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Climbing out of the Hole: Sunsets, Subjective Value, the Environment, and the English Common Law

Julian Morris*

*University of Westminster

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CLIMBING OUT OF THE HOLE: SUNSETS, SUBJECTIVE VALUE, THE ENVIRONMENT, AND THE ENGLISH COMMON LAW

*Julian Morris**

*“de gustibus non disputandum est”
“One man’s meat is another man’s poison”*

THE PRODUCTION OF ENVIRONMENTAL AMENITIES

At sunset on a clear summer’s day, the view to the West from my parent’s house is always stunning: London ensconced in a beautiful orange glow, the result of the Sun’s late afternoon rays diffracting through the hazy atmosphere. I have often wondered what value my parents and their neighbours in South Essex put on this hazy vision, so humbly maintained by industrialists and vehicle users.

Those individuals living by the side of London’s clogged arteries no doubt have a different view of these emissions. One might speculate that many of these people would be happier if they had a little less ozone with their breakfast. Additionally, we must not forget the industrialists and vehicle users who benefit directly from their haze-producing activities.

With so many different interests at stake, how can we decide how much haze to allow? Two popular views are those espoused by “environmentalists” and “economists.”¹ The standard environmentalist

* MA (Economics) Edinburgh, 1992; MSc (Environment and Resource Economics) University College London, 1993; MPhil (Land Economics) Cambridge University, 1995; Graduate Diploma (Law), University of Westminster, 1999. Visiting Professor, Department of International Studies, University of Buckingham, England; Research Fellow, Institute of Economic Affairs, London; Director, International Policy Network, London.

1. The discussion here presents something of a caricature of what economists and environmentalists tend to say about the subject. The author applauds those environmentalists and economists who object

response is to demand regulations that would drastically limit emissions by vehicles and industry. In contrast, the standard economist response is to identify the “socially optimal” level of emissions and construct a rational system of taxes and tradable permits that would lead to this outcome in an efficient manner. Both “solutions” are problematic.

The environmentalist response presumes that all emissions are harmful and that there are essentially no beneficial effects arising from industry and vehicle use, even at the margin.² To the environmentalist, the optimal level of emissions is zero.

The economist response is in many ways more reasonable than that of the environmentalist. It is unlikely that all members of society, even a simple majority, would want to eliminate emissions altogether (at least, not if it involves increased costs or reduced income). Even those who favor significant reductions in emissions in some places might think that emissions in other places (for example, in places where no person is adversely affected) would be perfectly acceptable. But the economist’s solution begins with the assumption that it is possible to achieve the “optimal” level of emissions through the actions of an all-powerful central regulator.³ Given the subjective

to this caricature and hopes they will encourage others to think less narrowly.

2. To extremist environmentalists, the orange haze would, by virtue of its unnatural origin, be condemned as aesthetically undesirable.

3. For example, the economists might try to conduct surveys to establish each householder’s willingness to pay for cleaner air or better sunsets. However, the evidence suggests that the numbers would be of little merit. The best that could be hoped for is that the surveys would rank the importance individuals and groups attach to various concerns. See, e.g. Don L Coursey, *The Revealed Demand for a Public Good: Evidence from Endangered and Threatened Species*, 6 N.Y.U. ENVTL. L.J. 411 (1981); Daniel Kahneman & Jack L. Knetsch, *Valuing Public Goods: The Purchase of Moral Satisfaction*, 22 J. ENVTL. ECON. & MGMT. 57 (1992). The problem, at base, with such surveys is that they do not, indeed cannot, replicate the mental processes that occur when a person makes a decision to buy or sell a good – so the values they obtain are not “prices.” For an explanation of how prices arise and their function in coordinating economic ac-

nature of desires (as exemplified above by the aesthetes who appreciate man-made sunsets over cities), it is not even possible for the state to identify the “optimal” level of pollution, let alone construct laws that will bring this optimum about.⁴

The problem is a little bit like that faced by a heating engineer attempting to ensure that each room of a house is at the right temperature. The first houses with central heating typically had one thermostat that would govern when the heating was on or off. The problem was that each room had different thermal properties – some had big windows, others small windows; some had high ceilings, others low ceilings. So – especially when doors were closed – the thermostat would ensure that the room in which it was placed was kept at the “right” temperature, while most other rooms would be too hot or too cold. Heating engineers have since realized that the best way to enable each room to be kept at the optimal temperature is to put individual thermostats on each radiator.

Just as decentralization of temperature control results in better, more effective temperature management, a growing body of scholarly literature suggests that many environmental amenities may be provided better, and more effectively, through decentralized institutions rather than through central government intervention.⁵ Com-

tivity, see F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, (1945).

4. The economist solution also typically ignores – or intentionally avoids – the issue of compensating losers. The standard by which actions are judged by such economists is “potential Pareto optimality,” under which it is enough that the winners *could* compensate the losers, not that they would actually so do. WILLIAM J. BAUMOL & WALLACE E. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* (1988); see also Mark Sagoff, *Four Dogmas of Environmental Economics*, 3 ENVTL. VALUES 284 (1994). So, in the above example, if the central authority decides that the householders in Essex gain more from particulate pollution than Londoners lose, then it is sufficient that the Essex folk could in principle compensate the Londoners. (The main argument used in favor of this standard is that it obviates the problem of transaction costs associated with both the collection of revenue from beneficiaries and their disbursement to losers.)

5. Such literature can be traced back at least to Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960), which cri-

mon law liability for environmental damage,⁶ combined with contracts,⁷ easements and covenants⁸ would, this literature suggests, in many if not most cases be more effective in providing the kinds of environmental amenities that people actually want. The purpose of this short article is to assess the success of one such institution in enabling people to protect the environment in England and Wales.⁹

tiques the unilateral nature of the “externality” as conceptualized in particular by Arthur Pigou. Coase argues that externalities are “reciprocal” and is concerned that the unilateral theory espoused by Pigou serves to promote an unjustified view of the role of the state in correcting market “defects”: “It is my belief that economists, and policy-makers generally, have tended to overestimate the advantages which come from government regulation.” *Id.* at 18.

6. See e.g. COASE, *supra* note 5, who shows that liability rules affect the structure of property rights; See also Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARVARD L. REV. 1089 (1972); Stephen C. Littlechild, *The Problem of Social Cost*, in NEW DIRECTIONS IN AUSTRIAN ECONOMICS 77-93 (Louis Spardo, ed., 1979); Steven Cheung, *The Myth of Social Cost*, 1978 LONDON: INST. OF ECON. AFF.; Hugh H. Macaulay, *Liability and Environmental Quality*, in THE ECONOMIC CONSEQUENCES OF LIABILITY RULES (Roger E. Meiners & Bruce Yandle eds., 1991); BRUCE YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT (1997).

7. In principle all amenities could be provided through contract. See Mark Pennington, *Liberating the Land*, 2002 LONDON: INST. OF ECON. AFF.

8. Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

9. Although Wales now has its own Assembly, it continues to share with England a common legal system. However, for simplicity's sake I shall refer to this system as the English Common Law. Moreover, unless otherwise stated, I use Common Law to describe the law developed both in the Courts of Common Pleas, Queen's Bench and Exchequer (collectively known as the Law courts) and in the Courts of Chancery (the court of Equity) – which were merged in 1875.

