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# COMMON LAW REMEDIES AND PROTECTION OF THE ENVIRONMENT

JULIAN CONRAD JUERGENSMEYER †

For centuries, common law courts have been confronted with disputes which in the ecologically conscious 1970's would be immediately identified as environment cases. Until recently neither the courts nor the litigants dubbed them such but all of the essential ingredients were present. To wit, the defendant in some way altered the natural quality of air or water in such a way that the changed condition caused damage or disturbance to the plaintiff's person or property. In spite of any conscious appreciation of ecological considerations, the courts found themselves furnished by general common law concepts with a panoply of theories which it could use to grant remedies to those plaintiffs who sufficiently demonstrated the damage they suffered when the defendant caused deterioration of environmental quality. The purpose of this article is to examine those common law principles which have been and are being used in environment cases and to evaluate their present and future effectiveness in terms of the present ecological context.

Much has been written, especially in the United States, about the common law remedies, or perhaps more correctly, the common law theories of action which form the basis for the granting of remedies and the private rights to which they relate.<sup>1</sup> Except for a

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<sup>1</sup> Some of the major items which have appeared in law journals are: V. F. COLEMAN, *Possible Repercussions of the National Environmental Policy Act of 1969 on the Private Law Governing Pollution Abatement Suits* (1970), 3 *Natural Resources Law* 647; J. C. ESPOSITO, *Air and Water Pollution: What to do While Waiting for Washington* (1970), 5 *HARV. CIV. RIGHTS—CIV. LIB. L. REV.* 32; J. C. JUERGENSMEYER, *Control of Air Pollution Through the Assertion of Private Rights*, [1967] *DUKE L.J.* 1126; J. C. JUERGENSMEYER and A. MORSE, *Air Pollution Control in Indiana in 1968: A Comment* (1967-68), 2 *VAL. U. L. REV.* 296; L. A. MILLER, *Air Pollution Control: An Introduction to Process Liability and Other Private Actions* (1970), 5 *NEW ENGLAND L. REV.* 163; L. A. MILLER and D. J. BORCHERS, *Private Lawsuits and Air Pollution Control* (1970), 56 *A.B.A.J.* 465; E. F. 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. L. 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; *Comment, Legal Methods for Control of Air Pollution in New York State: An Evaluation* (1969-70), 34 *ALBANY L. REV.* 563; *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 Abatement Enforcement in Texas 1969* (1970), 11 *S. TEX., L.J.* 416; *Comment, Air Pollution Abatement Control in Texas* (1969), 47 *TEXAS L. REV.* 1086; *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.

few very recent developments, a detailed discussion of these matters is not needed and will not be attempted. Instead, each of the important theories will be discussed in terms of a court decision or series of decisions which indicate the general use of such theory in environmental litigation. American cases will be used in most instances but Canadian and British readers will find footnote references which will indicate the universality of the theories throughout the common law world.<sup>2</sup>

#### COMMON LAW THEORIES AND REMEDIES

The list of traditional theories of actions which have been employed by common law courts in environmental litigation is not long. In fact, there are only four major ones: nuisance, trespass, negligence, and strict liability.<sup>3</sup> The list of remedies is even shorter: damages and injunctions. With minor variations these theories are equally applicable to air, water, noise, and land pollution, except that an additional and unique theory must be added in regard to water pollution—namely, the protection of riparian rights.

#### *Nuisance*

Nuisance is the theory with which to logically begin because it has, no doubt, been the theory which those harmed by environmental degradation have asserted as a basis of recovery for the longest time and with the greatest frequency. As early as 1611, the Court of King's Bench granted damages and an injunction to plaintiffs whose air had been "infected and corrupted" by the odors from a defendant's hog sty.<sup>4</sup>

In more recent and more serious cases—at least from an economic standpoint—litigants have found the nuisance theory appropriate since the polluting activity complained of so easily fits into the purview of nuisance—the use of property which interferes with the rights of others to enjoy their own property.<sup>5</sup> A recent example of its application in the field of water pollution is *Nelson v. C & C Ply-*

<sup>2</sup> For a comparative study of pollution control law in the United States, Canada, the United Kingdom, Australia and the members of the European Economic Community, see J. C. JUERGENSMEYER, *A Comparative View of the Legal Aspects of Pollution Control* (1971), 6 SUFFOLK U.L. REV. For the law of Canada, special reference should be made to A. R. LUCAS, *Legal Techniques for Pollution Control: The Role of the Public*, *supra*, at 167.

<sup>3</sup> For general discussions of these theories (1) in regard to environment cases in general, see *Comment, The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution* (1970), 16 WAYNE L. REV. 1085; (2) in regard to air pollution, J. C. JUERGENSMEYER, *Control of Air Pollution Through the Assertion of Private Rights*, [1967] DUKE, L.J. 1126; and (3) in regard to water pollution, *Note, Private Remedies for Water Pollution* (1970), 70 COLUM. L. REV. 734.

<sup>4</sup> *William Aldred's Case* (1611), 77 E.R. 816 (K.B.).

<sup>5</sup> Private Nuisance is "a definition of the dividing line between the right of any owner to use his property as he so desires and the recognition of that right in another.": *Roberts v. C.F. Adams & Son* (1947), 184 P. (2d) 634, 637 (S.C. OKLA.).

wood.<sup>6</sup> The plaintiffs, who were owners of a small farm, sought recovery from the defendant, a plywood company, on the ground that glue waste from the defendant's nearby plywood manufacturing plant had contaminated the local groundwater supply, thereby causing the water in the plaintiff's well to become discolored and odoriferous. The Supreme Court of Montana upheld the award of damages by the lower court basing its reasoning on a nuisance theory.<sup>7</sup>

Use of the nuisance doctrine is not confined to private litigants because if a nuisance affects "an interest common to the general public, rather than peculiar to one individual, or several,"<sup>8</sup> it may be abated by public officials. For example, in a recent Maryland case the Air Quality Control Division of the Maryland State Department of Health successfully sought an injunction against the defendant chemical company for "maintaining a public nuisance which endangers the health, safety and general welfare of the people of the State of Maryland."<sup>9</sup> The lower court which decided the case, took the very broad view of "nuisance" to be "anything that unlawfully annoys or does damage to another, and it includes everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property."<sup>10</sup>

This public nuisance concept may, however, act as a limitation on the use of the nuisance doctrine by private litigants in pollution cases. If the nuisance complained of is labeled public, then only public officials may bring the action unless the private individual can show that he has suffered "special damages," which means damage different in *kind* and not just *degree* from that suffered by the general public.<sup>11</sup> The classic application of this limitation is found in the case of *Bouquet v. Hackensack Water Co.*<sup>12</sup> in which the plaintiff, a riparian landowner along the Hackensack river, was denied any recovery against the defendant for "fouling" the river (and thereby

<sup>6</sup> (1970), 465 P. (2d) 314 (S.C. MONT.). For a general nuisance doctrine in a Canadian case involving odors from water pollution, see *River Park Enterprises v. Town of Fort St. John* (1967), 62 D.L.R. (2d) 519 (B.C.S.C.). A recent British case which demonstrates the currency of the nuisance doctrine in pollution cases in that country is *Halsey v. Esso Petroleum Co. Ltd.*, [1961] 2 All E.R. 145 (Q.B.). "Nuisance" has also seen at least some use in pollution cases in Australia: see LANTERI, THE LEGISLATIVE CONTROL OF AIR AND WATER POLLUTION IN AUSTRALIA (1970) 7-8.

