup> in which he dismissed the action of a group of commercial fishermen who claimed to have suffered loss in revenue attributed to the pollution of Placentia Bay by the defendant's plant.<sup>26</sup> If this reasoning is followed, it means that in certain geographical locations, where a significant proportion of the populace engages in a special productive use of public water resources, that special *use* will be the sole frame of reference as to whether the *damage* is special or not. For practical purposes the public equals the special class. Thus counsel who is denied the freedom to sue in the general public interest may now face the further obstacle that he cannot represent that segment of the populace which is most adversely affected by it, if that segment is too large.<sup>27</sup>

Secondly, although it is well accepted that personal injury and property damage fall within the designation "special damage",<sup>28</sup> there is some conflict as to whether it comprehends purely financial loss. The *Hickey* case, which is supported by two earlier decisions relating to commercial benefits derived from fisheries,<sup>29</sup> denies that it does.<sup>30</sup> The rationale for this rather remarkable finding is to be found in a statement of Baxter, J. in *Filion v. New Brunswick International Paper Co.*,<sup>31</sup> a case involving an alleged interference with the fishing of a commercial smelt fisherman by waste from the defendant's pulp mill. The judge asserted that since the plaintiff could have no greater rights than other members of the public in fishing, any damage which flowed from pollution of the fishery was by definition merely different in degree from that incurred by

<sup>25</sup> (1972), 21 D.L.R. (3d) 368.

<sup>26</sup> *Id.*, at 371-72.

<sup>27</sup> W. Prosser, *Private Action for Public Nuisance* (1966), 52 Va. L. Rev. 997 at 1010, 1015 indicates that authority in the United States favours the denial of a claim in public nuisance where the whole or a large proportion of the local community are adversely affected and suffer the same type of damage. See in particular *Smedberg v. Moxie Dam Co.* (1952), 148 Me. 302, 92 A.2d 606 (destruction of fish in a lake affected business of all the fishing camps in an area). The practical effect of the *Hickey* decision is alarming in that it can be argued that the plaintiffs had no other means of recourse. If they chose negligence they would have had the problem that liability does not usually extend to purely financial loss. In that regard it is interesting to note that Furlong C.J. referred to negligence cases in support of a more general proposition which he made, that in public nuisance 'mere' economic loss is not sufficient to ground an action. He specifically approved of Lord Denning M.R.'s opinion in *SCM (U.K.) Ltd. v. W. J. Whittal & Sons Ltd.*, [1970] 3 All E.R. 245 (C.A.) that economic loss without direct damage is not usually recoverable at law. If *Rylands v. Fletcher* was appealed to, the same objection could be raised and might well succeed, as the courts have never considered that cause of action in a case where there was lacking personal injury or damage to property in which the plaintiff had a legal interest. Even if a court was sympathetic on that issue, the plaintiffs would face the added obstacle of non-natural use.

<sup>28</sup> See e.g. *Mintz v. Hamilton Radial Electric Ry.* (1923), 53 O.L.R. 171 (C.A.), [1923] 1 D.L.R. 268 (knee injury); *Stephens v. MacMillan*, [1954] O.R. 133 (H.C.), [1954] 2 D.L.R. 135 (damage to aircraft).

<sup>29</sup> *Filion v. N.B. International Paper Co.* (1934), 8 M.P.R. 89 (N.B.S.C.), [1934] 3 D.L.R. 22; *McKie v. K.V.P. Co.*, [1948] O.R. 398 (H.C.), [1948] 3 D.L.R. 201 (loss of revenue by tourist camp operators due to pollution of fishery). See also *McRae v. British Norwegian Whaling Co.* (1927-31), 12 Nfld. L.R. 274 (S.C.), upon which Furlong C.J. relied heavily in the *Hickey* case.

<sup>30</sup> *Supra*, note 25 at 370-71.

<sup>31</sup> (1934), 8 M.P.R. 89 (N.B.S.C.), [1934] 3 D.L.R. 22.

others.<sup>32</sup> The decision fails to recognize that uses of public resources vary considerably in incidence and importance, and that this fact is reflected in a wide spectrum of adverse consequences in the event of interference, ranging from minor annoyance to financial ruin. Moreover, the court by divorcing the issue of rights from that of uses suggested another and more far reaching limitation of the anti-pollution suit, that is that whatever the incidence of the special use recovery for financial loss will be barred. The type of victim of pollution who incurs financial loss is the most likely to suffer from its long-term effects because of his permanent interest in the resources and his investment in utilizing it. He therefore has the greatest incentive to remedy it. Accordingly his exclusion from suit would mean the effective submersion of the environmental interest in public nuisance suits. Fortunately there is a countervailing trend in Canadian jurisprudence. There exists a triad of Ontario appellate decisions which have come to the opposite conclusion in an analogous context.<sup>33</sup> Each of these decisions make it clear that financial loss incurred by commercial concerns engaged in shipping enterprises on navigable waterways<sup>34</sup> by obstructions to navigation, amounts to 'special damage'. There is no difference in principle between financial loss flowing from interference with the commercial uses of the right to navigate and the right to fish in public waters. The nub of the complaint in both cases is the adverse effect upon the use, and upon it alone. Given this equation there is no reason why environmental counsel should not use these latter decisions effectively to counter the arguments of the fishery cases.

The controversy in Canadian jurisprudence over whether financial loss is 'special damage' does not leave one too sanguine about the possibility of the courts accepting the more general argument that a difference in the degree of damage is sufficient to found a private action in public nuisance. The only decisions which lend some support to the argument are three early Ontario cases, one involving obstruction of a highway<sup>35</sup> and the others navigable waterways,<sup>36</sup> which imply that an aggravated degree of inconvenience (in these instances to plaintiffs who depended upon the thoroughfares as channels of communication with the outside world) is enough. The utility of these decisions will depend on the willingness of a court to divorce them from their special facts, for it may be argued that the interference in each case came close to being an invasion of the property right of unobstructed ingress and egress, and thus tantamount to a private nuisance.<sup>37</sup> At best their authority as support for a difference in degree as the appropriate criterion may be described as tenuous. In conse-

---

<sup>32</sup> *Id.*, at 96, 26.

<sup>33</sup> *Crandell v. Mooney* (1878), 23 U.C.C.P. 212 (C.A.); *Rainy River Navigation Co. v. Ontario & Minnesota Power Co.* (1914), 26 O.W.R. 752 (C.A.), 17 D.L.R. 850; *Rainy River Navigation Co. v. Watrous Island Boom Co.* (1914), 26 O.W.R. 456 (C.A.), 6 O.W.N. 537.

<sup>34</sup> In each case the plaintiffs earned money from carrying freight and passengers.

<sup>35</sup> *O'Neil v. Harper* (1913), 28 O.L.R. 635 (C.A.), 13 D.L.R. 649.

<sup>36</sup> *Drake v. Sault Ste. Marie Pulp & Paper Co.* (1898), 25 O.A.R. 251; *Ireson v. Holt Timber Co.* (1914), 30 O.L.R. 209 (C.A.), 18 D.L.R. 604.

<sup>37</sup> There is clearly not much difference in result between the situation in which the gateway or entrance to the plaintiff's land is blocked, and the situation where a vital access route to his land is obstructed, albeit at some distance from his property. The property may be effectively isolated from the outside world.

quence, it is not possible to be confident about using public nuisance inventively protect individuals who are subjected to an aggravated degree of inconvenience from pollution in public places. Thus the worker in a city whose employment is the street or park and who is the victim of constant exposure to noise and air pollution may find that unless his health has as a result of his working conditions perceptibly deteriorated or he can point to property damage he has no standing. His concern to improve his working milieu may be of no avail.<sup>38</sup>

The restrictive nature of the rules surrounding the private action in public nuisance, and the unsatisfactory state of Canadian case authority, suggest that the action has limited potential as a means of vindicating the interests of environmentalists. The unfortunate irony of the development of this branch of the law of nuisance is that the chances of the concerned citizen achieving positive results decrease in inverse proportion to the gravity of the offending pollution problem and its adverse consequences. The environmental lawyer is effectively hamstrung in seeking to inject the anti-pollution perspective into the action, because he has to avoid at all costs giving the impression that the defendant's activity is causing a widespread common problem. If he does then his client's damage may become indistinguishable from that suffered by the rest of the community, and he will fail to sustain the unique nature of his claim.

The policy reasons underlying these judicial roadblocks are the fear of a multiplicity of claims and the launching of trivial suits.<sup>39</sup> One wonders whether this 'floodgates' type of thinking has any more validity here than in other areas of tort law in which it has been utilized to prevent or delay progressive development.<sup>40</sup> It has never been adequately proven that breakthroughs into new areas of liability trigger off large numbers of claims, let alone claims which are trivial. It may of course be argued that with the advent of widespread concern over pollution, that a stimulus to a multiplicity of actions would be provided by a more liberal approach to standing. However, it is the writer's opinion that the more likely result is the coalescence of effort by concerned citizens. There would obviously be suits, but suits involving large numbers of complainants, genuinely launched in the public interest. Furthermore, if there are trivial claims, it is surely not beyond the capacity of the courts to expose and discourage them.<sup>41</sup> The overriding factor in seeking more flexibility here is to circumvent the concern for economic expediency, which may restrain the official protectors of the public interest. However, in the absence of legislation it may be doubted whether

---

<sup>38</sup> For some of the problem associated with employment in polluted urban environments see K. Lasson, *The Workers; Portraits of Nine American Jobholders* (New York: Grossman, 1971).

<sup>39</sup> Prosser, *supra*, note 27. See also *Restatement; Torts 2d* (Tentative Draft No. 17: 1971) at 14.

<sup>40</sup> For example the fear expressed by Lord Abinger in *Winterbottom v. Wright* (1842), 10 M & W 109 (Exch), 152 E.R. 402 that to extend liability for negligence beyond the contractual relationship would be that 'the most absurd and outrageous consequences, to which I see no limit, would ensue' has hardly been justified by the recognition of such an extension in this century.

<sup>41</sup> It is clearly within the powers of a court to substitute damages for injunctive relief, and to award a nominal sum. Moreover, there is nothing to prevent a judge denying costs to the plaintiff, though he is technically entitled to a verdict.

there will be any significant judicial movement in the direction of liberalization of standing.<sup>42</sup>

## 2. *Private Nuisance*

By comparison the action for private nuisance offers a positive medium of legal redress for environmentalists. This species of nuisance has as its objective the protection of the individual in the use and enjoyment of his land from the damage, injury or inconvenience caused by operations carried out upon the land of others or in public places. Traditionally the action has covered industrial processes causing smells, smokes, poisons, particulates, waste, and noise which have harmed or annoyed individuals.

Ostensibly, the vindication of individual property rights would seem to be a poor basis for emphasizing the broader community concern with pollution. However, there are features of this species of nuisance which may permit both creativity and inventiveness in developing an environmental perspective. Its primary attraction is that it seems to be no obstacle to success that the pollution is also adversely affecting the legal interests of others. The defendant cannot argue that his pollution is so widespread and its effects so generally felt amongst the populace, that it is by definition a public nuisance, and in the absence of 'special damage' not actionable. The Ontario Court of Appeal in *Cairns v. Canadian Refining Co.*,<sup>43</sup> in which the plaintiff was claiming damages for injury to his person and property caused by arsenic fumes emanating from the defendant's smelter and descending upon the surrounding community, did indicate that in such case the claim might be brought in either private or public nuisance.<sup>44</sup> The decision, however, clearly implies that if the claimant chooses public nuisance, the 'special damage' requirement is satisfied by an injury to his private right in property, so that in either case liability depends upon the existence of a private nuisance.<sup>45</sup> In private nuisance, once the plaintiff has established an unwarranted interference with his rights over land he is entitled to a remedy, however severe the effect of the pollution on others, whether they are exercising public rights, or enjoying private rights in property. It is an obvious and important corollary of this rule that each person suffering interference with his interests in property is entitled to seek a remedy.<sup>46</sup> The policy rationale behind this refusal to entertain the 'public nuisance' argument is

---

<sup>42</sup> It is interesting to note that in those jurisdictions in the United States in which the notion of standing in public nuisance has been expanded, this has been achieved by legislation. See Wisc. Stat. Am. § 280.02; Fla. Stats. Am. § 60.05. Such statutes have been used from time to time to deal with environmental problems. See *National Container Corp. v. State* (1939), 138 Fla. 32, 189 So. 4 (suit to enjoin the erection of a pulp mill). The most significant departure from the traditional rules is the Michigan *Environmental Protection Act* 1970 P.A. 127 which allows any person to bring an action for declaratory and equitable relief from pollution, whether he is adversely affected by it or not. Thus it would be possible for a citizen of Detroit to initiate a suit against a polluter in Sault Ste. Marie at the other end of the State and vice-versa.

<sup>43</sup> (1914), 26 O.W.R. 490 (C.A.), 6 O.W.N. 562.

<sup>44</sup> *Id.*, at 492, 564.

<sup>45</sup> The court expressly dissented from the view expressed by Boyd C. at trial, (1914), 25 O.W.R. 384, 5 O.W.N. 423 (H.C.).

<sup>46</sup> *Id.*, at 495, 564.

perhaps best explained in a statement of the Supreme Court of California in *Fisher v. Zumwalt*,<sup>47</sup> an air pollution suit in which the 'converted nuisance' ploy was tried:

. . . [S]uch a doctrine [would not be] consistent with sound principle. Carried out practically, it would deprive persons of all redress for injury to property or health, or for personal annoyance and discomfort, in all cases where the nuisance was so general and extensive as to be a legitimate subject of a public prosecution; so that, in effect a wrongdoer would escape all liability to make indemnity for private rights by carrying on an offensive trade or occupation in such place and manner as to cause injury and annoyance to a sufficient number of persons to create a common nuisance . . .<sup>48</sup>

In short, he would acquire a vested right to pollute.

The practical effect of this refusal to give any weight to damage to the public interest as a negative factor is that counsel for an environmental plaintiff can expose the public interest as a positive factor. While it is true that he has to be careful to emphasize the unwarranted interference with the rights of his client he is free to make adequate use of local experience through his witnesses. Evidence of widespread social concern about the effects of the pollution may prove to be a valuable element in his case, more especially when the defendant is likely to try and persuade the court of the infallibility of its technical expertise, and claim to be the economic saviour and mentor of the surrounding community.<sup>49</sup>

#### B. *Who May Sue and How Many*

The scope of private nuisance, tied as it is to proprietary interests, is limited. It is essential that the plaintiff claim not only a right to the land, but also effective occupation of it.<sup>50</sup> The only leeway allowed by the law is the extension of the action to cover the members of the land occupier's family, as long as they are resident thereon.<sup>51</sup> The substantive confines of the tort need not, however, be a significant hindrance to the launching of environmental suits. The effects of air, water and noise pollution are usually diffuse enough to affect private property close to the source, and often the degree of interference with the use and enjoyment of the occupiers will be sufficient to cause some of them to seek a remedy.

A serious procedural issue is the question of whether the environmental suit must focus solely on the complaint of a single plaintiff, or can be converted

<sup>47</sup> (1900), 128 Cal. 493, 61 P. 82.

<sup>48</sup> *Id.*, at 495, 83. For a more recent expression of opinion in the same vein, see *Karpisek v. Cather & Sons Construction Inc.* (1962), 174 Neb. 234, 117 N.W. 2d 332.

<sup>49</sup> For an excellent outline of the conduct of an environmental case in nuisance, including comments on the utility of lay evidence, see D. Hadden, "Presenting the Air Pollution Case" in R. Needham ed., *Legal Control of the Environment—3D* (N.Y.: Practising Law Institute, 1971) at 49, 94-96.

<sup>50</sup> A reversioner may sue in nuisance only if the interference or damage is of a continuous or permanent nature: *Billingsgate Fish Ltd. v. B.C. Sugar Refining Co.* (1933), 46 B.C.R. 543 (S.C.), [1933] 1 W.W.R. 530; *Park v. White* (1893), 23 O.R. 611 (C.A.); *Landzick v. Robinson* (1935), 43 Man. R. 30. On the position of mortgagees see *Preston v. Hilton* (1920), 48 O.L.R. 172 (H.C.), 55 D.L.R. 647.

<sup>51</sup> See e.g. *Bottom v. Ontario Leaf Tobacco*, [1935] O.R. 205 (C.A.), [1935] 2 D.L.R. 699, where damages were awarded to cover the inconvenience caused by the defendant's operations to both the occupier and his wife.

into a group action. Obviously, the major point in bringing an environmental suit is to seek a legal solution to a pollution problem which benefits the local community as a whole. The most effective way of achieving this end is to bring into court, either in person or through a representative, those complainants who have suffered significant interference from the pollution source in question. There is a problem, however, of how receptive Canadian courts will be to the initiation of a case as a multi-claimant suit.

The most attractive way of bringing a multi-claimant suit would be to launch a class action in which the actual plaintiff would sue both in his own right and as the representative of all other parties adversely affected. Unfortunately, what little case law there is on class actions in Canada suggests that the expedient is not available where a claim in tort is brought, whether it be for damages or injunctive relief. Thus, in *Preston v. Hilton*<sup>52</sup> the plaintiff, who sought an injunction on her own behalf, and on that of other property owners on the same street, against the erection of wagon sheds and stables in the immediate vicinity, was denied the right to continue the suit in a representative capacity. The primary reason for the decision seems to have been that, in an action of this nature, although the complainants may have suffered, or may have feared damage from a common source, the injury or threatened injury was peculiar to each person or his property and each action was therefor discrete. This type of situation, where the interests were merely similar, was distinguishable from that where the interests of the claimants were the same, for example the case in which creditors had been defrauded, where the only difference in interest was the share of each claimant in a common fund. To emphasize the limits of the class action the court quoted with approval a statement of Fletcher-Moulton L.J. in *Markt & Co. v. Knight Steamship Co. Ltd.*<sup>53</sup>

The proper domain of the representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject matter.<sup>54</sup>

As the *Preston* case has been followed by the only other Canadian cases on point,<sup>55</sup> and seems to accord with the spirit of English jurisprudence on the matter,<sup>56</sup> it may be questioned whether there is anything counsel can do to remedy the situation. The one possible line of argument is that the requirement that the interest be the 'same' found in *Preston* and in Ontario's Rule 75 and its equivalents<sup>57</sup> is satisfied in a nuisance suit where an injunction is sought, and the complaint of the aggrieved parties relates as much to the quality of the environment, in which they have a common interest, as it does to their individual interest in the use and enjoyment of their property. As the grant of a class action by the judge is discretionary, it may be argued that there is something to be said

---

<sup>52</sup> *Preston v. Hilton* (1920), 48 O.L.R. 172 (H.C.), 55 D.L.R. 647.

<sup>53</sup> [1910] 2 K.B. 1021 (C.A.).

<sup>54</sup> *Id.*, at 1039.

<sup>55</sup> *Turtle v. Toronto* (1924), 56 O.L.R. 252 (C.A.), 27 O.W.R. 242; *St. Lawrence Rendering Co. v. Cornwall*, [1951] O.R. 669 (H.C.), [1951] 4 D.L.R. 790.

<sup>56</sup> 1 Jacob, *The Supreme Court Practice 1970*, at 187-9.

<sup>57</sup> The rules of the other Provinces seem to contain identical or similar provisions. See e.g. Alta. Rules of Court 1969, r.42 ('common interest') N.B. Rules 1969, 0.16(9) ('same interest'); Sask. Rules 1961 r.45 ('same interest').

for preserving a degree of flexibility in its use<sup>58</sup> and interpreting the power in the light of new social realities.