This article focuses on the role of private nuisance law, which is the branch of law that has traditionally dealt with ongoing interferences with private property. It begins with a discussion of the origins of nuisance and its development during the seventeenth and eighteenth centuries. It is hoped that by offering a historical backdrop, the confusion that often clouds discussion of nuisance – and especially the claim that nuisance is (or at least was) not guided by clear principles – will be avoided. Some of the key developments during the nineteenth and twentieth centuries are then adumbrated. Finally, some observations are made concerning the applicability of nuisance to contemporary environmental problems and some thoughts are given on possible reforms that might improve the utility of nuisance to such problems.¹⁰

EARLY DEVELOPMENTS AND THE PRINCIPLE OF SIC UTERE TUO UT IN
ALIENUM NON LAEDAS¹¹

The nuisance action has its origins in the assize of novel disseisin,¹² a remedy created by Henry II in 1166 to protect the posses-

10. The intention is not specifically to contrast these institutions with the alternatives – such as regulations, taxes and permits. For an excellent recent comparison of the role of common law with regulation, the reader is directed to David Howarth, *Muddying the Waters: Tort Law and the Environment*, 41 WASHBURN L.J. 469 (2002)

11. The following discussion draws extensively on Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1973); A.I. Ogus & G.M. Richardson, *Economics and the Environment: A Study of Private Nuisance*, 36 CAMBRIDGE L.J. 284 (1977); Daniel R. Coquillette, *Mosses from an old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761 (1979); and John P.S. McLaren, *Nuisance Law and the Industrial Revolution – Some Lessons from Social History*, 3 OXFORD J. LEGAL STUD. 155 (1981).

12. Here, we are tracing nuisance back only to its proximal medieval origins; there is evidence that Roman Law also employed similar rules, and probably the customary courts of England and other countries would have applied somewhat similar rules. The Assize of Novel Disseisin, for example, replaced the older “writs of right” COQUILLETTE, *supra* note 11, at 765-766.

sion of freeholders, and which entailed a trial by a jury of “twelve free and lawful men of that neighbourhood.”¹³ An early case, from 1201, involved Simon of Merston, who complained of problems caused by his neighbour Jordan’s mill pool. The judge ruled that Simon had been disseised of some attribute of his freehold and ordered the destruction of the mill pool.¹⁴

However, an assize of nuisance was not available merely because the plaintiff had experienced damage, as Daniel Coquillette notes: “To be actionable, a nuisance must result in both *injuria* (legal injury) and *damnum* (material damage).” These concepts were distinguished by Bracton: “if you built a mill on your land, taking customers from my mill, there was *damnum* to me but no *injuria*.”¹⁵ The implication here is that the law was unwilling to view pure economic loss, without any associated interference with a right, as an actionable nuisance. Coquillette offers that a necessary element of *injuria* was *omne id quod non iure fit* (“anything wrongfully done”). He then points out that the “meaning of this crucial phrase was unclear for centuries; perhaps there was no uniform definition.”

By 1443, things had been cleared up sufficiently for Judge Markam to assert that “if a man builds a house and stops up the light coming to my house, or causes rain to fall from his house and so undermines my house, or does anything which injures my free tenement, I shall have the assize of nuisance.”¹⁶ In other words, the assize of nuisance protected the rights of landowners to use and enjoy their property free from interference by others.

From 1601, the assize of nuisance was joined by a new action “on the case”.¹⁷ Although the former had the advantage that it enabled property owners to request an abatement, it was only available to

13. 3 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 194 (Samuel E. Thorne trans., 1977).

14. “Jordan the miller has within the time of the assize unjustly and without a judgement raised his mill pool in Weston to the nuisance of Simon’s freehold. The jurors say he has so raised the pool. Judgement: that the pool be destroyed and that Jordan be in mercy one half-mark. Damages, three shilling.” 62 Selden Society, cited and translated by Brenner, *supra* note 11, at 404.

15. COQUILLETTE, *supra* note 11, at 769.

16. *Id.* at 770.

17. This new action was established in the case of *Cantrel v. Church*, 78 Eng. Rep. 1072 (Ex Ch. 1601).

freeholders, whereas actions on the case were available both to freeholders and lesser tenants (such as leaseholders). Case entitled the successful plaintiff only to damages, but if the nuisance persisted the plaintiff could request an injunction in equity.¹⁸ Thus case, having a wider appeal, soon became the dominant form of action for nuisance.¹⁹

An action brought in 1608 by William Aldred at the Norfolk Assizes concerned a pigsty built by Aldred's neighbor Thomas Benton. The pigsty was adjacent to Aldred's house and had created a stink.²⁰ Benton argued in his defence that "the building of the house for hogs was necessary for the sustenance of man, and one ought not to have so delicate a nose, that he cannot bear the smell of hogs."²¹ However, this attempt to use a "public benefit" argument failed and the judge ruled in Aldred's favor.

Sir Edward Coke used Aldred's case to clarify the rule: property holders have a right to use and enjoy their property free from interference, but the extent of this right is only that of ordinary comfort and necessity, not delicate taste.²² Once it has been established that a right has been breached, no putative "public benefit" will justify the *damnum*. Here, Coke employed the Roman Maxim "sic utere tuo ut alienum non laedas" (so use your own property as not to injure your neighbours).²³ The *sic utere* rule was employed in numerous seventeenth century cases, including *Jones v. Powell*,²⁴ *Morley v. Prag-*

18. BRENNER, *supra* note 11, at 406. Here we are reminded of the strict separation that existed between the Courts of Common Pleas (the common law courts) and the Courts of Chancery (the courts of equity) until the late nineteenth Century – the distinction was abolished by Parliament in 1873.

19. As Coquillettes observes, "the careful plaintiff would always allege in case, so that lack of free tenement could not be argued at bar. Thus the assize of nuisance, although it historically preceded all actions on the case, was assimilated into the action on the case after 1601." COQUILLETTE, *supra* note 11, at 775.

20. Aldred's Case, 77 Eng. Rep. 816, (K.B. 1611).

21. *Id.*

22. *Id.* "In a house four things are desired [habitation of man, pleasure of the inhabitant, necessity of light, and cleanliness of air], and for nuisance done to three of them an action lies" *Id.*

23. Aldred's Case, 77 Eng. Rep. 816 (K.B. 1611).

24. 123 Eng. Rep. 1155 (C.P. 1628).

nel,²⁵ and *Tuberville v. Stamp*,²⁶ and was famously restated by Lord Holt in the 1704 case of *Tennant v. Goldwin*: “every man must so use his own as not to damnify another.”²⁷ Blackstone’s affirmative expression of the *sic utere tuo* rule suggests that through the mid-eighteenth century it held sway and was commonly applied to harms that have a distinctly modern environmental feel to them:

[I]f one erects a smelting house for lead so near the land of another that the vapor and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance...[I]f one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another’s property, it is a nuisance: for it is incumbent on him to find some other place to do that act where it will be less offensive.²⁸

PRESCRIPTIVE EASEMENTS: ACQUIRING THE RIGHT TO POLLUTE BY PRIOR APPROPRIATION

While *sic utere tuo* was the rule, there were exceptions. In the 1791 case of *R. v. Neville*,²⁹ the British Crown brought a case in public nuisance³⁰ against a “maker of kitchen stuff and other grease” for fouling the air. But Neville had been carrying on his trade for some

25. 79 Eng. Rep. 1039 (K.B. 1638).