<sup>7</sup> The lower court also spoke in terms of negligence but the Supreme Court took a nuisance view of the controversy.

<sup>8</sup> PROSSER, LAW OF TORTS (3rd ed. 1964) § 89, at 606.

<sup>9</sup> *Maryland v. Galaxy Chemical* (1970), 1 E.R.C. 1660, 1661 (MD. CIR. CT. CECIL CNTY.).

<sup>10</sup> *Id.*, at 1668.

<sup>11</sup> See *supra*, footnote 8, § 89, at 608. Two states, Florida and Wisconsin, have statutes which allow private individuals to institute judicial proceedings to enjoin a public nuisance. See *Comment, The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution* (1970), 16 WAYNE L. REV. 1085, 1108. For a series of Ontario cases dealing with the limited right of private individuals to proceed judicially when a nuisance is labeled "public," see *St. Lawrence Rendering Co. v. Cornwall*, [1951] 4 D.L.R. 790 (ONT. H.C.); *Preston v. Hilton* (1920), 48 O.L.R. 172 (ONT. S.C.); and *Turtle v. City of Toronto* (1924), 56 O.L.R. 252 (ONT. C.A.).

<sup>12</sup> (1917), 101 A. 379 (CT. ERR. & APP.).

making it less available for fishing, boating and swimming) on the ground that the rights allegedly interfered with were "rights of purely public character."<sup>13</sup> As one writer has said, the *Bouquet* case is "a prime example of strict formalization in common law classification and its effect upon the resolution of particular controversies."<sup>14</sup> Happily, more recent American decisions have been less rigid<sup>15</sup> but the public nuisance—private nuisance distinction remains a stumbling block the would-be private pollution controller must avoid at his peril.

Further restrictions on the usefulness of nuisance actions are found in such doctrines as "coming to the nuisance," which limits the right of late-comers to a nuisance in much the same way as assumption of risk limits tort-negligence plaintiffs. Although this doctrine has seldom been *the* deciding factor, it frequently is one of the reasons given for denying a recovery.<sup>16</sup> In *Waschak v. Moffat*,<sup>17</sup> for example, the plaintiffs unsuccessfully sought recovery for the damage done to their houses by hydrogen sulfide emitted from the defendants' culm banks; the court, after holding that the defendants had not made an unreasonable use of their property, added the comment that there could have been no recovery because:

When plaintiffs purchased the dwelling they were fully aware of the surrounding situation.

In *Versailles Borough v. McKeesport Coal & Coke Co.*, 83 Pittsb. Leg. J. 379, Mr. Justice Musmanno, when a county judge, accurately encompassed the problem when he said:

"The plaintiffs are subject to an annoyance. This we accept, but it is an annoyance they have freely assumed. Because they desired and needed a residential proximity to their places of employment, they chose to found their abode here. It is not for them to repine; and it is probable that upon reflection they will, in spite of the annoyance which they suffer, still conclude that, after all, one's bread is more important than landscape or clear skies.

"Without smoke, Pittsburgh would have remained a very pretty village."<sup>18</sup>

<sup>13</sup> *Id.*, at 379.

<sup>14</sup> *Comment, Private Remedies for Water Pollution* (1970), 70 COLUM. L.REV. 734, 741.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Supra*, footnote 8, § 92, at 632:

The question frequently arises, whether the plaintiff assumes the risk and is barred from recovery by the fact that he has "come to the nuisance" by purchasing land and moving in next to it after it is already in existence or operation. The prevailing rule is that in the absence of a prescriptive right the defendant cannot condemn the surrounding premises to endure the nuisance, and that the purchaser is entitled to the reasonable use and enjoyment of his land to the same extent as any other owner, so long as he buys in good faith and not for the sole purpose of a vexatious lawsuit. This is true in particular, for obvious reasons, of public nuisances, and of those private ones which the defendant could abate at any reasonable cost. There are cases, however, which have held that the plaintiff is barred by his voluntary choice of a place to live, particularly where the defendant's activity is one in which the public has a major interest; and the safer and more accurate statement would appear to be that "coming to the nuisance" is merely one factor, although clearly not the most important one, to be weighed in the scale along with the other elements which bear upon the question of "reasonable use."

<sup>17</sup> (1954), 109 A. (2d) 310 (S.C. Pa.).

<sup>18</sup> *Id.*, at 316.

In the same vein, defendants have in some cases successfully argued that the long period of time their nuisance went uncomplained of has caused it to ripen into a prescriptive right. In *W. G. Duncan Coal Co. v. Jones*,<sup>19</sup> a farmer sought recovery for damage to his crops allegedly caused by poisonous mine water discharged from the defendant's mine into a stream which overflowed onto the plaintiff's land. The Court of Appeals of Kentucky, although sending the case back for retrial, concluded that:

. . . if the company in this case has used the stream in question for the drainage of water from its mines for the statutory period of 15 years it has acquired the right to continue to use the stream for the same purpose, to the same extent, and under the same circumstances and conditions.<sup>20</sup>

Especially in Canada and Great Britain, defendants have also escaped liability by asserting statutory authorization of the activity complained of as a nuisance. The expression of the statutory authorization defense which has become classic is that of Viscount Dunedin in the English case, *Manchester Corporation v. Farnworth*:

When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.<sup>21</sup>

At least one recent Canadian case seems to lessen the effectiveness of the doctrine as a defense;<sup>22</sup> however, the concept is still an obstacle to be overcome by the assenter of the nuisance, and may ultimately prove to be his undoing.<sup>23</sup>

In conclusion, the nuisance concept has been and continues to be a frequently used common law theory for individuals and public officials who seek to control or recover from those who use their property in such a way that they cause pollution. The theory is, however, replete with pitfalls and its usefulness is impaired by the confusion of the decisions in and among the various jurisdictions. As one lawyer experienced in pollution control litigation has observed:

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<sup>19</sup> (1953), 254 S.W. (2d) 720 (C.A. Ky.).

<sup>20</sup> *Id.*, at 723.

<sup>21</sup> [1930] A.C. 171, 183 (H.L.).

<sup>22</sup> See, *City of Portage La Prairie v. B.C. Pea Growers Limited*, [1966] S.C.R. 150.

