

Fordham Environmental Law Review

Volume 14, Number 2

2002

Article 6

Saving our Streams- The Role of the Anglers' Conservation Association in Protecting English and Welsh Rivers

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SAVING OUR STREAMS: THE ROLE OF THE ANGLERS' CONSERVATION ASSOCIATION IN PROTECTING ENGLISH AND WELSH RIVERS

*Roger Bate**

INTRODUCTION

For the past 50 years environmental recovery and protection of English and Welsh rivers has been aided by a group of single-minded, selfishly-motivated private fishermen, assisted by a co-operative organisation operating on a shoestring budget and using the common law as its main tool. Their actions are taken in the Civil Courts and pre-date the environmental movement by 25 years.

This paper analyses the work of the Anglers' Conservation Association (ACA) in fighting pollution, and so provides an illustration of the legal process. Since its formation in 1948 as a private interest, self-help group, the ACA has quietly, consistently and successfully fought to improve and maintain good quality rivers in England and Wales. Its legal actions have established important precedents in environmental protection. It has helped to form policy by providing advice to both Houses of Parliament. The ACA's Director is currently serving on a Government Committee to try to solve the huge problem of pollution caused by flooding in disused coal mines.

The basis of its legal actions is very simple. In the common law landowners have certain benefits and duties, called riparian rights, over water flowing across or alongside their land. They cannot own

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the water, but they can use a “reasonable” amount of it and they have the right to a sufficient quality and quantity of water flowing past.¹ Their duties are to ensure that the rights of neighbouring riparian owners are not damaged by their own actions. Furthermore, if the riparian owner has a fishery, he also has the right that migratory fish have free passage up and down the river, from their spawning grounds to the sea.²

Adherence to these simple-sounding principles in common law has, in the words of a former Under-Secretary of State for the Environment, Mr Eldon-Griffiths, “been one of the main defences – and sometimes the only defence – against river pollution.”³ Nevertheless, during the lifetime of the ACA there have been three attempts to abolish the civil rights of riparian owners through statutory legislation. Fortunately, the ACA and their members mounted successful campaigns to alert MPs, officials and the media and the rights have remained intact.⁴

In the ACA’s history are incidents where a polluting public water authority was successfully sued by a private individual; where an angling club stopped pollution of an estuary 40 miles downstream of the club itself; and where ACA lobbying dissuaded government from handing a licence to pollute to large industries. Although they rarely make news headlines ACA action is extremely important. As in all forms of law most of its potential cases are settled by negotiation before they reach the courts – a process that yields little publicity to or recognition for the ACA as a preventer of pollution.

The ACA is probably the most efficient pollution-preventing body in Britain.⁵ This paper details how it has achieved such success and why its experience demonstrates the error of the idea that individuals either cannot or will not protect the environment.

1. *Sturges v. Bridgeman*, 11Ch.D. 852, 865 (1879)

2. *See generally*, ARTHUR WISDOM, *THE LAW OF RIVERS AND WATERCOURSES* (1979).

3. *Report for 1972*, 19 *THE ANGLERS’ CONSERVATION ASSOCIATION REVIEW* No. 3 at 21 (1973) [hereinafter *ACA REVIEW*]. The *ACA Review* is published by the Angler’s Conservation all of the volumes cited here are on file with the author.

4. *See generally*, ROGER BATE, *SAVING OUR STREAMS* (2000).

5. *See generally*, C. STRATTON GERRISH, *POLLUTION: THE ACA HANDBOOK* (5th ed. ACA Press 1973).

1. The Anglers' Conservation Association and the common law

The ACA will often enter into friendly negotiation with polluters and recover damages of a few hundred or a few thousand pounds, but in each case, the money represents realistic reparation for damage done and, significantly, it goes to the anglers who use it to make good what was lost.

Such reparation seems normal today since public opinion puts a high value on environmental protection but after the Second World War things were very different. The public mood was for economic development, regeneration of industry, building new homes, providing consumer goods and generally making up for the privations of a long and dreary war. Pollution was an occupational hazard of little significance to most people, but it was during this time that the first riparian action against pollution since the 19th century was brought.⁶

THE EARLY DAYS OF ACA

Sewage pollution was a significant cause of fish kill in the 1940s and it was fitting that the ACA began following an action brought by Lord Brockett.

Lord Brocket, a lawyer and MP sought remedy for sewage pollution in the common law as a riparian owner. The common law of England, as it developed over many centuries, allowed the owner of land adjoining a river or watercourse the entitlement to protect it from pollution and excess abstraction.⁷

If a riparian owner's water is polluted by a proprietor higher upstream, he has a good cause of action against the polluter. The reme-

6. PETER CARTY & STEVEN PAYNE, *ANGLING AND THE LAW* (1998).

7. This entitlement is known as a riparian right. Lord Wensleydale in *Chesmore v. Richards* summarised the law in 1859 as follows:

[The landowner] has the right to have [water] come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. 7 H.L. Cas. 349, 382 (1859).

dies available to a sufferer or plaintiff if his case is proven are compensation for loss suffered and the granting of an injunction to restrain any possible future pollution from the same defendant in the action.

The riparian owner also has a right to the ordinary use of the water flowing past his land, that is, to take as much water as is reasonably accepted. However there is no simple, standard definition of ordinary abstraction. Each case is considered on its own merits, the rule being that extraordinary abstraction that reduces the flow of water is in principle actionable by a lower riparian owner.⁸

Furthermore, the ownership rights are so strong that it was established in 1867⁹ that if a person wished to exercise a riparian right, for instance to stop pollution, it was only necessary for him to own a tiny fraction of the bank of the stream.

Nevertheless, exercising the law is expensive for individuals and the personal risk is high, because if he loses his case, the plaintiff is liable for all costs – his own and the defendant's. Naturally, this works the other way too, the loser pays for everything. Since the government had made severe pollution which caused a public nuisance a criminal offence in 1876, it was generally assumed that the owners' rights had been superseded, so the use of civil law to bring actions against polluters had all but disappeared in the twentieth century.

Lord Brocket claimed that his rights had been infringed and that the effluent from the Luton Corporation's sewage works¹⁰ had materially altered the natural state of his water. As a riparian owner, he did not even have to prove that he had suffered damage, only that his water had been affected. A writ was issued and the case of *Lord Brocket v. Luton Corporation* came before Judge Vaisey in 1946.¹¹

8. See *WISDOM*, *supra* note 2, at 104. There are several cases which have influenced this position: *Miner v. Gilmour*, 12 Moo. P.C.C. 131 (1859); *Earl of Norbury v. Kitchin*, 7, L.T. 685 (1863); *McCartney v. Londonderry Ry. Co.*, [1904] A.C. 301 (1904); *White & Sons v. White*, 1906, A.C. 72 (1904).

9. *Crossley v. Lightowler*, 16 L.T.R. 438 (1867)

10. The Luton Corporation is somewhat misleadingly named since it was a local government body.

11. See *Progress Against Pollution*, 1 *ACA REVIEW* No. 1, 10 (1950). Most of the ACA cases referred to in this paper were never reported in Law Journals. Transcripts were kept for up to seven years

He listened to the evidence, which had been prepared by the embryonic ACA team of solicitor, barrister and expert witnesses who gave evidence of their analyses. The sewage works was found liable for polluting the River Lea in Hertfordshire. An injunction was granted and the defendants were also ordered to pay the costs of the action.

In retaining the ACA team, Lord Brocket had given them the perfect test of how well their idea would work. For the team the case was “a try-out against determined opposition and proved its efficiency in action.”¹² It showed that it was possible for the ACA to brave conflict or controversy to achieve its goal. It also epitomised many of the cases encountered later – local authorities disregarding common law rights, effluent quality objectives that were useless at preventing pollution, and the lack of dilution for effluents being ignored.

THE FOUNDER

The idea that anglers shall group together to finance actions against polluters in the common law came from one man – an angling barrister and Bow Street magistrate. John Eastwood OBE, KC analysed the sixteen Acts of Parliament in force in the mid-1940s for the protection of rivers and decided “that none of them was any good.”¹³ He saw that the quality of water in a river was highly dependent on how water in that river was used. For example, good salmon fishing could be found on rivers like the Test, which supported little industrial activity, while industrial production near rivers like the Derwent and Trent meant that water quality was far poorer. According to Eastwood, there was apparently no real effort to stop any polluter from releasing effluent into those British rivers used to support industrial activity. Any statutory action on these industrial rivers had been either ineffectual or even damaging.

but for most of the cases discussed in this paper original research uncovered transcripts or the author relied upon the ACA’s own reporting.

12. *Id.*

13. *Pollution Talk on BBC*, 4 ACA REVIEW No. 1 at 65 (1953).