26. 88 Eng. Rep. 1228 (K.B. 1697).

27. *Tennant v. Goldwin*, 92 Eng. Rep. 222 (K.B. 1705). Goldwin had failed to maintain an adjoining wall, causing a stink from his privy to enter Tennant’s house, which affected Tennant’s enjoyment of his property. Lord Holt, finding for Tennant, concluded “And as every man is bound so to look to his cattle, as to keep them out of his neighbours ground...so he must keep in the filth of his house or office, that it may not flow in upon and damnify his neighbour.” *Id.* at 224.

28. 3 W. Blackstone, *Commentaries*, *217-218.

29. 170 Eng. Rep. 102 (1791).

30. The public nuisance is a separate action to the private nuisance. It relates to harms to the general public and is primarily enforced by the Crown, although individuals may also argue a case in public nuisance if the extent of harm they suffer is greater than that suffered by other members of the public.

time without objection from his neighbors and Lord Kenyon advised the jury that “where manufacturers have been borne within a neighbourhood for many years, it will operate as a consent of the inhabitants to their being carried on, though the law might have considered them as nuisances, had they been objected to in time.”³¹ The jury acquitted the defendant. Following this reasoning, a person may acquire a prescriptive right to cause harm to neighboring properties even though, if actioned, the harms would be considered a nuisance.

This rule (developed in a public nuisance case) was affirmed but constrained in the 1838 (private nuisance) case of *Bliss v. Hale*,³² in which a plaintiff complained of noxious smells and vapors arising from the works of a tallow chandler, which allegedly interfered with the plaintiff’s beneficial use of his property. The court ruled that since the defendant had only been causing the nuisance for three years, he had not acquired a prescriptive easement to continue, for which at least 20 years continuous operation would have been necessary. In *Sturges v. Bridgeman*,³³ the courts made clear that the harm itself, not merely the action causing the harm, must have continued for a period of 20 years in order for a right to have been acquired by prescription.

THE PLANNING FUNCTION OF NUISANCE LAW

In *R. v. Neville*, Lord Kenyon offered the observation that the consent to pollute would not apply to a newcomer who made the air “very disagreeable and uncomfortable.”³⁴ This was taken to imply that a newcomer whose actions made only a marginal difference to air quality would not be liable for their portion of the harm caused to neighboring properties.³⁵ The case of *Sturges v. Bridgeman*,³⁶ has been well described by Ronald Coase:³⁷

In this case, a confectioner...used two mortars and pestles in connection with his business (one had been in op-

31. 170 Eng. Rep. 102 (1791).

32. 7 Eng. Rep. 122 (1838).

33. 11 Eng. Rep. 852, at 865 (Ch. D. 1879).

34. 170 Eng. Rep. 102 (1791).

35. *Id.*

36. 11 Eng. Rep. 852 (Ch. D. 1879)

37. COASE, *supra* note 5, at 8-9.

eration in the same position for more than 60 years and the other for more than 26 years). A doctor then came to occupy neighbouring premises. ... The confectioner's machinery caused the doctor no harm until, eight years after he had first occupied the premises [that is, 34 years after the youngest pestle and mortar was first put into operation], he built a consulting room at the end of his garden right against the confectioner's kitchen. It was then found that the noise and vibration caused by the confectioner's machinery made it difficult for the doctor to use his new consulting room. ... The doctor therefore brought a legal action to force the confectioner to stop using his machinery.

The courts, granting an injunction to the doctor, remarked:

Whether anything is to be considered a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself, but in reference to its circumstances. What would be a nuisance in Belgrave Square (then and now a high-class residential district in London's West End) would not necessarily be so in Bermondsey (an area on the South side of the Thames, then full of tanneries).³⁸

In other words, nuisance law could provide a land-use planning, or "zoning", function,³⁹ dictating where an activity can or cannot take place.⁴⁰ By establishing clear and readily enforceable property rights

38. 11 Eng. Rep. 852 (Ch. D. 1879).

39. *See* *Colls v. Home and Colonial Stores*, 1904 A.C. 179 ("a dweller in towns cannot be expected to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell and noise may give a cause of action, but in each case it becomes a matter of degree").

40. Coase points out that the two parties would have been free to bargain around this judgement – the Doctor selling his right to peaceful enjoyment of his property to the sweet manufacturer – if they so wished. This point is important but, nevertheless, if such a bargain were struck it would not have affected the general right, as a resident of the West End of London, to be free from the noise of pestles and mortars, so the planning function of the law would remain. (Although, presumably, a point would come where so many defen-

in this way, nuisance law enabled parties to strike the balance between environmental amenities and cost. People buying a property in the West End knew that they had a right to be free from air pollution, noise and other interferences. People buying property in Bermondsey knew that they would not be able to take an action against a marginal polluter. The differences in property prices in these districts no doubt reflected the differences in amenities.

Nuisance law also contains an efficiency aspect. In areas where nuisance-type interferences are rare, as in Berkeley Square and Wimpole Street, it is more efficient to grant injunctions against those who cause a nuisance, since the transaction costs of bargaining will be relatively low. By contrast, in areas such as Bermondsey, where there are many parties causing nuisance-type interferences, the imposition of an injunction against one party seems iniquitous, yet the imposition of an injunction against all would cause great problems. The transaction costs of bargaining would be very high and if, as a result, many firms were to close, the costs to the local people could be great.⁴¹ Moreover, as a neighborhood becomes less industrial, judges may look more favorably on claims that an individual source of noise or noxious emission constitutes a nuisance. In this context, the English principle that coming to a nuisance is no defence, so clearly propounded in *Sturges v. Bridgeman*, helps those seeking to improve the environmental amenities in an area that was formerly industrial.⁴²

dants had bargained around their respective injunctions that the character of the area would have changed.) COASE, *supra* note 5.

41. If many firms were faced with injunctions, they would have to bargain with each of the affected parties, which may be time consuming and expensive – and most likely some parties would simply refuse any compensation. In the absence of low-cost abatement technologies, the only alternative for many firms might be to move the plant elsewhere.

42. Another option for improving the environment in an area “zoned” for industrial use would be for those affected by the pollution to bargain with the companies. However, the coordination costs of such an activity might be high. Moreover, the bargaining power of those so affected would probably be weak since the very nature of places that are “zoned” for industrial use implies that the residents are poor.

Finally, the establishment of property rights through decentralized private nuisance actions, is arguably both more equitable and more efficient than the creation of rights through a system of administrative planning. In the latter system, state administrators decide *a priori* where industry can locate and bargaining cannot take place, because rights created by administrative planning are inalienable.

REASONABLENESS AND THE DUTY OF CARE IN NUISANCE

In the late 1850s there was a brief attempt to expand on the propositions argued in *R. v. Neville* and *Bliss v. Hale* into a broader doctrine of reasonableness.