Regardless of the difficulties which may be faced in inducing the courts to recognize the legitimacy of the class action in nuisance suits, it still may be possible to broaden the area of grievance by seeking to join the actions of the several plaintiffs. Under Rule 66 in Ontario the joinder of plaintiffs is dependent not upon the existence of the 'same interest', but upon 'common questions of law or fact',<sup>59</sup> a requirement which would be satisfied if a number of occupiers were suing in nuisance a defendant who was the alleged source of pollution in the neighbourhood. What little case law there is on the subject suggests that joinder is appropriate in nuisance suits. In *Preston v. Hilton*, Orde J. indicated that it might have been possible to include all the aggrieved parties in the action under Rule 66.<sup>60</sup> In a more positive vein Latchford J. in *Gagnon v. Dominion Stamping*,<sup>61</sup> a noise pollution action brought by one plaintiff as a test case, opined that the case should more appropriately have been brought as a joint action under Rule 66.<sup>62</sup> While there are practical problems in joining plaintiffs in some types of actions, for example in a suit brought by the numerous shareholders of company, because of the necessity of obtaining the consent of each aggrieved party and seeking their approval of a single legal representative, it is unlikely that these difficulties will arise in the present context. As the environmental suit will usually be a collaborative effort by a group of concerned citizens, who may well be members of an environmental protection group, there is likely to be every incentive to select the most expeditious way of bringing their collective grievances before a court and entrusting the matter to one lawyer.

### C. *Who May Be Sued and How Many*

Although it is essential to the plaintiff's claim that he prove some possessory right in land, the same sort of interest need not exist in the defendant. This is entirely logical because the essence of the tort is interference with the plaintiff's use and enjoyment of his property. While the majority of nuisance cases involve competing uses of land, there are decisions in Canada which leave no doubt that liability will be imposed where the defendant is not a land occupier, for example where he has a mere license to use land,<sup>63</sup> or is engaged in some activity in a public place.<sup>64</sup>

<sup>58</sup> A point made by Megarry J. in *John v. Rees*, [1970] Ch. 345, [1969] 2 W.L.R. 1294, 369, 1306 (representative action on behalf of members of a constituency division of the Labour Party to prevent leaders of a disaffected group from running the local party machine).

<sup>59</sup> Again this rule has its equivalents in the other Canadian jurisdictions. See e.g. Alta. Rules 1969, r.36; N.B. Rules 1969, 0.16(1); Sask. Rules 1961, r.39.

<sup>60</sup> *Supra*, note 52 at 179, 654.

<sup>61</sup> (1914), 7 O.W.N. 530 (H.C.).

<sup>62</sup> *Id.*, at 533.

<sup>63</sup> See e.g. *Weber v. Berlin* (1904), 8 O.L.R. 302 (H.C.); *Crowther v. Coburg* (1912), 20 O.W.R. 844 (H.C.), 1 D.L.R. 40; *Groat v. Edmonton*, [1928] S.C.R. 522, [1928] 3 D.L.R. 725.

<sup>64</sup> See e.g. the authorities supporting the use of private nuisance for obstructions on highways interfering with ingress and egress—*Forster v. Medicine Hat* (1913), 5 Alta. L. R. 36 (S.C.), 6 W.W.R. 548; *Prentice v. Sault Ste. Marie*, [1928] S.C.R. 309, [1928] 3 D.L.R. 564; *Toronto Transportation Co. v. Swansea*, [1935] S.C.R. 455, [1935] 3 D.L.R. 619; *Hagel v. Yellowknife* (1957), 6 D.L.R. (2d) 417 (N.W.T.C.A.).



With defendants there is again the problem of a multiplicity of suits. In pollution situations in which a plaintiff's interest is subjected to interference from a number of industrial sources it makes a good deal of sense, both in terms of proof and seeking an overall solution, to bring a single action against all the offenders, or at least the chronic polluters. The practical method of achieving this purpose is to join the actions. Subject to the judge's power to order separate trials if he considers it unjust to do otherwise, joinder is allowed where the several causes of action arise out of the same occurrence or series of occurrences, or where the plaintiff is in doubt as to the person from whom he is entitled to redress.<sup>65</sup> This expedient would seem to be admirably suited to the environmental suit, because it allows the plaintiff to bring several polluters into court together, and if he is uncertain of the potential liability of any of them permits him to avoid the expense and frustration which he might experience if he chose an inappropriate single defendant.

#### D. *Nuisance Models and the Liability Issue*

One significant area of nuisance law in which confusion continues to reign in Anglo-Canadian jurisprudence is that of the basis of liability. In the minds of many judges nuisance seems to conjure up a rather messy collage of strict liability and negligence, with no clear pointers to the applicability of either. The attempts at rationalization by the courts are so abstract as to be useless as reliable precedent. When we are variously informed that liability in nuisance is strict,<sup>66</sup> that proof of negligence is not required in nuisance,<sup>67</sup> that nuisance and negligence are almost assimilated,<sup>68</sup> that fault is nearly always present in nuisance,<sup>69</sup> that foreseeability is the test for remoteness in nuisance,<sup>70</sup> and that *Rylands v. Fletcher* is analogous to, but different from nuisance,<sup>71</sup> counsel might be forgiven for concluding that he is on his own. In fact the lack of any comprehensive rationalization of the relationship between nuisance, negligence and *Rylands v. Fletcher* may provide the environmental lawyer with some latitude in proceeding with a theory of liability most favourable to his client. What follows is an attempt to view the question of liability in nuisance along functional lines, that is, to relate it to what the plaintiff is trying to achieve in launching his suit, and to expose the potential for creative argument that exists in the present amorphous state of the law.

---

<sup>65</sup> See Ontario Rules of Court 67. For equivalents in other provinces see Alta. Rules 1969 r.46; N.B. Rules 1969, 0.16 (4) (7); Sask. Rules 1961 r.42.

<sup>66</sup> *Read v. J. Lyons & Co.*, [1947] A.C. 156 (H.L.), [1946] 2 A11 E.R. 471, per Lord Simonds at 183, 482.

<sup>67</sup> *B.C. Pea Growers Ltd. v. Portage La Prairie*, [1966] S.C.R. 150, 54 W.W.R. 477, per Martland J. at 157, 483-4.

<sup>68</sup> *MacMillan Bloedel (Alberni) Ltd. v. B.C. Hydro* (1972), 22 D.L.R. (3d) 164 (B.C.S.C.) per Rae J., at 181.

<sup>69</sup> *Overseas Tankship (U.K.) Ltd. v. The Miller S.S. Co.*, [1967] 1 A.C. 617 (P.C., Aust.), [1966] 3 W.L.R. 498, per Lord Reid at 639, 508.

<sup>70</sup> *Id.*, at 640, 509.

<sup>71</sup> *J.P. Porter Co. v. Bell*, [1955] 1 D.L.R. 62 (N.S.C.A.), per McDonald J.A. at 64-65.

1. *The Relevance of the Defendant's Conduct of his Operation*(a) *The Continuing Nuisance*

Judges are often fond of remarking that liability in nuisance is strict, that fault in the traditional sense at least is not a condition of the plaintiff's success. The major problem with this generalization is that it assumes that it is possible to translate doctrine from other areas of tort law without relating it to the peculiarities of the nuisance action. It is this writer's contention that nuisance has a distinct function in the law, and to some extent has developed its own special liability concepts. The model pollution suit of the future will revolve around a distinctive factual framework. A plaintiff or group of plaintiffs will come to court alleging that the operations of an industrial or municipal defendant are causing an intolerable degree of interference with their use and enjoyment of land and the physical environment of the community at large. While the complaints may relate in part to interference in the past, and be attended by a claim for damages, the main thrust of the action will be to argue that the defendant's pollution is a present and a future menace to the individual and community interest, and that it should be enjoined or at least modified. In this context the cardinal question is not the legal characterization of the defendant's conduct, but rather the degree of interference experienced by the plaintiff and his neighbours. The issue is whether the conditions in which the plaintiff is forced to live as a result of the defendant's pollutants are beyond the bounds of reasonable tolerance. It is true that the answer to this question requires a careful consideration of the surrounding circumstances, including the nature and conduct of the defendant's process and its utility, but these are colouring factors rather than the necessary *desiderata* of liability. Insofar as Canadian judges have addressed themselves to this problem, the consensus seems to be that the plaintiff does not have any burden upon him to prove fault in the traditional sense.<sup>72</sup> The evidentiary onus lies rather in proving that the level of interference is beyond that which he should reasonably be expected to bear in the circumstances. American commentators and judges have tended to argue to the contrary that the conduct of the defendant is an important factor in these cases, and that fault must be shown in addition to unreasonable interference.<sup>73</sup> Whether this divergence in opinion is of any practical import is doubtful. If environmental plaintiffs come to court complaining of subsisting pollution, which they want abated, there can be no question that the defendant has already been fully apprised of the problem. Accordingly, given his knowledge, and absent any serious attempt to respond to it by voluntary abatement procedures, it can be

<sup>72</sup> *Chandler Electric Co. v. H.H. Fuller & Co.* (1892), 21 S.C.R. 337 aff'g 23 N.S.R. 263 (sub. nom. *Fuller v. Pearson*); *Andrews v. Cape Breton Electric Co.* (1904), 37 N.S.R. 105 (C.A.); *Walker v. McKinnon Industries Ltd.*, [1949] O.R. 549 (H.C.), [1949] 4 D.L.R.; 739; *Russell Transport Ltd. v. Ontario Malleable Iron*, [1952] O.R. 621 (H.C.), [1952] 4 D.L.R. 719; *B.C. Pea Growers Ltd. v. Portage La Prairie*, *supra*, note 67.

<sup>73</sup> W. Prosser, *Handbook of the Law of Torts* (4th Ed., St. Paul: West Publishing Co., 1971) 574; P. Keeton, *Trespass, Nuisance and Strict Liability* (1959), 59 Col. L. Rev. 457; *Restatement; Torts 2d* (Tentative Draft No. 17; 1971); *Wright v. Masonite Corp.* (1965), 368 F.2d 661 (4th Cir.); *Power v. Village of Hibbing*, (1930), 182 Minn. 66, 233 N.W. 597; *Schindler v. Standard Oil of Ind.* (1921), 207 Mo. App. 190, 232 S.W. 735; *Rose v. Socony Vacuum Corp.* (1934), 54 R.1. 411, 173 A. 627; *Ettl v. Land & Loan Co.* (1939), 122 N.J.L. 401, 5 A.2d. 689.

argued that he intends the consequences of his acts. If those consequences constitute an undesirable level of pollution, then he intends to pollute, and he has committed an intentional tort. The basic difference between the Canadian and what might be classified as the Restatement approach is that the former assumes this reality, whereas the latter seems to require its articulation. It is most unlikely that there would be any difference in result.

Just as the plaintiff is freed from proving fault it is not a decisive argument on the part of the defendant that he is taking reasonable care in the operation of his process.<sup>74</sup> This would seem to apply whether he is operating a plant which is not the most effective in environmental terms, in a competent and solicitous manner, or operating the most effective process in terms of pollution abatement.<sup>75</sup> As long as the result is an intolerable degree of interference with the plaintiff's rights liability follows. At the least the courts are prepared to force the polluter to underwrite the cost of the adverse consequences of his process.

(b) *The Past Nuisance*

A second type of nuisance model comprises actions by complainants for damages or injuries already suffered. Here the difference from negligence models is not so readily apparent, and the law is rather less settled on the basis of liability. The situation can arise in both an action which joins a claim for past damages with a prayer for an injunction, and in a claim which relates solely to past damages. Some nuisance cases of this type undoubtedly will be dealt with along the same lines as the first model. Thus, where the plaintiff's grievance relates to a sustained exposure to pollution in the past, the defendant in most cases will have been aware of the problem and the injurious effects alleged. Here the only real issue is whether the interference with the plaintiff's interests during that period was excessive. Again, fault in the traditional sense is treated as incidental.<sup>76</sup> Where problems of liability theory do arise is where there was no actual awareness by the defendant polluter that he was causing harm—the type of situation which usually presupposes that the plaintiff was unaware of any problem, or if he was, that he could not associate it with any operation of the defendant. In view of the clandestine operation of certain pollutants on health and both animate and inanimate objects, and the layman's lack of expertise in the area of pollution and its physical consequences, it is quite likely that this type of model will face the environmental lawyer from time to time.<sup>77</sup>

---

<sup>74</sup>*Drysdale v. Dugas* (1896), 26 S.C.R. 20; *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 (H.C.); *Walker v. McKinnon*, [1949] O.R. 549 (H.C.), [1949] 4 D.L.R.; 739; *Russell Transport Ltd. v. Ontario Malleable Iron*, [1952] O.R. 621 (H.C.), [1952] 4 D.L.R. 719; *Atwell v. Knights*, [1967] O.R. 419 (H.C.), 61 D.L.R. (2d) 108.

<sup>75</sup>See *Bottom v. Ontario Leaf Tobacco*, [1935] O.R. 205 (C.A.), [1935] 2 D.L.R. 699, where the court while refusing to grant an injunction did award damages to the plaintiffs, although it had been proved that every conceivable device for preventing the spread of tobacco fumes had been used.

<sup>76</sup>See e.g. *Russell Transport Ltd. v. Ontario Malleable Iron*, [1952] O.R. 621 (H.C.), [1952] 4 D.L.R. 719, in which McRuer C.J. makes no distinction in the principles of liability to be applied in dealing with the issues of past damages on the one hand and continuing damage on the other.

<sup>77</sup>For a fact situation which amply illustrates this model, see *Wright v. Masonite Corp.* (1965), 368 F. 2d 661 (4th Circ.). See text *infra* p. 523.

The only jurisdictions in which any attempt has been made to rationalize the pattern of liability in this area are in the United States. The majority opinion appears to be that set down in section 822 of the Restatement of Torts, that in the absence of proof of knowledge on the part of the defendant, the plaintiff is required to point to some negligence in the defendant's mode of operation, or, if that is impossible, to show that the activity is ultrahazardous.<sup>78</sup> In essence the attempt has been made to rationalize nuisance into the tri-fold contemporary pattern of liability. A minority view takes the position that nuisance has always been and has remained a tort of strict liability.<sup>79</sup> An instructive case which illustrates these conflicting theories is *Wright v. Masonite Corp.*<sup>80</sup> The plaintiff owned a grocery store adjacent to the defendant's plant where masonite board was manufactured, a spray containing formaldehyde being employed in the finishing process. For a period of time the plaintiff's premises were impregnated with a formaldehyde odour which infected his stocks, rendering them unsaleable. Initial tests of the local air were negative, and it was only some time later that it was found that small amounts of formaldehyde were being released into the air from the defendant's process, and that these, changing by synergetic process into formaldehyde gas, were carried into the store. The trial court found that a cause-effect relationship had been proven, but that, since the defendant had been ignorant of the adverse effects of its operation, their action was not intentional, and so did not constitute a nuisance under North Carolina law.<sup>81</sup> The majority of the Fourth Circuit upheld the trial judge's opinion. Haynsworth C.J speaking for them,<sup>82</sup> rejected the proposition that strict liability under *Rylands v. Fletcher* applied automatically to the escape of noxious gases. In his mind nuisance and *Rylands v. Fletcher* had to be related to the distinction in liability between intent, negligence and ultra-hazardous activity. Absent a culpable intention, which he interpreted as an intention to cause harm, negligence or the operation of an ultra-hazardous activity had to be proved. As neither intention nor negligence could be proven, and as the domestic jurisprudence had failed to classify the escape of noxious gases as ultra-hazardous, the defendant could not be fixed with liability. The dissenting judgment of Bryant, J. is based on the minority view of liability.<sup>83</sup> Prefacing his judgment with concern for the plaintiff being left both injured and remediless, he concluded that all that

---

<sup>78</sup> See authorities cited *supra*, note 73.

<sup>79</sup> See Prosser, *Handbook of the Law of Torts*, (4th Ed.) at 512-3. Dean Prosser suggests that most cases which apply strict liability under the guise of nuisance, have done so to obviate the concern voiced in some jurisdictions over accepting openly the *Rylands v. Fletcher* doctrine. Viewed in this light it can be argued that strict liability is limited to those instances involving an ultrahazardous activity or operation. It is evident however, that this strict liability nuisance approach has been used in a number of cases involving unexceptional industrial pollution, such as causing smoke, rust, bad odours and noxious gases, and it is questionable whether the notion of 'absolute nuisance' is as confined as he suggests. It is interesting to note also that there is presently some conflict amongst academic lawyers over the nature of liability in nuisance with Professors F. James and R. Keeton rejecting the Restatement approach and favouring characterization in terms of strict liability. See *Restatement; Torts 2d* (Tentative Draft No. 17: 1971) at 31-32.

<sup>80</sup> *Supra*, note 77.

<sup>81</sup> (1965), 237 F. Supp. 129 (N.C.M.D.).

<sup>82</sup> *Id.*, at 663-66.

<sup>83</sup> *Id.*, at 666.

was required by North Carolina law in a private nuisance action was an unreasonable invasion caused by an 'intentional use' of land by the defendant. He rejected the Restatement thesis that intention must be related to the adverse consequences of the polluter's acts. Intention to do the causative acts, that is to emit fumes was sufficient, and was satisfied here. He concluded his judgment with the observation:

North Carolina does not hold with the theory that the creator of a nuisance is liable only from the time he is caught. The State does not allow him one bite.<sup>84</sup>

While a divergence of opinion clearly exists in the United States, those positions have been clearly articulated, and there is some indication of a dominant trend in authority. By comparison the state of Canadian jurisprudence suggests little in the way of conscious rationalization. Nevertheless, it is possible to detect a definite trend in the authorities which may assist environmental counsel. The question of the law's response to this type of model in Canada depends basically upon the nature of the relationship between nuisance and the rule in *Rylands v. Fletcher*. The early law of nuisance, perhaps reflecting its roots in property law, seems to have rested upon strict liability.<sup>85</sup> Indeed, it does not appear that there was any challenge to this assumption until late in the last century. Certainly Blackburn J. and Lord Cranworth in their judgement in *Rylands v. Fletcher* entertained no doubts on the matter.<sup>86</sup> Blackburn J.'s opinion in particular is posited on the belief that liability in the instant case was a specific example of a general principle of liability without fault, which flowed through the injury to land cases.<sup>87</sup> While by that time no one seems to have bothered to determine the rationale for this approach, the maxim *sic utere tuo ut alienum non laedas* possessed the sort of historical respectability which made further reflection unnecessary. The first doubt to be cast upon the general thesis lay in the judgment of Lord Cairns in the *Rylands* case, for he was only prepared to impose strict liability in the case before him, if the use of the land by the defendant was non-natural.<sup>88</sup> Ever since it has been assumed that, in the absence of that condition, negligence is required.

The crucial issue for the environmental lawyer is whether *Rylands v. Fletcher* completely displaces or subsumes nuisance where the plaintiff's claim relates to the unintentional causation of past damage. If it does not then it may be possible for counsel representing the environmental interest to argue both that nuisance is relevant to the issue in some instances and that where it applies liability is strict. If it does, then it means that in the case of the second model the natural/non-natural dichotomy becomes a hurdle.

---

<sup>84</sup> *Id.*, at 667.

<sup>85</sup> For early development of nuisance and its association with property concepts, see W. McRae, *The Development of Nuisance in the Early Common Law* (1948), 1 U. of Fla. L. Rev. 27. On the liability issue, see Mounsen, Plowden, Wrayes and Manwood, *Brief Declaration for Special Nuisance Concerning Dwelling Houses* (1639) 8, 13, 20. See also *Tenant v. Goldwin* (1705), 1 Salk. 360 (K.B.), 91 E.R. 314.

<sup>86</sup> Both felt the landowner or occupier had traditionally been an insurer of the safety of adjacent property from activities on or conditions of their own land. (1865), L.R. 1 Ex. 265, 279-86; (1868), L.R. 3 H.L. 330, 341

<sup>87</sup> (1868), L.R. 1 Ex. 265 at 279-86.

<sup>88</sup> (1868), L.R. 3 H.L. 330 at 339.