LEGISLATION TO 1948 – THE LAW AND THE REMEDY

The Public Health Act of 1875 made the first attempt to deal with pollution from sewage and gas works, and the Rivers Pollution Prevention Acts (1876–1893) gave local authorities power to take criminal proceedings against polluters. Prior to that, the owner of a river, or of the land adjoining the river, was the only person entitled to protect it from pollution.¹⁴

The Attorney General could take criminal proceedings only if pollution was so gross as to constitute a public health danger – a public nuisance. A public nuisance is an act unwarranted by law or an omission to discharge a legal duty which materially affects the life, health, property, morals or reasonable comfort of a class of citizens, who come within the sphere or neighbourhood of its operation.¹⁵

This Rivers Pollution Prevention Act (1876) attempted to alleviate the expense of private action. However, according to C. Stratton Gerrish, the legal consultant to the ACA from 1950 to 1970, the Act failed because local authorities were only *enabled* to take action to stop pollution and not *obliged* to do so. What is more the prosecutor under the Act was usually the polluter itself (a local authority) or another local authority. In the case of industrial pollution, the consent for an action had to be given by the Minister of Health, who refused permission if the polluter could demonstrate that there was, as yet, no means of purifying the effluent. The perception following the 1876 Act was that polluters could escape liability if they used the latest technology.¹⁶

14. The rights of riparian owners are very strong, and since any offender who ignores an injunction is guilty of contempt of court and can be imprisoned, this means that the private riparian owner is in the strongest possible position to defend his river against pollution. But the cost is the great obstacle to actions.

15. *See generally*, A-G v. Basingstoke, 45 L.J. Ch. 726 (1876); A-G v. Lonsdale 33 J.P. 534 (1868).

16. The effect of this was that: “it paid industry handsomely not to discover new methods of effluent treatment. One court, for instance, decided that it was not reasonable to expect any firm to spend more than £100 on purifying its effluent... The view became established that it was not their business to do anything unless the pollution was so gross as to create a public nuisance.” *See GERRISH, supra* note 5, at 8.

Standard of Purity

A Royal Commission was established towards the end of the nineteenth century to enquire into the standards of purity of sewage and industrial effluents which ought to be required under the Rivers Pollution Prevention Acts. It recommended in its report of 1912 that a certain standard of purity should be maintained to avoid a public nuisance. Any standard should also allow for the availability of dilution for that effluent. However, the quality of water required to support fish life was not mentioned in the recommendation: sensitive fish like salmon and trout would probably not have survived in water that was polluted but still did not constitute a public nuisance.

The standard, which became known as the 30/20 standard, called for an effluent with not more than 30 parts per million of suspended solids and not more than 20 parts per million biological oxygen demand (BOD) to be discharged into a receiving water giving at least an eight-to-one dilution factor. The Royal Commission's recommendations (although never given statutory effect) were interpreted by local authorities as relieving them from all responsibility of taking action, unless the recommended standards were breached. Both industrial and Council polluters therefore considered their effluent to be acceptable as long as it did not infringe these standards.¹⁷

Fishery Legislation

Government concern was aroused back in 1860 about the dwindling salmon populations, with the result that a Commission was appointed to look into salmon fisheries. The Salmon Act of 1861 set down the seasons and methods of taking salmon and created the offence of taking immature and spawning salmon. Coarse fishing was similarly recognised by the Freshwater Fisheries Act of 1878.

By 1923 the legislation had been amended and patched up by 18 further acts of Parliament, including the creation of Fishery Boards under the Salmon and Freshwater Fisheries Act of 1907, but still there was no effective protection against pollution. The powers of the Rivers Pollution Prevention Acts (1876–1893) which had previously applied only to sanitary authorities, were extended by the 1907 Act to the new Fishery Boards. This was an improvement in that it removed the conflict of interests arising from a local authority prose-

17. See GERRISH, *supra* note 5, at 9.

cutting itself or a local counterpart – the gamekeeper and poacher problem. Fishery Boards were also given the power by bylaws to regulate the deposit of any matter detrimental to salmon, trout or freshwater fish.

The Salmon and Freshwater Fisheries Act of 1923 consolidated all the previous pieces of legislation and provided some improvements. The defence of best practical means remained but the £100 limit was dropped. The prosecution still had to prove that fish were present when the waters became injurious to fish through the presence of a specific polluting matter directly caused by the accused. The effect of this was to make multiple prosecutions almost impossible – a factory owner could plead that any fish that might have been in a river had already been killed by somebody's else's effluent before he discharged his factory's waste. The Act also gave protection to spawning grounds, spawn and fish food sources. However, the benefits of these changes must have been limited by the continuing need to obtain Ministerial consent to an action against mining or manufacturing pollution.

Still, the powers available to Fisheries Boards could have been used to great effect. That they were not was largely due to lack of money – some had budgets of as little as £200 a year (\$12,000¹⁸). Successful prosecutions brought only small fines and their only source of income was what they could raise by imposing licence duties. Since few anglers would want to buy a licence to fish polluted waters, it follows that the Fishery Boards responsible for the dirtiest rivers also had the least money.

A Glimmer of Hope

The Public Health Act of 1936 seemed to offer an effective remedy to polluted rivers and a relief to anglers. This Act rejected the effluent standard recommendations of the Royal Commission and in effect required sewage effluent to comply with the common law rights of riparian owners.

However, any hope raised was short-lived as the Act was modified by the Public Health (Drainage of Trade Premises) Act (1937). This allowed industries to discharge their effluents into sewers (subject to certain safeguards) and threw the onus of purifying them on to the

18. Figures in brackets are real prices for 2001 adjusted for inflation.

local authorities. In effect, polluters were able to pump effluents into rivers, as the sewerage system simply could not cope with the volumes and concentration of the discharges.¹⁹

THE CRUSADING ANGLER

John Eastwood describing how he set up the ACA he says that he made two sudden discoveries:

While pollution may have been inevitable in Queen Victoria's time, this was no longer the case. During this century science has made such strides that far the greater part of existing pollution can be stopped.

This discovery completely alters our sense of values. If a vital industry can get rid of its effluent only by poisoning a river, there seems to be no answer; but, if the effluent can be made harmless, is the industry entitled to destroy the pleasure of millions merely for the sake of cheaper production? An entirely new orientation of rights and duties has thus arisen. There is the relative duty of an industry to its shareholders, or a local authority to its ratepayers, and the wider duty of both to the general public.

My second discovery was this. To all intents and purposes every Act of Parliament dealing with pollution is a penal Act – that is to say, it creates pollution offences which are punishable in a criminal court. There is no Act dealing with the civil rights of an injured person. This has never been necessary because Civil rights are part of the Common Law of the land. They are the basis of freedom, and prescribe that an individual shall enjoy what is his without undue interference.²⁰

19. "Strangely enough the lamentable amount of pollution existing today is due largely to the various acts of Parliament that have been passed ostensibly to stop pollution." See GERRISH, *supra* note 5, at 6.

20. John Eastwood, K.C., *The Fight Against River Pollution*, ACA REVIEW 1998 at 13.

He knew that the common law could work, but he was concerned that riparian rights were not being enforced due to a lack of finance. "The snag was that the costs of actions to enforce that right would be enormous, because the chief defendants would be great city corporations, nationalised industries and huge combines who'd be bound to fight them every inch of the way."²¹ Eastwood wanted to know how to overcome the difficulties of enforcing these rights.

According to his son Hugo, John Eastwood decided on providing a practical solution when his family's fishing on the river Usk was threatened by a proposed industrial barrage on the river.²² The water environment he loved might be irrevocably changed and he "wanted to do something." He came up with the novel idea of an association designed to spread the risk of an action in common law by raising annual subscriptions among all those with property interest in water to guarantee against legal costs. His correspondence from 1946 showed the first germ of the idea. "Did I tell you that I have been working on a new scheme to protect our rivers against pollution? It is rather original and aims at enrolling 500,000 anglers on co-operative lines... it is my own idea."²³

In the two and a half years prior to the ACA's formation, he wrote 3,000 letters (in long-hand) to obtain support for the scheme. He also wrote numerous articles, attended many meetings, gave interviews and journeyed all over the country. He hoped to convince other fishermen of his strategy, and to encourage them to follow him.²⁴ His sincerity and their self-interest would determine the success.

On February 6, 1948 the first meeting of the temporary committee of the Anglers' Co-operative Association was held in a little room in Lincoln's Inn Fields in London's legal district. The ACA was incorporated soon afterwards as ACA Trustee Company Limited. Upon a Guarantee Fund made up of a £600 (\$20,000) float given by the Tackle Makers' Association and the fees of a modest membership, the ACA was ready to start operations.

It is interesting to note that John Eastwood used the term co-operative to describe his idea. Co-operative (self-help) movements

21. *Pollution Talk on BBC*, 4 *ACA REVIEW* No. 1 at 65 (1953).

22. Personal communication July 6, 2000 (on file with on author).

23. Dorothea Eastwood, *The Birth of the A.C.A.*, *ACA REVIEW* No. 3 at 54 (1954) (quoting a letter written by John Eastwood in January 1946).