The most extreme case was *Hole v. Barlow*,⁴³ which concerned a brickmaker who had allegedly caused a smoke nuisance. At trial, the judge asked the court to consider whether the brickmaker had established his facility in “a convenient and proper place,” suggesting that if this was so then no action would lie. This was affirmed at appeal and elaborated to include not only reasonableness of location but also of operation – a concept introduced from the nascent law of negligence.⁴⁴ However, subsequent decisions questioned the authority of *Hole v. Barlow*, and in *Bamford v. Turnley*,⁴⁵ another case of smoke from a brickmaker, the reasoning in *Hole* was explicitly rejected because it departed from the *sic utere tuo* principle.

In *St. Helen's Smelting Co. v. Tipping*,⁴⁶ a distinction was drawn between interference with property and interference with peaceful enjoyment. In 1859, Mr. Tipping purchased a 1300 acre estate in the town of St. Helen's in Merseyside. Four years later he brought an action against the defendants, alleging that their nearby copper smelting works had (1) caused injury to trees, hedges, fruit and cattle on his land, and (2) caused substantial personal discomfort.⁴⁷ The judge in the lower court instructed the jury that the law was not concerned with “trifling inconveniences” and that where noxious vapors were concerned “the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment

43. 140 Eng. Rep. 1113 (C.P. 1858).

44. *Id.*; See also McLaren, *supra* note 11, at 174.

45. 122 Eng. Rep. 25 (Ex. 1862).

46. 11 Eng. Rep. 1483 (H.L. 1865).

47. *Id.*

of it.” The jury awarded damages of £361 to Tipping. The Lords upheld the judgement but qualified it by clearly distinguishing between damage to the property itself, which would be actionable regardless of where the property was located, and interference with the beneficial use of that property, which would depend on the location of the property (and in this case was not available because of the industrial setting).

Although the rule in nuisance law remained *sic utere tuo*, its interpretation, and specifically whether there can be said to be *damnum*, in any case would depend on the type of interference that was alleged. Nuisance was effectively split into two separate torts:

1. **Tangible nuisance:** If there were physical harm to property (for example, damage to trees and shrubs) then it would be necessary only to show that the harm had been caused by the defendant’s action and that some kind of harm was a foreseeable consequence of the defendant’s action. In *Fletcher v. Rylands*,⁴⁸ the defendant had constructed a reservoir on his property in order to power his mill, but the water escaped into the plaintiff’s mineshaft causing severe damage. Judge Blackburn in the lower court asserted “that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril.”⁴⁹ The result was to reaffirm the general principle of *sic utere tuo*: if a defendant uses his property in such a way that it might cause harm to another’s and if some harm in fact materializes, then defendant should be liable for the harm. For ongoing instances of physical interference, there would of course be no need to show foreseeability.
2. **Intangible nuisance:** For interference with property that does not result in physical injury to the property itself (for example, a noxious smell), it would be necessary to evaluate whether the interference was unreasonable in the circumstances. What is reasonable would depend, *inter alia*, on the locality of the plaintiff (inhabitants of industrial areas must

48. (1866) L.R. 1-Ex. 265 (Blackburn), *aff’d* 3 L.R. 3 H.L. 330 (1868).

49. *Id.* at 279.

expect more interference),⁵⁰ the extent of the interference (even in industrial areas, there are limits),⁵¹ and the time of day (a continuous loud noise made during the middle of the night is considered less acceptable than the same during the day).⁵²

RIPARIAN DOCTRINE IN FLUX

As to water cases, likewise, the law was in flux during the 19th century. Until the mid-nineteenth century, the owners of riparian rights maintained an almost absolute right to the "natural flow" of water.⁵³ In *Embrey v. Owen*,⁵⁴ a water abstraction case, Lord Parke qualified that right: "The right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of all water in its natural state ... but it is a right only to the flow of water and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence."⁵⁵ Thus, an action could lie for an unreasonable and unauthorized use of this common benefit.

By contrast, in *Attorney General v. Birmingham Corporation*,⁵⁶ a water pollution case decided in the same year as *Hole*, the court upheld the right of a landowner "to enjoy the river ... in exactly the same condition in which it flowed formerly." Meanwhile, in *Stockport Waterworks v. Potter*,⁵⁷ decided in 1861, a printer who had

50. *Bliss v. Hale* [1838], 7 L.J.R. 122 (1838); *Sturges v. Bridgeman*, 11 Eng. Rep. 852 (Ch. D. 1879).

51. *R. v. Neville*, 170 Eng. Rep. 102 (1791); *Colls v. Home and Colonial Stores*, [1865] A.C. 179.

52. *Id.*

53. The rule was *aqua currit, et debet currer, ut solebat es juie naturae* ("water runs, and it should run, as it is used to run naturally"). See H. Marlow Green, *Common Law, Property Rights and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future*, 30 CORNELL INT'L L.J. 541 (1997).

54. 155 Eng. Rep. 579, 586 (Ex. 1851).

55. *Id.*

56. 70 Eng. Rep. 220, 225 (1858).

57. 158 Eng. Rep. 433, 436 (1858).

dumped arsenic in the water was found to have caused a nuisance in part because he had failed to carry on his enterprise in a proper place and in a reasonable manner. However, the Lords presiding over the case were careful to distance themselves from *Hole*: “the public are benefited by the carrying on of all trades ... But what answer is that to an action by persons whose water for drinking is affected by arsenic poured into it by persons carrying on such a trade?”⁵⁸

By 1867 a more explicit “balance of inconvenience” doctrine was being espoused. In *Lillywhite v. Trimmer*,⁵⁹ an action to restrain a local Board of Health from discharging sewage, Malins VC noted: “... if there is an important object to be effected, such as the drainage of a town ... I cannot help thinking that these great and important public objects are not wholly overlooked.”⁶⁰ Although this doctrine was never approved by the House of Lords, McLaren argues that it was used with some discretion by lower court judges.

The House of Lords finally settled the issue in 1893. In the case of *Young and Co v. Bankier Distillery Co.*,⁶¹ Lord McNaghten neatly tied down the concept of reasonable use:

A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. *Every riparian owner is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality.*⁶²

Reasonable use was thus defined by its effect on downstream users, and that effect was to be a marginal one at worst. Riparian doctrine has remained more or less unchanged since 1893.⁶³

58. *Id.*

59. [1867] 36 LJ Ch. 525.

60. *Id.* at 528-529.

61. [1893] 69 LT 838.

62. *Id.* at 839.

63. *Pride of Derby & Derbyshire Angling Club v. British Celanese Ltd.*, 2 W.L.R. 58 (C.A. 1953).