It should be said at the outset that there is a distinct lack of authority in either Canada or England which seeks to equate private nuisance and *Rylands v. Fletcher*. Indeed, if anything, there has been an unconscious trend towards divorcing their substantive content.<sup>89</sup> The present writer has argued elsewhere that, although we lack any serious attempts to associate these two heads of liability, it is desirable from the point of view of consistency, and in particular the need to bring liability for injury to landed interests into line with liability for personal injury and damage to chattels.<sup>90</sup> In brief, the thesis was propounded that in the case of unintentional past damage, whatever the interest affected, the form of liability should depend on whether the rule in *Rylands v. Fletcher*, or negligence is appropriate. On further reflection the writer is ready to concede that the argument that nuisance with its strict liability heritage has its attractions in an environmental suit brought to remedy past damage. The injection of the environmental element into nuisance litigation will often mean that the suit is divorced from the desire to protect narrow interests in land. In a very real sense the concern is with repairing the injury to the plaintiff's total life style, including not only his property and its values, but also his physical health and mental welfare, and that of his family. Given this fact and the very threat which modern technology poses to a tolerable human existence, the distinction between past damage and present injury may well break down, in particular where the plaintiff has been subjected to an ongoing invasion of his rights.

The nub of counsel's argument in seeking to distinguish the two actions would be to suggest that, whereas *Rylands v. Fletcher* in its genesis and subsequent application has been related to single incident accidents, nuisance is relevant where the plaintiff has been subjected to a sustained interference with his interests.<sup>91</sup> Under the latter action the question of whether the use of land is natural or non-natural has never been relevant. However commonplace the use may be, if it has caused an unreasonable degree of harm to the plaintiff, liability follows. The effect of the argument, if accepted, would be to wed *Rylands v.*

---

<sup>89</sup> The trend in Canadian decisions seems to have been to extend *Rylands v. Fletcher* beyond the bounds of damage to land to protect the individual's interest in his bodily welfare and chattels wherever the defendant's activities can be described as "non-natural". See *Bell Telephone Co. v. Ottawa Elec. Co.* (1920), 19 O.W.N. 580 (H.C.); *Dokuchia v. Domansch*, [1945] O.R. 141 (H.C.), [1945] 1 D.L.R. 757; *Ekstrom v. Deagon*, [1945] 2 W.W.R. 385 (Alta. S.C.), [1946] 1 D.L.R. 208; *Aldridge v. Van Patter*, [1952] O.R. 595 (H.C.), [1952] 4 D.L.R. 93; *Heard v. Woodward* (1954), 12 W.W.R. 312 (B.C.S.C.); *Saccardo v. Hamilton*, [1971] 2 O.R. 479 (H.C.). It is also doubtful whether the requirement 'of escape from a close' is any longer a necessary condition of liability. See e.g. *Holinaty v. Hawkins* (1965), 52 D.L.R. (2d) 289 (Ont. C.A.) (blasting by defendant on plaintiff's premises causing damage); *Wild v. Allied Tiling & Floors Ltd.* (1966), 57 W.W.R. 187 (Sask. Q.B.) (explosion from a propane tank being used by the defendants on the plaintiff's property).

<sup>90</sup> J. McLaren, "Nuisance in Canada" in A. Linden ed., *Studies in Canadian Tort Law* (1968) at 362-69.

<sup>91</sup> This is a distinction which enjoys the support of Prof. Newark. See Newark, *The Boundaries of Nuisance* (1949), 65 L.Q. Rev. 480 at 488.

*Fletcher* to negligence, rather than to nuisance.<sup>92</sup> In terms of authority counsel can point to a number of cases which illustrate the second model exactly, and show a court enthusiastically espousing nuisance and its traditional theory of liability. A recent Canadian decision which is instructive in this regard is *Esco v. Fort Henry Hotel*.<sup>93</sup> In that case, without any knowledge on the part of the defendants, a stone drain beneath their property, which carried their sewage from a four inch soil pipe into a six inch pipe traversing the plaintiff's premises became inadequate to carry off water and sewage from their establishment because of erosion. The effluent seeped out at the junction of the drain and the six inch pipe into the plaintiffs' basement, causing flooding. There was evidence that the soil pipes had been installed when the existing sewage system, the stone drain, became inadequate. The defendants or their predecessors in title had found it convenient not to join the pipes, and they had failed to seal the joint between the drain and the six inch pipe. In an action for damages McRuer, C.J. found for the plaintiffs in nuisance, following the nineteenth century English case of *Humphries v. Cousins*.<sup>94</sup> The following passage he felt explained the appropriate principle of law.

The *prima facie* right of every occupier of a piece of land is, to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining. He may be bound by prescription or otherwise to receive such matter; but the burthen of showing that he is so bound rests on those who seek to impose an easement upon him. Moreover, this right of every occupier of land is an incident of possession, and does not depend on the acts or omission of other persons; it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it.<sup>95</sup>

He was clearly satisfied that the principle applied, whether it was the defendants or their predecessors in title who were responsible for the modification to the drainage system.<sup>96</sup> The judge's view of the matter seems to accord with contemporary authority in Canada on damage caused by filth or sewage. While some English courts have voiced reservations about imposing strict liability in these cases, unless negligence or a non-natural use is proven,<sup>97</sup> the Canadian judges in situations involving the seepage of sewage through the soil have classified the resulting interference as a nuisance and expressly discounted the relevance of negligence. Ironically the Canadian view concurs with that of Lord Cairns in *Rylands v. Fletcher*, who, while anxious to limit the application of the strict liability principle, expressed full agreement with Blackburn J. that it applied *inter alia* to the escape of filth.<sup>98</sup> The authoritative enunciation of the Canadian

---

<sup>92</sup> As the only difference between the usual negligence situation and the usual *Rylands v. Fletcher* facts is one of degree of risk (a question which concentrates attention as much on the conduct of the defendant as the potential effect upon the plaintiff) this is a logical association. It will be suggested later that in nuisance it is generally the effect of the defendant's activities upon the plaintiff's use and enjoyment of his land which constitutes the dominant element of debate.

<sup>93</sup> [1962] O.R. 1057 (H.C.), 35 D.L.R. (2d) 206.

<sup>94</sup> (1877), 2 C.P.D. 239, 46 L.J.C.P. 438.

<sup>95</sup> *Id.*, at 243-44.

<sup>96</sup> *Supra*, note 93 at 1061-62.

<sup>97</sup> See e.g. *Ilford U.D.C v. Beal*, [1925] 1 K.B. 671, 94 L.J.K.B. 402 where Branson J. held that an owner of land was not liable for damage done by a sewer beneath his land where he did not know or could not reasonably have known of its existence.

<sup>98</sup> *Supra*, note 88 at 340.

rule is in the recent case of *Portage La Prairie v. B. C. Pea Growers Ltd.*<sup>99</sup> The appellants hired a firm of engineers to construct a sewage lagoon for the town. Soon after the work was completed and the lagoon operative, the respondents found evidence that sewage was seeping onto their property. The consequences were that crops were damaged, and the mill which the respondents maintained was flooded. It was found by the trial judge and accepted by both the Manitoba Court of Appeal and the Supreme Court that the engineers had not been negligent. In an action for an injunction and damages, the Supreme Court affirming the decisions of the lower courts found for the respondents on the ground that the appellants had by their operation of the lagoon caused a condition on the respondent's land which was a nuisance. Martland J. speaking for the Court rejected the contention that the appellants could rely in any way on the lack of negligence on the part of the engineers. The cause of action was nuisance and "it was not necessary in order to fix the appellant with liability for the creation of a nuisance, for the respondent to establish negligence on the part of the appellant or of its engineers in the construction, of the lagoon."<sup>100</sup> While the facts suggest that the case had elements of both the first and second models about it, the language of the court is expressed in absolute terms, which strongly suggests that the court's approach would have been identical had the case dealt solely with the unintentional causation of past damage. The judicial approach in the sewage cases, has also appealed to courts in cases involving the escape of steam and vapours. Thus in the early Supreme Court case of *Chandler Electric Co. v. Fuller*,<sup>101</sup> the court following *Humphries v. Cousins* granted an injunction and awarded damages where the defendant emitted steam from his plant, which was carried into the plaintiff's warehouse twenty feet away causing damage to the contents. While the defendant was notified of the problem some of the damage assessed was caused before he was aware of the injurious consequences of his operation. It may be argued on the basis of these cases that Canadian courts accept as a more or less blanket proposition that the essence of nuisance is an adverse effect on the plaintiff's land and once that is established (whatever the causative factors), liability follows. As the courts in deciding these cases have placed the emphasis upon the general head of liability, rather the particular causal agent, there is every reason to suppose that the reasoning would be extended to other forms of interference.

Regardless of the state of Canadian authority relating to nuisances which are consummated, it may still be possible for counsel to argue for liability within the confines of the rule of *Rylands v. Fletcher*. That doctrine has been used from time to time to assist plaintiffs bringing actions where the complaint relates to pollution. In *Halsey v. Esso Petroleum*,<sup>102</sup> a recent English case, the plaintiff claimed *inter alia* that particulates containing sulphate, emitted from the defendant's oil heating process, were deposited upon and damaged clothing on

---

<sup>99</sup> [1966] S.C.R. 150, 54 W.W.R. 477, 54 D.L.R. (2d) 503, aff'g 50 W.W.R. 415 (Man. C.A.) 49 D.L.R. (2d) 91 aff'g 45 W.W.R. 513 (Q.B.), 43 D.L.R. (2d) 713. See also *Lawrysyn v. Kipling* (1965), 55 W.W.R. 108 (Sask. C.A.), 55 D.L.R. (2d) 471; *Connery v. Government of Manitoba*, [1971] 4 W.W.R. 156 (Man. C.A.), 21 D.L.R. (3d) 234, aff'g (1971), 15 D.L.R. (3d) 309 (Q.B.).

<sup>100</sup> *Id.*, at 156-57, 483-84, 508-09.

<sup>101</sup> (1892), 21 S.C.R. 337 aff'g 23 N.S.R. 263 (*sub. nom. Fuller v. Pearson*).

<sup>102</sup> [1961] 1 W.L.R. 683 (Q.B.), [1961] 2 A11 E.R. 145.



his premises and his car parked in the street. Veale J. found the defendant liable on the ground of both nuisance and *Rylands v. Fletcher*. The facts satisfied both the requirements of escape and damage.<sup>103</sup> Interestingly, the judge does not enter into a discussion of whether the activity of the defendant was a non-natural user or not. He seems to have taken it for granted that it was. When it is considered that the defendant's operation was a fairly modest one located in a partially industrialized area, the decision may give some cause for optimism in seeking to persuade the Canadian courts that the rule needs to be interpreted in the light of existing social reality. In effect it may provide counsel with a useful springboard for the argument that the non-natural requirement should be related more to the magnitude of the overall social risk in running industrial operations, than to whether the activity is commonplace in general, or in its particular location. Canadian courts have used the *Rylands v. Fletcher* doctrine in a number of situations involving substances which may cause pollution, including insecticide,<sup>104</sup> natural gas,<sup>105</sup> prussic acid gas,<sup>106</sup> noxious fumes,<sup>107</sup> and sewage.<sup>108</sup> As the effect of these agents was localized in the individual cases, the decisions may well presage a responsiveness by the judges to the "social risk" argument in cases where the adverse effects are more widespread.<sup>109</sup>

## 2. *The Measure of Interference in an Environmental Context*

The assertion has already been made that the core issue in most private nuisance suits is the degree of the interference or harm suffered by the plaintiff. He must persuade the court that the level of interference with the use and enjoyment of his property by the defendant's operation is unreasonable. In effect the court is asked to balance the competing uses of property, in terms of both contemporary social values and the surrounding factual circumstances, and to determine whether the law should intervene on the side of the plaintiff. The process of balancing in traditional nuisance litigation has been fully discussed elsewhere.<sup>110</sup> What follows are some reflections upon the ways in which the environmental lawyer can affect this balancing process by a shrewd emphasis on the environmental interest. While there is ample authority in Canada for courts finding nuisances where plaintiffs have suffered from the noxious effects of airborne pollutants, subterranean intrusions by sewage, and noise,<sup>111</sup> there are few judicial decisions which seek to consider the problem from a more global

<sup>103</sup> *Id.*, at 692-73, 151-52.

<sup>104</sup> *Mihalchuk v. Ratke* (1966), 55 W.W.R. 555 (Sask. Q.B.), 57 D.L.R. (2d) 269.

<sup>105</sup> *Mortimer v. Brit. American Oil Co.*, [1949] 2 W.W.R. 107 (Alta. S.C.), aff'd [1950] 2 W.W.R. 433; *Lohndorf v. Brit. American Oil Co.* (1956), 24 W.W.R. 193 (Alta. S.C.).

<sup>106</sup> *Skubiniuk v. Hartmann* (1914), 6 W.W.R. 1133 (Man. Q.B.), 20 D.L.R. 323, aff'd with a variation (1914), 24 Man. R. 836, 7 W.W.R. 392.

<sup>107</sup> *Heard v. Woodward* (1954), 12 W.W.R. 312 (B.C.S.C.).

<sup>108</sup> *Sheels Bros. Lumber Co. v. Arnprior*, [1959] O.W.N. 305 (H.C.).

<sup>109</sup> See *Cairns v. Canadian Refining Co.* (1914), 26 O.W.R. 490 (C.A.), 6 O.W.N. 562 in which Mulock C.J. saw a direct analogy between the imposition of liability under *Rylands v. Fletcher* and its imposition through nuisance in the air pollution suit before the court.

<sup>110</sup> See McLaren *supra*, note 90 at 346-62.

<sup>111</sup> The majority of water pollution cases in Canada have been dealt with under the rubric of infringement of riparian rights. See text, *infra*, p. 5374.

viewpoint.<sup>112</sup> Apart from those odd cases where the activity of the defendant is of its nature reprehensible, for instance the running of a brothel,<sup>113</sup> the conflict has been viewed as one of choosing between what are, in the abstract at least, equally legitimate uses of land by individuals. Looked at in that light, direct concern for the total community and assessment of the effects of the defendant's operations in terms of their possible long term effects has been minimal. The environmental lawyer has to change this.

The major task is to persuade the courts that environmental considerations require a greater emphasis on the nature and extent of the interference with the quality of the plaintiff's life and the social ills associated with unabated pollution and less on the normality and social utility of the defendant's operation. This can be achieved both by emphasizing concordant elements within traditional nuisance law, and exposing judicial statements which show open acceptance of the environmental perspective. The first point to note is that it is well established in Anglo-Canadian jurisprudence that if the plaintiff has suffered tangible physical damage to his property then liability follows more or less automatically. In two Canadian decisions, one involving damage to automobiles stored on the plaintiff's property caused by the defendant's foundry operation,<sup>114</sup> the other damage to the plaintiff's house and garden caused by a trucking operation on a dirt road,<sup>115</sup> the courts asserted that the nature of the damage ruled out any concern for assessing the reasonable nature of the defendant's operation, or the location of the plaintiff's land.<sup>116</sup> While there is a lack of direct authority in Canada, it is to be expected that what is true of physical damage to property is also true of physical injury to those occupying the land.<sup>117</sup> Unless an environmental suit using nuisance theory is tied to trivial property damage, or injury to an especially sensitive operation or person,<sup>118</sup> counsel should have no difficulty in persuading the court that a nuisance exists, even though the plaintiff lives in an industrialized or industrializing area. Here the feeling that the indus-

---

<sup>112</sup> As will be explained later, the environmental perspective has been more readily exposed in riparian rights litigation, where the adulteration of the environment in question has always been the key consideration. Interestingly the most notable nuisance case in which the broader perspective has been utilized is *McKie v. K.V.P. Co.*, [1948] O.R. 398 (H.C.), [1948] 3 D.L.R. 201, which also involved a claim for infringement of riparian rights.

<sup>113</sup> The *nuisance per se* doctrine has not often arisen in Canadian cases, but on the odd occasion on which it has, the tendency has been to dismiss it. See e.g. *Kennedy v. The Queen* (1970), 3 O.R. 546 (H.C.) in which King J. refused to characterize a correctional camp as such.

<sup>114</sup> *Russell Transport Ltd. v. Ontario Malleable Iron Co.*, [1952] O.R. 621 (H.C.), [1952] 4 D.L.R. 719.

<sup>115</sup> *Kent v. Dominion Coal & Steel Corp.* (1965), 49 D.L.R. (2d) 241 (Nfld. C.A.).

<sup>116</sup> *Supra*, note 114 at 628-29, 730-31. *Supra*, note 115 at 248, 257-60.

<sup>117</sup> It would clearly be a perverse form of discrimination to limit this rule to damage to property, particularly as we acquire more knowledge on the adverse effects of pollution to health.

<sup>118</sup> For cases in which the courts have denied liability on the ground of the super-sensitivity of the plaintiff or his user, see *Houston v. Brown-Holder Biscuits Ltd.* (1936), 10 M.P.R. 544 (N.B.S.C.), *aff'd*, [1937] 2 D.L.R. 53; *Keeting v. Steeves* (1946), 18 M.P.R. 389 (N.B.S.C.); *Morris v. Dominion Foundries & Steel*, [1947] O.W.N. 413 (H.C.), [1947] 2 D.L.R. 840; *Noyes v. Huron & Erie Mortgage Corp.*, [1932] 3 D.L.R. 143 (Ont. H.C.); *Rattray v. Daniels* (1959), 27 W.W.R. (Alta. C.A.), 17 D.L.R. (2d) 134.

trial defendant should be compelled, if nothing more, to underwrite the social cost of his enterprise is at its strongest.

While it is well established that where the plaintiff's complaint relates to inconvenience in using his property, or unpleasant physical sensations, the balancing process provides the basis for a decision, the Canadian courts have been fairly careful not to overindulge defendants. It is widely accepted, as already indicated, that the argument that the defendant has acted with reasonable care is of no avail, if the level of the interference with the plaintiff's use and enjoyment is intolerable.<sup>119</sup> Moreover, the cases suggest a distinct hesitance to accept the social utility argument as a reason for denying liability.<sup>120</sup> Indeed, on occasion a judge has specifically rejected it. Especially suggestive in this context is a passage in McRuer C.J.'s judgment in *McKie v. K.V.P. Co.*<sup>121</sup> In answer to the defendant's contention that the importance of its kraft pulp mill to the economic welfare of the community in some way justified its pollution of the Spanish River and thus exonerated it from liability for nuisance and the impairment of riparian rights, the judge quoted from two remarkable statements by English judges. The first was the rejoinder of Martin B. in *Stockport Waterworks Co. v. Potter*<sup>122</sup> to the argument that the defendant's tannery operation which was polluting a watercourse on which a town relied for its water supply was run "in a reasonable and proper manner". After finding that the evidence was not sufficient to warrant the contention, he stated:

But suppose [it] was, how could it affect the people of Stockport? The defendants carried on the trade primarily for their own profit, and the public are benefited by the carrying on of all trades, for they have an interest in persons using their industry and capital. But what answer is that to an action by persons whose water for drinking is affected by arsenic poured into it by persons carrying on such a trade?<sup>123</sup>

McRuer C.J. then pointed to an observation of Lord Blanesburgh in *Manchester v. Farnworth*,<sup>124</sup> a suit brought to enjoin and seek damages for the injury caused by fumes emanating from the appellant's electricity station. The judge, feeling that he was compelled to apply the defense of legislative authority, remarked almost apologetically:

Very readily would I decide, if I felt at liberty to do so, that the loss resulting to the plaintiff from the defendant's operation should without any qualification

---

<sup>119</sup> See authorities *Supra*, note 74.

<sup>120</sup> It is clear that if the level of inconvenience with the plaintiff's use and enjoyment is minimal the social utility of the defendant's activity is going to attract more attention. If the operation is considered useful and necessary and is carried on reasonably then that will tip the balance in favour of the defendant — see *Downs v. William Jacobs Ltd.* (1962), 47 M.P.R. 367 (Nfld. S.C.) (minor inconvenience caused to the plaintiff by road excavations which necessitated him parking his car in the street and proceeding by foot to his residence). However, the Canadian courts seem to have shied away from the Restatement position (see *Restatement; Torts* (American Law Institute: St. Paul 1939 § 826) which is that nuisance liability always requires a direct comparison of the gravity of harm and the utility of the defendant's conduct.

<sup>121</sup> [1948] O.R. 398 (H.C.), [1948] 3 D.L.R. 201, aff'd [1949] 1 D.L.R. 39 (C.A.), aff'd [1949] S.C.R. 698.