24. *Id.*

were far more prevalent prior to the formation of the welfare state. At that time it was not unusual that finance for medical care and unemployment insurance was provided through co-operative associations. It is unlikely that any environmental interest group would use that title today, even though the basis of many environmental ideals is co-operation. In 1994, on merging with the Pure Rivers Society, the co-operative name was dropped in favour of conservation – The Anglers' Conservation Association. What was fundamental to the design of the organisation in 1946 had lost its social relevance.

Eastwood's appeal was not to a notion of public service (that is, as a duty to help keep rivers clean, as most environmental groups do today), but to all anglers' self-interest.

He also made it clear in his letters that the ACA would only support common law actions of those riparian owners and angling associations who were paid-up members of the ACA. In order for on free ride, one had to be sure that an ACA member or rich riparian owner (who might litigate) was on the same stretch of river. Eastwood was aware that the incentive to join the ACA would be stronger if he excluded non-members from its benefits. However, he was keen to include other angling associations as he realised the importance of their being members of the ACA. Moreover, the more people that provided the public good of clean river water, the lower the cost to those providing.

2. The ACA In Action

Anybody hoping to exercise riparian rights must have a legally-recognised interest in the property. For angling clubs this means a lease with the riparian landlord, preferably signed under seal, and preferably including a clause in which the riparian owner agrees to be a party in any legal action. Proper leases provide legal standing, but it is important to make them for as long as possible – 7, 14, or even 21 years are suggested by the ACA – for several reasons. On a practical level, a longer lease gives greater incentive for anglers to protect and improve their fisheries. And an action is less likely to be brought by a club which only has a year-to-year lease because the only damages that could be recovered if successful would be the loss of a maximum of one year's amenity. A polluted river often takes some years to recover before restocking can be attempted, and a club with a short lease is likely to give up and go elsewhere. Most important is the term of an injunction, restraining a polluter for ever. It is appropriate when there is reason to believe that the pollution will

continue and it is strongly enforceable. But "for ever" actually refers to the term of proprietary interest of the plaintiff. That is why it is best to have the riparian owner as party to an action and why long leases are a better insurance.

The property interest of the riparian owner or angling club is vital to the protection of waterways. Without these bundles of rights, it is doubtful whether the ACA would have ever been formed, or would have been able to act if it had.

River Cynon, Wales

The power of these narrowly-defined rights were well illustrated by an early ACA case. Following advice given in the ACA's Pollution Handbook, Dr. J. R. Steen restored the River Cynon, a 'dead river' in the heart of the Welsh coal mining valleys to its former purity. Dr. Steen formed the Aberdare and District Anglers' Association and obtained over 30 seven-year leases which covered the whole river. With some preliminary advice from the ACA, the anglers of Aberdare set about stopping the discharge of gas liquor by the Gas Board, the pollution with coal slurry by the Coal Board and caused a filter to be built to remove coal dust from the river. The Aberdare Urban District Council gave assurances that sewage pollution would cease, and other smaller sources of pollution were also cleaned up. In 1950, the Co-operative Wholesale Society had proposed to discharge chlorinated water into the river, but back-pedalled after hearing from the ACA solicitors.

River Cray, Kent

The first case to be entirely handled and financed by the ACA occurred in 1948.²⁵ In March 1948, all the fish in the Club's lake at St Mary Cray in Kent were killed. The ACA experts identified the cause as sulphuric acid which was discharged from the defendants' mills into the River Cray, which filled the Club's lake. The anglers were successful and eventually received £1,250 (\$40,000) in damages, which was handed over to the Club Secretary with great ceremony by John Eastwood himself.

25. *Orpington and District Angling Association v. Vegetable Parchment Mills Ltd*, *Progress Against Pollution*, 1 ACA REVIEW No. 1 at 10 (1950).

It is interesting that, having stressed above the importance of a proper fishing lease, the Orpington club had no fishing lease at all. They rented the land on a verbal tenancy and fished from the land. Neither did they have the right to fill their lake from the River Cray. The ACA must have been very relieved to win the case for the member and recover all their own costs. Gerrish mentioned several years later that “few of our present members realise how near the ACA was to crashing before it ever became airborne... the only way to save [the ACA] was to produce some tangible results, so the first action sponsored by the ACA was started and, by the mercy of providence, won with the backing of a fighting fund of just £200 (\$6,500)”²⁶.

However, the ACA was happy to report in May 1950 that it had “won eight contested High Court actions in six months and in as many more cases the required result was obtained without even having to start legal proceedings.”²⁷ Moreover, the many polluters who had “snapped their fingers at Fishery Boards and Public Health Authorities for years, have thrown in their hands as soon as a riparian owner’s action has been started against him.”²⁸

River Gade, Middlesex

One defendant in an early case did fight, and they were a £12 million (\$380 million) a year paper milling concern. The case was an important one because large stretches of waterways were concerned. The pollution alleged by the plaintiffs²⁹ had already been the subject of a report by the Ministry of Agriculture and Fisheries in 1932, and

26. C. Stratton Gerrish, *From Our Legal Consultant*, ACA REVIEW No. 10 at 15 (1968).

27. *Progress Against Pollution*, 1 ACA REVIEW No. 3 at 59 (1950).

28. *Id.*

29. *Elms Angling Club, Ltd. v. J. Dickinson & Co Ltd.*, *Progress Against Pollution*, 1 ACA REVIEW No. 2 at 30 (1950); *see also Further Progress in Cases Already Reported*, 1 ACA REVIEW No. 3 at 65 (1950) and *Progress Against Pollution*, 2 ACA REVIEW No. 4 at 53 (1951).

many subsequent complaints had been made. Penal proceedings had been taken in 1939 but the Watford Bench had refused to convict. The defendants denied any pollution of the River Gade, so a trial was inevitable. The ACA Trustees Co Ltd gave the plaintiffs an unlimited indemnity in respect of costs, although this must have caused some anxiety since the case was expected to last for two or three weeks and the costs to run high.

In the event, the defendants folded during the opening speech of the ACA Counsel, and submitted to an injunction and costs. The plaintiffs had been joined by many other angling clubs affected by the pollution. Altogether, 40 miles of waterways stood to benefit from the removal of the pollution.

During the course of the hearing Mr Justice Vaisey commented on the most unsatisfactory state of affairs in which Parliament had set up Boards with responsibility for preventing river pollution but had failed to give them adequate powers with the result that 'public spirited individuals have to undertake the enormous financial risks of civil proceedings to deal with such cases as this.'

A RARE DEFEAT

The ACA suffered its first defeat in *Stokoe v. Shand Ltd*, a pollution case on 28th March 1966. Cyanide releases from the defendant's premises in 1962/3 resulted in a series of fish kills on the River Axe. Initially, the case was settled by negotiation, with the defendant compensating the ACA members and assuring them that he had taken additional precautions to prevent further escape of cyanide. However, within a few weeks there was another heavy killing of fish caused by a cyanide release from the defendant's premises, which convinced the ACA committee that it was useless to rely on promises to reform. As the defendant had also been prosecuted by the Devon River Board, a writ was issued claiming an injunction. The defendant admitted responsibility but said he had made alterations which would make it impossible for more cyanide to escape. The judge decided against an injunction but kept the case open and gave the plaintiff leave to apply to the Court for an immediate injunction if there was another incident.

In August 1965, another fish kill caused by cyanide occurred downstream from the defendant's factory. The ACA pursued the action despite knowing that it would be difficult to prove that the cyanide originated from the defendant's factory. It was hoped that

even if it were not possible to prove how the cyanide had been discharged into the river, it would be possible to apply the rule in *Rylands v. Fletcher*. Under this rule, the ACA might satisfy the court that large quantities of cyanide were being stored by the defendants without satisfactory safeguards and that they must be held responsible if any of it went astray.³⁰

The defendants denied that the cyanide had come from their factory and suggested that the poisoning of the river must have been the work of poachers or saboteurs.

At the trial, the Judge rejected this alternative theory and was – according to the ACA – satisfied that the cyanide could only have come from the defendant’s premises but there was absolutely no evidence to show how it had got into the river. A court order against ‘causing or permitting’ harm was not broken merely by the defendants pursuing a course of action which was certain to lead to a breach of the Order or covenant. To enable the Court to interfere there must be some direct action by the defendant in breach of the Order.