<sup>23</sup> See generally, *CANADIAN INDUSTRIES LTD., A DIGEST OF ENVIRONMENTAL POLLUTION LEGISLATION IN CANADA: AIR AND SOIL* (N.S. Cooke, R.M. Cooper, J. Pilon eds. 1970) CL-6-8.

The nuisance cases are virtually impossible to summarize or even categorize since they differ so greatly from state to state as to the reasonableness of the defendant's conduct, the nature of the plaintiff's interest, and the interrelationship with other remedies, such as public nuisance.<sup>24</sup>

### *Trespass*

While one of the key aspects of nuisance is its nontrespassory nature, many instances of environmental degradation result from trespassory invasions of property interests. Consequently, the common law theory of action in trespass, is sometimes useful to plaintiffs in environment litigation. The leading American cases on point center around the air pollutants emitted by the Reynolds Aluminum plant at Troutdale, Oregon. The most important of these from the standpoint of the law of trespass is *Martin v. Reynolds Metals Company*.<sup>25</sup> In this case, cattle raisers near the Troutdale aluminum plant sought damages for the harm they allegedly suffered when their cattle ingested fluorides emitted from the defendant's aluminum plant and deposited on their land and water. The lower court held for the plaintiffs on the ground that there had been a trespassory invasion of their land by the defendant's pollutants. On appeal to the Supreme Court of Oregon, the defendant argued that the mere settling of fluoride deposits on the plaintiff's land did not meet the requirements for a trespass, namely, that there be a direct breaking and entering on the land. The Supreme Court rejected the defendant's view of the inapplicability of trespass and held:

The view recognizing a trespassory invasion where there is no "thing" which can be seen with the naked eye undoubtedly runs counter to the definition of trespass expressed in some quarters. . . . It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a *direct* invasion. But in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released. In fact, the now famous equation  $E=mc^2$  has taught us that mass and energy are equivalents and that our concept of "things" must be reframed. If these observations on science in relation to the law of trespass should appear theoretical and unreal in the abstract, they become very practical and real to the possessor of land when the unseen force cracks the foundation of his house. The force is just as real if it is chemical in nature and must be awakened by the intervention of another agency before it does harm.

If, then, we must look to the character of the instrumentality which is being used in making an intrusion upon another's land we prefer to

<sup>24</sup> P.D. RHEINGOLD, *Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere* (1966-67), 33 BROOKLYN L.REV. 17, 25.

<sup>25</sup> (1959), 342 P. (2d) 790 (S.C. ORE.), *cert. denied* (1960), 362 U.S. 918.

emphasize the object's energy or force rather than its size. Viewed in this way we may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist.

We are of the opinion, therefore, that the intrusion of the fluoride particulates in the present case constituted a trespass.<sup>26</sup>

Trespass has also been used in connection with water pollution, especially when pollutants are carried by water on to land. In a recent Kentucky case,<sup>27</sup> for example, the Court of Appeals labeled as a continuing trespass the deposit of deleterious substances from the defendants' coal mines brought to the plaintiff's land during a polluted river's overflow periods.

One must conclude therefore, that trespass must join nuisance as a common law theory of action which is useful to would-be private pollution controllers. The problem is that trespass is so frequently joined with nuisance by judges when writing their opinions, and by plaintiffs when phrasing their cause of action, that it is usually impossible to separate the two theories sufficiently to evaluate the usefulness of trespass doctrines to environmentalists without the accompanying nuisance aspects of the case. About the most which can be said of the trespass doctrine in environmental litigation is that it can frequently be added to nuisance theories and can sometimes be used to advantage when a statute of limitations may bar a nuisance action, but not a trespass action based on the same set of facts.

### *Negligence*

A third theory whereby those injured by pollution or other ecological impairment may seek recovery at common law is negligence. If the defendant negligently pollutes, and that pollution causes damage to a plaintiff, the basis for a negligence action has been established. The basic legal approach taken by the courts in such instances can be illustrated by *American Cyanamid Co. v. M. G. Sparto*.<sup>28</sup> The appellant company, through one of its plants located upstream from the appellee truck farmers, discharged substances into the river which harmed the appellees' crops when they used the river water for irrigation purposes. The Fifth Circuit Court of Appeals upheld the award of damages against the appellant on a jury finding that the discharge of the pollutants and the failure to warn the appellees of their potential harm, constituted negligence, and that such negligence was the proximate cause of damage to the appellees' property.

<sup>26</sup> (1959), 342 P. (2d) 790, 793-94 (S.C. ORE.).

<sup>27</sup> *West Kentucky Coal Co. v. Rudd* (1959), 328 S.W. (2d) 156 (C.A. Ky.).

<sup>28</sup> (1959), 267 F. (2d) 425 (5th Cir.).



The two prime difficulties pollution controllers encounter in using the negligence action, as is the case with all plaintiffs in negligence actions, are first, proof of the causal connection between the pollution and the harm, and second, the standard of care which is imposed to determine whether the conduct is negligent or non-negligent.

One of the most revealing private actions based on pollution injury, from the standpoint of causation, is *Hagy v. Allied Chemical & Dye Corporation*.<sup>29</sup> In this case, the plaintiff sought recovery for damages allegedly suffered to her larynx from sulfuric acid compounds negligently emitted from the defendant's plant. The defendant polluter admitted negligence in emitting the pollutants, but asserted as a matter of law that the evidence was insufficient to permit the jury to find a causal connection between the emissions and the plaintiff's condition. The court upheld a jury verdict for the plaintiff and stated:

The burden did not rest upon respondents to prove that the removal of respondent's larynx would not have been necessary but for her exposure to the smog; the burden was rather upon appellants to convince the jury that the operation would have been ultimately necessary in any event, even though the cancerous larynx had not been traumatized by the irritation of the smog.<sup>30</sup>

The establishment of the standard of care, a departure from which will constitute negligence is an equally difficult problem which the courts must resolve in order to decide a negligence-based pollution case. Thus far, at least, the courts have not formulated a standard and, in the long run, the standard will be a reflection of the societal resolution of the priorities to be given to environmental protection and preservation. In the short-run, the controversy centers around the balance between pollution prevention costs to the "polluter," and pollution damage costs to society and the particular plaintiffs. One of the best judicial expressions of this balancing problem is that found in *Renken v. Harvey Aluminum (Incorporated)*:

While the cost of the installations of these additional controls will be a substantial sum, the fact remains that effective controls must be exercised over the escape of these noxious fumes. Such expenditures would not be so great as to substantially deprive defendant of the use of its property. While we are not dealing with the public as such, we must recognize that air pollution is one of the great problems now facing the American public. If necessary, the cost of installing adequate controls must be passed on to the ultimate consumer. The heavy cost of corrective devices is no reason why plaintiffs should stand by and suffer substantial damage.