THE PROBLEM OF MULTIPLE SOURCES RECONSIDERED

In riparian cases, multiple sources have been held jointly liable for harms. In *Blair & Sumner v. Deakin*,⁶⁴ each contributor to a nuisance was held liable for his contribution to the pollution, even though individually their actions would not have constituted a nuisance – this is known as the combined effect rule.⁶⁵ In the *Pride of Derby Angling Club v. British Celanese*,⁶⁶ this was extended to cases where a co-defendant has already admitted liability. Thus, a defendant D will be held liable so long as he has contributed to a nuisance, even though another defendant C has admitted liability and even though D would not have committed a nuisance but for the actions of C.⁶⁷

The clarity of riparian rights was utilized in an innovative way by John Eastwood KC, who in 1952 established the Anglers Co-operative Association (ACA).⁶⁸ The ACA acts to indemnify riparian owners so that riparian users – especially anglers – are able to take nuisance actions against polluters on behalf of the owners.⁶⁹ As Roger Bate has shown, the ACA has successfully prosecuted thousands of actions, using money obtained in damages and through bargaining around injunctions to fight subsequent cases.⁷⁰

In air pollution cases, multiple sources may be held liable if their actions result in physical damage. This was true of the area around St Helen's, which was the site not only of a copper smelter (the St Helen's Smelting Company) but also an Alkali manufacturer. In spite of the high costs of legal action, the likely availability of damages for harm enabled the farmers living around St Helen's to obtain compensation from the smelting company. Indeed, not only were they able to obtain compensation from one of several polluters, they were able to do so en masse, through William Rothwell, a land agent

64. [1887] 57 L.T.R. 522.

65. Howarth, *supra* note 10 at 486.

66. 2 W.L.R. 58 (C.A. 1953).

67. *Id.*

68. The ACA has since changed its name to the Anglers' Conservation Association. Its acronym remains the same.

69. The right to support such an action through indemnity was challenged unsuccessfully (with an allegation of "maintenance") in *Martell and Others v. Consett Iron Co. Ltd*, [1955] 1 All E.R. 481.

70. Roger Bate, *Saving our Streams*, London: Institute of Economic Affairs, 2002.

and valuer in St. Helen's, who acted as arbitrator between the St. Helen's Smelting Company and numerous farmers who were adversely affected.⁷¹ In 1865, Mr. Tipping won an injunction against the smelting company, which led to the closure of the plant and no doubt put the various affected parties on a surer footing to bargain with the alkali works.⁷²

Following the earlier Court of Appeal case, however, actionability for interference with beneficial use, whether for single or multiple sources, became dependent upon showing that the interference was unreasonable in the circumstances. Since the most egregious forms of multiple source air pollution in England's towns have declined to relatively insignificant levels,⁷³ the remaining problems tend to be precisely those that would be classified under "beneficial use" – they do not for the most part cause physical damage to property but they can be harmful to health and are certainly irritating to many. With the greater uncertainty of success in bringing actions for interference with beneficial use, however, it is perhaps unsurprising that an equivalent of the ACA addressing air pollution has not emerged.⁷⁴

STATUTORY AUTHORITY

A significant barrier to effective private resolution of both air and water pollution, especially pollution created by industry, is the defense of statutory authority. In *R. v. Pease*, a railway was deemed

71. House of Lords Select Committee on Noxious Vapours, Parliamentary Papers, 14 (1862), Minutes of Evidence 21 QQ 220-2.

72. *Tipping v. St. Helen's* 11 Eng. Rep. 1483 (H.L. 1865).

73. For example, the ambient level of particulates and sulphur dioxide in London is now lower than at any time since the 16th century; meanwhile, nitrogen oxides and ozone have been falling since the mid-1970s. See, e.g., BJORN LOMBORG, *THE SKEPTICAL ENVIRONMENTALIST*, (2001).

74. In the mid-19th century a number of organizations were established whose objective was to use the law to reduce air pollution. However, these organizations tended to use the public nuisance action and various clauses in Town Improvement Acts rather than private nuisance. After a time, their main role seems to have been to lobby Parliament to introduce stricter legislation. See, e.g., ERIC ASHBY AND MARY ANDERSON, *THE POLITICS OF CLEAN AIR* (1981).

not to have committed an alleged public nuisance by virtue of the fact that it had been granted statutory authority to operate through a private Act of Parliament and had been operated without negligence.⁷⁵ In *Hammersmith and City Railway Co. v. Bush*,⁷⁶ the House of Lords ruled that a railway operating under statutory authority would not be held liable for any alleged private nuisance caused to neighbouring properties resulting from its operations.⁷⁷

In the leading case of *Allen v. Gulf Oil Refining*,⁷⁸ the owner of a house allegedly adversely affected (through noise, smoke and other interferences) resulting from the operation of a nearby oil refinery was denied redress on the grounds that refinery operator had obtained statutory authority to carry on its undertaking:

To the extent that the environment has been changed from that of a peaceful unpolluted countryside to an industrial complex (as to which different standards apply:⁷⁹ Parliament must be taken to have authorised it. So far, I venture to think, the matter is not open to doubt. But in my opinion the statutory authority extends beyond merely authorising a change in the environment and an alteration of standard. It confers immunity against proceedings for any nuisance which can be shown ... to be the inevitable result of erecting a refinery on the site, not, I repeat, the existing refinery, but any refinery, however carefully and with however great a regard for the interest of adjoining occupiers it is sited, constructed and operated. To this extent and only to the extent that the actual nuisance (if any) caused by the actual refinery and its operation exceeds that for which immunity is conferred, the plaintiff has a remedy.⁸⁰

Thus, if a corporation has obtained, by an Act of Parliament, the authority to carry on a particular operation, that corporation may not be held liable for any nuisance that is the inevitable consequence of

75. [1832] 1 All E.R. 579.

76. [1869] 4 H.L. 171.

77. Specifically, the court ruled that the Lands Clauses Consolidation Act 1845 and the Railways Clauses Consolidation Act 1845 created a statutory right to carry on the operation of the railway.

78. [1981] 1 All E.R. 353.

79. *See Sturges v. Bridgeman*, [1879] 11 Ch. D. 852.

80. *Id.* at 857-858, per Lord Wilberforce.

carrying on the operation. This is subject to the following qualifications:

1. The statutory powers must be exercised without “negligence” – meaning that the work should be carried out with all reasonable regard and care for the interests of other persons.⁸¹
2. The statutory powers conferred are not merely permissive, in which case they would have to be carried out in strict conformity with private rights.⁸²
3. The powers are conferred directly by parliament, not by an administrative body responsible for implementing legislation. So, for example, neither planning consent nor the granting of a license necessary for operating certain classes of plant (such as a landfill site) would confer statutory immunity from a suit in nuisance.⁸³

BACK IN A HOLE?

As noted above, under the *sic utere tuo* rule, defendant would be held liable if, *in principle*, harm to plaintiff’s property was a *likely* consequence of defendant’s action and if *in fact* harm resulted. Thus, even if defendant could not reasonably have foreseen the particular harm that might result, he remains liable. This is a rule of strict liability and is to be contrasted with the rule in negligence, in

81. *Hesketh v. Birmingham Corp* [1924] 1 K.B. 260, (1922).

82. *Asylum District Managers v. Hill* [1881] 6 App Cas 193. *But c.f.* *Manchester Corp v. Farnworth* [1930] AC 171, 183 (the statutory authority to operate a generating station was in general terms and this was deemed sufficient to over-ride private rights: there could be “no action for the making or doing of that thing if the nuisance if the inevitable result of the making or doing so authorised.”).