As the ACA was only making an application under the Order obtained previously, the costs involved to the Association were not anything like as much as would have been incurred in a full scale action but at the same time they were not trifling. “The one redeeming feature is that in the course of the hearing the defendant’s Counsel announced that in January the defendant had decided to discontinue the use of cyanide altogether for hardening steel and to adopt a new process which will not involve any discharge of effluent to the river.”³¹

MONITORING POLLUTION

The ACA is meticulous in gathering evidence so that it can be very certain of its case before considering taking action. The many experts used by ACA in investigations include chemical analysts, biologists, engineers, photographers (terrestrial and aerial), advisers on rehabilitation and restocking of water. One of the great strengths of the ACA method is that anglers are their own watchdogs. Over the

30. See *Notes on Pending Cases*, 16 ACA REVIEW No. 8 at 11 (1967).

31. *Id.*

years the ACA has trained volunteer anglers to become Water Pollution Officers for their clubs. The ACA Pollution Handbook gives detailed instructions on how to take samples of what might be polluted waters and get them sent off safely and quickly for analysis. This is especially useful in the case of sudden pollution, or accidents. Anglers are advised to note exactly where the incident occurred, at what time and if necessary to chase the wave of pollution downstream and take a sample in their gum boots or thermos flask if they haven't got anything else to hand.

Pollutants Not Necessarily Toxic

Many pollutions are caused by substances that are not toxic but have simply overwhelmed the receiving environment. In a bizarre incident in 1977, when a tanker turned over on a bridge, its contents – one thousand gallons of orange juice³² – managed to ruin two miles of excellent trout fishing.

In 1997 there was a fish kill caused by sugar syrup escaping from a cider factory;³³ in 1999 fishing was repeatedly spoiled by soil entering the river from a carrot washing factory.³⁴ Road works or in-river works, gravel washing operations, and other activities which send down suspended solids are a perennial problem. Although seemingly innocuous, they cause discoloration, poor visibility and settle out on the river bed, spoiling spawning grounds.

ACA TRUSTEES CO LTD AND THE GUARANTEE FUND

The guarantee fund acts like an insurance policy against loss incurred by plaintiffs through unsuccessful litigations. As with all insurance, the risk is spread as wide as possible so that individual participators do not have to bear a disproportionate liability. The fund is voluntary with a few large donors, but any sum is welcomed. But, not all the costs incurred in presenting cases are recovered, so the Trustees have to consider carefully which cases to support.

The ACA Trustee Company Limited has two outstanding objectives. The first is to use the guarantee fund to spread the liability of individual members taking actions against polluters. The second is to

32. See *Editorial Notes*, ACA REVIEW Summer 1977 at 5.

33. See *Legal Review*, ACA REVIEW Summer 1997 at 19.

34. See *Legal Review*, ACA REVIEW 1999 – 2000 at 34.

step in and act as trustee for any club where club members are nervous of accepting the risk of becoming trustees themselves. Cases revolving around the latter were frequent in the 1950s.³⁵

3. Landmark Cases

The ACA's most famous case is usually referred to simply as the *Pride of Derby*.³⁶ It established the ACA's reputation and later alerted the author to the existence of the ACA. It involved a major multiple pollution of the River Derwent, eight miles of which was dead, as was three miles of the River Trent into which it flowed. The water flowing past the plaintiff's property was "black, opaque, hot and stinking; the bottom was carpeted with sewage fungus and the temperature of the water was extremely high – often between 90° and 95°F. In summer it was completely deoxygenated."³⁷ In 1942, salmon were still running up the river below Derby, but when the ACA team investigated ten years later, the only life in the river was mosquito larvae. When the Fishery Board turned a consignment of roach into the river in November 1950 the fish died within a few minutes.

The plaintiff's case was that the dry weather flow of the Derwent below Derby was about 100 million gallons per day of which British Celanese Ltd were extracting 72 million gallons. The Derby Corporation and British Celanese were discharging effluent amounting to 80 million gallons a day, all being bad effluents into the bargain. The Derby Sewage works were overloaded. Having been built in 1906 and enlarged (following an adverse government report) in 1933 to treat 6 millions gallons a day, in 1950 it was treating, or failing to treat 9.5 million gallons a day. According to its own analysis, the works rarely achieved more than 50 per cent purification, while often it was under 20 per cent. The British Electricity Authority's role

35. See e.g., *ACA Trustees Co. Ltd and Others v. Thomas Bolton and Sons, Ltd.*, *Progress Against Pollution*, 3 ACA REVIEW No. 1 at 7.

36. *Pride of Derby and Derbyshire Angling Association Ltd. and Earl of Harrington v. British Celanese Ltd, the Derby Corporation, the British Electricity Authority* [1952] 1 All E.R. 179 (1952); [1953] 1 All E.R. 1326 (C.A. 1953).

37. *Progress Against Pollution*, 3 ACA REVIEW No. 2 at 27 (1952).

in the affair was to take the results and heat them. This "Hell's Brew," as the Plaintiffs' Counsel called it, made the river hotter than the Red Sea. Even tropical fish could not have survived in it.

Before the trial opened, British Celanese Ltd withdrew its defence and only asked that the inevitable injunction be suspended.

After listening to the evidence for nearly two days the remaining defendants admitted that the plaintiff's water was substantially polluted, but the Corporation denied that their sewage had anything to do with it and British Electricity Authority (BEA) contended that the high temperature was beneficial to fish and assisted them in spawning.

Apart from these defences, both the BEA and the Derby Corporation claimed that their special statutory powers could override the common law; in effect claiming that they were entitled to pollute the river. BEA admitted that its power station had been enlarged until it was too big for the river. The surveyor to the Derby Corporation stated that he had first reported the overloaded and unsatisfactory state of the sewage works in 1946, but that no plan had been drawn up until three months after the commencement of the ACA action. Defending Counsel argued that, provided the sewage works was properly constructed originally, the local authority could not be compelled to enlarge or improve it because the population had increased, nor to keep it running efficiently and so could not be answerable to a riparian owner if its works were overloaded.

Mr Justice Harman found against all the defendants and issued injunctions against them all. He found that neither the Corporation nor BEA had proven prescription by their private statutes. During his judgement he said that a distressing feature of the case was the inactivity of the UK Government's Fishery Board which, in spite of the obvious facts which had been apparent for many years, had done nothing.³⁸

The Derby Corporation and British Electricity appealed the ruling, which was heard by the Master of the Rolls, Lord Evershed, Lord Justice Denning and Lord Justice Romer in the Court of Appeal in December 1953.³⁹ In his judgement, the Master of the Rolls said that Derby Corporation's appeal rested on two points. The first was that, if they acted within the Derby Corporation Acts of 1907 and 1930, the plaintiff had no cause of action. The second was that, even if the

38. *Id.* at 39.

39. [1953] 1 All ER 1326 (C.A. 1953).

plaintiff did have a cause of action, no injunction ought ever to be granted against the Derby Corporation or any local authority in respect of sewage pollution, and that to do so was an improper interference with the Minister of Housing and Local Government and an impudent invasion of the sovereign authority of the Derby Corporation. The Master of the Rolls said he was shocked at the suggestion that it was improper for the plaintiffs to ask for protection in Her Majesty's Courts. Defendant's Counsel withdrew the suggestion and agreed that it should not have been made. His Lordship also refused to consider the suggestion that since it would cost a lot of money to stop the pollution and the plaintiff's fishing had a low value, the court ought to exercise its discretion and refuse an injunction.

His Lordship came to the conclusion, which became a highly influential precedent, that the Derby Corporation Acts expressly prohibited the defendants from causing a nuisance. Only a private statute which specifically authorised pollution could override the common law. He found the wholly admirable judgement of Mr Justice Harman was correct in every particular: the appeal failed and was dismissed, with costs.

BEA appealed for a variation in terms of the injunction. Since it had a statutory right to return hot water to the river so long as it did not damage the fish, it asked whether it might not reduce the temperature to suit the fish, rather than to cool it completely. His Lordship agreed to limit the injunction, but gave the Earl of Harrington leave to apply for restoration of the full injunction if in the future he should want to use the river for other purposes.

Reviewing the case 15 years later, C Stratton Gerrish, revealed that "if British Celanese Limited, the first defendants in the Derby case, had not thrown their hands in when they did the ACA would have had to drop the case as the guarantee fund was then insufficient to cover the costs of a prolonged trial against three defendants."⁴⁰

The success of the Pride of Derby case has had lasting effects. In 1980, the Secretary of Derbyshire County Council Angling Club had to turn away 600 applications for season tickets and refuse hundreds of applications for angling matches on this very stretch of river. "The match-angling ace, Ivan Marks, said that the Lower Derwent is the best angling venue in England."⁴¹

40. C. Stratton Gerrish, *From Our Legal Consultant*, 16 ACA REVIEW No. 10 at 15 (1968).

41. *Id.*

Now the area along the south bank of the Lower Derwent is a park and nature trail, created and maintained by the Derby City Council and supported by Acordis (formerly British Celanese). Acordis still extracts 204 million litres (45 million gallons) a day for cooling from its settling lakes. After use, a small amount goes to Severn Trent Water's treatment plant and the rest is returned directly to the river. There are many factories and works on the north side of the river, including Rolls Royce plc. The power plant further down the river is recognisable by its cluster of cooling towers. The river is now healthy and supports chub, dace, gudgeon, perch, pike, roach and barbel. The park and river trail are a considerable civic amenity, and the private nature reserve owned and run by Acordis and even Severn Trent's sludge lagoons provide a livelihood for a variety of wildlife. Nowadays, anglers are outnumbered by cyclists and dog walkers, but if the ACA had not succeeded in stopping pollution when it did, the river and its environs might have deteriorated further, with these new amenities not yet provided.