<sup>122</sup> (1861), 7 H & N 160 (Exch.), 158 E.R. 433.

<sup>123</sup> *Id.*, at 168-69, 436.

<sup>124</sup> [1930] A.C. 171 (H.L.), [1929] A11 E.R. 90.

be borne by the Corporation. That loss is truly just as much part of the cost of generating their electrical energy as is, for example, the cost of the coal whose combustion is the original source of all the mischief. In a question between the plaintiff on the one hand and the Corporation on the other I can discover no sound principle why this loss should not be theirs.<sup>125</sup>

Following the spirit of these dicta the Chief Justice concluded:

In my view, if I were to consider and give effect to an argument based on the defendant's economic position in the community, or its financial interests, I would in effect be giving to it a veritable power of expropriation of the common law rights of the riparian owners, without compensation.<sup>126</sup>

The important point about this passage is that it shows a Canadian judge openly emphasizing the social cost of the defendant's enterprise in the adulteration of the environment, and using that factor to totally discount the social utility argument. Moreover, it indicates that support for this attitude can be found in the most respectable places.

The importance of environmental considerations in solving conflicting use problems has been stressed in an even more forceful fashion in a very recent Ontario decision. In *Gauthier v. Naneff*<sup>127</sup> an action was brought by a group of riparian owners of property on the shores of Lake Ramsay in Sudbury, for a *quia timet* injunction to prevent the holding of a power boat regatta on the Lake by the members of a local service club. Dunlap L.J.S.C. granted the injunction, finding that the plaintiffs' fears concerning the effect on the "purity, wholesomeness, and potability" of the lake's water were well founded. In reaching his decision his Honour noted that the lake was the source of Sudbury's water supply, as well as that of the riparian owners, and that the quality of water already had deteriorated. In support of his contention that riparian owners were entitled to water in its natural state, he referred to a passage in the sixth edition of *Kerr on Injunctions* which implies that the vindication of riparian right is related to the "unreasonable" nature of the defendant's use. Commenting on the use of that term he remarked:

I deem it appropriate to interpret the word "unreasonable" in the light of present day knowledge of a concern for pollution problems, at this moment in time, as they apply to the particular circumstances of the water supply in Lake Ramsay and the various demands made thereon.<sup>128</sup>

While it may be questioned whether there was any necessity to rely upon and explain this passage in *Kerr*, because, as he found, the plaintiffs were entitled at law to water "without any sensible alteration in quality", it is significant for *nuisance* law that he saw fit to include the broader pollution issue as a vital factor in determining whether the use was unreasonable.

Given these examples of forthright approval of the pertinence of the environmental perspective, and the lack of any concrete support for emphasizing the 'social utility' factor, environmental counsel should have little reason for hesitation in developing openly his argument on the new realities of conflicting land use.

<sup>125</sup> *Id.*, at 203-4, 105.

<sup>126</sup> *Supra*, note 121.

<sup>127</sup> [1971] 1 O.R. 97 (H.C.), 14 D.L.R. (3d) 513.

<sup>128</sup> *Id.*, at 101, 517.

In order to highlight the extent and degree of the pollution problem, concerned counsel must be prepared to make adroit use of both lay and expert witnesses. Perhaps the most effective way to expose the environment in which the plaintiff lives is to draw heavily on lay testimony from the surrounding community. As one American environmental lawyer with active experience in the nuisance litigation field has observed:

Lay testimony, properly developed, can establish a prima facie case by itself. Lay witnesses can describe their observation of the pollution and how it smelled, felt and looked. They can describe its effects on their breathing, visibility, etc. Only lay witnesses can properly describe the damage to homes and property, and the effect of pollution on the normal use and enjoyment of a residence, and the annoyance, inconvenience and discomfort caused by it.<sup>129</sup>

With the presentation of genuine and concerned testimony from the community, which indicates a widespread and troublesome pollution pattern in the neighbourhood, counsel may have done much to neutralize effectively the evidence which inevitably will be paraded by the defence.

By astute use of expert witnesses counsel can help to underline lay testimony by affirming in authoritative professional terms the existence of an ongoing pollution problem in the area attributable to the defendant's operation, and at the same time can expose the adverse consequences for the future if it is not abated. Chemists can attest to the types and levels of pollutant material in the atmosphere; public health officers to the incidence of respiratory diseases in the area; realtors to the decline in real estate values which may be associated with the pollution blight. The chemical engineer will be invaluable in describing the defendant's process, the ambit of the resulting pollution problem, the known effects of the pollutants on common materials, and, what is most important, control methods available and their relative effectiveness.<sup>130</sup> The advanced stage of contemporary pollution control technology means that it should be possible in most cases to effectively counteract the well-worn plea of the industrialist that everything has been tried by pointing to one or more systems which, if incorporated into the defendant's process, would successfully reduce pollution levels. The other key figure in developing the environmental perspective of the case will be the medical expert. The doctor who has experience examining and treating subjects from the afflicted area can play a vital role in conveying to the court the very real dangers that exist not only to the health of the plaintiff and his family, but also to that of the entire neighbourhood. Indeed the exposure of the health hazards attending pollution promises to be the most significant weapon in the forensic arsenal of the environmental litigant.<sup>131</sup>

Counsel must also be ready to seek access to various types of documentary evidence in the hands of third parties. Studies by governmental departments and administrative agencies with concerns in the pollution field, which are related to the problem in hand may prove invaluable in making out a case. Of particular utility will be material concerning the defendant's adherence or non-adherence

---

<sup>129</sup> D. Hadden, *supra*, note 49 at 94. For an instructive judicial comment recognizing the strength of lay testimony in a pollution suit, see *McNiven v. Crawford*, [1940] O.W.N. 323 (C.A.), per Robertson C.J.O. at 325.

<sup>130</sup> *Id.*, at 95-96. See also illustrative direct examination of an expert engineer at 97-101.

<sup>131</sup> *Id.*, at 95-96. See illustrative direct examination of plaintiff's doctor; at 102-03.

to legislative standards and regulations which prescribe maximum emission levels. While compliance or non-compliance with legislative standards should not necessarily constitute a conclusive criterion of liability, because of the great number of variables which affect pollution levels, and which make for significant differences in the degree of interference experienced by the public in different locales, the existence of those standards may be utilized by the courts as an established and carefully devised reference system.<sup>132</sup> In order to expose this type of data the cooperation of the bodies concerned should be actively sought. If access is denied and, as Professor Lucas has shown, Canadian administrators have on occasion shown themselves singularly uncooperative,<sup>133</sup> then counsel must exploit to the full the subpoena procedures open to him.<sup>134</sup>

### 3. *The Relative Neighbourhood Equation*

In balancing the competing uses of land in traditional nuisance law considerable emphasis has been laid in the physical location of the parties. In essence the attitude of the courts, encapsulated in Thesiger L.J.'s observation in *Sturges v. Bridgman* that "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey",<sup>135</sup> is that the closer the plaintiff lives to an industrial environment the less freedom from the necessary by-products of that milieu he can claim.

It is true that Canadian judges like their English counterparts have been careful not to give the impression that the industrialist can operate with complete insensitivity to the rights of others in what he may feel to be his particular bailiwick.<sup>136</sup> Moreover they have rejected the "coming to the nuisance" defence which has gained some support in American jurisprudence.<sup>137</sup> However, they have been willing to allow him a degree of freedom which would be considered thoroughly offensive in a select residential area. As liability in nuisance at this point is a relative matter, this form of discrimination may seem perfectly justifiable. However, viewed in the sober light of economic and social reality, as well as contemporary technological possibility, the argument begins to look somewhat tarnished. The validity of this circumstantial factor as an important element in the weighing process presupposes that there is always some degree of real choice in terms of where a person lives and the life style he enjoys. To the nine-

<sup>132</sup> For a case in which a Canadian court used a legislative injunction in imposing liability on a polluter see *Suzuki v. Ionion Leader*, [1950] Exch. C.R. 427, [1950] 3 D.L.R. 790 (discharging oil into Frazer River a breach of s. 33 of Federal Fisheries Act enjoining putting any 'deleterious substance into waters frequented by fish'). See also Note, *Water Quality Standards in Private Nuisance Actions* (1970), 79 Yale L.J. 102.

<sup>133</sup> Lucas, *supra*, note 5.

<sup>134</sup> It would also seem worthwhile to exploit procedures for the production of documents in the hands of third parties. See e.g. Ontario Rules of Court 1970, r.349. If government officials are loath to reveal reports relating to the defendant's pollution control record a court might be willing to compel production and permit inspection under this type of provision.

<sup>135</sup> (1879), 11 Ch. D. 852, 865, 48 L.J. Ch. 785.

<sup>136</sup> *Gagnon v. Dominion Stamping Co.* (1914), 7 O.W.N. 530 (H.C.) (use of steam hammers in an industrial neighbourhood); *Hydro Electric Power Comm'n v. Hill* (1920), 19 O.W.N. 45 (H.C.) (operation of a billiard room in business area without insulation).

<sup>137</sup> *Drysdale v. Dugas* (1896), 26 S.C.R. 20; *Keeting v. Steeves* (1946), 18 M.P.R. 389 (N.B.S.C.); *Belisle v. Canadian Cotton Ltd.*, [1952] O.W.N. 114 (H.C.).

teenth century judge, who was either a socio-economic determinist or wedded to a naive belief that a laissez-faire philosophy was the door to Utopia, choice may either have been irrelevant or axiomatic. Today, however, with clear evidence that a sizeable minority of the population exist in a social and economic environment in which choice is illusory and thus are compelled to live in areas in which a pollution blight exists with little hope of relocation, discrimination on the grounds of physical proximity to pollution sources is inequitable. To sustain this factor as a primary consideration may well mean that the courts will be accepting the fact that those who suffer most from the ravages of pollution are the least worthy of protection.<sup>138</sup> The tragic irony of the situation is that they will be doing this, while at the same time they are responding favourably to the claims of those who live in more distant residential neighbourhoods. As it is now recognized that the effects of pollution are far more diffuse and widespread than formerly supposed and that accordingly it is difficult for the wealthier elements of the population to escape from pollution problems, it is only to be expected that the incidence of suits to protect such neighbourhoods will increase.

In seeking to de-emphasize the "neighbourhood equation" environmental counsel may have a formidable argument in the fact that often there is no good technological reason why those adjacent to industrial processing should be subjected to the pollution levels which in the past were considered inevitable. The application of pollution control devices can reduce significantly the interference experienced by those in the immediate neighbourhood, whatever form the pollution takes. The judge of the past may be excused for having supposed that industrial expansion by its nature demanded a sacrifice in terms of the quality of life from certain segments of the population. There is no such excuse available to the contemporary judge. It can be argued, therefore, that both from the viewpoint of an equitable approach to the vindication by law of the rights of citizens and of a practical approach to environmental protection the physical location of the parties is of less significance today, than heretofore. Of course, it should not be entirely discounted as a decisional element. The ambient environment of Windsor, Ontario is always likely to differ from that of Mozart,

---

<sup>138</sup> An unfortunate example of reasoning based on this type of discrimination is the judgment of Winter J. in *Kent v. Dominion Steel & Coal Corp.* (1963), 38 D.L.R. (2d) 62 (Nfld. S.C.) at 76. In determining whether the plaintiff, an employee of the defendant, whose father had 'for convenience' constructed a home close to the defendant's plant, could succeed in an action for nuisance for the dust problem caused by the company's trucks, he remarked:

"When the whole matter is closely examined, it is hard to see how the plaintiff's case is essentially different from that of dwellers, whether miners or not, near coal mines, or of those living in close proximity to steel works, paper industries, automobile plants or other large manufacturing concerns. What they may suffer from coal dust, noise, disagreeable odours and so on is part of the price they, and society at large, have to pay for progress. More and more, as time goes on, and as population increases and land is taken over for industrial enterprises and activities which are for the general weal but unavoidably bring discomforts and inconveniences in their train, so more and more do the rather rigid rules of the law of nuisance laid down in mid-Victorian times, when life was easier and space more plentiful, require to be modified."

See also *Lockwood v. Brentwood Park Investments Ltd.* (1970), 10 D.L.R. (3d) 143 (N.S.S.C.) 165 (city dwellers of today necessarily forfeit the environmental purity of yesteryear).

Saskatchewan, and there will always be some who by choice prefer the bustling *melée* of the former, to the easygoing tranquility of the latter. The essence of the argument is that judges abandon the type of judicial zoning which reflects an "over the tracks" mentality and which has allowed industry to dictate for so long the life style of those who live within the shadows of "its dark Satanic mills."<sup>139</sup>

It may of course be argued that the resolution of pollution problems flowing from conflicting land use in certain locales is a matter for legislative or administrative initiative as part of a general zoning pattern, rather than for unorganized judicial intervention. While it would be foolish to deny the value of zoning regulation in obviating some of the serious use conflicts of the past, it is submitted that zoning is not the exclusive answer to contemporary pollution problems. In the first place, the development of zoning patterns in this country has not at this point in time resulted in complete rationalization of land use. The process of carving out exclusive use areas is a gradual one.<sup>140</sup> Consequently, in fringe areas where a dominant use is not yet established or which is in the process of conversion, and competing uses are recognized or non-conforming uses permitted, zoning will have been somewhat deficient as an elixir for pollution. Of course, these are the types of areas in which pollution problems are at their most aggravated. Secondly, as zoning policy-making is in the hands of local government, there are political and economic factors to be considered, which often belie the development of programs with environmental considerations as primary motivating factors.<sup>141</sup> Finally, it is clear that, even with a rational division of land use, the nature and incidence of pollution, especially air and water pollution, is so capricious that man-made terrestrial boundaries are rendered meaningless, and areas far from industrial concentrations may experience its adverse effects.<sup>142</sup>

The conclusion is that while zoning regulations may have an important complementary role to play in developing more general solutions to pollution, they are not an instant cure-all, and should not therefore dictate whether nuisance law is relevant to the broad problems of pollution, nor compel decisions in individual nuisance cases. Canadian courts have been very careful to reject the contention that the result of a nuisance suit is determinable by applicable zoning regulations. It is of no avail to the industrial defendant to claim the pro-

---

<sup>139</sup> For a spirited repudiation of the notion that an employee of a polluter sacrifices his rights if he lives close to his employer's plant, see *Kent v. Dominion Steel & Coal Corp.* (1965), 49 D.L.R. (2d) 241 (Nfld. C.A.), per Puddester J. at 257-262.

<sup>140</sup> On the problems posed by the compromise between the need for rational zoning plans, and the concern to protect established uses, see J. Milner, *Community Planning — A Casebook of Law and Administration* (Toronto: Univ. of Toronto Press, 1963) at 493 et seq..

<sup>141</sup> *Id.*, at 193 et seq. An unfortunate example of the victory of the politicians over the planners is provided by the recent decision of Windsor City Council to allow a developer to construct a low income housing complex on land bounded by industrial and commercial property. See Dept. of Planning and Urban Renewal *Report to City of Windsor Planning Board* (Re: Low-cost Housing Development, Jefferson Blvd. and Tecumseh Rd.) Aug. 13th 1970.

<sup>142</sup> It would, for instance, at the present time be somewhat difficult to produce a zoning plan for the City of Windsor, which would enable some of the residents of that city to escape the often serious air borne pollution from the Detroit area.



tection of a zoning regulation which permits his operation, if he is in fact causing a significant degree of interference with adjacent property.<sup>143</sup> *A fortiori* it should be impossible for him to argue that zoning regulations have usurped in some fashion the judicial function in evaluating competing uses of land.

#### 4. *The Duration Factor*

It is sometimes maintained that nuisance connotes a continuing or recurring interference with the use and enjoyment of land, and therefore cannot apply where the plaintiff's claim relates to an isolated incident. While there may be something of an inconsistency with previous comments upon the relationship of nuisance and *Rylands v. Fletcher*,<sup>144</sup> the writer is inclined to reject this contention as a general proposition. In part the inconsistency is more apparent than real. In the first place the consequences of a single, transitory act on the part of the defendant may spread over a considerable period of time. Thus the brief discharge of oil from a tanker on the Great Lakes, or a navigable river may be felt by property occupiers in the area for weeks thereafter, and constitute a continuing menace. Secondly, it has always been accepted that a nuisance action may be launched to prevent a recurrence of damage or interference already experienced, and it is no objection that there has only been a single isolated incident up to that point in time. Indeed, it would be thoroughly illogical if such an objection were sustained, because the law through the grant of *quia timet* injunctions allows nuisance actions before any damage has been incurred. Thus it should be possible for a property occupier who has suffered the shock or tangible damage from a transitory force, such as a sonic boom, to characterize the effect as a nuisance and to seek to enjoin any further invasion of his rights.<sup>145</sup> Since there is no indication in Anglo-Canadian jurisprudence that injunctive relief is available under the rule in *Rylands v. Fletcher*, that action may be of minimal utility as an aid to pollution prevention and abatement, unless of course the damages awarded are sizeable enough to achieve that result indirectly. The only significant area of conflict between the two actions is where damages are claimed which flow from a single incident, the injurious consequences of which are almost instantaneous. Having argued earlier that *Rylands v. Fletcher* may be confined in its application to such situations, it is somewhat difficult to suggest that nuisance is a possible alternative cause of action. Overall, it seems, the courts, with some notable exceptions,<sup>146</sup> have observed a distinction which rests

<sup>143</sup> *Beamish v. Glenn* (1916), 36 O.L.R. 10 (C.A.), 28 D.L.R. 702; *Maker v. Davanne Holdings*, [1954] O.R. 935 (H.C.), [1955] 1 D.L.R. 728; *Savage v. MacKenzie* (1961), 25 D.L.R. (2d) 175 (N.B.C.A.).

<sup>144</sup> See text *supra*.

<sup>145</sup> On the general issue of the legal response to "sonic booms", see M. Katz, *The Function of Tort Liability in Technology Assessment* (1969), 38 U. of Cinn. L. Rev. 587, at 655-61; W. Baxter, *The SST: From Watts to Harlem in Two Hours* (1968), 21 Stan. L. Rev. 1; M. Malley, *The Supersonic Transports Sonic Boom Cost: A Common Law Approach* (1968), 37 Geo. Wash. L. Rev. 683.

<sup>146</sup> See e.g. *Midwood v. Manchester*, [1905] 2 K.B. 597 (C.A.) (destruction of goods through a single explosion of accumulated gas characterized as a nuisance); *Aldridge v. Van Patter*, [1952] O.R. 595 (H.C.), [1952] 4 D.L.R. 93 (racing car speeding off track and injuring prospective entrant on to track characterized in the alternative as a nuisance); *Halsey v. Esso Petroleum Co.*, [1961] 1 W.L.R. 683 (Q.B.), [1961] 2 A11 E.R. 145 (continuing damage and interference by air pollution accepted as falling within the rule in *Rylands v. Fletcher*).

upon the duration factor. Whether the choice of *Rylands v. Fletcher* over nuisance will lead to any difference in result in individual cases is doubtful. It has already been argued that the requirement of non-natural use can be interpreted to comprehend activities which by their nature present a pollution risk, and there is much to suggest from a canvassing of Canadian authority that courts would be receptive to this type of argument.<sup>147</sup>

E. *Riparian Rights and Water Pollution: 'Natural Flow' and the Environmental Perspective*

In the realm of water pollution, environmental counsel has perhaps more in the way of forensic mobility, than in the other fields. The main reason for this, is that in many cases he will be suing not in nuisance, but under an analogous head, the impairment of riparian rights. In spite of attempts in some jurisdictions, notably in the United States, to equate the substance of nuisance and the action to vindicate riparian rights, the latter was historically treated as discrete<sup>148</sup> and in Canada has retained distinctive features which make it a formidable tool in the environmental lawsuit.