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<sup>29</sup> (1954), 265 P. (2d) 86 (Dist. Ct. App. Cal.).

<sup>30</sup> *Id.*, at 92.

[O]nce the plaintiffs established that fluorides were deposited on their lands from the plant of the defendant, the burden of going forward with the evidence was on the defendant to show that the use of its property, which caused the injury, was unavoidable or that it could not be prevented except by the expenditure of such vast sums of money as would substantially deprive it of the use of its property.<sup>31</sup>

### *Strict Liability*

A discussion of common law remedies would be incomplete without at least some reference to the concept of "strict liability" or "ultra-hazardous activity." Considering it a separate theory of action is debatable; perhaps it would be best to consider it, as some writers have done, as a branch of the law of nuisance.<sup>32</sup> Whatever the conceptual framework one chooses, many American courts have interpreted, or misinterpreted, the English case of *Rylands v. Fletcher*<sup>33</sup> as establishing the concept that there are activities for which, if they lead to damage, the perpetrator should be held liable without any necessity on the part of the person harmed to show negligence.<sup>34</sup>

<sup>31</sup> (1963), 226 F. SUPP. 169, 172, 174 (D. ORE.).

<sup>32</sup> Comment, *The Role of Private Nuisance Law in the Control of Air Pollution* (1968), 10 ARIZ. L. REV. 107, 109-11.

In the middle of the 19th century a new and unfortunate distinction was made. The development of the law of negligence caused courts to attempt to distinguish between nuisances that required proof of negligence and those that did not.

The rule of the case of *Rylands v. Fletcher*, itself having nothing to do with a nuisance, but rather involving a trespass, was seized upon to formulate the distinguishing test. *Rylands* applied liability regardless of care to one who keeps an unnatural and inherently dangerous thing on his property when that thing escapes and injures another's property. *Rylands*, when generalized, placed emphasis on the actor's knowledge of a risk of harm from the nature of the thing he kept on his land. From this knowledge the courts imputed intent. When this *Rylands* theory, that in some kinds of cases liability attached without proof of lack of due care, was incorporated into American tort law, it became the "ultra-hazardous activity" rule of absolute liability, which in nuisance law became "absolute nuisance." Whenever one realized that there was a risk of harm when he allowed an emission, the nuisance he created was intentional and he was liable for any substantial interference with his neighbor's rights regardless of his care or of the reasonableness of his use of his property.

The greatest significance of the absolute nuisance doctrine is its treatment, in effect, of all "intentional" nuisances as ultra-hazardous activities. This would seem to set up an unintentional "nuisance by negligence" as a separate tort with different guidelines and rules. This demonstrates a failure to understand that while negligence can be the cause of a nuisance, negligence is not a necessary element in the proof of a nuisance.

The use of absolute nuisance law in many states is particularly illogical since those same states have rejected the *Rylands* doctrine and its American cousin — ultra-hazardous activity strict liability. In those states, merely by proceeding in nuisance instead of trespass, a plaintiff can invoke the law supposedly rejected.

<sup>33</sup> (1868), L.R. 3 H.L. 330.

<sup>34</sup> The use by British courts of *Rylands v. Fletcher* in nuisance pollution cases can be noted in the previously cited case of *Halsey v. Esso Petroleum Co. Ltd.*, *supra* footnote 6. In *Halsey* one item of damages claimed by the plaintiff was based on damage to the paint on his automobile allegedly caused by acid smuts from defendant's oil depot. In this regard the court at 152 said:

Nuisance is commonly regarded as a tort in respect of land. In *Read v. J. Lyons & Co., Ltd.*, Lord Simonds said "... only he has a lawful claim who has suffered an invasion of some proprietary or other interest in land." In this connexion the allegation of damage to the plaintiff's motor car calls for special consideration, since the allegation is that when the offending smuts from the defendant's chimney alighted on it, the motor car was not actually on land in the plaintiff's occupation, but was on the public highway outside his door. Whether or not a claim in respect of private nuisance lies for damage to the motor car in these circumstances, in my judgment such damage is covered by the doctrine in *Rylands v. Fletcher*. If it be the fact that harmful sulphuric acid or harmful sulphate escaped from the defendants' premises and damaged the motor car in the public highway, I am bound by the decision of the Court of Appeal in *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, and *Miles v. Forest Rock Granite Co. (Leicestershire), Ltd.* in neither of which cases

This strict liability concept has obvious though uncertain advantages to offer private plaintiffs in environment cases who, for whatever reason, prefer not to bear the burden of establishing the negligent or intentional aspect of traditional negligence, nuisance, and trespass doctrines. The confusion and lack of uniformity which characterizes the judicial response to a plaintiff's use of "strict liability" in an environment case can be seen by examining the opinions in *Wright v. Masonite Corporation*.<sup>35</sup>

The plaintiff in this case was a grocer whose stock of goods was damaged by formaldehyde gas which allegedly escaped from the defendant's masonite board factory. The federal district court resolved the factual conflicts in the plaintiff's favor but denied recovery on the theory that the invasion of his property was not intentional, and therefore did not form the basis for an actionable private nuisance. In affirming the lower court's decision, the Court of Appeals, per Chief Judge Haynsworth, stressed the unintentional element of the defendant's acts and the inapplicability of the *Rylands v. Fletcher* doctrine since no ultrahazardous activity was involved. In this regard, he observed:

Some American states have applied the rule of *Rylands v. Fletcher*, in noxious gas cases. They are collected in Prosser on Torts, 3rd Edition, at pages 524-6. They include Maryland and South Carolina, in this Circuit, but not North Carolina. The more general rule in the United States confines the *Rylands v. Fletcher* doctrine to ultrahazardous activities. This is recognized by Prosser and by the Restatement. Since the North Carolina Supreme Court, in discussing this subject, frequently has cited and paraphrased the Restatement, it provides a particularly useful point of reference.

In the Restatement of Torts, the *Rylands v. Fletcher* doctrine, as applied to ultrahazardous activity, is set forth in §§ 519-20. The very different rules governing liability for private nuisances are set forth in Chapter 40, the first section of which is 822. That section provides that an actor is liable for a nontrespassory invasion of another's interests in land, if, in this context, the invasion is both intentional and unreasonable. Under § 825, the invasion is intentional within the meaning of § 822 only if the actor acts for the purpose of causing the harm or knows that it is resulting or is substantially certain to result from his

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was the plaintiff in occupation of land. This doctrine of *Rylands v. Fletcher*, whether or not it is strictly based on nuisance, applies to the sulphuric acid or sulphate in smuts or oily drops wherever they alight: on washing hung out to dry, as well as on to a motor car in the street. In my judgment the plaintiff is also right in saying that if the motor car was damaged in this way while on the public highway, it is a public nuisance in respect of which he has suffered special damage. This view occurs in the judgment of Oliver, J., on very different facts in *Holling v. Yorkshire Traction Co., Ltd.* and I have no evidence as to the period during which the plaintiff's motor car was outside his door; but even if the plaintiff was using the road as a place to garage his motor car, and he was not entitled to do so, I do not regard those facts as disentitling him to claim damages in respect of injury to the motor car. [CITATIONS OMITTED].

