Environmental Pollution and Common Law Remedies

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The environmental law as it is known today is an amalgamation of common law and statutory principles. Even before specific laws came into force, there were certain common law remedies against pollution. Common law is the body of customary law of England based upon judicial decisions and is embodied in the reports of decided cases. Common law had been administered by the common law courts of England since the middle ages. The term ‘common law’ is derived from Latin, *lex communis*.

In common law, pollution cases generally fall under four categories. They are Nuisance, Trespass, Negligence and Strict liability. The dominant water law theories and the public trust doctrine also had influence on the use of staple resources of water and land.

**Nuisance**

The deepest doctrinal roots of modern environmental law are found in the common law principles of nuisance. A well known writer says that the substantive law for the protection of the citizen’s environment is basically that of common law relating to nuisance.

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3. These do not come within the scope of this paper.
4. R. N. D. Hamilton, “Private Recourse for Environmental Harm”, (f. n. contd.)
There is much difficulty in employing tortious actions based on nuisance as an effective remedy against environmental pollution because of the exhaustive and diverse definitions of the term “nuisance”.5 “Nuisance” ordinarily means anything which annoys, hurts or that which is offensive.6 Nuisance includes any act, omission, injury, damage, annoyance or offence to the sense of sight, smell, hearing or which is or may be dangerous to life or injurious to health or property.7

The failure to distinguish between trespass and nuisance is another difficulty. The former is a direct infringement of one’s right to property. In the latter, the infringement is the result of an act which is not wrongful in itself; but the consequences which may follow such act infringe the right of other persons.8

Kinds of Nuisance

In common law, nuisance are of two types namely public and private nuisance.9 A public nuisance can be defined as an unreasonable interference with a right common to general public. A private nuisance is a substantial and unreasonable interference with the use and enjoyment of land.10 A public nuisance has been defined in Section 268 of the Indian Penal Code also.11

7. The Cantonment Act, 1924, Sec. 2 (xxii).
11. Sec. 268 of the Indian Penal Code reads: “Public nuisance:- A person is guilty of a public nuisance, who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause
The importance of the division of nuisance into public and private lies partly in the difference of the remedies and defences applicable to each and partly in the fact that a private individual has no right of action in respect of a public nuisance unless he can show that he has sustained some “special” damage over and above that inflicted on the community at large.

In India, public nuisance action can be brought before a court either by a civil or by a criminal action. Section 91 of the Code of Civil Procedure, 1908 ensures the right of action in the case of public nuisance. The procedure for removal of a public nuisance is laid down in Sections 133 to 143 of the Code of Criminal Procedure, 1973. In England, all civil proceedings brought in respect of public nuisance other than a private action by an individual who or a public or local authority which, has suffered particular damage or an action brought by a local authority in its own name to protect the inhabitants of its area must be brought with the sanction and in the name of the Attorney General. A private individual or a public authority may bring a private action on public nuisance in his or its name when and only when he or it can show that he or it has suffered some particular foreseeable and substantial damage over and above that sustained by the public at large or when the interference

injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.
A common nuisance is not excused on the ground that it causes some convenience or advantage”.

12. Section 91 of the Code of Civil Procedure reads: "Public nuisances and other wrongful acts affecting the public:- (1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,—
(a) by the Advocate-General, or
(b) with the leave of the court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.
(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions”.

with the public right involves a violation of some private right of his or its own.\textsuperscript{14}

The Standard of Liability in Nuisance

Foreseeability is an essential element in determining liability for nuisance. Liability may arise even where utmost care is taken. Although negligence is not an essential element in determining liability, fault of some kind on the part of the defendant is almost always necessary and the fault generally involves foreseeability. Reasonable foreseeability is the test applied in determining liability for nuisance. For example in the \textit{Wagon Mound (No. 2) case},\textsuperscript{15} an action in negligence and nuisance was brought against the defendants by the owners of the corrimal which was being repaired in Sheerlegs wharf and was badly damaged by fire caused through carelessness of the defendants in allowing bunkering oil to spill from ship into water. The Privy Council held\textsuperscript{16} that the outbreak of fire was reasonably foreseeable and the appellants are liable in damages.\textsuperscript{17}