In approaching environmental litigation in the water pollution area, plaintiff's counsel should be very careful to characterize correctly the nature of the plaintiff's rights in the water in question. The primary question is to determine whether the plaintiff enjoys rights in the water by virtue of ownership of the bed of the watercourse or a privilege to take its resources on the one hand, or merely as a riparian owner on the other. The benefit in establishing the former rather than the latter is that the claims of the holders of rights in the water to an unpolluted environment are more extensive. A case which illustrates the distinction is *McKie v. K.V.P. Co.*<sup>149</sup> A number of plaintiffs, mostly riparian owners, but including one party who had a property interest in the bed of the river launched the suit against the defendant pulp mill. In part their claim related to the adverse effect of the pollution on fisheries in the area. In dealing with the claims relating to the fisheries McRuer C.J. drew a fundamental distinction between the rights of the plaintiff who owned the solum and the riparian owners.<sup>150</sup> The former was suing to protect a distinct property right which he had in the fish in superjacent waters. Thus regardless of the effect of the pollution upon others, once interference with his right was established, he was entitled to a remedy. The riparian owners on the other hand whose rights in the water were merely usufructuary had no special claim to the fisheries. Their rights were no greater in respect of fishing than those of the general public. Accordingly, the success of their claims depended upon proof of "special damage".<sup>151</sup> The practical effect of this distinction is important where damages are sought. As it will be shown, a riparian owner may be granted an injunction for mere deterioration of water quality. His riparian rights are sufficient to ground that claim. Where he seeks

---

<sup>147</sup> See text *supra*.

<sup>148</sup> See *Crowther v. Coburg* (1912), 20 O.W.R. 844 (H.C.) 846-7, 1 D.L.R. 40, 42. For the confused situation in the United States, see P. Davis, *Theories of Water Pollution Litigation* [1971] Wisc. L. Rev. 738.

<sup>149</sup> *Supra*, note 121.

<sup>150</sup> *Id.*, at 411-14, 214-16.

<sup>151</sup> *Id.*, at 413, 216.

damages, however, he can only succeed if he can prove actual injury to his usufructuary right. Absent the latter, he is confined to a cause of action in public nuisance.

For most practical purposes in Canada, because the title to the beds of a large number of lakes and waterways, is vested in the Crown, the usual basis of a water pollution suit by the private citizen will be the impairment of his riparian rights.<sup>152</sup> The riparian owner has the right to utilize the water for any legitimate purpose connected with the use and enjoyment of his land, be it recreational, domestic, agricultural or even industrial, subject to the caveat that the right is exercised in such a way as to maintain the equal enjoyment of other riparians. By definition riparian rights are correlative.<sup>153</sup> From the point of view of counsel representing a client who is claiming water pollution by an industrial or municipal operation the important issue is the question of the test for balancing the conflicting interest in water use. The answer to this seems to hinge upon the extent to which industrial interests and public utilities have impressed the courts with their social utility, and the economic necessity of allowing them some leeway in using the environment to dispose of their wastes. The English doctrine, which has been enthusiastically espoused in Canada,<sup>154</sup> and which appears hostile to the industrial adulteration of watercourses is the "natural flow" theory. Perhaps the most concise explanation of this test is that of Lord MacNaughten in *John & Co. v. Bankier Distillery Co.*<sup>155</sup>

Every riparian proprietor is entitled to the water of his stream in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court.

---

<sup>152</sup> The situation in Canada may be contrasted with that in England where often the *solum* or a fishery is privately owned. See e.g. *Pride of Derby Angling Assoc. v. British Celanese Ltd.*, [1953] Ch. 149 (C.A.), [1953] 1 A11 E.R. 172. For an exceptional Canadian example, see *Nepisquit Real Estate & Fishing Co. v. Canadian Iron Corpn.* (1913), 42 N.B.R. 387 (S.C.), 13 E.L.R. 458.

<sup>153</sup> The term "correlative" however, has to be viewed against a classification of uses which has always favoured time honoured forms of exploitation, such as agriculture and mining, as opposed to newer industrial projects.

<sup>154</sup> *Crowther v. Coburg* (1912), 20 O.W.R. 844 (H.C.), 1 D.L.R. 40; *Clare v. Edmonton* (1914), 5 W.W.R. 1133 (Alta. S.C.), 15 D.L.R. 514; *Groat v. Edmonton*, [1928] S.C.R. 522, [1928] 3 D.L.R. 725; *McKie v. K. V.P. Co.*, [1948] O.R. 398 (H.C.), [1948] 3 D.L.R. 201; *Stephens v. Richmond Hill* [1955] O.R. 806 (H.C.), [1955] 4 D.L.R. 572, aff'd with variation as to damages [1956] O.R. 88, 1 D.L.R. (2d) 569; *Howrith v. Holden* (1960), 32 W.W.R. 491 (Alta. S.C.); *Gauthier v. Naneff*, [1971] 1 O.R. 97 (H.C.), 14 D.L.R. (3d) 513.

<sup>155</sup> [1893] A.C. 691 (H.C.) at 698. Although Lord MacNaghton prefaces this statement by excepting 'ordinary uses' and 'further uses . . . as may be reasonable under the circumstances' it is doubtful whether he is saying any more than that certain well defined and time-honoured uses of water are acceptable even if some pollution results, and that other uses will be tolerated as reasonable as long as they do not sensibly alter the quality of the water. If the writer is wrong in this latter interpretation, and Lord MacNaghton did intend to exclude 'reasonable uses' his comments on that issue may be characterized as *obiter dictum*, since the other judges clearly did not wish to go that far. See in particular the judgments of Lord Watson at 695-97 and Lord Shand at 700-703.

The doctrine has been used in a series of English cases to enjoin in absolute terms the polluting activities of industrial and municipal enterprises.<sup>156</sup> Moreover, in the spirit of Lord MacNaughten's alternative proposition on the basis of the claim, it has been accepted that the complaining riparian does not have to prove damage to his interest in the factual sense. It is enough that the water washing his banks is of deteriorated quality.<sup>157</sup> Here is one of those rare points in the common law where the private litigant is able to emphasize the injury to the environment as an integral part of his claim. The only doubt cast upon the rigid application of the doctrine seems to be the *dictum* of Lord Cairns in *Swindon Waterworks v. Wilts & Berks Canal Navigation Co.*<sup>158</sup> that reasonable use of the water by an upper riparian engaged in manufacturing is tolerable. Just what are the implications of this *dictum* which related specifically to interference with the quantity of water in the area of interference with water quality is not clear. It may be that all Lord Cairns was suggesting was that industrial use of water was not *ipso facto* unreasonable, but that the labelling of the use as reasonable is contingent upon the return of or addition to the waterflow being free from pollutants. Alternatively, he may have mentioned the "reasonable use" theory advisedly to allow some leeway for pollution. Felicitously for the environmental lawyer in Canada the judges seem to have unreservedly applied the "natural flow" theory. The most authoritative case is the decision of the Supreme Court of Canada in *Groat v. Edmonton*.<sup>159</sup> The case involved a claim by riparian owners for an injunction and damages against the defendant City for polluting the water in a ravine which transversed or bounded their land, by discharging sewage into it. A majority of the Court found that there had been an alteration in the quality of the water and that this constituted an infringement of the plaintiffs' riparian rights. Accordingly, they were entitled to the remedies sought. The judgment of Rinfret, J.,<sup>160</sup> rendered on behalf of himself and Anglin C.J., is particularly suggestive, because it specifically relates the result reached to the pollution problem raised. He articulated the principle which he wished to apply in these words:

The right of a riparian proprietor to drain his land into a natural stream is an undoubted common law right, but it may not be exercised to the injury or damage of the riparian proprietor below, and it can afford no defense to an action for polluting the water in the stream. Pollution is always unlawful and, in itself constitutes a nuisance.<sup>161</sup>

The clear message here is that the effects of the challenged use on the environment is a primary factor when considering a claim based on riparian rights. Given the favourable state of the case law and judicial sensitivity of this nature there is no substantive reason why the "natural flow" theory with its eminently respectable pedigree, and a more modern interpretation stressing concern for the protection of a valuable natural resource, should not be exploited to the full by environmental lawyers.

---

<sup>156</sup> See e.g. *Mason v. Hill* (1833), 5 B & Ad. 1 (K.B.), 110 E.R. 692; *Wood v. Waud* (1849), 3 Exch. 748, 154 E.R. 1047; *Jones v. Llanrust U.D.C.*, [1911] 1 Ch. 393, [1908-10] A11 E.R. 922.

<sup>157</sup> See e.g. *Crossley & Sons Ltd. v. Lightowler* (1867), L.R. 2 Ch. 478.

<sup>158</sup> (1875), L.R. 7 H.L. 697, 704.

<sup>159</sup> [1928] S.C.R. 522, [1928] 3 D.L.R. 725.

<sup>160</sup> *Id.*, at 527-35, 726-32.

<sup>161</sup> *Id.*, at 532, 730.

#### F. *Causal Problems in the Environmental Suit*

Perhaps the most significant obstacle to the actionability of nuisance in the past has been the difficulty in establishing a cause-effect relationship between the process of the defendant and the damage to the plaintiff's interests. In general the lack of reliable scientific data was a significant impediment to the plaintiff making out his case. Moreover in high pollution areas, where the added complication of numerous pollution sources existed, the difficulties in determining whom to sue and for what must have seemed insuperable. While it is not suggested that all the difficulties surrounding the establishment of a causal link have been solved, the utilization of accepted procedural devices, together with full exposure of new sources of pollution data, promises to offset to a considerable degree the disadvantages formerly faced by plaintiffs.

As already noted, the plaintiff should have no difficulty in bringing to court in the one action those whom he suspects of adulterating the environment in which he lives.<sup>162</sup> Indeed, one of the avowed purposes of the joinder of defendants rule is to assist the plaintiff in circumventing the problem of doubt as to who are the real offenders.<sup>163</sup> Moreover, by shrewd use of the discovery procedure, by seeking the cooperation of government officials with particular knowledge of pollution problems in the area, and by presenting the evidence of independent experts counsel may have adduced sufficient direct proof to satisfy the burden on the causal issue. The question, of course, is left of what he does if direct evidence is lacking. The defendants may have failed to keep any record of the effects of their operation, government studies may not exist or may not have been publicized, and independent evidence may be inconclusive. Is there any procedural device which would allow him to proceed without the assistance of direct evidence? *Prima facie* one would have thought that the time-honoured expedient of appealing to circumstantial evidence could be used. It has clearly been accepted as valid in the context of the causation issue in negligence law.<sup>164</sup> Unfortunately, the one Canadian case which seems to have considered the matter in the context of the nuisance action would seem on the surface at least to cast some doubt on its validity. In *Newhouse v. Coniagas Reduction Co.*,<sup>165</sup> an action brought by a group of plaintiffs for an injunction and damages in respect of the alleged death of their bees from arsenic fumes emanating from the defendant's operation, Falconbridge C.J. asserted that the burden of proving cause lay on the plaintiffs, and that they could not relieve themselves of it by appealing to the doctrine of *res ipsa loquitur*. As the evidence adduced failed to satisfy him that a causal link existed, he found for the defendant. How significant a negative authority this case is may be questioned. In the first place, the judge made the error of placing the criminal burden of proof on the plaintiffs. Secondly, he does not attempt to elaborate on what he means by *res ipsa loquitur*. Thirdly, there was a lack of any evidence as to the cause of death of the bees. It is this writer's contention that regardless of the applicability of *res ipsa loquitur*, a doctrine

---

<sup>162</sup> See text *supra*.

<sup>163</sup> See *supra*, note 64, for examples of rules allowing for joinder of defendants.

<sup>164</sup> See W. Prosser, *Handbook of the Law of Torts* (4th Ed., St. Paul: West Publishing Co., 1971) at 242, n. 47.

<sup>165</sup> (1917), 12 O.W.N. 136 (H.C.).

tied closely to negligence law, which has developed its own peculiar corollaries, it is open for the plaintiff to adduce circumstantial evidence as the basis of his argument on cause in nuisance. If he can go as far as to relate the pollution problem on his land to the type of effluent emitted or discharged from the defendant's plant, in terms of time, space and, where appropriate, meteorological conditions, then he may have said enough to allow a court to find in his favour on the cause issue. At least he should be able to avoid a non-suit.<sup>166</sup>

Somewhat more perplexing for environmental counsel is the problem he faces when he is not able to establish which of a number of industrial defendants is the cause or are the causes of his client's problem. Of course the general rule in tort law is that if the plaintiff fails to establish a link between the defendant and his injury then he fails. However, it has been suggested that an argument might be made out in a multi-defendant nuisance suit similar to that which has succeeded in some negligence cases, that where a number of defendants have acted wrongfully in relation to a plaintiff, and he is unable, because of the haziness or confused nature of the evidence, to put his finger on the actual culprits, the burden of proof shifts to them to exculpate themselves as causal agents.<sup>167</sup> This is an expedient which appealed to the Canadian Supreme Court in *Cook v. Lewis*,<sup>168</sup> a hunting case in which the plaintiff was hit by one bullet which could have come from one of two guns. However, there may be some difficulties in translating the idea to nuisance law. The expedient can be justified in negligence, because it is possible for a court to characterize the defendants as negligent or careless towards the plaintiff before the causal issue is decided. In nuisance, however, the tort by its nature makes both the causal issue and the degree of interference with the plaintiff's interests essential elements in establishing the existence of a wrong on the part of the defendant. As Professor Katz has pointed out, to assume that the defendant has committed nuisance, before it is proven, is to beg the central question.<sup>169</sup> The way around this argument is perhaps to extend the circumstantial evidence ploy mentioned above. If the plaintiff can point to (a) an aggravated degree of pollution around his residence; (b) the fact that the defendants in the neighbourhood are emitting or discharging the same type of pollutant from their plants; (c) appropriate meteorological conditions; and (d) the contemporaneity of pollution emission or discharge and interference, then he has established at least an inference that the several defendants have caused him injury.

Once it is established that a number of defendants have contributed to the plaintiff's pollution problem, there remains the question of the relative responsibility of each. It is well established that if a particular defendant has contributed to pollution he cannot argue his way out of liability by asserting that on its own

---

<sup>166</sup> This was the traditional function of the 'circumstantial evidence' rule, now somewhat clouded by development of the so-called doctrine of *res ipsa loquitur* — see C. Wright, *Special Lectures of the Law Society of Upper Canada* (Toronto: De Boo, 1955) at 103, reprinted in A. Linden ed., *Studies in Canadian Tort Law* (1968) at 41.

<sup>167</sup> M. Katz, *The Function of Tort Liability in Technology Assessment* (1969), 38 U. of Cinn. L. Rev. 587, at 616-7.

<sup>168</sup> [1951] S.C.R. 830, [1952] 1 D.L.R. 1.

<sup>169</sup> *Id.*, at 618.

his contribution to the pollution would have been insignificant.<sup>170</sup> It is enough that it has combined with others to produce an actionable nuisance. *A fortiori* he cannot argue that he should be exonerated because he merely added to existing pollution.<sup>171</sup> A contention of the defendants which may cause the plaintiff greater worry is that the combined consequences of their pollution is divisible, so that each is liable for only a proportion of the total effect. In terms of scientific reality one might be justifiably sceptical of such claims. Given the interaction of different pollutants, the changes in their chemical composition caused by synergetic processes and the capricious effects of atmospheric conditions, it should not be too difficult for the plaintiff to make the point that the overall pollution is indivisible. Only in those instances where the pollution is of a type which can be successfully monitored not only at the point of emission, but also at its reception point, is any other conclusion credible. Indeed in these cases it may be asserted that the issue of responsibility is one in which the onus of proof should be on the defendants. The argument may be supported by a line of Canadian cases dealing with flooding which was the combined result of a defendant's activities and natural causes.<sup>172</sup> The established rule is that unless the defendant can show a satisfactory basis for apportionment of the damage then he is liable to the full extent.<sup>173</sup> If the shifting of the onus to the defendant and the adverse result if he fails are acceptable where the other cause is innocent, *a fortiori* the argument is entitled to respect where it is culpable. The one question mark which arises on this issue of divisibility of damages stems from the lack of a comprehensive contribution rule amongst tortfeasors in some provinces. Unless there is a rule allowing contribution between the tortfeasors, which extends to nuisance and allows the paying defendant to recover from the others, a court might be tempted to do what it considers to be justice to the several defendants and divide the indivisible consequences equally between them. The problem does not arise in those provinces which have adopted the comprehensive section of the English Law Reform (Married Women and Tortfeasors) Act,<sup>174</sup> because joint and several liability and contribution apply whatever the cause of action, and there is no need to protect the defendant who pays. However, in those jurisdictions where the Ontario pattern which refers solely to actions based on 'fault or negligence' is followed,<sup>175</sup> the

---

<sup>170</sup> *Lambton v. Mellish*, [1894] 3 Ch. 163, 63 L.J. Ch. 929; *Duke of Buccleuch v. Cowen* (1866), 5 Macph. 214 (Ct. of Sess.); *Blair & Sumner v. Deakin* (1887), 57 L.T. 522 (Ch), 3 T.L.R. 757; *Walker v. McKinnon*, [1949] O.R. 549 (H.C.), [1949] 4 D.L.R. 739; *Russell Transport Ltd. v. Ontario Malleable Iron Co.*, [1952] O.R. 621 (H.C.), [1952] 4 D.L.R. 719.

<sup>171</sup> *McKie v. K.V.P. Co.*, [1948] O.R. 398 (H.C.), [1948] 3 D.L.R. 201; *Walker v. McKinnon*, [1949] O.R. 549 (H.C.), [1949] 4 D.L.R. 739.

<sup>172</sup> *Mackenzie v. West Flamborough* (1899), 26 O.A.R. 198; *Townsend v. Canadian Northern Rly.* (1922), 17 Alta. L.R. 289 (C.A.), [1922] 1 W.W.R. 1121, 65 D.L.R. 85; *Kelly v. Canadian Northern Rly.*, [1950] 1 W.W.R. 744 (B.C.C.A.), [1950] 2 D.L.R. 760; *Dyke v. Rosetown* (1956-57), 20 W.W.R. 1 (Sask. C.A.); *Brown v. Morden* (1958), 66 Man. R. 142 (Q.B.), 24 W.W.R. 200, 12 D.L.R. (2d) 576.

<sup>173</sup> See authorities *supra*, note 172.

<sup>174</sup> 25 and 26 Geo. V. (U.K.), c. 30, s. 6. This provision has been incorporated into apportionment legislation in Alberta, R.S.A. 1970, c. 365, s. 4; Manitoba R.S.M. 1970, c. T90, s. 3, New Brunswick R.S.N.B. 1952, c. 232, s. 2; Nova Scotia, R.S.N.S. 1967, c. 307, s. 2.

<sup>175</sup> See *The Negligence Act* R.S.O. 1970, c. 296, s. 2(1).

courts may feel compelled to apply this form of distributive justice, particularly in past nuisance situations in which the application of the action appears to result in strict liability and thus leaves the paying defendant outside the ambit of the statute.

#### G. *The Impact of the Defences to Nuisance on the Environmental Action*

Counsel for a plaintiff bringing an environmental suit in nuisance must of course anticipate and be ready to counter defences raised by the polluter. In the pollution suit context there are three defences which may prove troublesome—prescription, acquiescence or *laches*, and legislative authority.

##### (a) *Prescription*

Where a defendant's plant is well established and has been operating in the same location for a long period, he may well raise the objection to a plaintiff's claim that by virtue of his activities over that period and the uninterrupted discharge of pollutants over or onto the plaintiff's property a prescriptive right to pollute that property has been acquired. It seems to be accepted in Canadian jurisprudence that it is possible to develop a prescriptive right to sustain a nuisance affecting the plaintiff's property, if the nuisance has continued without complaint for twenty years.<sup>176</sup> Moreover there are judicial observations to the effect that the prescription defence would extend to cases in which the nuisance manifest itself in air, noise or water pollution.<sup>177</sup>

In view of this judicial inclination, the question is raised of how environmental counsel deals with this defence. As prescriptive rights run with the servient land it is no objection that the particular plaintiff has been in occupation for a period less than twenty years. It is, however, an objection, as McRuer C.J. noted in *Russell Transport v. Ontario Malleable Iron*<sup>178</sup> that the adverse effects of the user by the dominant owner have not been apparent for the whole twenty year period. Thus if the plaintiff's land remained vacant for a period, or the plaintiff was unaware that a nuisance existed during the twenty year span, the defence fails. The defendant cannot argue that, because he felt he was causing a nuisance, one existed.