<sup>35</sup> (1966), 368 F. (2d) 661 (4th Cir.).

conduct. Sections 826, et seq., elaborate the rules for application of the concurrent requirement that the actor's conduct be unreasonable.<sup>36</sup>

In dissenting, Circuit Judge Bryan stressed the need to relate intention to the performance of the act causing harm—not to the harm caused:

The District Court's findings established, as the majority concedes, that appellee Masonite was purposely emitting noxious gases, which substantially and unreasonably invaded Wright's property. Thus, his hurt arose from what Masonite did, and *intended to do*, i.e., to expel and rid its plant of unwholesome fumes. True, the expulsion was not negligent, reckless, ultrahazardous or accidental in any sense, and Masonite *did not intend to injure anyone*, but injury there was.

To ascertain whether the acts were intentional, the inquiry is directed in North Carolina, and rightly I think, to the voluntariness of the offending acts. This inquiry does not pertain to the effect or consequences of the acts. It is not whether the *injury* was intentional; but whether the *causative acts* were intentionally done. The only question in respect to the injury is whether it was substantial and unreasonable.<sup>37</sup>

After discussing various North Carolina cases in support of his contention, Judge Bryan concluded:

Our Circuit spoke similarly to the question in *Norfolk & W. Ry. v. Amicon Fruit Co.*, 269 F. 559, 561-562, 14 A.L.R. 547 (4 Cir. 1920):

"Defendant built this pipe line on its own land and for its own benefit, acting thereby in a private capacity and without legislative authority. However skillfully the work was done and whatever the diligence since exercised, it must be held responsible, not perhaps for a purely accidental occurrence, but for those injuries to an adjoining owner which actually and repeatedly and as it were inevitably resulted, despite the care with which the pipe line was maintained and used. This is the doctrine of *Rylands v. Fletcher*, L.R. (1) Exch. 265, long regarded as a leading case, and of the following \* \* \*." (Citations omitted.)

To me the law of North Carolina more closely resembles *Rylands v. Fletcher* than it does the Restatement.<sup>38</sup>

### *Riparian Rights*

Courts in those jurisdictions which follow the riparian concept of water rights have long recognized that the riparian right can be violated through an impairment of the quality as well as the quantity of the water which reaches the riparian owner. As one early American court expressed it:

An injury to the purity or quality of the water to the detriment of other riparian owners constitutes in legal effect a wrong and an invasion of

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<sup>36</sup> *Id.*, at 663.

<sup>37</sup> *Id.*, at 666-67.

<sup>38</sup> *Id.*, at 667.

private right in like manner as a permanent obstruction or diversion of the water.<sup>39</sup>

Strictly speaking, any discussion of the assertion of riparian rights to obtain relief in regard to water pollution should distinguish between the jurisdictions which follow the natural flow theory<sup>40</sup> and those which have adopted the reasonable-use concept.<sup>41</sup> In actual fact, however, the distinction is not essential in water pollution cases. As one treatise writer has observed:

Many courts have not recognized that there are two distinct theories and, in pollution cases, tend to temper language sounding in the natural-flow theory with qualifications from the full beneficial or reasonable-use theory. The law has therefore been confusing.<sup>42</sup>

In theory, if not always in practice, any degradation of the quality of water beyond a de minimis principle violates the rights of riparians in a natural flow jurisdiction and gives them a cause of action against the perpetrator of the degradation. Thus, in *Mann v. Willey*,<sup>43</sup> a downstream riparian owner was granted an injunction to stop the discharge of sewage by an upstream riparian who operated a summer

<sup>39</sup> *Merrified v. Lombard* (1866), 95 MASS. (13 ALLEN) 16, 17 (MASS. CH.). One observer has noted in regard to riparian rights in England: "The fact is that most riparian owners are completely ignorant of the strength of their common law rights and, if the majority were to enforce these rights as strictly as a few have done in the past, a wholly intolerable situation would arise.": *Riparian Rights and Pollution* (1962), 233 LAW TIMES 423; and see for example, *Brocket v. Luton Corp.*, [1948] W.N. 352 (CH.). The Canadian situation is discussed by A.R. LUCAS, *Legal Techniques for Pollution Control: The Role of the Public*, *supra*, at 167.

The reader should note that the discussion in the text in regard to riparian rights is irrelevant in those American states having the prior-appropriations/permit system of water use allocation. For an extensive discussion of appropriative/permit rights and pollution, see R. E. CLARK (ed.) 3 WATER AND WATER RIGHTS: WATER POLLUTION AND QUALITY CONTROLS (1967) 212ff. One should beware of such over-simplifications in regard to prior appropriations jurisdictions as: "In these jurisdictions nuisance law is the only remedy available for pollution." *Comment, Private Remedies for Water Pollution* (1970), 70 COLUM. L.REV. 734, 736 n. 11.

<sup>40</sup> AMERICAN LAW INSTITUTE, *RESTATEMENT OF THE LAW OF TORTS* (1939) Vol. IV Ch. 41 Topic 3, *Scope Note* 342-43:

*The natural flow theory.* Under this theory the primary or fundamental right of each riparian proprietor on a watercourse or lake is to have the body of water maintained in its natural state, not sensibly diminished in quantity or impaired in quality. Each proprietor, however, is recognized as having a privilege to use the water to supply his "natural" wants, and each also has a privilege to make "extraordinary" or "artificial" uses so long, but only so long, as such uses do not sensibly or materially affect the natural quantity of quality of the water, and are made on or in connection with the use of the riparian land. These limited privileges in each proprietor qualify the primary rights of the other proprietors to have the stream or lake maintained in the status quo of nature. Thus, according to this theory of riparian rights, all proprietors have equal rights to have the water flow as it was wont to flow in the course of nature, qualified only by the equal privileges in each to make limited uses of the water.

<sup>41</sup> *Id.*, at 344:

*The Reasonable Use theory.* Under the Reasonable Use theory the primary or fundamental right of each riparian proprietor on a water course or lake is merely to be free from an unreasonable interference with his use of the water therein. Emphasis is placed on a full and beneficial use of the advantages of the stream or lake, and each riparian proprietor has a privilege to make a beneficial use of water for any purpose, provided only that such use does not unreasonably interfere with the beneficial uses of others. Reasonable use is the only measure of riparian rights. Reasonableness, being a question of fact, must be determined in each case on the peculiar facts and circumstances of that case. Reasonableness is determined from a standpoint of a court or jury and depends not only upon the utility of the use itself, but also upon the gravity of its consequences on other proprietors.

<sup>42</sup> R. E. CLARK, *supra*, footnote 39, § 211.1(B), at 56.