Case Mix and Advisory Role

During the *Pride of Derby* case, the ACA received a lot of notice in the press. Up to 1953, 192 cases of pollution or anticipated pollution had been referred to the ACA.⁴² Most often, members wanted only advice and the ACA was asked to take action in only 35. Of these 8 could not be pursued because the member had no legal title and his landlord would not co-operate – in most cases the landlord was the Docks and Inland Waterways Executive. In four cases “we came to the conclusion after investigation that the member's claim was bogus or completely trivial.”⁴³ Fifteen cases were dealt with without legal action; 8 were continuing pollutions which were stopped and 7 were non-recurring pollution in which compensation was paid to the injured party. Writs were issued in 22 cases against 25 defendants. Out of these cases, “13 threw their hands in almost as soon as a writ was issued; 6 submitted to judgement in later stages before trial and only 6 actually let the matter come into Court.”⁴⁴

42. *Progress Against Pollution*, 5 *ACA REVIEW* No. 3 at 37 (1952).

43. *Id.*

44. *Id.*

ESTUARIES

Pollution of the sea coast and estuaries in 1950 was 'appalling' despite the vigorous tidal action around the coasts.⁴⁵ However, it was established in Magna Carta that all tidal rivers are for the benefit of all members of the public, and only inland rivers and streams are subject to private ownership rights. This left the ACA with no direct course of action to help struggling sea anglers, except that reducing pollution in a river also reduces pollution reaching an estuary. However, the ACA's lawyer knew of a possible cause of action in that polluted salt water prevents the exit and return of migratory fish – an infringement of the common law rights of the fishery owner.

An important new decision had been made in the case of *Nicholl and Others v. Penybont Main Sewerage Board* (1951)⁴⁶ in which the plaintiffs had obtained an injunction against the discharge of untreated sewage into the Ogmore below Bridgend in south Wales. The significance of this was that the anglers were lessees of the fishing rights on the river for eight miles above the source of pollution: the pollution was preventing the free passage of sea trout and other migratory fish up the river. Despite this decision, there were other grounds of action against the defendants (discharge of raw sewage being illegal under the Public Health Act) so the issue of the free passage of fish was not fully argued. Moreover, the site of the pollution was in the freshwater part of the river. However, another case soon clarified the issue.⁴⁷

The lead plaintiff, Colonel Myddelton, claimed that salmon smolts were being killed in the River Dee estuary in Wales, and his fishery, 35 to 40 miles upstream, was being harmed. The only cause of action was the obstruction of the free movement of fish between their spawning ground and the sea. The ACA knew this would be an important case and asked for increased guarantees from their members in case the action took a long time to present. Counter-guarantees were put up by the netsmen of the Dee estuary who were losing their livelihood because of estuarial pollution.

45. BRITISH FIELD SPORTS ASSOCIATION, POLLUTION REPORT, 1950 (on file with author).

46. *Further Progress in Cases Already Reported*, 3 ACA REVIEW No. 4 at 53 (1952).

47. *Myddelton and Others v. John Summers and Sons, Ltd.*, see *Progress Against Pollution*, 5 ACA REVIEW No. 1 at 4 (1954).

Colonel Myddelton had previously, and largely at his own expense managed to restrain Monsanto Chemicals Ltd from polluting further up the river.⁴⁸ The case had been strongly contested and it was on this case that John Eastwood was working when he died in 1952. But cleaning the tidal estuary was the key to restoring the river.

At that time, local authorities and industrialists had come to assume that pollution of tidal waters was permissible. In fact, polluters could have been prosecuted under the Salmon and Freshwater Fisheries Act of 1923, but there was great difficulty in proving an offence under this Act in the case of multiple pollution.⁴⁹ The pollutants in the estuary were being washed back and forth by the tide and determining which was discharged by whom and which caused the mischief was impossible. The common law has no such difficulty with multiple pollution, as liability of a number of polluters is joint and several – the injured party can sue any one or more of them for full reparation of damage. It is not necessary to apportion or evaluate the blame or liability as between them. The polluter cannot escape liability by proving that someone else was also polluting the river.

This case was important to all anglers because many estuaries had suffered from this lack of control: migratory fish were almost extinct in the Tyne and Tees and being obstructed by pollution in the estuaries of the Usk, Severn, Wyre, Taw and Torridge.

Mr Justice Roxburgh found that cyanide pollution by the defendant, J. Summers and Sons Limited, created a material obstruction to the free passage of salmon through the estuary. This pollution was an interference with the right of the fishery owners on the river and thus there should be judgement for the plaintiff in the form of an injunction and damages. In the event, it took only two months to solve the problem. A new closed-circuit cooling system was installed which prevented the escape of cyanide into the Dee estuary. Although this cost the company £6,000 (\$138,000) and would have been cheaper if built in from the start, it was probably not too great an inconvenience for a large plant to sustain.

That most trouble in estuaries could have been prevented quite easily with proper control and forethought was noted by the ACA, but at the same time it saw no cause for rushing headlong into an irre-

48. Myddelton and Others v. Monsanto Chemicals, Ltd., *see Progress Against Pollution*, 3 ACA REVIEW No. 3 at 40 (1952) and *Progress Against Pollution*, 4 ACA REVIEW No. 1 at 25 (1953).

49. *See* CARTY & PAYNE, *supra* note 6, at 75.

sponsible witch hunt among polluters of estuaries. Even so, they did expect to see the polluters start "setting their houses in order." But while industry had shown itself anxious to play its part in Britain's clean-the-rivers campaign, it soon became clear that local authority sewage works posed a far more intractable problem.

For example, the Tyne estuary was of particular importance, both economically, being the port of Newcastle, but also because the Tyne local authorities failed to stop other pollution and influenced local authorities responsible for pollution not to bring prosecutions. In 1927, 3361 salmon were registered caught in the Tyne; by 1955 only three were caught.⁵⁰ In 1959, the Tyne "continued to fester on the densely populated borders of Northumberland and Durham."⁵¹ It was "devastatingly foul" with 30 to 40 million gallons poured in every day to be swirled up and down the 14-mile estuary by the tide.⁵²

UNLAWFUL MAINTENANCE?

John Eastwood well understood that financial maintenance of actions by third parties with no direct interest in a case is generally unlawful.⁵³ For this reason, only ACA members could be assisted and only cases that were of interest to other anglers were taken up. It was always made known to defendants when the ACA gave indemnities to plaintiffs. In *Martell and Others v. Consett Iron Co Ltd*⁵⁴ the fundamental question was raised whether this common cause was a sufficient common interest in the eyes of the law to justify anglers generally in financing legal action by one particular angler or riparian owner to protect one particular piece of water.

This case struck at the heart of the ACA's activities. Consett Iron Company Limited claimed the financial and technical assistance given by the ACA to its members amounted to illegal maintenance

50. Don Everitt, *Let's Clean Up Our Poisoned Rivers*, 10 ACA REVIEW No. 10 at 31 (1959).

51. *Editorial*, 10 ACA REVIEW No. 10 at 38 (1959).

52. Don Everitt, *Let's Clean Up Our Poisoned Rivers*, 10 ACA REVIEW No. 10 at 31 (1959).

53. See generally CARTY & PAYNE, *supra* note 6.

54. [1954] 3 All E.R. 339 (1954); [1955] 1 All E.R. 481 (1955 C.A.).

and was a criminal offence. That is, that the ACA had no proprietary interests in the action and therefore should not be allowed to fund the action. Obviously if this claim had been upheld, it would have put an end to most of the ACA's legal activity.

Mr Justice Danckwerts considered the legal challenge in a hearing before the case proper could be heard. Consett's claim was rejected, the Judge holding that anglers and others were justified and entitled to band together to protect rivers from pollution.⁵⁵

On Appeal, Lord Justice Jenkins upheld the ruling and held that the range of relevant interests which was sufficient to justify the assistance given by the ACA was much wider than those claimed by the defendant.⁵⁶ He said that maintenance could be extended to visitors and those who came to fish merely by permission of the owner, and that fishing tackle dealers and proprietors of local hotels which relied on the anglers for business could maintain the action.⁵⁷ Indeed, on the principle of mutual protection, those with interests in any river which might suffer the same fate, could qualify.⁵⁸ Within a year the ACA ensured that its fighting fund was only contributed to by those who fell under Lord Jenkins' specification of "common cause."

The legality of the ACA and its procedure have been challenged in the courts and upheld by the High Court and the Court of Appeal. Although we have always been prepared for such a challenge it would be idle to pretend that it did not cause some very anxious moments when it came, but by and large it was worth it as it procured for us invaluable guidance as to how and to what extent we may legally help our members.⁵⁹

55. [1954] 3 All E.R. 339.