Reasonableness

Reasonableness of defendant's conduct is the central problem in nuisance cases. In nuisance cases, the burden of proving unreasonableness is often difficult because the reasonableness of the defendant's conduct is determined by weighing its utility against the gravity of harm to the plaintiff. In cases where the major polluters are large industrial firms, it is often difficult to prove unreasonableness in the conduct of their business having regard to their high economic and social status.\textsuperscript{18}

\textsuperscript{14} Id., p. 135.
\textsuperscript{16} Id., p. 719.
\textsuperscript{17} The decision of the Court in \textit{Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engg. Co. Ltd., The Wagon Mound (No. 1),} [1961] A.C. 388; [1961] All E.R. 404, was thus overruled in the \textit{Wagon Mound (No. 2) case}.
\textsuperscript{18} See also the observation of Calabresi, "Some Thoughts on Risk Contribution and the Law of Torts", (1961) 70 Yale L.J. 499 at 537-38.
However, courts have sometimes held that the "relative utility" test is not sufficiently great to bar an injunction.

The common defences in pollution cases are (1) the right obtained by prescription to pollute, (2) estoppel, (3) comparative injury and (4) statutory authorisation. In deciding whether a particular act is or is not an actionable nuisance, the court must consider the locality, the nature of the nuisance and other questions of similar nature.

**Remedies for Nuisance**

There are four classes of remedies for nuisance namely abatement without recourse to legal proceedings, civil proceedings for damage or injunction, summary proceedings for penalties or abatement of statutory nuisance and criminal proceedings. According to Rodgers remedial opportunities often fall into four broad categories namely (1) damages (2) land use accommodations, (3) technological accommodations and (4) operational controls.

The damages remedy is aimed at making whole the plaintiff's losses by a money judgment. The land use remedy requires that one or the other party should relocate. The technological accommodation requires the defendant to instal the best control technology and operate it with maximum efficiency. The fourth remedy, the operational controls interfere least with one's enterprises. It requires only that the conduct of one's enterprise should be with more skill and care or in a different manner or at a different time to minimise the harm. The four dominant remedial approaches are seen combined in the case of *Smith v. Staso*

19. The importance of the place of the hurt lies in the distinction between a nuisance per se and a nuisance in fact. A nuisance per se is defined as an activity, occupation or structure which constitutes a nuisance anywhere regardless of how it is operated. A nuisance in fact is an activity, operation or structure which constitutes a nuisance only because of its location or manner of operation. See Rodgers, *op. cit.*, p. 129.


Milling Company\textsuperscript{23} where the owner of a summer residence was besieged by water, air and noise pollution from the defendant's crushing mill. Here each aspect of nuisance was remedied differently. Courts may allow plaintiff to recover special damages also when he suffers loss before trial.\textsuperscript{24} However, the plaintiff cannot secure both a damages judgment for reduced market value due to permanent injury to property and an injunction abating the cause of the depreciation. In considering the grant of injunctive relief, the courts most often will "balance the equities." The courts will consider the relative economic hardship\textsuperscript{25} which will result to the parties from grant or denial of an injunction, the good faith or intentional misconduct of the parties and the public interest in the continuation of the defendant's activities.

**Trespass**

Trespass is a theory closely related to nuisance and is occasionally invoked in environmental cases. Trespass requires an intentional invasion of the plaintiff's interest in the exclusive possession of property, whereas nuisance requires a substantial and unreasonable interference with his use and enjoyment of it. No substantial injury need be shown for a plaintiff to succeed in an action for trespass. The only requirement to establish a trespass is that there must be an intentional unprivileged physical entry by a person or object on land possessed by another. Upon proof of technical trespass plaintiff is always entitled to nominal damages. The plaintiff could also get injunctive relief against a technical trespass. Another advantage of trespass action over an action for nuisance is that an action for trespass has a considerably longer statute of limitations.\textsuperscript{26}

Most of the important aspects of pollution control where

\textsuperscript{23} 18 F. 2d 736 (1927) cited in Rodgers, op. cit., p. 143.
\textsuperscript{26} James E. Krier, op. cit., p. 211.
trespass is used as the theory of action have been discussed by courts in many cases.