<sup>43</sup> (1900), N.Y.S. 589 (S.C. APP. DIV.).

hotel; it was given even though the downstream plaintiff was making no use of the stream's water. The court reasoned quite logically, given natural flow concepts, that the downstream riparian by virtue of her riparian status "had the right to the stream in its natural purity."<sup>44</sup>

In the reasonable-use jurisdictions, the courts examine the polluting activity complained of in terms of the reasonableness of the use made by the upper riparian and the use of the lower riparian with which it interferes. The cases of *Borough of Westville v. Whitney Home Builders*<sup>45</sup> and *Parker v. American Woolen Co.*<sup>46</sup> illustrate reasonable-use cases, one of which illustrates the application of the reasonable-use theory to restrict pollution, and the other to allow pollution. In the *Parker* case, a downstream riparian was granted an injunction to stop an upstream riparian from using his woolen mill which polluted the stream. In reaching this position, the Supreme Judicial Court of Massachusetts clearly recognized that "each proprietor is entitled to use the stream in such reasonable manner, according to the usages and wants of the community, as will not be inconsistent with a like use by other proprietors above and below him."<sup>47</sup>

But in spite of this right of reasonable use, the court held:

We regard it however as settled that no riparian proprietor has the right to use the waters of a natural stream for such purposes or in such a manner as will materially corrupt it to the substantial injury of a lower proprietor, or to cast or discharge into it noxious and deleterious substances which will tend to defile the water and make it unfit for use.<sup>48</sup>

In the *Westville* case, on the other hand, the court resolved the conflict engendered by the right of all riparians to make a "reasonable" use of the water in favor of the polluter. The court upheld the denial by the lower court of an injunction against the defendant sewerage company's discharge of effluent into a stream, although the plaintiff municipality was a downstream riparian. The court spent considerable time in its opinion examining the reasonable-use doctrine which, it observed:

. . . does not concern itself with the impairment of the natural flow or quality of the water but allows full use of the watercourse in any way that is beneficial to the riparian owner provided only it does not unreasonably interfere with the beneficial uses of others, the court or jury being the arbiter as to what is unreasonable.<sup>49</sup>

The court concluded:

On the basis of the entire case we cannot conclude that the denial of injunctive relief by the trial court was erroneous. We do not rest our

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<sup>44</sup> *Id.*, at 590.

<sup>45</sup> (1956), 122 A. (2d) 233 (SUPER. CT. N.J.).

<sup>46</sup> (1907), 81 N.E. 468 (S.C. MASS.).

<sup>47</sup> *Id.*, at 469.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Supra*, footnote 45, at 240.

conclusion on the premise, which plaintiff has properly been at pains to dissipate, that there is required a showing of any particular kind of damages or injury other than psychological where there has, indeed, been the invasion of a property right. See *Holsman v. Boiling Spring Bleaching Co.*, . . . (14 N.J.Eq., at pages 342, 343). Our conception is, rather, that a determination as to the existence of an actionable invasion of the unquestionable property right of a riparian owner in the flow of a watercourse depends upon a weighing of the reasonableness, under all the circumstances, of the use being made by the defendant and of the materiality of the harm, if any found to be visited by such use upon the reasonable uses of the water by the complaining owner. For all of the reasons we have set out, we do not consider that the balance of uses and harms reflected by this record points to an injunction. We trust that what we have said will not be read in anywise to impugn the appropriateness of the plaintiff's use of the ditch and pond for recreational and park purposes as a riparian owner. If defendants' future operation of the treatment plant is ever shown to be such, in fact, as unreasonably to affect the use and enjoyment by the people of Westville of their park and pond, nothing herein determined upon the basis of the present record will, of course, preclude appropriate relief.<sup>50</sup>

### *Damages*

Which of the above theories, or combinations thereof, the would-be pollution controller chooses is important from an overall pollution control standpoint, only as it relates to winning or losing the litigation. The matter of greatest significance from a societal viewpoint is the remedy which the successful plaintiff obtains. Ordinarily, a plaintiff in an environment case asks for both damages and an injunction. The one that is most important to him depends not only upon the nature and continuation of the harm of which he complains, but also upon whether his primary motivation in bringing the suit is personally or societally oriented.

A mere recovery of damages is of significance to the individual who institutes the suit for personal redress. But no matter how personal the motives of the plaintiff, a damage judgment has societal importance because it makes actions harmful to the environment expensive, and thereby economically motivates defendants and potential defendants to act otherwise.<sup>51</sup> Furthermore, the public relations aspect of suffering a money judgment in environment cases should not be underrated since very few if any businesses or even individuals are now insensitive to public or shareholder opinion in the environment realm.

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<sup>50</sup> *Id.*, at 244-45.

<sup>51</sup> The extent of the economic motivation depends upon a balancing between the cost of pollution control versus the amount of damages that may have to be paid if the pollution is not controlled. The actual decision-making of businessmen in such a situation is difficult if not impossible to ascertain.

Injunctions are, however, clearly a more effective remedy from a society-wide standpoint since the goal is to stop actions which are environmentally detrimental, and not merely to collect damages from their perpetrators. Whether or not American courts will grant injunctions in environment cases, and if so under what circumstances, is a question that is difficult to answer even in a given jurisdiction. The general approach of most courts is that they will "balance the equities."

In the oft-cited *Madison v. Ducktown Sulfur, Copper & Iron Company*,<sup>52</sup> the Supreme Court of Tennessee declined to grant an injunction against the defendants who were polluting the air and largely destroying the usefulness of the plaintiffs' land. The court justified its decision by this reasoning:

In order to protect by injunction several small tracts of land, aggregating in value less than \$1,000, we are asked to destroy other property worth nearly \$2,000,000, and wreck two great mining and manufacturing enterprises. . . . The result would be practically a confiscation of the property of the defendants for the benefit of the complainants—an appropriation without compensation. . . . We appreciate the argument based on the fact that the homes of the complainants who live on the small tracts of land referred to are not so comfortable and useful to their owners as they were before they were affected by the smoke complained of, and we are deeply sensible of the truth of the proposition that no man is entitled to any more rights than another on the ground that he has or owns more property than that other. But in a case of conflicting rights, where neither party can enjoy his own without in some measure restricting the liberty of the other in the use of property, the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances. We see no escape from the conclusion in the present case that the only proper decree is to allow the complainants a reference for the ascertainment of damages, and that the injunction must be denied to them. . . .<sup>53</sup>

The classic refutation of the *Ducktown* reasoning is that made by the Supreme Court of California in *Hulbert v. California Portland Cement Company*.<sup>54</sup> There the court granted an injunction against air polluting by a defendant who had asserted:

. . . the resulting injuries must be balanced by the court, and . . . where the hardship inflicted upon one party by the granting of an injunction would be very much greater than that which would be suffered by the other party if the nuisance were permitted to continue, injunctive relief should be denied.<sup>55</sup>

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<sup>52</sup> (1904), 83 S.W. 658 (S.C. TENN.).