83. *Wheeler v. JJ Saunders Ltd.*, [1995] 2 All ER 697, planning permission to operate piggery was deemed insufficient to grant immunity to nuisance suit for creating noxious smell. *But c.f.* *Gillingham Borough Council v. Medway (Chatham) Dock Co Ltd.*, [1992] 3 All ER 923, in which planning permission to operate a commercial port was deemed to be sufficient to grant immunity to nuisance suit for increased noise, but in that case the planning permission was granted for the reopening of an operation that had previously had direct Parliamentary consent.

which defendant is only liable if he could have foreseen with some degree of precision the consequences of his action and if he had not taken reasonable care to avoid any adverse consequences that were foreseeable.

The rule for interference with beneficial use established in *St. Helen's v. Tipping* – that the interference should be unreasonable in the circumstances – appears at first sight closer to negligence. But still the rule is distinguished by the fact that liability pertains not according to the reasonableness of defendant's action, as in negligence, but by the unreasonableness of the interference with plaintiff's right to peaceful enjoyment.

In spite of the clear difference between these concepts, the 20th Century saw a blurring of the distinction between nuisance and negligence. In part this arose from the introduction of a narrower requirement of foreseeability in nuisance. Perhaps the most important case is *Wagon Mound (No 2)*,⁸⁴ which pertained to an accidental release of furnace oil into Sydney Harbour. The release, which occurred while the oil was being loaded onto the *Wagon Mound*, a ship on demise charter to Overseas Tankships (UK) Ltd, was followed by several fires in which numerous ships were burnt. Two lengthy cases resulted, the second of which is of particular relevance.⁸⁵

84. [1967] 1 A.C. 617.

85. The first case was heard by the Supreme Court of New South Wales: *Mort Dock and Engineering Company Ltd v. Overseas Tankship (UK) Ltd (The "Wagon Mound")* [1959] 2 Lloyd's Rep 697; This was appealed to the same court, see [1958] 1 Lloyd's Rep 575, and subsequently to the Privy Council. See [1961] AC 388. The case was argued primarily on negligence and the Privy Council ruled that the defendant was not negligent on the grounds that the particular damage that ensued could not have been foreseen. The second case, again heard by the Supreme Court of New South Wales, concerned two other plaintiffs, *The Miller Steamship Company, Pty., Ltd. v. Overseas Tankship (U.K.), Ltd., and R. W. Miller & Co., Pty., Ltd. v. Same (The "Wagon Mound" (No. 2))*. [1963] 1 Lloyd's Rep 402. This case was also appealed to the Privy Council. See [1967] 1 AC 617.

Wagon Mound (No 2) was initially argued on three alternative grounds: negligence, the rule in *Rylands v. Fletcher*,⁸⁶ and nuisance.⁸⁷ In the Supreme Court of New South Wales, Judge Walsh found that the claim in negligence failed because, although the defendant had been careless, the damage was not reasonably foreseeable. He found that the claim in *Rylands v. Fletcher* failed because the use of a harbour by a ship is “natural use”. And he also found that the plaintiff’s claim failed in private nuisance because there was no interference with the use and enjoyment of the plaintiff’s land. However, he found that the plaintiff’s claim succeeded in public nuisance, since the harbour is a public place.

The defendants then appealed the case in nuisance, while the plaintiffs appealed the case in negligence. The Privy Council held that creating a danger to persons or property in navigable waters falls in the class of public nuisance for which foreseeability of harm was adjudged to be a requirement. The Judicial Committee was, however, careful to distinguish nuisance from negligence and to ensure that not all forms of nuisance were lumped together.

However, there followed a rather ambiguous statement about the requirement of “fault” and “foreseeability” in nuisance cases:

And although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability, e.g. in cases like *Sedleigh-Denfield v. O’Callaghan*⁸⁸ the fault is in failing to abate the nuisance of the existence of which the defender is or ought to be aware as likely to cause damage to his neighbour.⁸⁹

In principle, this statement is broadly consistent with strict liability – where “strict” is construed to mean that liability pertains to actions for which a reasonable man should have foreseen that some harmful consequence might result from his actions. This is the old nuisance rule of *sic utere tuo* – so use your own as not to harm another’s – which implies that fault arises when one has insufficient regard for the possible effects on others of one’s actions.

86. At that time, the rule in *Rylands v. Fletcher* was considered a separate tort pertaining to accidental damage resulting from land uses that are “non-natural.”

87. [1963] Lloyd’s Rep 402.

88. [1940] 3 All ER 349.

89. [1967] 1 AC 617, 620.

Having made the above arguments specifically in the context of the case at hand and for the tort of public nuisance, the Privy Council offered obiter the observation that "It could not be right to discriminate between different cases of nuisance so as to make foreseeability a necessary element in determining damages in those cases where it is a necessary element in determining liability, but not in others. So the choice is between it being a necessary element in all cases of nuisance or in none."⁹⁰

Worse than this non-sequitur, however, the Privy Council then proceeded to assert that "the similarities between nuisance and other forms of tort to which *The Wagon Mound (No. 1)* applies far outweigh any differences ... It is not sufficient that the injury suffered by the respondents' vessels was the direct result of the nuisance if that injury was in the relevant sense unforeseeable."⁹¹ This is a rather bizarre statement, given that the Privy Council in *The Wagon Mound (No. 1)* had ruled that although there was no liability in negligence, there might be liability in nuisance, precisely because different standards of foreseeability apply!

Notwithstanding the dubiousness of the reasoning underpinning these *obiter dicta* in *Wagon Mound (No 2)*, they were employed in subsequent cases to justify a substantial blurring of the distinction between nuisance and negligence. Consider Lord Wilberforce's judgement in the privy council decision of *Goldman v. Hargrave*,⁹² where he asserted that an occupier has duty to take reasonable steps to prevent the spreading of a fire caused by lightning striking a tree,⁹³ failing to discriminate between nuisance and negligence:

So far it has been possible to consider the existence of a duty, in general terms. But the matter cannot be left there without some definition of the scope of his duty. How far does it go? What is the standard of the effort required? What is the position as regards expenditure? It is not enough to say merely that these must be "reasonable", since what is reasonable to one man may be very unreasonable, and indeed ruinous, to another: the law must take account of the fact that the occupier on whom the duty is cast has, *ex hypothesi*, had this hazard thrust upon

90. *Id.*

91. *Id.*

92. [1967] 1 A.C. 645.

93. *Id.* at 663.

him through no seeking or fault of his own. His interest, and his resources, whether physical or material, may be of a very modest character either in relation to the magnitude of the hazard, or as compared with those of his threatened neighbour. A rule which required of him in such unsought circumstances in his neighbour's interest a physical effort of which he is not capable, or an excessive expenditure of money, would be unenforceable or unjust. One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it. And in many cases, as, for example, in *Scrutton LJ's* hypothetical case of stamping out a fire, or the present case, where the hazard could have been removed with little effort and no expenditure, no problem arises. But other cases may not be so simple. In such situations the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able-bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should have done more. This approach to a difficult matter is in fact that which the courts in their more recent decisions have taken."⁹⁴

In *Cambridge Water v. Eastern Counties Leather*,⁹⁵ the plaintiff, a recently-privatised water company, alleged that the defendant, a leather tannery had during the course of its operations spilled various chemical solvents and that these had seeped into the plaintiff's bore-hole rendering the water unusable. The case was complicated by several factors, including (1) the procedures employed by the tannery which had resulted in the spillage had ceased some years before

94. *Id.* at 656-657.