In *Arvidson v. Reynolds Metals Company*\textsuperscript{27} the court observed that aluminium is produced by the defendant plant in a manner that unavoidably caused fluorides to be discharged into the atmosphere and recognised that fluorides of some of the types escaping from the plants, if ingested in excessive quantities, are capable of causing damage to cattle. Nevertheless the court found for the defendants on the ground that large scale production of aluminium is essential to national defence.

In *Fairview Farms, Incorporated v. Reynolds Metals Company*\textsuperscript{28} the court held that air borne liquids and solids deposited upon Fairview land constituted trespass and allowed damages for six year period applying the statute of limitations. However, injunctive relief was denied on the ground that pollution was not reasonably certain to be repeated and the defendant had apparently done all it could to control the pollution.

In *Martin v. Reynolds Metals Company*\textsuperscript{29} the defendant argued that mere setting of fluoride deposits upon the plaintiff's land was not sufficient to constitute a trespass. The court refusing the contention, defined trespass as "the invasion of land owner's right to exclusive possession, whether by visible or invisible substances". This departure from the traditional definition of trespass would impose a heavy burden on industry. Nevertheless trespass theory is inadequate to control air pollution. The difficulty in identifying the correct source of air pollution in an area, the cost of litigation and willingness of the people to accept the *status quo* etc. tend to discourage the filing of trespass suits. A change in judicial attitude can be seen in later cases. For instance, in *Renken v. Harvey Aluminium Incorporated*\textsuperscript{30} the

\begin{itemize}
\item \textsuperscript{28} 176 F. Supp. 178 (D. Ore. 1959) as cited in James, E. Krier, *op. cit.*, p. 190.
\item \textsuperscript{29} 135 F. Supp. 379 as cited in James, E. Krier, *op. cit.*, pp. 190-191.
\end{itemize}
court refused to balance the equities before granting injunction and relied on Martin in concluding that the emissions from Harvey Aluminium Company were trespassory.

NEGLIGENCE

Negligence is another specific tort on which a common law action for preventing environmental pollution can be based. It is the failure to exercise that care which the circumstances demand in any given situation. Where there is a duty to take care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in a particular case depends on the accompanying circumstances and may vary according to the amount of risk to be encountered and to the magnitude of the prospective injury. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence.

The act of negligence may also constitute a nuisance if it interferes unlawfully and for a substantial length of time with the enjoyment of another's right in land or it occasions on the high way a dangerous state of affairs as contrasted with a single isolated act. Equally, it may also be a breach of the rule in Rylands v. Fletcher if the negligent act allows the escape of a non-natural and dangerous thing which the defendant has brought on his land. The causal relation between negligence and the plaintiff's injury must be shown by the plaintiff in an action for damages

31. See supra n. 29.
32. "The reasonable man is presumed to be free both from over-apprehension and from over-confidence...." per Lord Mac Millan in Glasgow Corporation v. Muir, [1943] A.C. 448 (H.L.) at p. 457.
35. (1868) L.R. 3 H.L. 330.
based on negligence. When the plaintiff has proved to the satisfaction of the jury the existence of facts which are claimed and outlined, then a *prima facie* case of negligence is presented. It thereupon becomes the duty of the defendant to come forward with evidence to show that the act was not negligent.

The causal relation between the negligent act and the injury suffered is not particularly onerous task when a deadly pollutant like carbon monoxide is discharged in the air admittedly under the defendant’s exclusive control as in *Greyhound Corporation v. Blakley.* However, where one brings an action for lung damage caused by fine dust particles against a local cement plant or glass factory, the case gets extremely difficult from a causation standpoint.