56. [1955] 1 All E.R. at 488.

57. *Id.* at 499.

58. *Id.* at 501.

59. C. STRATTON GERRISH, *Preface to the Fourth Edition*, POLLUTION: THE ACA HANDBOOK (5th ed. ACA Press 1973).

Maintaining Good Relations with Polluters

In general, the relations between the ACA and defendants remained cordial,⁶⁰ although the ACA Review, as early as 1957, had pointed out a difference in attitudes between commercial and public sector defendants:

We continue to find an increasing readiness on the part of industrial concerns to take voluntary action to remedy pollution. Local authorities, however, are still being difficult. No doubt some of them genuinely want to bring their sewage works up to date and to fulfil their statutory obligations under the Public Health Act and are only prevented from doing so by the refusal of the Ministry of Health to sanction the necessary work, but there are still a good many local authorities who simply have no intention of spending money on avoiding pollution unless they are absolutely compelled to do so. In dealing with these local authorities we have to bear in mind that national considerations must prevail and to try to achieve a result which will remedy the injustice to the individual without upsetting the national economy.⁶¹

The ACA became expert in ways to stop and prevent pollution, and although it has no obligation it has always been very willing to give advice to polluters, both to save them from the expense of court action and to minimise the costs of technical improvements. The 1950 ACA Review reported that the ACA had anticipated a risk of pollution from a new housing estate in Berkshire and had drawn attention to it. The Newbury Rural District Council was proposing to build a surface-water sewer from the new estate into a small brook which flows into the River Lambourn. Although the local authority had statutory power to lay the sewer, the ACA thought it wise to point out that the effluent must satisfy the rights of riparian owners to an absolutely clean river, and not merely to satisfy public health requirements.

60. *Wilmot v. Portals, John Allen and Sons, Ltd.*, see *Notes on Pending Cases*, 16 ACA REVIEW No. 2 at 15 (1965).

61. See BATE, *supra* note 4, at 70 (citing *Editorial*, 7 ACA REVIEW No. 1 at 5 (1957)).

A similar negotiation took place in 1962.⁶² Life in the River Crimple below the Harrogate Sewage Works outfall was extinguished due to effluent from the sewage works, which at times reduced the whole of the water in the stream to the quality of a substandard sewage effluent. Enquiries disclosed that Harrogate Corporation was aware of the position and had already prepared plans to modernise the sewage works. However, it also planned to increase capacity, which meant that the volume of effluent would be double the natural flow of the stream. This, the ACA were advised, was bound to cause pollution.

At that stage the Corporation could not, or would not, say what the quality of the effluent would be. "In previous cases, local authorities against whom injunctions have been granted after they have built new sewage works have complained bitterly that it is much more expensive to make alterations and improvements after the works have been built than it would have been to do the job properly in the first instance, so this action was started in the hope of avoiding a similar situation."⁶³ (ACA, 1962, 13, 4:18-19).

The plaintiffs (Mr G. Dent and Mr J.H. Dent) asked for damages only for the existing pollution, and an injunction restraining the defendants from constructing or enlarging the sewage works without ensuring that they would cease to pollute the river.

Long after the writ was issued, the defendants stated that they intended to supplement the conventional treatment of the sewage with tertiary treatment by irrigation over grass roots. The plaintiffs were advised that, because of the lack of dilution, the defendants' actions would simply create another form of pollution from nitrate, phosphate and potash (which were the end products of 1960s sewage purification techniques) and, if present in excess, would cause uncontrollable growths of flannel weed, rushes and similar undesirable weed. The ACA also departed from normal practice by pointing out to the defendants that they could discharge the effluent from the new works into the River Nidd where there was ample dilution for it, instead of into the Crimple. However, the defendants were not prepared to do this and maintained that the discharge of the effluent into the Crimple would not cause as much damage as was claimed by the plaintiffs.

62. See Dent and Dent v. Harrogate Corporation, *Progress Against Pollution*, 13 ACA REVIEW No. 4 at 18-19 (1962).

63. *Id.*

The defendants agreed that the river had been clear previously, and had supported a good mixed fishery with coarse fish and trout. They agreed to pay full costs and re-stock, after their works were complete. Still, the Corporation decided to carry on with its plans and hope for the best. However, it was warned by the Judge that it must not pollute by making sure that its releases had adequate dilution and agreed that, should that occur, it would build a pipeline to discharge elsewhere, probably in the River Nidd. This was allowed by Mr Justice Plowman on 4th March 1962.

Pollution ceased after this incident with no repeat cases. This is a good example of how the ACA tried to negotiate a settlement to save taxpayers' money by making sure that sewage works were adequate. In other cases, there was no option but to spend considerable amounts of its own time and money to prevent determined local authorities from continuing to pollute.

DEFENCES

Pollution is simply another aspect of the ancient laws of trespass and nuisance, which are part of the common law. It is an infringement of the owner's right to enjoy the use of his property without interference. These rights also apply to abstraction, as was established in *Edinburgh Water Trustees v. Sommerville & Son*,⁶⁴ which states "[w]hen an Act of Parliament authorises interference with the natural flow, the original rights of the riparian proprietors are impaired only so far as the reasonable exercise of the statutory rights impairs them."⁶⁵

There are two key defences to a common law action that affect river pollution. These are prescription and conduct permitted by statute.

PRESCRIPTION

Pollution by custom, or plaintiffs granting pollution rights is unusual. A prescriptive right is deemed to exist when a nuisance caused

64. 95 L.T.R. 217. (1906). *See also* *Medway Co. v. Earl of Romney*, 4 L.T.R. 87 (1861).

65. *See* WISDOM, *supra* note 5 at 87.

by the defendant has been continuing for a long period to the full knowledge of the plaintiff without complaint from the plaintiff.⁶⁶

A defendant who can show a prescriptive right has a good defence in an action for pollution. For example, he might show that he has been causing pollution for a long time (usually 20 years) and, as nobody has complained before, he has effectively attained the right. For example, a case of tin miners using a natural stream for washing ore was held to be "good custom" since it was a reasonable use and limited to the necessary working of the mine.⁶⁷ However, as realised in *Goodman v. Saltash Corporation*⁶⁸ prescription can only be claimed for something that has a lawful origin at common law. The discharge of untreated sewage into tidal waters polluting oyster beds⁶⁹ was unacceptable and did not constitute an easement. Most important, if the defendant has secretly enjoyed the alleged easement to pollute and the plaintiff was unaware that pollution was occurring, then a prescriptive right is not granted.⁷⁰

Prescription was the defence used in *Golden Hill Fishing Club v. Wansford Trout Farm* in 1986 in the ACA's first action against a trout farm.⁷¹ In 1982 the trout farm was polluting the West Beck, one of the best chalk streams in Britain. It was also abstracting large quantities of water which at times cut off all instream flows to the Beck.

The fish farm claimed the right to abstract and pollute by easement because it had been farming trout since 1955. The ACA challenged the defence by claiming that the level of abstraction and pollution had increased over time. As evidence they cited the sales revenue for the Wansford Trout Farm which was £58,907 in 1973 but by 1981 had increased to £616,329 (roughly £200,000 in 1973 prices). Negotiations broke down and action in the High Court followed. The ACA's costs, had they lost, would have been in excess of £80,000 (\$200,000). Nevertheless, when the ACA's Pollution Sub-committee met in London, it unanimously voted to go to the High Court.

66. *Sturges v. Bridgman*, 11 Ch. D. 852, 865 (1879).

67. *Carlyon v. Lovering*, 1 H. & N. 784 (1857).

68. 48 L.T.R. 39 (1882).

69. *Foster v. Warblington U.D.C.*, 1 K.B. 648 (1906).

70. *Liverpool Corporation v. Coghill*, 1 Ch. 307 (1918).

71. *The Rescue of the West Beck*, ACA REVIEW Summer 1986 at 18.

In front of the Judge the trout farm backed down and agreed to remedy the conditions and pay costs and damages to the Golden Hill Fishing Club of £32,500 (\$88,000).

Five years later the trout farm again polluted the West Beck, causing harm to rights of the Golden Hill Fishing Club. The pollution in 1990/91 was held to be contempt of court since the farm had an injunction against it following its pollution in 1986. Mr Justice Henry fined it £500 (\$1,280) for each breach of covenant (14 breaches in total). The Managing Director of the trout farm did not have his property sequestered nor was he sent to jail "because of the efforts the company was now making to counter the pollution."⁷² It put in operation pumps, which increased its costs by £46,500 (\$120,000), and a biological filter, which cost £50,000 (\$128,000).

This was a notable legal victory by the ACA in overcoming the defence of prescription, but the other defence, statute, is by far the more important. It is more difficult to overcome as it arises through parliamentary legislation.