95. 1 All E.R. 53 (1994).

the alleged injury had come to light; (2) the concentration of the solvents present in the bore-hole water when the case came to court were within statutory limits when the spillage occurred but the statutory limits were lowered as a result of the implementation of the EC's Groundwater Directive. Lord Goff asserted:

Of course, although liability for nuisance has generally been regarded as strict, at least in the case of a defendant who has been responsible for the creation of a nuisance, even so that liability has been kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land, under which “those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action.” The effect is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable even though he may have exercised reasonable care and skill to avoid it.⁹⁶

He went on to suggest that this “reasonable user” principle is similar to the “natural user” doctrine developed under the rule in *Rylands v. Fletcher*. This latter point is perhaps true, but by omitting from the concept of reasonable user the caveat that the actions should be done “conveniently” – a key element of *Bradford v. Turnley* – liability for nuisance under Goff's “reasonable user” shifts dramatically away from the *sic utere tuo* rule that had been supported wholeheartedly by Baron Bramwell in *Bradford v. Turnley*. The extent of the shift is clear in Goff's elaboration of the concept of foreseeability in nuisance. Citing as authority the *obiter dicta* of the Privy Council in *Wagon Mound (No 2)*, in which foreseeability of harm of the relevant kind was considered essential to establishing liability in both public and private nuisance, Lord Goff asserts that “It is widely accepted that ... foreseeability of harm is indeed a prerequisite of the recovery of damages in private nuisance, as in the case of public nui-

96. *Cambridge Water Co Ltd v. Eastern Counties Leather, PLC.* 1 All E.R. 53 at 299, (quoting *Bradford v. Turnley*, [1862] 3 B. & S. 62, 83).

sance.”⁹⁷ He then went on to consider the issue of foreseeability in *Rylands v. Fletcher* and came to the same conclusion.⁹⁸

In *Hunter v. Canary Wharf Ltd.*,⁹⁹ a case of alleged interference with the beneficial use of property resulting from dust and from the blocking of television reception, Lord Goff repeated the observation in *Cambridge Water* and then proceeded to claim that negligence has effectively replaced nuisance as the cause of action for harm resulting from smoke:

If the occupier of land suffers personal injury as a result of inhaling the smoke, he may have a cause of action in negligence. But he does not have a cause of action in nuisance for his personal injury, nor for interference with his personal enjoyment.¹⁰⁰

Remember that *Bamford v. Turnley* was a case of smoke nuisance resulting from the operation of a brick kiln. Remember also that in *Bamford v. Turnley*, the incipient shift away from the *sic utere tuo* rule, begun with *Hole v. Barlow*, was expressly overruled. Yet, Lord Goff asserts that smoke does not constitute such a nuisance. Even if one reads the passage narrowly so that it is construed to apply only to personal injury it is peculiar: why should personal injury not be a form of interference with beneficial use?

For continuing nuisances, the requirement of foreseeability is less onerous, even if the nuisance is the result of a defendant’s neglect rather than any positive action. issue was addressed in *Sedleigh-Denfield v. O’Callaghan*.¹⁰¹ In that case, a pipe was placed on the defendant’s land by a trespasser. The defendants subsequently used the pipe to drain their land. However, during the course of a heavy rainstorm the pipe became blocked with leaves and water overflowed on to the plaintiff’s property. The plaintiff sued the defendant for nuisance. The lower court ruled that the defendant had not created the nuisance and so was under no duty to abate it. The Court of Appeal upheld this judgment. However, the House of Lords reversed the judgment. The defendant not only had knowledge of the

97. *Id.*

98. *Id.*

99. 2 All E.R. 426, (1997).

100. *See id.* per Lord Goff.

101. [1940] AC 880.

pipe but he used it: he therefore both adopted and continued the nuisance.¹⁰²

In *Davey v. Harrow Corporation*, tree roots had grown from defendant's property onto that of the plaintiff causing physical damage to the plaintiff's property. The Judge in the lower court found for the defendant on the grounds that ownership of the trees had not been clearly established. The Court of Appeal reversed the decision, holding that the owner of a property on which a tree stands and from which roots grow is liable for damage caused by those roots, regardless of whether the owner planted the trees or not.

The issue was again addressed in *Leakey and Others v. National Trust*,¹⁰³ which concerned a landslide from the defendants' property onto that of the plaintiffs. In the summer of 1976, during a prolonged drought, cracks had opened up in the earth on the defendants' property and one of the plaintiffs had complained to the defendant about the imminent risk of a landslide possibly affecting her property. The defendants replied that they were not obliged to do anything about it and soon thereafter a landslide occurred resulting in damage to the plaintiffs' property. The plaintiffs then asked the defendant to remove the earth, but the defendant refused, and the plaintiffs removed the earth at their own expense. The plaintiffs sued the defendant to recover the cost of removing the earth and damages for nuisance. The Defendants appealed arguing: (1) that there was no liability for things that naturally accumulate on land, and (2) that even if there was liability it was in negligence and not nuisance. On the first point, the Court of Appeal upheld the lower court judgment, affirming the decision in *Davey v. Harrow Corporation* that the owner of a property is liable even for things naturally upon his land. On the second point, the Court of Appeal (per Lords Justice Megaw and Cumming- Bruce) ruled that this was clearly a case of nuisance.

The issue was addressed most recently by the House of Lords in the case of *Delaware Mansions Ltd. v. Westminster City Council*.¹⁰⁴ The case was similar to *Davey v. Harrow Corporation*: the plaintiff had suffered physical damage to its property as a result of tree roots egressing from the defendant's. Again the House of Lords ruled that this was a case of nuisance, however the reasoning given was based

102. *Id.*

103. *Leakey and Others v. National Trust for Places of Historic Interest or Natural History*, [1980] Q.B.485.

104. [2002] 1 A.C. 321.

on considerations of “reasonableness between neighbours” and reasonable foreseeability,” per Lord Cooke. In the case at hand, for example, it was considered necessary for the plaintiff to have given notice to the defendant of the continuing nuisance.

The present status of nuisance may be summarized as follows: Where D’s actions have caused physical injury to P’s property or interfered with P’s beneficial use of her property, D will be liable only if P can show that D could have foreseen harm of the relevant type resulting from D’s actions. But even so, the interference will not be an actionable nuisance if it relates only to injury to the person. However, where a nuisance has been continued or is ongoing, and is evident to D – or where P has given notice of its existence to D – the foreseeability requirement is presumed to be fulfilled.

CLIMBING OUT OF THE *HOLE*

Notwithstanding the availability of remedies in other causes of action (most notably negligence), the above analysis indicates that the following amendments would improve the utility of nuisance law as a means of addressing environmental problems.