<sup>53</sup> *Id.*, at 666-67.

<sup>54</sup> (1911), 118 P. 928 (S.C. CAL.).

<sup>55</sup> *Id.*, at 931.



The court responded:

Of course great interests should not be overthrown on trifling or frivolous grounds, as where the maxim "De minimis non curat lex," is applicable; but every substantial, material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate . . . that the poor man is ultimately enabled to become a capitalist himself. If the smaller interest must yield to the larger, all small property rights, and all small and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few; and their development to a condition of great value and importance, both to the individual and the public, would be arrested in its incipency.<sup>56</sup>

The controversy over injunctions in environment cases is exemplified in the majority and dissenting opinions in the recent New York Court of Appeals case, *Boomer v. Atlantic Cement Company*.<sup>57</sup> The court upheld the denial of an injunction against the defendant whose emission of pollutants from its cement plant was damaging the plaintiffs, neighboring landowners. The court noted at the outset that the rule in New York had been that a nuisance would be enjoined "although marked disparity be shown in economic consequence between the effect of the injunction and the effect of the nuisance."<sup>58</sup> The court was determined to avoid the application of this rule in such a way that the defendant's plant would be shut down. To do this, the court granted an injunction "which shall be vacated upon payment by defendant of such amounts of permanent damage"<sup>59</sup> as the lower court should determine on remand.

Judge Jasen, dissenting, evaluated the court's decision as follows:

I see grave dangers in overruling our long-established rule of granting an injunction where a nuisance results in substantial continuing damage. In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.

It is true that some courts have sanctioned the remedy here proposed by the majority in a number of cases, but none of the authorities relied upon by the majority are analogous to the situation before us. In those cases, the courts, in denying an injunction and awarding money damages, grounded their decision on a showing that the use to which the property was intended to be put was primarily for the public benefit.

<sup>56</sup> *Id.*, at 933, quoting Judge Sawyer in *Woodruff v. North Bloomfield Gravel Mining Co.* (1884), 18 F. 753, 807 (C.C.D. CAL.).

<sup>57</sup> (1970), 309 N.Y.S. (2d) 312 (C.A.).

<sup>58</sup> *Id.*, at 315.

<sup>59</sup> *Id.*, at 319.

Here, on the other hand, it is clearly established that the cement company is creating a continuing air pollution nuisance primarily for its own private interest with no public benefit.

This kind of inverse condemnation (*Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E.2d 801) may not be invoked by a private person or corporation for private gain or advantage. Inverse condemnation should only be permitted when the public is primarily served in the taking or impairment of property. (*Matter of New York City Housing Auth. v. Muller*, 270 N.Y. 333, 343, 1 N.E. 2d 153, 156; *Pocantico Water Works Co. v. Bird*, 130 N.Y. 249, 258, 29 N.E. 246, 248.) The promotion of the interests of the polluting cement company has, in my opinion, no public use of benefit.

Nor is it constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use. (See *Fifth Ave. Coach Lines v. City of New York*, 11 N.Y. 2d 342, 347, 229 N.Y. S. 2d 400, 403, 183 N.E. 2d 684, 686; *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S. Ct. 200, 1 L.Ed. 2d 178.) This is made clear by the State Constitution (art. 1, § 7, subd. [a]) which provides that "[p]rivate property shall not be taken for *public use* without just compensation" (emphasis added). It is, of course, significant that the section makes no mention of taking for a *private* use.

In sum, then, by constitutional mandate as well as by judicial pronouncement, the permanent impairment of private property for private purposes is not authorized in the absence of clearly demonstrated public benefit and use.

I would enjoin the defendant cement company from continuing the discharge of dust particles upon its neighbors' properties unless, within 18 months, the cement company abated this nuisance.

It is not my intention to cause the removal of the cement plant from the Albany area, but to recognize the urgency of the problem stemming from this stationary source of air pollution, and to allow the company a specified period of time to develop a means to alleviate this nuisance.

I am aware that the trial court found that the most modern dust control devices available have been installed in defendant's plant, but, I submit, this does not mean that *better* and more effective dust control devices could not be developed within the time allowed to abate the pollution.

Moreover, I believe it is incumbent upon the defendant to develop such devices, since the cement company, at the time the plant commenced production (1962), was well aware of the plaintiffs' presence in the area, as well as the probable consequences of its contemplated operation. Yet, it still chose to build and operate the plant at this site.

In a day when there is a growing concern for clean air, highly developed industry should not expect acquiescence by the courts, but should, instead, plan its operations to eliminate contamination of our air and damage to its neighbors.<sup>60</sup>

<sup>60</sup> *Id.*, at 320-22. For a scholarly criticism of injunctions, see W.P. KEETON AND C. MORRIS, *Notes on "Balancing the Equities"* (1939-40), 18 TEXAS L.REV. 412 in which the authors maintain that the plaintiff is usually seeking an injunction in order to exact the highest price possible for his property. It is significant to note that this observation was made

The dilemma is severe. If courts were to use only a *de minimis* limitation on the granting of injunctions in pollution and related environment cases, much industrial activity would be seriously impaired and society would suffer accordingly. On the other hand, if permanent damages are to be granted in lieu of injunctions, an effective weapon will be deleted from the arsenal of environmental protection devices. It would mean that private property can be violated by private entities anytime the perpetrator of an invasion of property rights is willing to pay permanent damages. In this last regard, it is easy to imagine a landowner who declines to "sell out" to an adjoining factory, thereby finding the beneficial use of his land forcibly sold to the factory through the refusal of a court to grant an injunction and allowing only an award of "permanent damages."

Which is the preferable approach? It is tempting for the environmentalist to see the injunction as "good" and permanent damages as "bad." However, since the entire pro-ecology movement is based on a "greatest good for the greatest number" concept, it would be inconsistent and eventually detrimental to assert the absolute theory of private property rights which forms the basis of the injunction-in-every-case argument. If private ownership is to be so strongly protected, governmental regulations in the environmental area may themselves be subject to attack. Conversely, to use permanent damages as the only remedy in such cases, leads to a preference-to-the-most-powerful approach which ignores not only small private property interests, but also ignores the societal interest in controlling activities which lead to environmental damage. The preferable view is to assert the classic "balancing of the equities" formula as the means of deciding when an injunction will or will not be granted. The efforts of the environmentalist should be directed toward urging the courts to balance the proper factors and considerations. Where so many courts have gone wrong in the past is to balance only the interests of the parties before the court. Thus, the courts have weighed the loss to a defendant that would result from an injunction, against the loss a plaintiff suffers absent an injunction. Even worse, some courts (and the *Ducktown*<sup>61</sup> case illustrates this) have balanced the damage to the defendant plus the economic damage to society from impairing or stopping the defendant's manufacturing activities, against the damage to plaintiff. The proper use of the balancing concept, and the one

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before the dawning of the ecology era and the group litigation concept of environmental protection. The comment is clearly inapplicable to environmental litigants.