In *Hagy v. Allied Chemical and Dye Corporation,* Mrs. Hagy successfully sued the defendant for damages suffered to her larynx when she and her husband drove through smog which she alleged to have contained injurious sulphuric acid components negligently emitted from the defendant’s plant. The defendant asserted before the appellate court that as a matter of law the evidence was insufficient to permit the jury to find causal connection between the smog and Mrs. Hagy’s condition. The court affirmed the verdict of the court below on the ground that the burden was rather upon the appellants to convince the jury that the operation would have been ultimately necessary in any event, eventhough the cancerous larynx had not been traumatized by the irritation of the smog. In *Suko v. North Western Ice and Cold Storage Co.,* a water tank maintained by the defendant burst and dropped a large quantity of water upon the plaintiff’s adjoining land and caused personal injury to the plaintiff. Here the Oregan Supreme Court did not adopt the so called *Rylands* doctrine. The court adopted the pure and simple rule of negligence with the test of ordinary due care and gave the plaintiff

37. 262 F. 2d 401 (9th Cir. 1958), as cited in James E. Krier, *op. cit.*, p. 169.
the benefit and evidentiary aid of the so-called *res ipsa loquitur* that the instrumentality which caused the injury was in the exclusive possession and control of the defendant. *Reynolds Metals Company v. Yturide* leaves the “standard of care” question unanswered. However, in *Ure v. United States* where the plaintiff was injured by over flow of water from the irrigation canal maintained by the defendant, the court observed that a very high degree of danger calls for a very high degree of care. The dangers caused by environmental pollution are often potential dangers difficult to evaluate. Moreover the standard of care, no doubt, will be seriously affected not only by the state of scientific knowledge as to the causes and effects of air pollution but also by the state of technology and the extent to which prevailing pollution control devices are effective and economically feasible.

DOCTRINE OF STRICT LIABILITY

The rule in *Rylands v. Fletcher*, although normally dealt with as a separate tort, can be considered as an extension of the law of nuisance. The rule enunciated by Blackburn, J. in that case is that “the person who for his own purpose brings on his lands and collects and keeps there anything likely to be a mischief if it escapes, must keep it at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape”. Use of care, skill and public benefit are not defences. However, “the act of God” excludes liability under the rule in *Rylands v. Fletcher*.

The doctrine of strict liability - liability without fault - is worth considering in relation to cases arising from environmental pollution. In *Waschak v. Moffat*, hydrogen sulphide gas was emitted from two of the defendant’s culm banks which damaged

42. (1868) L.R. 3 H.L. 330.
43. *Ibid*.
the paint on plaintiff's dwelling. The defendant did not know and had no reason to anticipate the emission of the gas and the results which might follow. The Supreme Court held the plaintiff liable on the ground that a different chemical content in the foreign coal which the defendant brought to the borough and processed there, accounted for the presence of the gas in the atmosphere. The Supreme Court of Pennsylvania distinguished three theories for allowing recovery against one from whose property material has escaped without negligence or fault and caused damage to another:

(1) The English rule of Rylands v. Fletcher
(2) Absolute Nuisance Doctrine
(3) Restatement Rules.

Under the cover of "absolute nuisance" in Rylands v. Fletcher, the concept of strict liability has gained acceptance in the majority of American jurisdictions.

An activity is hazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care and (b) is not a matter of common usage. In Fritz v. E. I. du Pont de Nemours and Company, the plaintiff suffered injuries from chlorine gas and fumes which escaped in a manner unknown to the defendant. The court held that the use of chlorine gas was not so unusual and that the defendant should have become liable as an insurer in case of injury. The "common usage" limitation is of doubtful utility in cases where the principle of strict liability is applied.