1. Generally follow the late nineteenth century doctrine, which for an actionable private nuisance would entail establishing:
 - a. Interference with another’s right
 - i. for physical damage to property this would merely require showing that harm has occurred.
 - ii. for interference with beneficial use of property, this would require showing that the interference was “unreasonable” in the circumstances (as judged by that wonderful legal fiction, the reasonable man); reasonableness in this context would be dependent principally on the extent of the interference, the location of the P, the time the interference occurred, and the duration of the interference.

This distinction between physical interference and interference with beneficial use may be justified a number of ways. Perhaps the most satisfactory justification being that it accords with the common law’s general predilection for clear, objectively verifiable in itself. By contrast, interference with beneficial use is inherently subjective (just as one man’s meat

is another man's poison, so too one woman's irritating, rumbling train is another woman's pleasurable vibro-massage).

Probably the only way to make the interference with beneficial use rule objective would be to make all forms of interference actionable (which is little more than a "lonely rural fantasy".¹⁰⁵) Thus, a rule based on the principles of reasonableness outlined above seems about as close to an objective standard as one could reasonably hope for.

- b. Cause: that the interference with P's right had in fact resulted from D's actions. However, it should not be necessary to show that the harm resulted uniquely from D's actions, or indeed that D's actions would have resulted in harm but for the actions of another. It should only be necessary to show that D's actions contributed, in the circumstances, to the interference.
 - c. Foreseeability and fault: liability is strict; it is enough that D has done something *likely* to interfere with another's property. It does not matter that the specific interference itself is unforeseeable. The test is whether a "reasonable man" should have foreseen some potential interference.¹⁰⁶ It does not matter that D took every care to ensure that his operation was conducted in compliance with industry standards.
2. Cases of injury to persons or property that occur in places controlled directly by the state (e.g. public highways, public waterways, and so on) should be governed by separate rules. The reason is simply that the activities in such places are not subject to the same sphere of control that pertains in private spaces. It is, for example, not usually possible to enter into a contract with the state to prevent persons walking past one's building while one is erecting an extension to one's property. Perhaps the solution in such cases is for the state to be liable under the same rules as apply in private nuisance. So, in

105. Howarth, *supra* note 10, at 505.

106. The rule is *sic utere tuo ut in alienum non laedas*, which means that D should have regard to the effects of his actions on others, so as not to cause harm, and also "that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril." *Rylands v. Fletcher* [1866], 1 L. R. Ex. 265, 279.

Wagon Mound, the state of New South Wales might have been held liable for permitting fuel to be loaded in its harbour in such a way that it could leak and cause injury to other boats.¹⁰⁷

3. Constrain or Remove the defense of statutory authority. At present this is one of the single most significant barriers to the use of private nuisance for environmental protection.¹⁰⁸

Perhaps the best approach, however, to this is that adumbrated by Lord Denning in the Court of Appeal decision in *Allen v. Gulf Oil*:

But I venture to suggest that modern statutes should be construed on a new principle. Wherever private undertakers seek statutory authority to construct and operate an installation which may cause damage to people living in the neighbourhood, it should not be assumed that Parliament intended that damage should be done to innocent people without redress. Just as in principle property should not be taken compulsorily except on proper compensation being paid for it, so also in principle property should not be damaged compulsorily except on proper compensation being made for the damage done. No matter whether the undertakers use due diligence or not, they ought not to be allowed, for their own profit, to damage innocent people or property without paying compensation. They ought to provide for it as part of the legitimate expenses of their operation, either as initial capital cost or out of the subsequent revenue.¹⁰⁹

Remove the more general defence of public benefit, which compels judges to make impossible calculations (weighing up, to use the example from the introduction, the interests of road users, industrialists, and sunset worshippers against the interests of those adversely affected by emissions). To the extent that “public benefit” is of rele-

107. At the very least this might encourage the state to reconsider the merits of owning such a large proportion of the infrastructure. If the harbour had been owned by a private party, that party could have specified the liability rules to apply in his contracts with those using the harbour, thereby avoiding lengthy and expensive tort cases (and one would hope not substituting them with lengthy and expensive cases for breach of contract).

108. *Allen v. Gulf Oil Refining, Ltd.*, [1979] 3 All E.R. 1008, 1012, per Lord Denning.

109. *Allen v. Gulf Oil Refining Ltd.* [1979] 3 All E.R. 1008, [1979] 3 W.L.R. 523 [1980] R.V.R. 126 per Lord Denning.

vance, it is incorporated into the locality criterion. Moreover, if the benefit of continuing a nuisance is sufficiently great, then in some cases the defendant may be able to buy out the plaintiff(s).¹¹⁰

4. Propose that harm to human health be covered as an interference with beneficial use, actionable by the possessor of the affected property, P. It seems reasonable, for example, to propose that air emissions which contribute to asthma or other respiratory problems should be presumed to interfere with beneficial use and that P should be able to avail herself of an action in nuisance for abatement.¹¹¹ Combined with better scientific understanding of the causes of these problems and with better monitoring techniques, enabling readier and cheaper identification of the sources of pollution, such a presumption would offer a means of dealing with modern air pollution problems.¹¹²
5. In case there is any confusion, the primary remedy for continuing nuisances should be the injunction. Whereas in some cases courts may be able accurately to assess damages for past nuisances, it seems extremely unlikely that they will be able to assess damages for future nuisances, making the injunction a more appropriate remedy from the perspective of protecting the rights of those who are adversely affected.¹¹³ Moreover, in cases where many people are adversely affected, an injunction brought by one party would effectively protect the rights

110. As noted above, there is evidence of such bargaining taking place, however in a recent study Ward Farnsworth found no evidence of bargaining. Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CH. L. REV. 373 (1999).

111. This proposition is in direct contradiction of the current law: "If the occupier of land suffers personal injury as a result of inhaling the smoke, he may have a cause of action in negligence. But he does not have a cause of action in nuisance for his personal injury, nor for interference with his personal enjoyment." *Hunter v. Canary Wharf, Ltd.*, [1997] 2 WLR 684, 699 per Lord Goff.

112. Even pollution from vehicles could be dealt with in this way by holding the state liable as maintainer of the highway on which those vehicles traverse.

113. See Stephen Tromans, *Nuisance - Prevention or Payment*, 41 CAMBRIDGE L. J. 87 (1982).

of many and thereby protect the environment as a whole. Such a reformation of nuisance law seems to offer at least a partial solution.

Such a reformulation of nuisance law seems to offer at least a partial solution to the conundrum posed in the introduction. By clearly delineating rights and responsibilities this way, people will be able to choose the kind of environment they want. Meanwhile environmental organizations might follow the ACA model and indemnify parties who seek to sue polluters, rather than push for more stringent environmental regulation. Indeed, there might be a move to repeal the entire body of environmental legislation, which would soon begin to look cumbersome, expensive, and counterproductive.¹¹⁴

114. Cf. Robert Cutting, *One Man's Ceilin' is Another Man's Floor: Property Rights as the Double Edged Sword*, 31 ENVTL. L. 819 (2001) (if property rights advocates truly acknowledged the responsibilities and the rights of property owners, the remainder of the body of environmental law as we know it might actually become unnecessary).