The situation in regard to injunctions in Canadian environment cases has been summarized by Professor Lucas, *supra*, at 173-74.

<sup>61</sup> *Supra*, footnote 52.

which makes it a suitable theory for environmental litigation, is to balance (1) the damage to the defendant and the damage to society which would result from enjoining the activity which causes environmental harm, against (2) the damage to the plaintiff and the damage which society in general suffers from the environmentally harmful activity. Only if the societal aspects on both sides are "weighed" is there a true balancing of equities, and only then does the court respond to the societal issues as well as to the private issues involved.

#### EVALUATION OF COMMON LAW REMEDIES

It is incontestable that damage judgments and injunctions granted on the basis of actions framed in terms of nuisance, trespass, negligence, or strict liability (or some combination or variation of them) have been and still are having important control consequences as far as pollution and other ecologically harmful activities are concerned in the United States and some other common law countries. The key to their popularity lies in the avenue they offer to ecologically conscious private citizens or groups. The concept of private and group litigation in the area has become so popular that it is being touted as "the answer," at least for the foreseeable future, to the environment crisis.<sup>62</sup>

Unfortunately, too much time and energy has been spent in this regard with the intricacies of the common law theories discussed above. Whether one should or must bring a nuisance action as opposed to a trespass action, or whether new theories of action such as process liability, shareholders' derivative suits, and products liability should be asserted, is sometimes of tactical but seldom of ultimate significance. In short, traditional common law concepts are too confining and confusing to serve well as the basis for extensive private environmental litigation. The recent successes of Professor Sax's theory of statutorily granting a private cause of action independent of traditional common law theories<sup>63</sup> correctly reflects the futility of handling the matter through traditional common law theories.

In conclusion, however, two important but frequently ignored questions should be raised in regard to private litigation, whether it

<sup>62</sup> "[F]or the present at least, the courts have the greatest potential to innovate, to dramatize, and to provide redress insofar as our environmental crisis is concerned." J.C. ESPOSITO, *Air and Water Pollution: What to do While Waiting for Washington* (1970), 5 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 32, 52.

<sup>63</sup> Professor Sax is the author of Michigan legislation, No. 127, [1970] MICH. PUB. ACT. § 2(1) provides:

The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may obtain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for

is based on traditional common law theories or statutorily created rights: (1) Will the courts in common law jurisdictions take a societal view of environmental litigation which comes before them? (2) Should they?

The reader need not be referred to still another new case to illustrate the answers judges give. The *Boomer* case,<sup>64</sup> just discussed, contains representative although unusually direct judicial responses. As can be easily inferred from its decision, the majority took the view that it would not and should not decide the case from a societal viewpoint:

The public concern with air pollution arising from many sources in industry and in transportation is currently accorded ever wider recognition accompanied by a growing sense of responsibility in State and Federal Governments to control it. Cement plants are obvious sources of air pollution in the neighborhoods where they operate.

But there is now before the court private litigation in which individual property owners have sought specific relief from a single plant operation. The threshold question raised by the division of view on this appeal is whether the court should resolve the litigation between the parties now before it as equitably as seems possible; or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives.

A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government. In large measure adequate technical procedures are yet to be developed and some that appear possible may be economically impracticable.

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the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction. [EMPHASIS ADDED].

Professor Sax is also the inspiration of the "citizen suits" provision of the 1970 Amendments to the federal AIR QUALITY ACT which provides in part:

Sec. 304. (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf —

- (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
- (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

CLEAN AIR ACT AMENDMENTS, (1970), P.L. 91-604; 84 STAT. 1676. For a summary of the Amendments, see (1970), 1 ENVIRONMENT REPORTER (Current Developments) 865-66.

<sup>64</sup> *Supra*, footnote 57.

It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley.<sup>65</sup>

The judicial response so popular with environmental activists is given in the dissenting opinion:

... to permit the cement company to continue polluting the air indefinitely upon the payment of permanent damages is, in my opinion, compounding the magnitude of a very serious problem in our State and Nation today.

In recognition of this problem, the Legislature of the State has enacted the Air Pollution Control Act (Public Health Law, Consol.Laws, c. 45, §§ 1264 to 1299-m) declaring that it is the State policy to require the use of all available and reasonable methods to prevent and control air pollution (Public Health Law § 1265).

The harmful nature and widespread occurrence of air pollution have been extensively documented. Congressional hearings have revealed that air pollution causes substantial property damage, as well as being a contributing factor to a rising incidence of lung cancer, emphysema, bronchitis and asthma.

The specific problem faced here is known as particulate contamination because of the fine dust particles emanating from defendant's cement plant. The particular type of nuisance is not new, having appeared in many cases for at least the past 60 years. See *Hulbert v. California Portland Cement Co.*, 161 Cal. 239, 118 P. 928 [1911]. It is interesting to note that cement production has recently been identified as a significant source of particulate contamination in the Hudson Valley. This type of pollution, wherein very small particles escape and stay in the atmosphere, has been denominated as the type of air pollution which produces the greatest hazard to human health. We have thus a nuisance which not only is damaging to the plaintiffs, but also is decidedly harmful to the general public.<sup>66</sup>

Thus, the very basic and recurring problem is raised anew—what is the proper role of the courts. The judicial activism as far as environment matters is concerned has been fully and ably developed by Professor Sax<sup>67</sup>—so much so that a full treatment of this matter

<sup>65</sup> *Id.*, at 314-15.

<sup>66</sup> *Id.*, at 320.

<sup>67</sup> J.L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1970).

would unnecessarily prolong our discussion. Just his summaries will be offered to the reader who hopefully will refer to the full treatment of the subject:

Litigation, then, provides an additional source of leverage in making environmental decision-making operate rationally, thoughtfully, and with a sense of responsiveness to the entire range of citizen concerns. Courts alone cannot and will not do the job that is needed. But courts can help to open the doors to a far more limber governmental process. The more leverage citizens have, the more responsive and responsible their officials and fellow citizens will be.<sup>68</sup>

The argument is appealing—and perhaps even convincing. But two considerations at least deserve more attention. First, in championing the role of private litigation even for the short term, are we not risking an unnecessary deviation from, and camouflaging of, the only ultimate answer to the ecology crisis—government regulation of resource allocation and development. In short, in the real world should we risk sending Jack up the Beanstalk or should someone more the giant's size be sent to begin with. Secondly, even if one is convinced of the value of private litigation in this area, should our fervor for environmental protection necessarily lead us to favor more judicial activism. Surely one must ask whether the end justifies the means.

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<sup>68</sup> *Id.*, at 115.