Scope of the rule

The rule in Rylands v. Fletcher, was meticulously interpreted by later decisions. It was applied to a variety of

45. See supra n. 42.
47. Ibid.
49. See supra n. 42.
circumstances. Damage due to fire, gas, explosions, electricity, oil, noxious fumes, colliery spoil, rusty wire from a decayed fence, vibrations, poisonous vegetation etc. were held to be coming under this doctrine. Lord Viscount Simon stated that *Rylands v. Fletcher* was conditioned by two elements which he called (a) "the condition of 'escape' from the land of something likely to do mischief if it escapes", and (b) "the condition of 'non-natural' use of the land". Unless there is an "escape" of the substance from the land of the defendant where it is kept, there is no liability under the rule and the non-natural use must be some special use bringing with it increased dangers to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

The court must investigate not only the reasonableness of the accumulation but also the defendant's responsibility for its actual escape.

Conclusions and Suggestions

The courts' tendency to balance hardships and deny injunctions and lack of "standing" to sue are factors which make the nuisance law inadequate to control widespread pollution. In

50. For a list of cases where the rule has been applied see Stallybrass, "Dangerous Things and the Non-natural User of Land", (1929) 3 Camb. L.J. 376 at 382-385.
55. *Hoare & Co. v. Mc Alpine* [1923] 1 Ch. 167.
58. See supra n. 42.
private actions on public nuisance, "special injury" is to be proved if the action is to succeed. The "special injury" suffered by the plaintiff must be different in kind from that suffered by the general public and not just different only in degree. If the courts insist on this, the nuisance action by private individuals against pollution, against air pollution in particular, will be less effective. Still another difficulty is the burden of proving material harm attributable to unreasonable conduct of the defendant since it is impossible to point out any particular polluter responsible for the poor air or water quality.

The common law action of trespass is not suited to deal with the general issues or questions of environmental degradation in view of the fact that it requires some direct physical interference by one against the person or property of another. Environmental degradation tends, generally, to be indirect in its nature and effect. Persons aggrieved by it may find it difficult to establish a successful legal action for trespass. The requirement that an aggrieved party has to prove that there is a causal connection between the negligent act and the plaintiff's injury makes it extremely difficult for the plaintiff to succeed in an action for negligence. The degree of reasonable care depends on various factors taken into consideration by the courts in deciding the matter. Moreover the standard of care is seriously affected not only by the state of scientific knowledge as to the causes and effects of air and water pollution but also by the state of technology and the extent to which prevailing pollution control devices are effective economically and feasible.

The Rylands rule has a more restricted application than those rules applied in nuisance cases. To invoke the Rylands rule there must be an accumulation of pollutants and it must be of a nuisance, likely to cause injury if it escapes. The problem to be resolved in pollution cases is however different. The problem is to control or prevent pollution, rather than to decide the liability of the wrong doer. Insurance against abnormally dangerous harm may be a proper remedy in deciding the question of liability. Considering the pollution problem in its totality, interests of the public may considerably overshadow the interests
of the parties concerned. When such a situation occurs, a sound pollution control programme is called for. This requires that the public point of view be searched out and decisions be taken in the light the social policy.

The inherent inability of courts to deal efficiently with issues of a scientifically complex nature is another problem. In environmental degradation situations, often a considerable time elapses before symptoms of disease caused from pollution become manifest. The chemical, biological, physiological and other scientific evidence required to prove the causal connection between the alleged discharge of pollutants and the harm caused to the plaintiff is often highly technical. It may be impossible for even the most alert judge to assimilate and evaluate them. There are other difficulties like high costs of litigation, limited administrative capabilities etc. which make judiciary an unfit organ to provide adequate remedies.

The policy adopted by the government also has an important role to control or prevent environmental pollution. There should be insistence on observance of uniform methods of pollution control methods by all persons engaged in one industry. Selective approach may not be successful for the reason that cost of production incurred by an industry is connected with the method of pollution control adopted which ultimately affects the price of the product.

It is suggested to create expert bodies and entrust them with the task of ensuring protection and development of environment. They may be urged to hold public hearing while settling standards and drafting plans for implementation.

In addition to these expert bodies, special courts should be created to deal with common law action against environmental pollution. The success of the endeavour against pollution depends mainly on the civic consciousness of the people and on the recognition of good environment and ecological balance in nature.