A further factor, which has not been articulated by the judges, but which seems to inhere in the nature of prescriptive rights, is the requirement that the nuisance be fairly constant in incidence and effect over the required period.<sup>179</sup> This is an element which should be vigorously exploited by counsel. It will be

<sup>176</sup> *Wood v. Gibson* (1897), 30 N.S.R. 15 (C.A.); *Hall v. Alexander* (1902), 3 O.L.R. 482 (C.A.); *DeVault v. Robinson* (1920), 48 O.L.R. 34 (C.A.), 54 D.L.R. 591.

<sup>177</sup> See *Danforth Glebe Estates Ltd. v. W. Harris & Co.* (1919), 16 O.W.N. 41 (C.A.) per Riddell J. at 42; *Dutchman v. Oakland Dairy Co.* (1929), 63 O.L.R. 111 (C.A.), [1929] 1 D.L.R. 9, per Masten J.A. 28; *McKie v. K.V.P. Co.*, [1948] O.R., 398 (H.C.) 406, [1948] 3 D.L.R. 201, 209-10; *B.C. Forest Products v. Nordal* (1954), 11 W.W.R. 403 (B.C.S.C.).

<sup>178</sup> [1952] O.R. 621 (H.C.) 632-6, [1952] 4 D.L.R. 719, 733-8.

<sup>179</sup> J. Fleming, *The Law of Torts* (4th Ed, Sydney: Law Book Co. 1971) at 367-68. For an English decision which specifically refers to the importance of consistency in the degree of interference, see *Hulley v. Silversprings Bleaching Co.*, [1922] 2 Ch. 268 (water pollution from a dyeing and bleach factory).



very unlikely in most instances that pollution levels and patterns have remained constant over a period of twenty years. Changes in the level of output, expansion of physical facilities and the incorporation of new machinery may have affected the level of pollution in the case of industrial sources. With municipalities or public utilities, increases in population and thus the demand for basic utilities, will again have meant a growth in the volume of effluent and waste. Apart from these incremental changes in pollution levels there are certain types of pollution, air pollution being the obvious example, which vary from day to day. The emission level may be constant, but the effects may vary considerably depending on uncertain factors such as weather conditions and interaction with other airborne agents. A rather more subtle argument which is worth exploring is that the effects of pollution are often cumulative in nature, so that although there may be proof of a fairly low level output of a particular pollutant, it is unlikely that its effects will remain constant. Thus mildly annoying concentrations of fumes or particulates ten years ago may have been converted into emphysema in the intervening period, and the mild adulteration of a stream then, is now a level of deoxygenization which has effectively banished fish from the waterway.

(b) *Acquiescence*

It is suggested in some older Canadian decisions that delay in taking action against or unequivocal acquiescence in relation to a nuisance is a legitimate ground for denying a claim.<sup>180</sup> These cases, of course, rely on the equitable defence of *laches*. It is possible that this defence might be raised by a polluter where the plaintiff concerned has been subjected to interference over a period of time without taking action to have the nuisance abated. However, it is unlikely to be a significant stumbling block in most circumstances. As far as unequivocal acquiescence is concerned it has always been held that a positive act of acceptance of the defendant's operation with knowledge of its actual or potential effects is required.<sup>181</sup> In practice the defendant would have to prove that the plaintiff approved of or encouraged his enterprise, a burden which would seem difficult to satisfy in pollution cases. Unless the industrial concern has revealed in some detail its developmental plans, it would be hard enough for the defendant to prove that adjacent land occupiers had been apprised of the likely effects of the new plant or process, let alone assented to them. Moreover, in the present atmosphere of environmental concern, it is unlikely that the industrialist would confess openly that his operation had a pollution potential.

Where delay in launching an action is the objection, apart from the special case of interlocutory injunctions, where expedition is of vital importance, the tendency of the courts has been to deny its validity, unless something in the nature of fraud or unconscionable conduct can be found on the part of the plaintiff.<sup>182</sup> Unnecessary delay may induce a court to substitute damages for an injunction,<sup>182a</sup> but not to deny a remedy entirely. Counsel usually should have

---

<sup>180</sup> *Heenan v. Dewar* (1870), 17 Gr. 658 (Ont. Ch.), aff'd 18 Gr. 438; *Sanson v. Northern Ry.* (1881), 29 Gr. 459 (Ont. Ch.).

<sup>181</sup> W. Kerr, *A Treatise of the Law and Practice of Injunctions* (5th Ed. Paterson ed. Toronto: Carswell Co. 1914) at 21, 36.

<sup>182</sup> *Radenhurst v. Coate* (1857), 6 Gr. 139 (U.C.C.A.).

<sup>182a.</sup> See *Nestor v. Hayes Wheel Co.*, (1924), 26 O.W.N. 129 (H.C.).

no problem in countering this defence. In the first place, as the existence of a nuisance is in many cases a relative matter, a plaintiff may well be justified in deferring his claim until he is fairly confident of his chances of success.<sup>183</sup> Secondly, the effects of certain forms of pollution are insidious and it may be a significant period of time before the plaintiff realizes the seriousness of the impact of the pollution on him.<sup>184</sup> Finally on a more general plane, in view of the fact that it is only recently that the full impact of the pollution problem has become apparent, it would be thoroughly inequitable for the courts to allow any significant rein to this defence. If they do then they will be setting a premium on the exploitation of *bona fide* ignorance on the citizen's part.

### (c) Legislative Authority

The argument that the nuisance has been created pursuant to the exercise of statutory authority is one which environmental counsel may face where an anti-pollution suit is brought against a municipality or public utility. The defence which has its genesis in Anglo-Canadian jurisprudence in *Vaughan v. Taff Vale Railway Co.*<sup>185</sup> seems to have had its major rationale in the very practical consideration, that with a developed notion of parliamentary sovereignty, once Parliament authorized the development of services in the public interest which necessarily clashed with individual rights, it was difficult for the judges to subvert the legislative will without opening themselves to the criticism of usurping Parliament's function. Fortunately for the environmental cause, the trend in judicial decisions, in particular in this century, has been progressively to restrict the scope of the defence. The courts, using a variety of distinguishing devices, have chipped away at the core of the defence to the point at which it has become considerably emasculated. An argument which will be often open to environmental counsel, as there is usually no express legislative direction on the issue of tortious liability, is that the statute or regulations should be strictly construed so as not to conflict with the basic rights of citizens.<sup>186</sup> He can assert that if Parliament or the legislature wished to curb their rights, particularly the

<sup>183</sup> See *Francklyn v. Peoples Heat & Light Co.* (1899), 32 N.S.R. 44 (C.A.).

<sup>184</sup> The difficulties which they have encountered in dealing with limitation periods and the ravages of insidious diseases in negligence law ought to be enough to persuade the courts of the dangers of erecting technical obstacles to suit in the nuisance field. See e.g. *Cartledge v. E. Jopling Co.*, [1963] A.C. 758 (H.L.), [1963] 1 A11 ER. 431.

<sup>185</sup> (1860), 5 H & N. 679 (Exch.), 157 E.R. 1351.

<sup>185a</sup>. For a full account of the development and incidence of this defence, see A. Linden, *Strict Liability, Nuisance and Legislature Authorization* (1966), 4 Osgoode Hall L.J. 196.

<sup>186</sup> See *Quebec Rly. Co. v. Vandry* [1920] A.C. 662 (P.C. Can.) 679 [1920] 1 W.W.R. 901; *Groat v. Edmonton*, [1928] S.C.R. 522 at 533, [1928] 3 D.L.R. 725 at 730-31 per Rinfret J. For specific examples of strict interpretation, see *Jones v. Festiniog Rly.* (1868), 3 Q.B. 773, 18 L.T.R. 903; *A.-G. v. Leeds* (1870), 22 L.T.R. 330 (Ch.); *Metropolitan Asylum v. Hill* (1881), 6 App. Cas. 193 (H.L.); *Rapier v. London Tramways*, [1893] 2 Ch. 588 (C.A.); *A.-G. v. Colney Hatch Lunatic Asylum* (1869), 19 L.T.R. 708 (Ch.D.); *Burgess v. Woodstock*, [1955] O.R. 814 (H.C.), [1955] 4 D.L.R. 615; *Gas, Light & Coke Co. v. Vestry of St. Mary Abbots* (1885), 15 Q.B.D. 1; *Alliance & Dublin Gas v. Dublin*, [1901] 1 Ir. 492 (C.A.); *Ogston v. Aberdeen Tramways*, [1897] A.C. 111 (H.L.); *C.P.R. v. Park* [1899] A.C. 535 (P.C. Can.); *Guelph Worsteds Ltd. v. Guelph* (1914), 30 O.L.R. 466 (H.C.), 18 D.L.R. 73; *Manchester v. Farnworth*, [1930] A.C. 171 (H.L.); *Grandel v. Mason*, [1953] 1 S.C.R. 459, [1953] 3 D.L.R. 65; *Connery v. Gov. of Manitoba* [1971] 4 W.W.R. 156 (Man. C.A.), 21 D.L.R. (3d) 234.

right to a wholesome environment, it would have made that plain. While some courts have gone so far as to assert that an intention to abridge private rights can be implied, the more recent approach has been to allow this interpretation only where the adverse result to the plaintiff's interest is found to be a necessary or inevitable consequence of the defendant's activities.<sup>187</sup> Even the apparent "inevitability" of a nuisance may be a shaky basis for the defence. As that term has been interpreted to mean what is possible "according to the state of scientific knowledge at the time . . . having also in view . . . practical feasibility",<sup>188</sup> it may be open to environmental counsel by the use of scientific data to argue that the defendant's process is not the most efficient, since it does not incorporate the most advanced pollution abatement equipment available.

Another loophole in the defence is that a clear division has been made by the courts between legislation which is imperative and that which is merely permissive in content.<sup>189</sup> This distinction reflects a feeling that in the latter case there is room for a consideration of whether the power can be exercised without infringing private rights, and the legislative agent is under no compulsion to act if serious interference is unescapable. Other variants of this argument which may be useful to counsel are the exclusion of the defence where discretion is allowed in the choice of location,<sup>190</sup> or of method.<sup>191</sup> In either case, counsel may be able to effectively counteract the defence by arguing that in selecting its site, or *modus operandi* the utility did not pay enough attention to the interests of the citizens and in particular to the environmental ramifications of its decision. Finally, the courts have approved of the expedient of shifting the onus of proof to the defendant, so that he has to demonstrate that his conduct is authorized by the legislation in question, and that the damage or interference which is caused is inevitable.<sup>192</sup> From the environmental viewpoint this device has the beneficial

<sup>187</sup> See *Hammersmith v. Brand* (1869), L.R. 4 H.L. 171, as qualified by *Manchester v. Farnworth*, [1930] A.C. 171 (H.L.) at 182; *Stephens v. Richmond Hill*, [1956] O.R. 88 (C.A.) 105, 1 D.L.R. (2d) 569.

<sup>188</sup> *Manchester v. Farnworth*, [1930] A.C. 171 (H.L.) at 182; *Crepin v. Ottawa Electric Co.* (1931), 66 O.L.R. 409 (C.A.) at 421, [1931] 1 D.L.R. 792 at 802-3 per Masten J.A. aff'd [1931] S.C.R. 407, [1931] 3 D.L.R. 113; *Aikman v. George Mills & Co.*, [1934] O.R. 597 (H.C.), [1934] 4 D.L.R. 264.

<sup>189</sup> *Metropolitan Asylum v. Hill* (1881), 6 App. Cas. 193 (H.L.) 212-3 per Lord Watson; *R. v. Bradford Navigation* (1865), L.J. 34 C.L. (N.S.) 191; *Smiley v. Ottawa*, [1941] O.R. 47 (C.A.), [1941] 2 D.L.R. 390; *Hopkin v. Hamilton Electric Light Co.* (1901), 2 O.L.R. 240 (H.C.) aff'd 4 O.L.R. 258; *Turpin v. Halifax-Dartmouth Bridge Comm.* (1959), 44 M.P.R. 151 (N.S.C.A.) 21 D.L.R. (2d) 623; *Lawrysyn v. Kipling* (1965), 55 W.W.R. 108 (Sask. C.A.), 55 D.L.R. (2d) 471; *B.C. Pea Growers Ltd. v. Portage La Prairie*, [1966] S.C.R. 150, 54 W.W.R. 477, 54 D.L.R. (2d) 503; *Schubert v. Sterling Trust Corp.*, [1943] O.L.R. 438 (H.C.), [1943] 4 D.L.R. 584.

<sup>190</sup> *Metropolitan Asylum v. Hill* (1881), 6 App. Cas. 193 (H.L.); *Rapier v. London Tramways*, [1893] 2 Ch. 588 (C.A.); *Mudge v. Penge U.D.C.* (1917), 86 L.J. Ch. 126; *J.P. Porter Co. v. Bell*, [1955] 1 D.L.R. 62 (N.S.C.A.) 72, per MacDonald J.A..

<sup>191</sup> *Gas, Light & Coke Co. v. Vestry of St. Mary Abbots* (1885), 15 Q.B.D. 1; *West v. Bristol Tramways*, [1908] 2 K.B. 14 (C.A.), *Stott v. N. Norfolk* (1914), 24 Man. L.R. 9 (Q.B.), 16 D.L.R. 48; *Turtle v. Toronto* (1924), 56 O.L.R. 252 (C.A.); *Pride of Derby v. British Celanese*, [1953] 1 Ch. 149 (C.A.); *J.P. Porter Co. v. Bell*, [1955] 1 D.L.R. 62 at 72, per MacDonald J.A..

<sup>192</sup> *Manchester v. Farnworth*, [1930] A.C. 171 (H.L.); *Renahan v. Vancouver*, [1930] 3 W.W.R. 166 (B.C.S.C.), [1930] 4 D.L.R. 1018; *J.P. Porter Co. v. Bell*, [1955] 1 D.L.R. 62 (N.S.C.A.); *Stephens v. Richmond Hill*, [1956] O.R. 88 (C.A.), 1 D.L.R. (2d) 569; *Lawrysyn v. Kipling* (1965), 55 W.W.R. 108 (Sask. C.A.), 55 D.L.R. (2d) 471.

result of forcing the defendant to explain his conduct and may be used as a tool for determining whether any serious attention was paid to environmental considerations in the planning stage.

Even if counsel is unsuccessful in persuading the court that the defence of legislative authority should be ignored, it does not necessarily mean the demise of his case. The availability of the defence has always been contingent upon the absence of negligence on the part of the defendant, and in the context of legislative powers negligence has been given a somewhat extended interpretation. It is not confined to the absence of care in the circumstances, but may extend to failure to plan the operation with due concern for the rights of others. If damage could have been prevented by the "unreasonable exercise of powers", then it is negligence if the defendant fails so to act.<sup>193</sup> Furthermore there is authority to the effect that "it is negligence to carry out work in a manner which results in damage unless it can be shown that, that and only that was the way in which the duty could be performed."<sup>194</sup> Unless the polluter can prove that there was only one feasible way of operating, it may be negligence, if he chooses a means which is not sufficiently related to the environmental interests of the populace.

#### H. *The Crucial Issue: Which Remedy?*

The whole tenor of this article reflects a belief that there is inherent in the action for private nuisance a flexibility of concepts which allows for the injection of the environmental perspective. The cardinal question, however, in determining whether this cause of action is a viable means of bringing an environmental suit is whether the courts will be willing to utilize the injunctive remedy. In most instances the purpose of environmental litigation will be to seek an improvement in the environment in which the plaintiff and his neighbours live. The most satisfactory way of achieving this is to persuade the court to restrain the defendant from conducting his operations in such a way as to cause pollution. By grant of a perpetual prohibitory injunction direct pressure is brought upon the offender to seek ways of obviating the pollution which he is causing, and if he fails to comply his enterprise may be curtailed entirely. It may be argued that the same result can be achieved, albeit indirectly, through the award of damages. This assumes, however, that the damages awarded are high enough to cause the industrialist to consider changing his *modus operandi*. If the damages are modest he may look upon them as a license to continue pollution. If this is allowed to happen then the environmental interest is effectively subverted.<sup>195</sup>

The grant of injunctive relief as an equitable remedy has always been labelled as discretionary. The question of its availability in environmental suits seems to hang upon the nature and extent of that discretion, and how far it is limited in practice by accepted precedent. Counsel in Canada is faced with a corpus of authority which indicates some degree of ambivalence. In brief there are two lines of case law. The first follows the spirit of English jurisprudence,

<sup>193</sup> *Geddis v. Bann Reservoir* (1878), 3 App. Cas. 430 (H.L.) at 455.

<sup>194</sup> *Provender Millers v. Southampton C.B.C.*, [1940] 1 Ch. 131 at 140.

<sup>195</sup> For an instructive judicial conflict over the importance of environmental considerations, see *Boomer v. Atlantic Cement Co.* (1970), 26 N.Y. 2d 218 (C.A.); 309 N.Y.S. 312, Judge Bergan (for the majority) at 314-19, Judge Jasen (dissenting) at 319-322. The latter is a classic example of a judge applying the environmental perspective.

which is that, if the plaintiff has suffered significant interference, or the nuisance is a continuing one, the plaintiff is entitled to an injunction, whatever the surrounding circumstances. The second, which jibes with the majority view in the United States, is that the grant of an injunction is dependent upon a balancing of the equities in the individual case, a process which includes consideration of the effect of the injunction upon the financial welfare of the defendant and the economic destiny of the surrounding community. Both lines of authority will be considered in some detail.

(a) *The English Heritage*

The English tradition in granting injunctive relief reflects very clearly a nineteenth century socio-economic philosophy which stressed the sanctity of individual rights. In a series of nineteenth century decisions the judges made it quite clear that they were not impressed with the argument raised by both public and private enterprises that the interest of the individual in freedom from interference must bend to the public or community interest. The clearest statement of this approach appears in the judgement of Sir W. Page-Wood V.C. in *Attorney General v. Birmingham*,<sup>196</sup> a public nuisance action on the relation of a single riparian owner to enjoy the pollution of a river by the discharge of sewage by the defendant Corporation:

There are cases at common law in which it has been held, that where the question arises between two portions of the community, the convenience of one may be counterbalanced by the inconvenience of the other, where the latter are far more numerous. But in the case of an individual claiming certain private rights, and seeking to have those rights protected against an infraction of the law, the question is simply whether he has those rights, and if so, whether the court looking to the precedents by which it must be governed in the exercise of its judicial discretion, can interfere to protect them.

Now with regard to the question of the plaintiff's right to an injunction, it appears to me that, so far as this court is concerned, it is a matter of almost absolute indifference whether the decision will affect a population of 250,000, or a single individual carrying on a manufactory for his own benefit. . . I am not sitting here as a committee for public safety, armed with power to prevent what, it is said, will be a great injury not to Birmingham only but to the whole of England; that is not my function. My function is only to interpret what the Legislature (the proper body to which all such arguments should be addressed) has considered necessary for the town of Birmingham. . . The plaintiff's rights are neither more nor less than the Legislature has thought it proper to leave him. And the question whether the town of Birmingham is concerned, or whether . . . the defendants are carrying on these operations for their own profit, is one which is entirely beside the purpose to argue in this court.<sup>197</sup>

Although judges in later cases may have had doubts about stressing individual rights so forcefully, and although the effective application of this philosophy was subsequently limited by the recognition of the defence of statutory authority,<sup>198</sup> the sentiment that the plaintiff is entitled to his injunction has remained strong in English judicial thought. Thus in the celebrated case of *Shelfer v. London Electric Lighting Co.*<sup>199</sup> Lindley L.J. felt constrained to say:

<sup>196</sup> (1858), 4 K & J 528 (Ch.), 70 E.R. 220.

<sup>197</sup> *Id.*, at 539-40, 225.

<sup>198</sup> See *Vaughan v. Taff Vale Rly.* (1860), 5 H & N 679, 157 E.R. 1351.