Statutory Authority – Private Acts

The case of *Nicholl v. Penybont Main Sewerage Board*⁷³ has already been mentioned with regard to the plaintiff being upstream from the polluter. But another aspect in the case was that the plaintiff had also asked for a mandatory order compelling the defendants to demolish and remove the valve and outfall, as it existed solely to discharge unpurified sewage which, in any case, was illegal under the Public Health Act. However, six years later in January 1958, the Penybont Main Sewerage Board deposited a Private Bill with Parliament which would allow it to carry on discharging sewage as before. It was stated quite openly in the subsequent proceedings before Parliament that the sole purpose of this bill was to have the injunction rescinded.

The Board had applied to the Ministry of Housing and Local Government, which then had the responsibility for cleaning up rivers, to give its special authority to the Private Bill. The Ministry strongly approved of the move, citing the expense of altering the sewage arrangements and claiming that the relevant section of the Public

72. *Polluting Trout Farm Faces Bill of 'At Least £250,000,'* ACA NEWS, Autumn 1991 at 1-2.

73. *See supra* note 46.

Health Act could not be complied with by any inland sewage disposal scheme at all.

Fortunately, the Parliamentary Agents retained by the ACA noticed the Bill and action was taken to amend the Penybont Main Sewerage Bill so that the common law rights of riparian owners on the Ogmere and Ewenni rivers remained. Riparian owners on the Colne River were not so lucky when they referred a case of pollution from a new sewage works. The Hertfordshire County Council had pre-empted the ACA by some years when it promoted a Private Act to protect the Colne Valley Sewage Board from action against any polluting activity in 1937. The Act provided that "no riparian owner or other party injured by the discharge of effluent from the Works shall have any right of actions against the Board either for an injunction or damages."

In this case, the only way forward was for the ACA to table its own private bill to amend that of the Sewage Board. In the event, the ACA action did prompt improvements to be made and the pollution was brought under control. Had the plaintiffs been standing alone they would not have known about the removal of their rights nor been in a position to do anything about it. The Parliamentary action in the Penybont case took £2,500 (\$52,000) to carry through – a sum well beyond most individuals.

Interpretation of what is unintentionally allowed by conduct permitted by the State is varied, and hence may include pollution as a by-product of a necessary and approved activity. It is, therefore, the most frequent defence. Other statutory defences have failed, for example as mentioned above in the case of the Derby Corporation, and British Electricity Authority, because the authority to pollute was assumed to come with the statutory duty to perform public services, rather than expressly permitted.

4. How ACA Affected Government Policy and Legislation⁷⁴

When not bringing Common Law actions against polluters the ACA's most important job was in lobbying government to prevent pollution. For much of the time this lobbying was to prevent Government legislation that made pollution more likely.

74. See generally Bate *supra* note 4 (for a full discussion of the role of the ACA in affecting Government Policy and Legislation).

The Fishery Boards and the River Boards whose job it was to prevent pollution generally failed in every regard. Part of the problem was the background of decision-making committees whose members had an interest in the water environment, but mainly from a commercial angle. Most were from local business, such as farmers and industrialists, or local government. Few, if any, were from fisheries, although some may have been landowners. Therefore, many of the members of the various boards were themselves potential polluters and it is not surprising that the boards were unsuccessful in preventing pollution.

An example of why so many committees were unsuccessful at combating pollution can be found in discussions of uniform emission standards (UES). Many committees and even Acts of Parliaments proposed UES. When originally suggested by a Royal Commission of 1912, the standards would have taken notice of the impact that effluent would have on the receiving environment. In other words, it was not simply the amount or type of effluent that mattered, but also the amount of water and flow of the river. However, in practice the assimilative capacity of the receiving environment was ignored, and the operation of UES omitted half the equation. It provided certainty for the polluter, but would lead to pollution. Fortunately, UES were never given statutory authority. They were interpreted as guidelines, allowing common law actions to proceed.

The ACA maintained a running campaign against such statutory protection (because of business lobbying aimed at ensuring that UES should protect polluters). It spent considerable sums reminding government officials that UES, if defined as a statutory authorisation by government, would stop any common law action against a polluter complying with their UES, regardless of the pollution caused.

Acknowledging the power of the interests against it and in favour of UES, the ACA suggested a compromise to the government. The common law should remain as it was (hence UES was not a statutory authorisation and would not undermine the common law) but, in any case where national economic interests might have been affected by any common law action, the Attorney General could apply to the Court for an extension of time before the order of the Court (such as an injunction) became operative. This amendment was supported by members on both sides of the House and in the end the Minister withdrew the two subsections which would have undermined common law. This was the first instance in which the ACA successfully influenced public policy largely through thousands of ACA members writing letters to their MPs. And it became a model for future action.

Every two or three years there was a crisis, where a particular committee recommended the attenuation of Common Law through legislation, and each time the ACA succeeded in preventing the worst from occurring. The ACA became influential enough that British Environment Secretary's would meet with them to discuss how to protect rivers. One such Under Secretary said, "I am sure that most people with concern for the environment will recognise that common law actions have been one of the main defences – and sometimes the only defence – against river pollution; and that even with our proposed improvements in administration and control we could ill afford to do without them."⁷⁵

Nevertheless there was a continual battle to stop legal pollutant discharges from undermining the ACA's main mode of action. In 1989 the water industry was privatised in Britain and at the same time a new body, the National Rivers Authority was formed. The ACA thought that the National Rivers Authority (NRA), the new government inspectorate, was a step in the right direction. However, they were concerned that the NRA, like the river and fishery boards, would be ineffectual. "At present there is nothing [the NRA] can do, because in order to make a success of water privatisation the government gave legal permission to the water authorities to discharge sewage into rivers pending the building of adequate sewage works, so the NRA, like an army awaiting its supplies of ammunition, will only be able to tackle the problem when the Government's derogations expire in a few years' time."⁷⁶

Nevertheless, the ACA co-operated in several actions with the NRA. The NRA was to benefit from a change in public, and hence political, sympathy from producer to environmental and consumer interests. The resulting switch in emphasis was manifested in 'green' legislation, which partly sprang from the strong showing of the Green Party in the 1989 European elections. As a result the NRA was given the power to deliver environmental protection, unlike its predecessors. The NRA fast developed a good reputation for combating pollution of English rivers, and continued to co-operate with the ACA until it became part of the Environment Agency in 1995.⁷⁷

75. Dermot Wilson, M.C., *Report for 1972*, 19 *ACA REVIEW* No. 3 at 21 (1973).

76. Ken Sutton, *A Blue/Green Future*, *ACA REVIEW* Summer 1990 at 4.

77. See CARTY & PAYNE, *supra* note 6, at 101.

The NRA was helped by the separation of the environmental protection function of the former water authorities from the provision of water and sewerage services.

The NRA took action against several newly privatised water companies, but private individuals (backed by the ACA) brought the first-ever action against a water company in 1992.⁷⁸

The clarity of riparian property rights and the greater experience of the ACA in fighting river pollution sometimes meant that, in the co-operation between the ACA and NRA, it was the ACA that played the dominant role.

MINEWATER TEST CASE

In 1992, the ACA took on the very risky and seemingly insuperable problem of pollution caused by flooded, decommissioned coal mines. *ACA Trustees Ltd v. British Coal* (1992)⁷⁹ was the case that generated the most publicity for the ACA since *Pride of Derby*. It prosecuted British Coal over pollution of the River Rhymney in South Wales, alleging that contaminated water from a closed-down colliery had caused pollution and killed fish. The nationalised coal industry had been protected by statute and no common law actions had been possible to this point. The summons issued under the Water Resources Act 1991, which made the offence a criminal rather than a civil matter, claimed “that the discharge was caused by the cessation of pumping at Britannia colliery, which stopped mining operations in 1990.”⁸⁰ The outcome of the case depended on whether British Coal knowingly permitted pollution to reach the river. Until that time, switching off the pumps at a disused pit had not constituted this.⁸¹ A successful prosecution would impose an enormous burden on British Coal – a declining industry – as it would have to continue to pump out numerous pits recently abandoned as uneconomical.

78. See *Leek and District Fly Fishing Club (Staffordshire Branch) v. Severn Trent Water, Ltd.*, see also ‘Speedy’ *Is Relative*, ACA REVIEW Summer 1992 at 15.

79. See *Minewater Fight Goes On*, ACA REVIEW Summer 1994 at 3.

80. See *Four Historic Cases*, ACA REVIEW Summer 1993 at 4.

81. *Id.*

The Judge at Cardiff Crown Court ruled that there was insufficient evidence to show that British Coal had 'knowingly polluted' the Rhymney and hence the ACA lost only its third case ever. However, the judge said that the costs of £120,000 (\$245,000) should be paid from government funds because of the importance of the ACA's action. The ACA appealed because one of its legal advisers concluded: "that contrary to this ruling, the ferruginous discharge into the Rhymney was foreseeable."⁸²

The significance of this case extended far beyond the River Rhymney. Perhaps as much as 450 miles of rivers in England and Wales are affected by discharges from abandoned mines. The most dramatic example is over the future of the River Wear in Co Durham. The river and its tributaries are home to migratory salmon and sea trout, but with the closure of the area's last big colliery (Easington) several years ago, there are growing fears that the eventual ending of pumping could result in the rivers becoming almost totally lifeless.