<sup>199</sup> [1895] 1 Ch. 287.

... The circumstance that the wrongdoer is in some sense a public benefactor (e.g. a gas or water company or a sewer authority) has never been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Expropriation, even for a money consideration, is only justifiable when Parliament has sanctioned it. Courts of justice are not like Parliament, which considers whether proposed works will be so beneficial to the public as to justify exceptional legislation, and the deprivation of people of their rights with or without compensation.<sup>200</sup>

The nineteenth century judiciary also seems to have been capable of scepticism over the argument raised by defendants that injunctions necessarily meant economic ruin to them or dislocation in the community. In *Imperial Gas, Light and Coke Co. v. Broadbent*<sup>201</sup> in which the plaintiff, a market gardener, sought an injunction to prevent further damage to his land by fumes issuing from the gas retort house run by the defendants, Campbell L.C. stated

But my lords, what reason is there to suppose that they could not go on supplying gas as they did before the new retort was resorted to? They supplied a large district before, and that district may still be supplied, and they may for anything I know, discover some chemical ingredient by use of which the noxious effects of the gas, of which the plaintiff complains, may be neutralized. The Appellants are at liberty, under the injunction to carry on their works so they do not injure the plaintiff, and they must either find out some mode by which they can carry gas on their works without that injury, or they must limit the quantity of gas to that which they made before this new retort was constructed. I do not believe that the public will at all suffer from this injunction being maintained.<sup>202</sup>

When *Attorney-General v. Birmingham*<sup>203</sup> and the *Broadbent*<sup>204</sup> cases were decided, the only appropriate remedy which could be granted by a court of Equity was the injunction. It was not possible to substitute damages. This shortcoming in the powers of Chancery was remedied in 1858 with the passage of *Lord Cairns Act*<sup>205</sup> which opened up the alternative of an award of damages. The effect of this statute was to extend the notion of damages in nuisance to cover prospective loss, and to substitute them if the court found that the circumstances were such that injunctive relief was unwarranted. The principles governing the application of judicial discretion in these cases are generally held to be those laid down in the case of *Shelfer v. London Electric Lighting Co.*<sup>206</sup> The defendants erected powerful engines for generating electricity close to the public house of which the plaintiff was lessee. As a result of the excavation for the plant and the vibration and noise from the working of the engines, structural injury was caused to the building, and annoyance and discomfort to the occupier. In an action for an injunction and damages, the trial judge, while recognizing that a nuisance existed, exercised what he conceived to be his power under *Lord Cairns Act* and awarded damages in lieu of an injunction. The Court of Appeal unanimously reversed this decision. Lord Halsbury<sup>207</sup> was content to say that in his estimation the Act had not changed the criteria which governed

---

<sup>200</sup> *Id.*, at 316.

<sup>201</sup> (1859), 7 H.L.C. 600, 11 E.R. 239.

<sup>202</sup> *Id.*, at 611, 243-44.

<sup>203</sup> *Supra*, note 196.

<sup>204</sup> *Supra*, note 201.

<sup>205</sup> 21 & 22 Vict. c.27, s.2., otherwise known as the *Chancery Amendment Act*.

<sup>206</sup> *Supra*, note 199.

<sup>207</sup> *Id.*, at 308-312.

whether an injunction should be granted. Following the judgement of Lord Kingsdown in the *Broadbent* case<sup>208</sup> he felt that it was only in 'special cases' that an injunction should be denied. This was not such a case and, since there would have been no doubt about the grant of injunction prior to the Act, there was no warrant for its refusal here. Lindley L.J.<sup>209</sup> agreed that there had been no change wrought in the principles which should apply to the grant of an injunction, and as already indicated, refuted the suggestion that the public benefit was of any inherent consequence. On the issue of the criteria to be applied he was somewhat more specific, and gave examples of situations in which the substitution of damages might be warranted:

... [I] refer, by way of example, to trivial and occasional nuisances: cases in which a plaintiff has shown that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases, and in all others where an action for damages is really an adequate remedy — as where the acts complained of are already finished — an injunction can be properly refused.<sup>210</sup>

A. L. Smith L.J.<sup>211</sup> agreed with the tenor of his brethren's opinions, but went further than either of them in articulating the elements which would justify a court in substituting damages for an injunction. The former he felt were appropriate:

- (1) If the injury to the plaintiff's legal rights is small
- (2) And is one which is capable of being estimated in money,
- (3) And is one which can be adequately compensated by a small money payment,
- (4) And the case is one in which it would be oppressive to the defendant to grant an injunction . . .<sup>212</sup>

It will be noted that Smith L.J. used the conjunctive "and" rather than the disjunctive "or", which means that he felt that each of these criteria would have to be satisfied in the individual case. The sentiments expressed in the *Shelfer* case clearly represent the attitude of the English judiciary where the plaintiff is seeking a prohibitory injunction against a continuing nuisance, or where significant interference or loss has occurred and there is a chance of recurrence.<sup>213</sup> There has been no enthusiasm for going outside the criteria laid out by Smith L.J. and seeking to balance the equities, or to worry over the hardship to the defendant

<sup>208</sup> *Supra*, note 201.

<sup>209</sup> *Supra*, note 199 at 312-18.

<sup>210</sup> *Id.*, at 317.

<sup>211</sup> *Id.*, at 318-25.

<sup>212</sup> *Id.*, at 322-23.

<sup>213</sup> On injunctive relief and continuing nuisances see e.g. *A.-G. v. Lewes Corpn.*, [1911] 2 Ch. 495; *Wood v. Conway Corpn.*, [1914] 2 Ch. 47 (C.A.); *Stollmeyer v. Petroleum Development Co. Ltd.*, [1918] A.C. 498 (P.C. Trinidad); *Morrow v. Stepney Corpn.* (1920), L.G.R. 458; *Maberly v. H. Peabody & Co.*, [1946] 2 A11 E.A. 192 (K.B.D.); *McCombe v. Read*, [1955] 2 Q.B. 429.

On injunctive relief and substantial injury, see *Colwell v. St. Pancras B.C.*, [1904] 1 Ch. 707; *Knight Isle of Wight Electric Light & Power Co.* (1904), 73 L.J. Ch. 299; *Bexter v. Aldershot U.D.C.* (1915), 79 J.P.J.D. 580; *Rushmer v. Polsne & Alfieri, Ltd.*, [1906] 1 Ch. 234 (C.A.), aff'd [1907] A.C. 121; *Gilling v. Gray* (1910), 21 T.L.R. 39 (Ch.); *Bosworth-Smith v. Gwynnes Ltd.* (1919), 89 L.J. Ch. 368; *Vanderpant v. Mayfair Hotel Co.*, [1930] 1 Ch. 138.

or the possible injury to the local community in financial terms.<sup>214</sup> This inflexible attitude was underlined recently by a dictum of Lord Upjohn in *Morris v. Redland Bricks Ltd.*,<sup>215</sup> a case which dealt with the validity of a mandatory injunction where the defendant had removed support from the plaintiff's land. In highlighting the differences between the criteria relevant to the grant of mandatory and prohibitory injunctions he made the following observations on judicial attitudes towards the latter:

It is, of course quite clear and was settled in your Lordship's house nearly a hundred years ago in *Darley Main Colliery Co. v. Mitchell* (1886) 11 App. Cas. 127, that if a person withdraws support from his neighbour's land that gives no right at law to that neighbour until damage to his land has thereby been suffered; damage is the gist of the action. When such damage occurs the neighbour is entitled to sue for the damage suffered to his land and equity comes to the aid of the common law by granting an injunction to restrain the continuance or recurrence of any acts which may lead to a further withdrawal of support in the future.

The neighbour may not be entitled as of right to such an injunction as it is in its nature a discretionary remedy, but he is entitled to it "as of course" which comes to much the same thing and at this stage an argument on behalf of the tortfeasor, who has been withdrawing support that this will be very costly to him, perhaps by rendering him liable for heavy damages for breach of contract for failing to supply e.g., clay or gravel, receives scant, if any respect. A similar case arises when injunctions are granted in the negative form where local authorities or statutory undertakers are enjoined from polluting rivers; in practice the most they can hope for is a suspension of the injunction while they have to take perhaps the most expensive steps to prevent further pollution.<sup>216</sup>

While Lord Upjohn does not make it clear in his judgement, it would seem that his observations would apply with equal force where the plaintiff seeks a prohibitory injunction which is related solely to apprehended injury, in other words a *quia timet* injunction. Once it is established that the fear of the plaintiff is well-founded and that he in all likelihood stands to experience interference, the issue of whether the injunction should be granted or damages substituted is resolvable by the application of the criteria laid down in the *Shelfer* case.

---

<sup>214</sup> For an informative critique of this judicial attitude see H. Read, *Equity & Public Wrongs* (1933), 11 Can. B. Rev. 73 at 78-87. See also *Bellew v. Cement Ltd.*, [1948] Ir. R. 61 (S.C. Eire); *Pride of Derby Angling Assoc. v. British Celanese Ltd.*, [1953] Ch. 149 (C.A.), at 181-182 per Evershed M.R., at 192, per Denning L.J. at 194, per Romer L.J. Lord Denning's comments on the propriety of the court granting an injunction against the City of Derby to abate pollution of a river are particularly instructive on the English approach to the grant of injunctive relief:

The remaining question is whether an injunction should be issued against them. Sir Andrew Clark argued that an injunction should not issue. The corporation, he said, could not dam back the sewage because that "would cause a most frightful "nuisance" to the inhabitants of Derby, and they could not extend their sewage disposal works because they were prohibited under the Defence Regulations from doing so without the consent of the Minister. These are strong reasons for suspending the injunction, but are no reason for not granting it. The power of the courts to issue an injunction for nuisance has proved itself to be the best method so far devised of securing the cleanliness of our rivers; and in this connexion it is significant that the law relating to nuisance has been expressly preserved by section 11 (6) of the Rivers Pollution Prevention Act, 1951.

<sup>215</sup> [1970] A.C. 652 (H.L.), [1969] 2 W.L.R. 1437.

<sup>216</sup> *Id.*, at 664, 1443.



(b) *The Canadian Conflict*

There is a respectable body of Canadian case law which follows English principle on the exercise of the power to grant injunctive relief, and on balance it would seem "the English approach" enjoys the greater share of judicial support.

The strain of individualism which has been noted in English authority has its proponents amongst the Canadian judges. Thus Idington J. in *Canada Paper Co. v. Brown*<sup>217</sup> had no doubts about the primacy of the individual's rights to enjoy his land free from unwarranted interference in determining whether an injunction should be granted:

... As long as we keep in view the essential merits of the remedy in the way of protecting the right of property and preventing them from being invaded by mere autocratic assertions of what will be more conducive to the prosperity of the local community by disregarding such rights, we will not go far astray in taking as our guide the reasoning of any jurisprudence which recognizes the identical aim of protecting people in their rights of property when employing the remedy of perpetual injunction.<sup>218</sup>

The words of Lindley L.J. in the *Shelfer* case, quoted earlier, have their parallel in the judgement of Rinfret J. in *Groat v. Edmonton*.<sup>219</sup>

But whatever the consequence . . . the principle must be upheld that unless Parliament otherwise decrees, "public works must be so executed as not to interfere with private rights of individuals."<sup>220</sup>

More pointed still is the recent observation of Stewart J. of the Ontario High Court in *Stephens v. Village of Richmond Hill*.<sup>221</sup>

It is the duty of the state (and of statesmen) to seek the greatest happiness of the greatest number. To this end, all civilized nations have entrusted much individual independence to their Governments. But be it ever remembered that no one is above the law. Neither those who govern our affairs, their appointed advisors, nor those retained to build great works for society's benefit, may act so as to abrogate the slightest right of the individual, save within the law. It is for the Government to protect the general welfare by wise and benevolent enactment. It is for me, or so I think, to interpret the law, determine the rights of the individual and to invoke the remedy required for their enforcement.<sup>222</sup>

The spirit of both the *Broadbent* and the *Shelfer* cases has been widely accepted in Canadian case law, whether the complaint has related to actual tangible damage or mere inconvenience, and has been applied to most of the common forms of pollution.<sup>223</sup> Of particular import is the fact that the Supreme

<sup>217</sup> (1922), 63 S.C.R. 243, 66 D.L.R. 287.

<sup>218</sup> *Id.*, at 250, 291.

<sup>219</sup> [1928] S.C.R. 522, [1928] 3 D.L.R. 725.

<sup>220</sup> *Id.*, at 534, 732.

<sup>221</sup> [1955] O.R. 806 (H.C.), [1955] 4 D.L.R. 572, *aff'd* with variation as to damages [1956] O.R. 88, 1 D.L.R. (2d) 569.

<sup>222</sup> *Id.*, at 813.

<sup>223</sup> See e.g. *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 (H.C.); *Duchman v. Oakland Dairy Co.* (1929), 63 O.L.R. 111 (C.A.), [1929] 1 D.L.R. 9; *McKie v. K.V.P. Co.*, [1948] O.R. 398 (H.C.), [1948] 3 D.L.R. 201; *Walker v. McKinnon*, [1949] O.R. 549 (H.C.), [1949] 4 D.L.R. 739; *Roiston v. Lapa Cadillac Gold Mines*, [1950] O.R. 103 (H.C.); *Russell Transportation Ltd. v. Ontario Malleable Iron Co.*, [1952] O.R. 621 (H.C.), [1952] 4 D.L.R. 719; *Stephens v. Richmond Hill*, [1956] O.R. 88 (C.A.), (1956), 1 D.L.R. (2d) 569; *Atwell v. Knights*, [1967] 1 O.R. 419 (H.C.), 61 D.L.R. (2d) 108.

Court has accepted the line of reasoning in those decisions. Again the *McKie v. K.V.P. Co.* case<sup>224</sup> is instructive. McRuer C.J. at trial had no hesitation in applying the *Shelfer* case, noting its approval of the earlier *Broadbent* decision, and granted an injunction.<sup>225</sup> In the Supreme Court Kerwin J., speaking for the Court, addressed the issue of the validity of the grant of an injunction on the facts. He noted the unbroken line of English authority supporting the grant of an injunction for a violation of right, and drew attention to the judgement of Viscount Finlay in *Leeds Industrial Cooperative Soc. v. Slack*<sup>226</sup> in which the latter approved of the judgement of Lindley L.J. in *Shelfer*. He then commented upon the *dictum* of Duff J. in *Canada Paper Co. v. Brown*<sup>227</sup> which expressed the view that the effect of an injunction upon the neighbourhood and the defendant must be taken into account, indicating that the same judge may later have had doubts about the validity of that.<sup>228</sup> On the facts of this case the answer in his own mind was clear:

Pollution has been shown to exist, damages would not be a complete and adequate remedy, and the Court's discretion should not be exercised against the "current of authority which is of many years standing".<sup>229</sup>

This statement is important because it not only shows approval of the English approach, but also indicates that the existence of a pollution problem is a relevant factor to be considered in determining whether an injunction should be granted. Moreover by his thinly veiled criticism of Duff J. he seems to suggest that there is no room for consideration of the arguments that the defendant and the surrounding community stand to suffer financial loss.

More recent support for the proposition that the hardship upon the defendants and the social utility of his enterprise are of no consequence may be found in the judgement of Dunlap L.J.S.C. in *Gauthier v. Naneff*.<sup>230</sup> In granting the

---

<sup>224</sup> [1949] S.C.R. 698, [1949] 4 D.L.R. 497.

<sup>225</sup> [1948] O.R. 398 (H.C.) 416-17, [1948] 3 D.L.R. 201 at 218-19.

<sup>226</sup> [1924] A.C. 851 (H.L.) 855-63.

<sup>227</sup> *Supra*, note 217 at 252-53.

<sup>228</sup> He quoted from Duff J.'s judgement in *Gross v. Wright*, [1923] S.C.R. 214 at 227 in which that judge indicated that the primary point for consideration in determining whether an injunction should or should not be granted was whether damages were a complete and adequate remedy.

<sup>229</sup> *Supra*, note 224 at 703, 501. It is sobering to note that the Ontario government saw fit to persuade the legislature to pass legislation dissolving the injunction granted in this case — *The K.V.P. Co. Ltd. Act* S.O., 1950, c. 33. If this move was the product of genuine concern for a community, the economic livelihood of which was threatened, then it may have been justifiable. However, the use of special pleading by the company cannot be ruled out, and if that was the major inspirational factor then the action of the government was reprehensible in the extreme.

Pursuant to McRuer C.J.'s decision *The Lakes and River Improvement Act* was amended to specifically direct the attention of the judiciary towards the impact of injunctive relief upon the local community and to allow for a 'balancing of the equities' approach in claims resulting from the pollution of lakes or rivers by mills — see R.S.O. 1970, c. 233 s. 37 (1) (a). The absence of any litigation since 1948 relating specifically to the operations of mills precludes any comment on how far the judges would feel compelled to take a different view of the propriety of injunctive relief.

<sup>230</sup> *Gauthier v. Naneff*, [1971] 1 O.R. 97 (H.C.), 14 D.L.R. (3d) 513.

*quia timet* injunction, and thus preventing the staging of the defendant's charitable event, he commented:

It is trite law that economic necessities of the defendants are irrelevant in a case of this character. It is unfortunate that in the circumstances of this case the rights of a riparian land proprietor come into conflict with the laudable objects of a charitable pursuit formulated and prosecuted with sincerity by the defendants . . . on behalf of their club . . . Nonetheless the most honourable of intentions alone at no time can justify the expropriation of common law rights of riparian owners.<sup>231</sup>

The antithetical notion that in exercising his discretion to grant a prohibitory injunction the judge is entitled to consider the social utility of the defendant's user and the adverse economic effect of a restraining order seems to have been the brain child of Middleton J. in his days as a justice on the Ontario High Court. After approving of the criteria laid down by Smith L.J. in the *Shelfer* case<sup>232</sup> and remarking that the cases in which damages should be substituted for an injunction "must be exceedingly rare" in his judgement in *Appleby v. Erie Tobacco Co.*,<sup>233</sup> he seems to have had second thoughts. In *Chadwick v. Toronto*<sup>234</sup> in which he found the City guilty of causing a nuisance by noise in operating electrical pumps in a waterworks, he refused to grant a prohibitory injunction because the pumping of the water was necessary for municipal purposes. His substitution of damages for an injunction was affirmed by the Court of Appeal. Whether Middleton J. borrowed the notion of "balancing the equities" from the practice followed with interlocutory injunctions,<sup>234a</sup> or was influenced by his earlier judgement in *Ramsay v. Barnes*,<sup>235</sup> in which he considered the burden on the defendant in refusing a mandatory injunction, is not clear. Whatever its source, it clearly impressed him. Three years later in a judgement on the claim of a group of farmers in the Sudbury area for injunctive relief against two area smelters which were causing damage to their homes and land,<sup>236</sup> he extended the application of the social utility argument to the industrial polluter. With what must have seemed at the time to be unassailable logic he stated:

Mines cannot be operated without the production of smoke from the roast yards and smelters, which smoke contains very large quantities of sulphur dioxide. There are circumstances in which it is impossible for the individual so to assert his individual rights as to inflict a substantial injury upon the whole community. If the mines should be prevented from operating, the community could not exist at all. Once close the mines, and the mining community would be at an end, and farming would not long continue. Any capable farmer would find farms easier to operate and nearer general markets if the local market ceased. The consideration of this situation induced plaintiff's counsel to abandon the claims for injunctions. The

---

<sup>231</sup> *Id.*, at 103, 519.

<sup>232</sup> *Supra*, note 199 at 322-23.

<sup>233</sup> (1910), 22 O.L.R. 533 (H.C.).

<sup>234</sup> (1914), 32 O.L.R. 111 (H.C.), aff'd by C.A. 115.

<sup>234a</sup>. See e.g. comments of Burton J.A. in *McLaren v. Caldwell* (1880), 5 O.A.R. 363 at 367-68.