The National Rivers Authority signed a formal agreement with British Coal whereby it will receive at least 14 days' notice of any intention to suspend pumping. The ACA will receive the same consideration. If necessary, the NRA (now the Environment Agency) could then seek legal action to prevent pollution occurring, rather than bringing a prosecution after the damage had been done.

April 1995 saw the formation of the Environment Agency, which was to coordinate the system of integrated pollution control and provide an "environment one stop shop," regulating water, land and air pollution under one roof.

The litigation over the River Rhymney was compromised in 1996 by an agreement to set up a task group charged with commissioning a study and ultimately finding a solution to the problem. The River Rhymney Task Group comprised the Environment Agency, the Coal Authority, the Welsh Office, the Caerphilly County Borough Council and angling clubs, and was chaired by the ACA. The Task Group suggests methods of remedying the problem, and economic consultants are preparing a cost-benefit study of the various options. These are still under review at the time of writing.

82. See *Minewater Fight Goes On*, ACA REVIEW Summer 1994 at 3.

CURRENT AND PLANNED LEGISLATION

The ACA is currently concerned with Section 48(2) of the Water Resources Act (1991), which gives a defence to a common law action if the conditions of an abstraction licence had been properly fulfilled. The ACA has lobbied against this section ever since, but to June 2002 with no success.

The water abstraction regime is currently under review by the Environment Agency. New proposals include the introduction of time-limited licences, the restitution of common law rights to relief from harm caused by over-abstraction, the abolition of licences of right and the revocation of licences causing environmental harm. In addition a consultation process on fisheries legislation is continuing, with reports due to be published in mid-2002. The recommendations are likely to include new fishery plans, a new environmental court to deal with pollution (it is hoped this will make the ACA's job easier) and making siltation of rivers an environmental offence.

5. Conclusions

English common law is working at its best when the deterrent effect is complete. The preventative power of an ex-post liability system relies on the threat of action. Where rights are clearly defined, as with anglers and rivers, potential polluters know exactly what action they can take. There is no doubt that the ACA's actions, based on common law protection of private rights over water and fishing, are a significant threat to would-be polluters. That few cases find their way into Court merely shows the strength of the ACA's methods. An estimate of how much pollution they prevented is impossible to calculate. Their more famous cases show that they cleaned up (and kept clean) hundreds of miles of rivers in industrial areas, such as the Derwent, Trent and Dee (Estuary).

The extremely successful and efficient out-of-court settlement of disputes means that the ACA is not well known to the general public. It is obvious from the ACA reviews that it has always been a struggle for the ACA staff to maintain membership. When the ACA was bringing actions (and receiving newspaper coverage) its membership kept increasing, from 1,500 in 1950 to 10,000 in 1966. As the powerful common law deterrent became widely known among local authority and business circles, any disputes were quickly settled in the anglers' favour. Even members who had directly benefited from ACA actions forgot to renew their subscriptions because

the threat of pollution had been removed so effectually. Membership declined until the notable actions of the 1980s, when it rose to its current 16,500 (of which 2,000 are club members, representing over 250,000 anglers in total).

The ACA rarely failed, but was particularly frustrated by polluters, especially local councils, which were given statutory authority to pollute. The breach of private rights in the name of public interest was a pervasive and insidious form of government intervention, but the ACA worked through the Parliamentary process to challenge the authority. Despite pollution being made a criminal offence in 1876, it was not until part II of the Control of Pollution Act (1974) came into effect in the mid-1980s that regulation really began to tackle pollution with any effect. The era of government listening most to producer interests did not effectively end until 1989, with privatisation. From then on, consumer interest groups (if not consumers themselves) were those most dominant in establishing government policy.

The ACA's lobbying activity was also effective. Working within its specific brief to establish and maintain clean rivers, the ACA became a successful environmental watchdog long before the major environmental groups were formed. Had it not been for ACA lobbying, government Acts between 1951 and 1985 would have protected some nationalised industries from all liability for pollution. It is extremely doubtful that government, national or local, would have prevented gross pollution of English and Welsh rivers.

Modern environmental organisations have grown to resemble the large corporations that they attack. They rely on orchestrated publicity events to raise donations to support their massive administration. They lobby support from large donors and have all but forgotten the individual supporter on whom the movements were founded. The ACA, which has never had more than six employees, has thankfully been spared the temptation to abandon its basic interests.

In the fifty years since the prescient John Eastwood founded the ACA, the various solicitors and barristers acting on behalf of its members have probably had over 2,000 cases of pollution referred to them. About 40% of the cases involved local authorities or companies operating with statutory authority. Private companies were potential defendants in 47% of the cases, about 7% were farmers and there is a small miscellaneous remainder. 920 cases have been collated so far by the author in an ever-expanding database and many more will be added over the coming years.

From the author's database,⁸³ there are 34 recorded injunctions (most before 1966) and damages and costs totalling considerably more than £1 million against defendants (a much greater amount in real terms). Once anglers' rights were established, few cases brought direct challenges. As the defendant's lawyers became aware of the strength of the ACA case, most disputes were settled out of court. Large, undisclosed settlements were being achieved from the late 1960s onwards. There are probably far more injunctions, court orders, and verbal agreements made than this author has been able to unearth. Furthermore, the settlements are probably nearer £10 million (at least \$50 million) because settlements often remain undisclosed, since most defendants wish to keep their names out of the press. In its history, the ACA has lost only three court actions.

Most of the cases never reached the courts and of those only a handful were ever reported in law reports/journals, a few of those mentioned above being the exceptions. Legal representatives for the ACA became adept at negotiating settlements by the threat of action.

Now, a team of three lawyers (one working full-time for the ACA) and an ACA staff of four (who also work on membership and other matters) are able to maintain an average of 40 cases a year, a remarkable achievement of efficiency and simplicity.

The ACA campaigns against pollution, not against particular polluters. Nor does it try to rally public opinion to force changes through Parliament; it simply protects the civil rights that the common man has in his property. This thoroughly single-minded campaign against pollution has probably been the most successful that Britain, and possibly any nation, has seen from a voluntary organisation.

There were over 1.1 million anglers registered in England and Wales in 1998 (and over 500,000 when the ACA was formed). This is a massive user base from which to draw support, and an ever-vigilant membership to spot pollution. It is unlikely that any other interest group would have as many potential members with a similar goal (although the Royal Society for the Protection of Birds claims a million members).

Part of the success of the ACA is that it relies on a system of law where the individual's rights are narrowly defined and can be strictly upheld. ACA actions are, on the whole, not general citizen suits against threats to the environment, but specific actions against indi-

83. On file with the author.

vidual polluters, brought by people with strong claims and legal standing. Any country with similar common rights could use the ACA methods as a template to exercise individual rights in the environment.⁸⁴

WHAT SHOULD ACA DO IN THE FUTURE?

When the ACA started out there was little public or governmental sympathy with its aims. Even now that we are all environmentalists, anglers' interests still do not coincide exactly with the mainstream view. Anglers want clean rivers because they support fish – other benefits are incidental – and it is this narrow definition of interests and protection of rights in those interests that give the ACA its strength.

The ACA's success has come from its defence of civil rights, and in urging individuals and cooperatives (clubs) to acquire property rights in the environment in which they pursue their leisure interests. Political 'ownership' of the environment in the past has led to environmental degradation and pollution. There is now serious political interest in environmental protection, however a successful outcome is far from certain. The government has tried several times to override the common law interests with new policies designed to protect the environment, and each time those policies have been found ineffectual. By contrast, the system of protection of property rights in the civil courts has shown itself to be beneficial, efficient, flexible, and equitable.

Several Acts of Parliament since 1963 have tried and failed to establish instream flow requirements for each river.⁸⁵ Without levels being established, discharge and abstraction consents always run the risk of harming the environment. The result is that, even today, when environmental interests dominate in water legislation formulation, common law is still required to protect the fish and the water in which they live. The common law says that it is the duty of the discharger to ensure that the receiving environment can dilute his effluent without causing pollution. This is a simple test which encompasses all circumstances and provides certainty for all water users.

84. See generally CLAY LANDRY, *SAVING OUR STREAMS* (Political Economy Research Center 1998).

85. See generally CARTY & PAYNE *supra* note 6.

The ACA will concentrate on maintaining individual rights and restricting the powers that the Environment Agency has over rivers. For example, the ACA might take advantage of the proposed changes in legislation to allow it to purchase water abstraction licences (perhaps from farmers) to ensure that the water they need stays within the streams. Ownership of the environment is the best way to ensure that it is protected. In the same way that the ACA guarantee fund helped fight pollution, perhaps an instream flow fund could be established to work to the model established by angling and environmental groups in the Western United States.