<sup>235</sup> (1913), 5 O.W.N. 322. It is interesting to note that on the facts of this case which were identical to those in *Morris v. Redlands Brick Ltd.*, *supra*, note 216, Middleton J. used reasoning on mandatory injunctions which is in substantial accord with those of Lord Upjohn.

<sup>236</sup> *Sub. nom. Black v. Canadian Copper Co.*, [1917] O.W.N. 243 (H.C.).

Court ought not to destroy the mining industry — nickel is of great value to the world — even if a few farms are damaged or destroyed.<sup>237</sup>

He thereupon awarded exceedingly modest damages to each of the plaintiffs.

The "Middleton thesis" received a potential boost from a *dictum* of Duff C.J. in the case of *Canada Paper Co. v. Brown*<sup>238</sup> in which the Chief Justice indicated that in the proper case it would be legitimate in deciding whether to grant injunctive relief to consider the effect on the local community and the defendant. Interestingly, he reached this conclusion by applying the "Smith formula" from *Shelfer*, detaching the fourth condition and modifying it to extend to a situation where the grant of an injunction would be oppressive to "innocent persons". His rationalization for this extension was that it merely amounted to "applying the limitations and restrictions which the law imposes in relation to the pursuit of this particular form of remedy, in order to prevent it becoming an instrument of injustice and oppression."<sup>239</sup>

This slender strand of authority was apparently strong enough to persuade the Ontario Court of Appeal in *Bottom v. Ontario Leaf Tobacco*<sup>240</sup> that the rules in *Shelfer* had been "more liberally construed in Canada than in England".<sup>241</sup> Accordingly, although the plaintiff sought an injunction to restrain the operations of the defendant's tobacco factory the fumes from which were causing him and his wife inconvenience and adverse physical sensations, damages were substituted. The rationale is clearly stated in the judgement of Macdonnell J.A.

... The defendant's factory, employing it is said some two hundred men, has been equipped with every known device for preventing the escape of fumes and smells; it is impossible to avoid the discomfort caused to the plaintiff without stopping the operation of the factory altogether; to grant an injunction prohibiting the present nuisance would mean the closing of the plant, resulting not merely in loss to the defendant but in unemployment disastrous to a small community.<sup>242</sup>

Since the *Bottom* case there appears to be scant Canadian authority justifying the substitution of damages for an injunction on the ground that the effect would be detrimental to the defendant or the local community.<sup>243</sup> However, in

---

<sup>237</sup> *Id.*, at 244. In 1924 the Ontario Legislature enacted *The Damage by Fumes Arbitration Act* which effectively emasculated the power of the courts in disputes involving the adverse effects of fumes from the roasting or smelting of nickel-copper ore. It achieved this by forbidding the grant of injunctions, and consigning the determination of damages to arbitration — see R.S.O. 1960, c. 86. However, although the Act subsisted until 1969, it has mysteriously disappeared from the 1970 Revision. The physical effects of this moratorium on injunctive relief are all too apparent in the Sudbury area.

For a spirited apologia for the "Middleton thesis" see H. Read, *Equity and Public Wrongs* (1933), 11 Can. B. Rev. 73, at 78-87.

<sup>238</sup> *Supra*, note 217 at 251-53, 291-93.

<sup>239</sup> *Id.*, at 252-53, 292-93.

<sup>240</sup> [1935] O.R. 205 (C.A.), [1935] 2 D.L.R. 699.

<sup>241</sup> *Id.*, per Macdonnell J.A. at 209, 703.

<sup>242</sup> *Id.*, at 211, 704.

<sup>243</sup> There seems to be only one subsequent authority which goes that far — see *Belisle v. Canadian Cottons Ltd.*, [1952] O.W.N. 114 (H.C.). It is still, of course, open to a court to reject claim for an injunction on the more orthodox grounds set out in *Shelfer* — see e.g. *Morris v. Dominion Foundries & Steel*, [1947] O.W.N. 413 (H.C.), [1947] 2 D.L.R. 840 (interferences by vibrations, dust and smoke smell and capable of being estimated in money and compensated for by a small money payment).

*Huston v. Lloyd Refineries*<sup>244</sup> the reasoning in the *Bottom* case was accepted as the ground for granting the plaintiff a limited injunction. In that case the plaintiffs had claimed an injunction and damages in respect of odours, noise and soot which affected their residence and which was caused by the defendant's oil refinery. There was evidence that the levels of odour and particulates had been reduced somewhat during the year preceding trial, and Greene J. accepted that no further precautions could be taken without the expenditure of money beyond the means of the defendant. As he was not willing to grant an absolute injunction which would "destroy an investment of half a million dollars" he made an order limiting the level of emissions to those achieved in the immediate pre-trial period.

(c) *Making a Choice*

Comparing the incidence of these conflicting theories in the cases it is clear that the "English doctrine" commands both more consistent and loftier support. Accordingly it should be possible for environmental counsel to argue persuasively that it is not proper for a judge to attach any significant weight to the economic loss to the defendant or to the surrounding community in exercising his discretion as to whether he should grant injunctive relief. Moreover, following the spirit of the judgments at trial and in the Supreme Court in *McKie v. K.V.P. Co.*,<sup>245</sup> and in *Gauthier v. Nanef*<sup>246</sup> he can underline this argument by suggesting that modern conditions and in particular the gravity of contemporary pollution problems provide a compelling policy rationale for an old dogma. It is possible, of course, that he will encounter judicial opinion which is rather more favourably disposed towards the "balancing of the equities" approach, and a judge who is ready in exercising his discretion to consider the economic positions of the defendant and the community. This fact will not necessarily be detrimental to his case, however, because he can argue convincingly that a "balancing of the equities", if it is to be truly comprehensive, must also include consideration of the adverse environmental effects of the defendant's operation if the pollution remains unabated. Thus, two apparently opposing community interests must be balanced against each other, rather than matching the economic livelihood of the populace against the purely individual concern of the particular plaintiff for a more acceptable life style, which was the effect of the "Middleton thesis". While it may have been both practically and philosophically difficult for judges like Middleton J. to look beyond the economic equation, because of the widespread lack of knowledge concerning environmental deterioration and its solution, and general satisfaction with the benefits of an expanding industrial society, the "judicial mercantalism" of those earlier judgments cannot be justified today.<sup>247</sup> The dangers of unabated pollution are only too apparent, the technological aids to control are available, and social values today increasingly reflect the desire to compensate for the tragic excesses of rampant industrialization by restoring the quality of the environment.

<sup>244</sup> [1937] O.W.N. 53 (H.C.). See also *Rombough v. Crestbrook Timber Ltd.* (1966), 55 W.W.R. 577 (B.C.C.A.), 57 D.L.R. (2d) 49.

<sup>245</sup> [1948] O.R. 398 (H.C.), [1948] 3 D.L.R. 201, [1949] S.C.R. 698.

<sup>246</sup> [1971] 1 O.R. 97 (H.C.), 14 D.L.R. (3d) 513.

<sup>247</sup> For a useful criticism of this type of judicial thinking in the American context, see J. Esposito, *Air & Water Pollution: What to Do While Waiting for Washington* (1970), 5 Harv. Civ. Rights — Civ. Lib. L. Rev. 32.

Whichever approach is followed, and the writer's bias is for the former, the important element in the plaintiff's argument must be the discounting of the traditional defence ploy that everything possible has been done to alleviate the problem, or that any solution which is technologically feasible is going to be financially ruinous. The first contention can be discounted in most situations by pointing to the existence of pollution abatement technology which can remove or reduce the pollution problem. There is little doubt that industrialists will often ignore technological reality and resist making adjustment in their processes to accommodate pollution control, unless they are forced to think and to act. In this respect it is particularly revealing that one of the most damning criticisms of this attitude comes from that sector of the engineering industry which is developing and building pollution control equipment. Thus one manufacturer of water pollution control equipment has stated:

... we have found it very hard to place our equipment out in the field, mostly because industries refuse to spend any money for this cause. The attitude towards cleaning up the waste water is very negative, and they feel that they are paying for something in which there is no profit available to them. Therefore, unless they are forced into doing something about it, my opinion is that they are going to continue to stall, either by pulling political strings or denying that there is any purification equipment available.<sup>248</sup>

Given both the state of technological possibility and the existence of this attitude amongst polluters the court should as a matter of course place the onus upon the industrialist to discover ways of remedying the situation. This may be achieved either by granting an injunction or awarding sizable damages. In every respect the former remedy is to be preferred. The choice of an injunction shows clearly that the court is serious about dealing with the root of the problem which has given rise to the plaintiff's claim. Moreover, when a court grants injunctive relief it undertakes a supervisory role in seeing that the terms of the injunction are satisfied, and thus can guarantee that the polluter takes appropriate action. In addition the injunction is inherently flexible and can be tailor-made to reflect the exigencies of the situation as they affect the defendant. In the first place injunctive relief need not be absolute. A limited injunction can be granted which recognizes the practical obstacles in achieving a total solution, or that such a solution may not be necessary from an environmental viewpoint.<sup>249</sup> Secondly, injunctions do not have to be made absolute from the time they are granted. The court may suspend the operation of the remedy for a period of time to allow the polluter to canvas available technology, or if necessary to work out a novel solution, and to come up with a form of control which satisfies the terms of the

---

<sup>248</sup> *Id.*, at 34 quoting from confidential correspondence.

<sup>249</sup> See *Huston v. Lloyd Refineries Ltd.*, [1937] O.W.N. 53 (H.C.); *Rambough v. Crestbrook Timber Ltd.* (1966), 55 W.W.R. 577 (B.C.C.A.) 57 D.L.R. (2d) 49. Obviously the grant of limited injunctions has to be approached with some caution, because its qualified form may serve the convenience of the polluter to the detriment of the environment. However, it has to be recognized that with certain forms of pollution, noise being the obvious example, an absolute injunction is rarely necessary. The desire of most complainants who allege noise pollution is not to achieve total silence, but a noise level which does not offend the ambient environment. The latter of course will vary because of physical location. Further, noise levels in the same location will change depending on the time of day or night. Accordingly remedial measures must be relative in nature.

order.<sup>250</sup> Finally it is quite clear from the decision of the Supreme Court in *Canada Paper Co. v. Brown*<sup>251</sup> that, if the order takes the form of prescribing definite curbs on the operations of the defendant in order to reduce pollution to acceptable limits, and a technological breakthrough is subsequently made which allows greater productivity without an attendant increase in pollution levels, the defendant can apply for relief from the inhibition.<sup>252</sup>

The economic hardship argument is more difficult to answer. The economic status of industrial units varies considerably, and it is possible that in the case of a concern with a slender profit margin, or which exists in a highly competitive sector of production a significant outlay on pollution control would be economically embarrassing and might be sufficient to force the concern out of business, with attendant economic dislocation in the adjacent community. Here again, however, it is all too easy to accept the argument at its face value. If industrialists are loath to act voluntarily in the matter of pollution control, it is quite likely that they will parade a series of excuses as to why it is unfair to force them into

---

<sup>250</sup> See e.g. *Beamish v. Glenn* (1916), 36 O.L.R. 10 (C.A.), 28 D.L.R. 702; *Taylor v. Mullen Coal Co.* (1915), 7 O.W.N. 764 (H.C.), aff'd 8 O.W.N. 445, 21 D.L.R. 481; *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 (H.C.); *McMaster v. Bell Bros.* (1931), 40 O.W.W. 536; *McKie v. K.V.P. Co.*, [1948] O.R. 398 (H.C.), [1948] 3 D.L.R. 201, aff'd with extension of time period [1949] 1 D.L.R. 39 (C.A.), aff'd [1949] S.C.R. 698; *Walker v. MacKinnon Industries Ltd.*, [1949] O.R. 549 (H.C.), [1949] 4 D.L.R. 739, aff'd with extension of time period [1950] 3 D.L.R. 159 (C.A.), aff'd [1951] 3 D.L.R. 577 (P.C.); *Russell Transport v. Ontario Malleable Iron Ltd.*, [1952] O.R. 621 (H.C.), [1952] 4 D.L.R. 719; *Atwell v. Knights*, [1967] 1 O.R. 419 (H.C.), 61 D.L.R. (2d) 108; *River Park Enterprises Ltd. v. Fort St. John* (1967), 62 D.L.R. (2d) 519 (B.C.S.C.).

A six month suspension period seems to be the norm in Canadian cases. However, other factors may persuade a court to allow a longer period. The latter is often the case where pollution results from community waste disposal where both technical and political considerations demand greater leeway for the polluter. — see *Stephens v. Richmond Hill*, [1955] O.R. 806 (H.C.), [1955] 4 D.L.R. 572 (one year); *Brown v. Morden* (1958), 24 W.W.R. 200 (Man. Q.B.), 12 D.L.R. (2d) 576 (16 months). Cf. *Plater v. Collingwood*, [1968] 1 O.R. 81 (H.C.), 65 D.L.R. (2d) 492 (immediate injunction granted against municipality to halt burning of refuse).

It is also possible to apply for an extension of the suspension period, if special grounds for extra grace can be shown — see *River Park Enterprises v. Ft. St. John* (1967), 62 D.L.R. (2d) 519 (B.C.S.C.) 528; *Brown v. Morden* (1958), 24 W.W.R. 200 (Man. Q.B.) 214, 12 D.L.R. (2d) 576, 590.

Except in the case of mandatory injunctions the Anglo-Canadian tradition is against the Court enquiring into and directing how the defendant may best abate the nuisance. It is for the defendant to discover the means. See *Macievich v. Anderson* (1951), 59 Man. R. 24 (C.A.), 1 W.W.R. (N.S.) 595, [1951] 2 D.L.R. 572. Cf. *Renken v. Harvey Aluminum Inc.* (1963), 226 F. Supp. 169 (D. Ore.) (defendants required to install electrostatic precipitators to abate air pollution).

<sup>251</sup> *Supra*, note 218.

<sup>252</sup> *Id.*, at 218, 296 per Anglin J.

that position.<sup>253</sup> In many cases by a reorientation of corporate priorities and the transmission of the cost to the consumers of their goods or services the economic burden of pollution control can be absorbed without any serious harm to the overall economic position of the industrial concern. Even in those cases where there is a serious economic problem to be faced by the defendant in making changes it is the writer's opinion that injunctive relief should be granted. Again the inherent flexibility of the remedy should be underlined. The remedy does not have to be formulated in absolute terms, its effect can be suspended and its substance can be revised if the economic circumstances of the polluter improve. The possibility of delaying the application of the injunction is particularly important. If the application of the injunction is suspended it may well give the defendant breathing space to work out a solution which enables it to comply with the order and carry on business. It may be possible to arrange to finance the project relatively painlessly. It may be possible to negotiate a government loan or subsidy. The possibilities for a less dramatic solution than closing down may be considerable.

If in the final analysis, the practical result is the shutting down of the offending operation, then, in the writer's opinion, that has to be faced by the polluter and the community with what fortitude they can muster. It can well be argued that in the contemporary scale of social values endeavours to improve the state of the environment are more important than the continued existence of marginal or struggling industrial concerns. Apart from anything else it is not beyond the ingenuity of society and particularly governments to compensate for the adverse community consequences of the demise of a local employer. New non-polluting industries may be brought in or encouraged to set up. Workers may be absorbed in other plants or relocated. The consequences are remediable. However, pollution, by definition, has no other solution than to restrict or remove its sources. If it continues, then the sure result is further and perhaps irreparable corruption of the environment. It may be argued that an award of damages would be one less drastic way of dealing with the problem. This, of course, assumes that damages would be less burdensome to the defendant. This is not necessarily the case. If damages are to be a satisfactory substitute for an injunction they should reflect fully the potential injury which the plaintiff can expect, including further decreases in the value of his property and the continued existence of a less than satisfactory life style.<sup>254</sup> If the pollution problem

---

<sup>253</sup> The obvious arguments are economic hardship to both the defendant and the community. For a recent example of an attempt to persuade a court of the strength of this type of argument, see *Atwell v. Knights*, [1967] 1 O.R. 419 (H.C.) 424, 61 D.L.R. (2d) 108, 113 (economic hardship in moving malodorous hen houses).

The classic answer to this kind of ploy is contained in the delightfully sceptical judgement of Bennett J. in *Andreae v. Selfridge & Co. Ltd.*, [1963] 2 A11 E.R. (Ch.) aff'd with variation as to damages [1938] Ch. 1 (C.A.). In response to the defendant's argument that the necessity of using its manpower effectively ruled out cessation of its troublesome operations at certain times during the day, the learned judge remarked:

I cannot help being reminded of a line I remember in "Paradise Lost": "So spoke the Fiend, and with necessity, the tyrant's plea, excused his devilish deed."

<sup>254</sup> See Mayne & McGregor, *On Damages* (12th Ed., London: Sweet & Maxwell, 1961) at 183-85. *Quaere* whether MacRuer C.J. is correct in suggesting in *Russell Transport Ltd. v. Ontario Malleable Iron Co.*, [1952] O.R. 621 (H.C.), [1952] 4 D.L.R. 719 that a court in substituting damages for an injunction cannot compensate for the existence of a continuing nuisance.



is significant then the damages should be sizable. If they are sizable then surely the same economic objection is likely to arise that the polluter may be forced out of business. Moreover, where significant damages are levied the remedy is absolute in the legal sense. There is no legal device for easing the impact on the defendant, as there is where an injunction is granted. If a judge tries to circumvent these problems by allowing economic factors to affect the level of damages he awards, then the criteria he is using are at odds with those generally accepted in the award of tortious damages, and he is effectively licensing the polluter.<sup>255</sup>

### *Conclusion*

A survey of Canadian authority in the area of nuisance law suggests that while public nuisance has distinct limitations as the basis of an environmental suit, private nuisance has considerable potential. Three features of the private nuisance action are worthy of note. The first is that the conceptual framework of nuisance is sufficiently malleable to allow the injection of the environmental perspective. Secondly, judges who have been faced with private nuisance litigation which involved pollution problems have been prepared to recognize that fact and to respond with judgments which show a considerable degree of environmental sensitivity. As suggested in the discussion of the relevance of physical location, there is room for rethinking by the judges, but, given the elements of substantive flexibility and judicial responsiveness to environmental arguments, change is by no means impossible. Finally, it can be said that the way in which most Canadian courts have approached the question of the selection of remedies in private nuisance litigation suggests that they are ready to use the law to make polluters change their ways, without the sort of outdated scruples which still affect some American courts and which have had their supporters in some older Canadian cases. The action to protect riparian rights is, if anything, more viable than private nuisance because not only has the pollution element always been dominant, but also the test applied has meant an absolute interdiction of pollution, if pollution is proven. With creative application of the potential in both actions the courts should be able to develop the notion of admonition or "therapeutic deterrence" suggested earlier, and thus play a useful role in dealing with this serious contemporary problem. This is by no means to suggest that litigation is the elixir of our environmental ills. There are obvious shortcomings to a system which deals with as complex a problem as pollution on an incidental and piecemeal basis. Litigation is not going to solve the total pollution problems of, for example, a large city or an extensive river system. It is, however, one instrument which can be used in the absence of effective solutions from more appropriate sources in situations where there is a clearly definable local pollution problem. Moreover, if enough environmental lawsuits are launched against polluters and succeed, a beneficial psychological effect on polluters in general may accrue. A new spectre will be created, the possibility of being forced into a public forum and asked to explain their conduct and lack of concern for

---

<sup>255</sup> Indeed the whole emphasis of the English tradition in substituting damages for injunctive relief is upon the trivial quality of the interference suffered by the plaintiff. Only within the limits laid down by Smith A.J. in *Shelfer* can the defendant purchase his license.

environmental values. Thus the stimulus for redemption may be broader than the cases in which compulsion is actually applied.

It is the writer's belief that the time is ripe for initiative in environmental litigation. The environmentalist has exposed and is exposing the serious ecological problems associated with pollution. It remains for the lawyer to respond with appropriate legal techniques to combat the problems. Litigation is one constructive expedient which can be used effectively *now* without waiting for legislation or administrative initiatives. The action in private nuisance and the action for the impairment of riparian rights are two "well-tempered swords" available to the environmental lawyer who is anxious to respond to this challenge.

